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RECENT LEGISLATION AND CASE LAW OF INTEREST TO MAGISTRATES

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Because the Administrative Office of the Courts is unable to fund regional magistrates' schools this fall, this memorandum will cover all legislation enacted in 1980 by the General Assembly and all North Carolina appellate court decisions of the last year of interest to magistrates.

Criminal Law

The 1980 General Assembly enacted a new law to provide for tougher penalties for drug dealers. Ch. 1251, S.L. 1979, took effect on July 1, 1980, and applies to crimes committed on or after that date. The new law creates a separate felony of "trafficking in drugs," which provides for increased penalties for persons who deal in large amounts of marijuana, methaqualone, cocaine, and opium. A person commits the crime of trafficking in drugs when he sells, manufactures, delivers, transports, or possesses large amounts of marijuana, methaqualone, cocaine, or opium (including heroin). The penalties for violations increase as the amount of drugs increase. The chart below sets out punishments under the new law:

Drug	Punishment
Marijuana:	
over 50 pounds but less than 100	2-5 years and minimum $5,000 fine
100 or more pounds but less than 2,000	3-10 years and minimum $25,000 fine

2,000 or more pounds but less than 10,000	6-15 years and minimum $50,000 fine
10,000 or more pounds	16-40 years and minimum $200,000 fine

Methaqualone (or mixture containing methaqualone)

over 1,000 units but less than 5,000	2-5 years and minimum $5,000 fine
1,000 or more units but less than 5,000	3-10 years and minimum $25,000 fine
5,000 or more units but less than 10,000	6-15 years and minimum $50,000 fine
10,000 or more units	16-40 years and minimum $200,000 fine

Cocaine (coca leaves or any derivative or preparation chemically equivalent)

28 or more grams but less than 200	3-10 years and minimum $50,000 fine
200 or more grams but less than 400	6-15 years and minimum $100,000 fine
400 or more grams	16-40 years and minimum $250,000 fine

Opium and Heroin (opium or opiates or derivatives except apomorphine, nalbuphine, naloxone, and naltrexone)

4 or more grams but less than 14	6-15 years and minimum $50,000 fine
14 or more grams but less than 28	8-20 years and minimum $100,000 fine
28 or more grams	20-50 years and minimum $500,000 fine

The new law provides the same punishments for conspiracy to traffic in one of the listed drugs. An arrest warrant form for "trafficking" is attached at the end of this memo. It should be placed in your Arrest Warrant Forms book.

Ch. 1251 also amends G.S. 14-17 to provide that a person who proximately causes another person's death by the unlawful distribution of opium (heroin) is guilty of second-degree murder. In order to charge a person with murder by opium distribution, a magistrate must have probable cause to believe that the defendant (1) killed; (2) another living human being; (3) with malice (which is met by unlawfully distributing opium or heroin). The defendant need not have distributed the drugs directly to the person who died from ingestion of the opium or heroin. Anyone in the chain of distribution could be charged with this offense.

In charging second-degree murder by opium distrubition, a magistrate should use the standard arrest warrant form for murder found in Arrest Warrant Forms § 14-17, which reads ". . . did unlawfully, willfully, and feloniously and of malice aforethought kill and murder *(name victim)* in violation of the following law: G.S. 14-17." The punishment for second-degree murder is imprisonment for not less than two years and up to life.

Ch. 1323, which takes effect on October 1, 1980, amends G.S. 20-217 (makes it a misdemeanor to pass a stopped school bus) to provide that proof that a motor vehicle has passed a stopped school bus is prima facie evidence that the motor vehicle was operated at the time of the violation by its registered owner. Thus a magistrate can issue process for a violation of G.S. 20-217 when he has probable cause to believe that a motor vehicle registered to the defendant passed a stopped school bus. He need not be given any proof that the defendant was actually driving the car at the time.

Procedure in Small-Claims Courts

Ch. 1328, effective on October 1, 1980, amends G.S. 7A-228 to provide that if a party who appeals a magistrate's judgment in a small-claims case fails to appear and prosecute his case at the district court trial, the district court judge may dismiss the case and the magistrate's judgment is affirmed. Formerly, the district court judge was required to try the case.

G.S. 7A-228 provides that no new trial is allowed before the magistrate; the sole remedy for a party aggrieved is by appeal for trial de novo before a district court judge.

