C.2

This issue distributed to:

Appellate Court Judges, Superior Court Judges, Prosecutors, Public Defenders

ADMINISTRATION OF JUSTICE MEMORANDA

PUBLISHED BY THE INSTITUTE OF GOVERNMENT
University of North Carolina at Chapel Hill

December 1981

No. 81/09

RECEIVED
DEC 30 1981
INSTITUTE OF GOVERNMENT
UNIVERSITY OF NORTH CAROLINA

THE SPEEDY-TRIAL LAW: RECENT CASES AND LEGISLATIVE CHANGES

Robert L. Farb

This memorandum discusses 1981 legislative changes[1] and recent appellate cases concerning the speedy-trial law. A complete text of that law appears at the end of this memorandum, with the 1981 legislative changes indicated in italics (new language) and strike-over (deleted language).

This memorandum is divided into four sections: the general time limitations [G.S. 15A-701(a1)(1)], exclusionary periods [G.S. 15A-701(b)], cases in counties with limited court sessions [G.S. 15A-701(b)(8) and G.S. 15A-702], and dismissal sanctions [G.S. 15A-703].

PERMANENT FILE COPY
not to be taken
from Library

I. GENERAL TIME LIMITATIONS

Speedy-trial law inapplicable to district court misdemeanors and juvenile proceedings. A 1981 legislative change adds a new subsection (b) to G.S. 15A-703 to exclude district court misdemeanors from the law's coverage by deleting the dismissal sanctions for such cases. However, this provision is effective only until October 1, 1983.

The Court of Appeals in In Re Beddingfield[2] held that the speedy-trial law does not apply to juvenile proceedings.

Time limitations of the speedy-trial law do not apply in a felony case from arrest to indictment or from arrest to trial. G.S. 15A-701(a1)(1) provides that the speedy-trial time clock begins from the last of the following events: arrest, service of criminal process, indictment, or information. The defendant in State v. Charles[3] was arrested for murder on August 14,

1. N.C. Sess. Laws 1981, Ch. 626 and Ch. 902. Ch. 626 became effective June 19, 1981, and Ch. 902 became effective on July 9, 1981.
2. 42 N.C. App. 712, 257 S.E.2d 643 (1979).
3. __ N.C. App. ___, 281 S.E.2d 438 (1981).

Copyright © 1978, Institute of Government, University of North Carolina at Chapel Hill. Made in the United States. This publication is issued occasionally by the Institute of Government. An issue is distributed to public officials, listed in the upper left-hand corner, to whom its subject is of interest. Copies of this publication may not be reproduced without permission of the Institute of Government, except that criminal justice officials may reproduce copies in full, including the letterhead, for use by their own employees. Comments, suggestions for future issues, and additions or changes to the mailing lists should be sent to: Editor, Administration of Justice Memoranda, Institute of Government, P.O. Box 990, Chapel Hill, North Carolina 27514.

1979, and indicted on January 8, 1980. His trial began on April 10, 1980. The Court of Appeals held that the speedy-trial law was not violated because the trial began within 120 days of indictment, the last event to occur.[4] The time from arrest to indictment or from preindictment arrest to trial is not subject to the speedy-trial time limitations.[5]

Speedy-trial clock for misdemeanor trial de novo. A 1981 legislative change to G.S. 15A-701(a1)(2) makes the speedy-trial clock begin for a misdemeanor trial de novo in superior court on the day after the last day[6] of the first regularly scheduled criminal session, for which a calendar has not been published at the time of notice of appeal, held after the defendant has given notice of appeal.

> *Example:* Defendant Jones is convicted of DUI in district court on October 12, 1981, and gives notice of appeal the same day. On October 16, 1981, the district attorney publishes a trial calendar for a regularly scheduled criminal session of superior court beginning October 26, 1981. The speedy-trial clock will begin on the day after the last day of the October 26, 1981, session.
>
> If the calendar for the October 26, 1981, session had been published on October 10, 1981, the speedy-trial clock would not begin until the day after the last day of a succeeding session for which a calendar was published after October 12, 1981.[7]

District attorneys should note the date of a calendar's publication on the calendar so that all parties can calculate the time limitations for a misdemeanor trial de novo.

Dismissal at probable cause hearing gives new 120-day speedy-trial clock when new charge is brought. G.S. 15A-701(a1)(3) provides that when a charge is dismissed and later the same or a similar charge is brought, the speedy-trial clock for the new charge begins from the last event that occurred for

---

4. The court stated in a footnote that it recognizes that other events may occur in a case that may affect its holding. For example, G.S. 15A-701(a1)(3) may affect the speedy-trial time limitations if a case is dismissed and a new charge is brought, such as when an indictment follows a prosecutor's voluntary dismissal of a felony case in district court.