Although that provision has been the law since the small-claims courts were formed, there has been some thought that a chief district court judge could authorize a magistrate to hear motions under Rule 60 to set aside a judgment or an order of dismissal. The court in Menache v. Atlantic Coast Management, 43 N.C. App. 733 (1979) (cert. denied), held that the district court is the proper forum to hear and decide Rule 60 motions from a magistrate's decision. Thus, when a magistrate has dismissed a case or entered a judgment that a party seeks to have overturned, the party may either appeal the decision to district court or, if the time for appeal has elapsed, file a motion to set aside the judgment or order. That motion must be filed in district court and heard by a district court judge.

In another case, the court dealt with the issue of voluntary dismissals. In Parrish v. Uzzell, 41 N.C. App. 479 (1979), the plaintiff filed a personal-injury automobile negligence suit on February 2, 1970. (The accident occurred on August 8, 1968.) The court dismissed the action on March 23, 1973, on the basis that the plaintiff chose to have it dismissed. Within one year (on March 7, 1974), the plaintiff refiled the action, and then on December 13, 1976, the action was again dismissed by judicial order on the plaintiff's request. On December 9, 1977, the plaintiff refiled the action again. The defendant moved to dismiss on two grounds: (1) the second voluntary dismissal operated as an adjudication on the merits, and (2) the action was barred by the three-year statute of limitations. With regard to the first claim, the court held that the provision in Rule 41 that a second dismissal operates as an adjudication on the merits applies only when the plaintiff files a notice of dismissal. In Parrish, the dismissals were granted by court order and not by notice of plaintiff. This case would apply to the situation when a magistrate issues an order of dismissal (AOC-L Form 316) on the ground that the plaintiff has decided not to prosecute and moved for dismissal. When a case is dismissed in that manner, the dismissal is without prejudice unless the magistrate states otherwise. According to Parrish, this dismissal is voluntary, and the action can be reinstituted within one year from dismissal. If the plaintiff then asks the court to dismiss the case a second time, he is entitled to refile the action again within one year. In fact, as long as the magistrate continues to grant dismissals on this ground, the plaintiff may continue to refile his action within one year of the dismissal. The magistrate need not worry about how many times the case has been dismissed as long as it was dismissed without prejudice by order of the magistrate. Only if it is dismissed by notice given by the plaintiff (without a court order) does the second dismissal operate as an adjudication on the merits preventing the plaintiff from bringing suit again. If the magistrate wishes

to prevent a case from being refiled, he can specifically provide that it is dismissed with prejudice.

The second question addressed in Parrish was whether the three-year statute of limitations barred the refiling of the lawsuit. The court said that the action was not barred by the statute of limitations since Rule 41 authorizes refiling of the action within one year after the dismissal. If the original lawsuit was filed within the statute of limitations, the plaintiff may refile within one year after having the court grant a voluntary dismissal even though the statute of limitations had run when the suit was refiled.

Court Costs

Ch. 1234 amended G.S. 7A-305(a)(2) to provide that the General Court of Justice fees in district court are $5 if the amount in controversy is $800 or less. That amendment, effective on July 1, 1980, brings the court-costs provision in line with the 1979 increase in small-claims court jurisdiction. Now, the court costs in all actions brought in small-claims court is $8 (plus a $3 service-of-process fee for each defendant).

Interest Rates

After much discussion about raising the allowable interest rates that lenders could charge, the General Assembly made only three changes in allowable rates. Ch. 1330 amended G.S. 25A-15(b) to provide that a seller who makes a consumer credit sale may charge a finance charge of 16 per cent per year when he extends credit for $3,000 or more. This bill took effect on June 25, 1980. Before that time, a seller could charge 16 per cent per year when the amount financed was $3,000 but less than $5,000 and only 14 per cent per year when the amount financed was $5,000 or more.

Ch. 1330 also amended G.S. 24-11(b) to raise the rates that banks can charge on revolving credit loans (check loans, check credit, or other revolving credit plans whereby a bank or other lending agency makes direct loans to a borrower, such as NCNB cash reserve) from 1 1/4 per cent to 1 1/2 per cent per month (18 per cent per year).

Most important, the General Assembly raised the legal rate of interest, effective on July 1, 1980, from 6 to 8 per cent a year (Ch. 1157). The legal rate of interest is the maximum amount of interest that can be charged by a lender when there is no specific statute allowing him to charge more. It is also the rate of interest that judgments draw

from the time they are entered until paid. (In some instances a plaintiff will plead and be entitled to a higher rate of interest on a judgment.) The new law applies to judgments entered on or after July 1. A judgment entered on June 30, 1980, would draw interest at a rate of 6 per cent even though it is not collected until May 1982, whereas a judgment entered on July 1, 1980, would draw interest at a rate of 8 per cent.

Landlord and Tenant

In a very important case, Spinks v. Taylor, 47 N.C. App. 68 (1980), the Court of Appeals held that a landlord can lawfully exercise peaceful, nonviolent self-help to regain leased premises where the tenant fails to pay rent. (The plaintiffs have sought certiorari from the Supreme Court, but no action has been taken on the petition yet.) In the Spinks case the landlord had adopted the following self-help procedures:

Rent was due on the first day of the month. Tenants who had not paid by the eighth of the month were given notice that unless the rent was paid before the date set, the apartment would be padlocked on the last Tuesday of the month. At least ten days' notice of the proposed padlocking was always given. On the day of padlocking, the manager knocked on the tenant's door, identified himself, and stated the purpose of the visit. If the tenant paid the rent, the procedure ended. If the tenant said he would not leave, the landlord left and began summary ejectment proceedings. If no one answered his knock at the tenant's door, he opened the door with his pass key and announced his purpose again. After checking to see that no person or animals were present, the manager padlocked the door. He taped a notice of padlocking to the door and also tried to personally notify the tenant of the padlocking. If the tenant requested his personal property from the padlocked apartment, the manager allowed him to enter and remove it. If the tenant, after entering to remove the property refused to leave, the manager removed the padlock and began a summary ejectment proceeding in court.

The court upheld this procedure as a peaceful, self-help eviction. It is likely that once this decision becomes widely known, many landlords will begin to invoke self-help procedures to evict tenants. The court establishes some rules for self-help: (1) If the tenant tells the landlord before the landlord padlocks the door or takes some other step to evict the tenant that he intends to stay in possession, the landlord cannot proceed with self-help but rather must file a summary ejectment action in court. (2) If

the tenant is not present when the procedure to evict is undertaken, the landlord may enter the premises. The court has said that such entry is not forcible under the law since forcible entry includes some violence beyond mere trespass. (3) If the tenant has personal property on the premises, the landlord may not withhold the property for rent owed but must turn it over to the tenant on request.

Several matters are left unanswered in this case and will need resoluton. For example:

(1) Must the landlord give the tenant notice that he will padlock or use some other method of self-help to evict the tenant when rent is past due? Although in this case the landlord actually gave such notice, it is not clear that notice would be required. The closest analogy is the provision in G.S. 25-9-503, which authorizes a secured party, after default by the debtor, to repossess collateral without resorting to a court proceeding if he can do so without a breach of the peace. In that instance the secured party is not required to notify the defaulting debtor before he takes the car out of the driveway at night, for example. However, the court might draw a distinction, since self-help eviction may involve nonconcensual entry into a dwelling. With regard to leases that do not have a forfeiture clause for failure to pay rent, G.S. 42-3 would at least require the landlord to demand the rent and wait ten days before using self-help eviction procedures.

(2) When is an eviction complete? If the landlord may peaceably evict a tenant, it is important to know at what point the eviction is complete. In Spinks the landlord apparently removed the padlock and began court proceedings if the tenant regained entry to the premises to remove his personal property and then refused to leave. However, it is not clear from the case whether that practice must be followed. If the eviction was complete when the padlock was placed on the door, then the landlord might be able to treat the tenant as a trespasser and have him removed.

But suppose the landlord padlocks the premises and the tenant returns home and cannot enter. When he confronts the landlord, they get into a fight. Has the landlord evicted peaceably? If the eviction was complete when the padlock was placed on the door, it was a peaceful eviction, and any later breach of the peace does not invalidate the eviction.

(3) Another question left unresolved is what other kinds of self-help can a landlord use to evict a tenant who has not paid his rent? When the landlord padlocks the premises, can he also remove the defendant's personal property or can he cut off electricity, water, and other services as a means of evicting the tenant?

These and other qustions must be resolved at some point. Magistrates might want to interpret the Spinks decision narrowly by applying it only to cases with very similar fact situations to Spinks, at least until the Supreme Court rules on the matter or decides not to hear the case.

In another case, Boyer v. Agapion, 46 N.C. App. 45 (1980), the court dealt with a landlord's liability for injuries to third parties at a private residence that were caused by a condition that existed when the tenant took possession. Plaintiff, a postman, was injured while delivering mail when the step of the premises owned by defendant broke, causing plaintiff to fall. Plaintiff sued the lessor-owner of the property as well as the tenant who occupied the property. The court held that the landlord is liable for injuries to those who are on property with the tenant's consent (which would include a postman) only to the same extent as he is liable to the tenant. The court then said that the landlord is liable to the tenant only if (1) the tenant does not know or have reason to know of the condition or the risk involved, and (2) the landlord knows or has reason to know of the condition, realizes or should have realized the risk involved, and has reason to expect that the tenant will not discover the condition or realize the risk. The court held that in this case the lessee was aware of the danger of the step and the lessor had reason to expect that the lessee would discover the condition and realize the risk. Therefore, the court upheld the dismissal of the action against the landlord and stated that the plaintiff-guest of the lessee must look to the lessee and not the landlord for recovery.