5. See also State v. Young, 302 N.C. 385, 275 S.E.2d 429 (1981); State v. Brady, 299 N.C. 547, 264 S.E.2d 66 (1980); State v. Rice, 46 N.C. App. 118, 264 S.E.2d 140, cert. denied, 300 N.C. 561, 270 S.E.2d 115 (1980).

6. In State v. Morehead, 46 N.C. App. 39, 264 S.E.2d 400, cert. denied 300 N.C. 201, 269 S.E.2d 615 (1980), the Court of Appeals held that the language "from" the first regularly scheduled criminal session "held after" notice of appeal means that the speedy-trial clock begins on the day after the last day of the session.

7. Since the purpose of the legislative amendment inserting the calendar's publication date was to give time for the district attorney to place the case on the calendar before the speedy-trial clock began, a calendar should not be considered published at the time of notice of appeal if it was published on the same day as the appeal.

the original charge. Two exceptions to this rule that are specified in the subdivision are (a) a dismissal by a judge at a probable cause hearing because he found no probable cause, and (b) a dismissal by a judge for violation of the speedy-trial time limitations.

The Court of Appeals in State v. Boltinhouse[8] cited G.S. 15A-701(a1)(3) and G.S. 15A-612(b)[9] to support its holding that when a charge is dismissed at a probable cause hearing and later the defendant is charged with the same or a similar charge, the speedy-trial clock begins with the last event for the new charge. Since a dismissal at a probable cause hearing is excluded from G.S. 15A-701(a1)(3), the new charge is treated as if the earlier charge had never been brought. Therefore, the speedy-trial clock begins with the last event for the new charge.

The defendant in Boltinhouse was charged with feloniously receiving stolen goods in a warrant issued May 24, 1979. A finding of no probable cause was made on September 5, 1979. On September 24, 1979, the defendant was indicted for feloniously possessing stolen goods on the basis of the same incident charged in the dismissed warrant. His trial began January 7, 1980. The court held that since the trial began within 120 days of the indictment, on September 24, 1979, the last event for the new charge, the defendant's motion for a speedy-trial dismissal was properly overruled.

Interpretation of similar offense in G.S. 15A-701(a1)(3). G.S. 15A-701(a1)(3) applies to the same or a similar charge that is brought after a dismissal of the original charge. A similar charge is defined in the subdivision as one based on:

> an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts or a single scheme or plan . . . .

The question in State v. Walden[10] was whether a misdemeanor child-abuse charge based on a child-beating on December 8, 1979, was a similar charge under the subdivision as a felonious assault charge based on a beating of the same child one day later. (The child-abuse charge was dismissed before the defendant was indicted for felonious assault.) The Court of Appeals analyzed the beatings and determined that they were unrelated. Therefore the speedy-trial clock for the felonious assault charge was not affected by the dismissal of the child-abuse charge.

Superseding indictment starts new 120-day speedy-trial clock. The defendant in State v. Moore[11] was indicted on

---

8. 49 N.C. App. 660, 272 S.E.2d 148 (1980).
9. G.S. 15A-612(b) permits reprosecution when no probable cause is found.
10. 53 N.C. App. 196, 280 S.E.2d 505 (1981).
11. 51 N.C. App. 26, 275 S.E.2d 257 (1981).

August 27, 1979, for felonious breaking or entering and felonious larceny. A new indictment charging the same offense was issued on January 7, 1980, except that the new indictment alleged different offense dates. The defendant's trial on the new indictment began on April 10, 1980--more than 120 days from the original indictment but less than 120 days from the new indictment.

Relying on G.S. 15A-646, which provides that a new indictment charging the same offense alleged in the original indictment supersedes the original indictment, the Court of Appeals held that the speedy-trial clock for the new indictment began with the last event of the new indictment. The court noted that the prosecutor obtained the new indictment in good faith: to correct the dates of the offenses in anticipation of an alibi defense.[12]

II. EXCLUDING PERIODS OF DELAY FROM THE TIME LIMITATIONS

Revisions to G.S. 15A-701(b)(1) covering delay from other proceedings concerning the defendant. Two significant 1981 legislative changes were made to G.S. 15A-701(b)(1). First, the word "any" was added to paragraph d. of G.S. 15A-701(b)(1), so that it now provides:

> d. Hearings on any pretrial motions or the granting or denial of such motions.