Salaries

Magistrates, along with other state employees, received a 10 per cent raise, effective on July 1, 1980 (Ch. 1137, S.L. 1979). The new salary scale for full-time magistrates is as follows:

Number of prior years of service	Annual Salary
Less than 1	$9,456
1 but less than 3	10,284
3 but less than 5	11,232
5 but less than 7	12,252
7 but less than 9	13,380
9 or more	14,640

A bill (S 1088) that would have had the seniority pay scale take effect on the anniversary of a magistrate's appointment rather than at the reappointment date of January 1 on odd-numbered years failed.

Finally, the General Assembly amended G.S. 138-6 to raise the reimbursement rate for state employees' business travel from 19 cents to 25 cents per mile and to raise the in-state subsistence allowance from $31 to $35 per day. The daily subsistence rate includes $3 for breakfast, $3.75 for lunch, $7.25 for dinner, and $21 for lodging.

FELONIOUS TRAFFICKING IN DRUGS G.S. 90-95(h),(i)

FORM OF CHARGE:

I. Trafficking in drugs

. . . did unlawfully, willfully, and feloniously *(choose one or more:* sell; manufacture; deliver; transport; possess) *(insert appropriate statutory minimum and maximum amount)* of *(choose one:* marijuana, methaqualone,* cocaine,** opium***) in violation of the following law: G.S. 90-95(h).

II. Conspiracy to traffic in drugs

. . . did unlawfully, willfully, and feloniously conspire with *(either name persons with whom conspired or write persons unknown)* to commit the felony of trafficking in *(insert appropriate statutory maximum and minimum amount)* of *(choose one:* marijuana; methaqualone; cocaine; opium), G.S. 90-95(h), in violation of the following law: G.S. 90-90(i).

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* The statute also applies to any mixture including methaqualone.

** The statute applies to coca leaves or any salts, compound, derivative, or preparation thereof that is chemically equivalent or identical to any of these substances except those leaves or extractions that do not contain cocaine or ecqonine.

*** The statute applies to opium or opiates (includes heroin) or any salt, compound, derivative, or preparation of opium or opiate except apomorphine, nolbuphine, naloxone, and naltrixone.

SAMPLE AFFIDAVITS:

I . . . did unlawfully, willfully, and feloniously possess more than 50 pounds but less than 100 pounds of marijuana in violation of the following law. G.S. 90-95(h).

. . . did unlawfully, willfully, and feloniously transport and possess at least 28 grams of heroin in violation of the following law: G.S. 90-95(h).

II . . . did unlawfully, willfully, and feloniously conspire with Samuel Smith and Jennifer Robin to commit the felony of trafficking in at least 5,000 but less than 10,000 dosage units of methaqualone, G.S. 90-95(h), in violation of the following law: G.S. 90-95(i).

PUNISHMENT:

Marijuana: More than 50 lbs. but less than 100 lbs.--two to five years imprisonment and a fine of not less than $5,000; at least 100 lbs. but less than 2,000 lbs.--three to ten years' imprisonment and a fine of not less than $25,000; at least 2,000 lbs., but less than 10,000 lbs.--six to fifteen years imprisonment and a fine of not less than $50,000.

Methaqualone: At least 1,000 but less than 5,000 dosage units--three to ten years' imprisonment and a fine of not less than $25,000; 5,000 but less than 10,000 dosage units--six to fifteen years' imprisonment and a fine of not less than $50,000; 10,000 or more dosage units--16 to 40 years' imprisonment and a fine of not less than $200,000.

Cocaine: Twenty-eight but less than 200 grams--three to ten years' imprisonment and a fine of not less than $50,000; 200 but less than 400 grams--six to 15 years' imprisonment and a fine not less than $100,000; 400 grams or more--16 to 40 years' imprisonment and a fine of not less than $250,000.

Opium or Heroin: Four but less than 14 grams--six to 15 years imprisonment and a fine of not less than $50,000; 14 but less than 28 grams--eight to 20 years'imprisonment and a fine of not less than $100,000; 28 grams or more--20 to 50 years'imprisonment and a fine of not less than $500,000.