This change is significant because the Supreme Court in State v. Oliver[13] stated in dictum that the only pretrial motions included in paragraph d. are those that must be determined before the case can be scheduled for trial, such as motions for change of venue. This legislative change should make it clear that paragraph d. is not limited to such motions.

The second significant change was adding the following paragraph to G.S. 15A-701(b)(1):

> The period of delay under this subdivision must include all delay from the time a motion or other event occurs that begins the delay until the time a judge makes a final ruling on the motion or the event causing the delay is finally resolved . . . .

---

12. The Moore holding is questionable. G.S. 15A-646 also provides that a judge must dismiss the count in the original indictment that charges the same offense alleged in the new indictment. Such a dismissal should trigger the provisions in G.S. 15A-701(a1)(3). Thus the speedy-trial clock for the new indictment should run from the original indictment.

Compare State v. Dunbar, 47 N.C. App. 623, 267 S.E.2d 577 (1980), which involved the issuance of forgery indictments after false-pretenses indictments already had been issued for the same incident. Although the court did not discuss the question, G.S. 15A-646 would not apply since it only requires a dismissal of the same offense for which there is a subsequent indictment.

13. 302 N.C. 28, 274 S.E.2d 183 (1981).

In two cases decided before this legislative change, State v. Harren[14] and State v. McCoy,[15] the Supreme Court held that the excluded period for delay caused by a commitment of the defendant for a mental examination runs from the date of the commitment order to the date the examination report becomes available to the defendant and the prosecutor. The new statutory language would exclude a longer period of delay: from the date a motion is filed questioning the defendant's capacity to proceed until the date (after the defendant is returned from his examination) when a judge makes a final ruling on the defendant's capacity to proceed.

It would appear that the method of calculation set forth above should be adjusted if a prosecutor deliberately delays a hearing for the purpose of thwarting the speedy-trial law time limitations. The Oliver case stated such a principle and, even though it was decided before the legislative change, its reasoning is sound and ought to be continued. The Court in Oliver also stated that a motion should be heard within a reasonable time after it is filed, and in State v. Avery[16] it stated that the frequency of court sessions is a factor to be considered in determining what is reasonable. The Court in McCoy noted that the defendant was held longer than the 60-day maximum provided in G.S. 15A-1002(b) for a mental examination, but it was not required to decide whether the number of days over 60 should be excluded.

Exclude first day and include last day in calculating delay. In calculating periods of delay, the Supreme Court in Harren held that the first day of delay is excluded and the last day is included, as provided in Rule 6(a) of the Rules of Civil Procedure.

Delay resulting from obtaining a lawyer. The Court of Appeals has decided two significant cases[17] concerning delay while a lawyer is obtained. In State v. Rogers,[18] the court held that the trial judge properly excluded the period of time from the defendant's indictment until her stipulation of readiness for trial because the state reasonably believed that she was attempting to obtain counsel during that period. The defendant had indicated in district court that she was hiring privately retained counsel. The state had no notice that she was represented by counsel, retained or appointed, until counsel appointed to represent her in other cases filed a

---

14. 302 N.C. 142, 273 S.E.2d 694 (1981).
15. 303 N.C. 1, 277 S.E.2d 515 (1981).
16. 302 N.C. 517, 276 S.E.2d 699 (1981).
17. Cases that are not discussed in the text include: State v. Bradsher, 49 N.C. App. 507, 271 S.E.2d 915 (1980) (eight days properly excluded, from time of withdrawal of counsel until appointment of new counsel); State v. Letterlough, ___ N.C. App. ___, 281 S.E.2d 749 (1981) (court notes that trial judge could have excluded the time from withdrawal of counsel until appointment of new counsel).
18. 49 N.C. App. 337, 271 S.E.2d 535, cert. denied, 301 N.C. 530, 273 S.E.2d 464 (1980).

stipulation of readiness for trial. The court noted that its holding was limited to the "peculiar facts of this case."

In State v. Edwards,[19] the Court noted that--unlike the situation in the Rogers case--the state presented no evidence to show that the defendant caused the 100-day delay from indictment to the appointment of counsel. Therefore it held that the state failed to meet its burden of going forward with evidence to justify the exclusion of the delay period.

Continuances. Two important 1981 legislative changes were made in G.S. 15A-701(b)(7), which excludes delay resulting from continuances.[20] First, the subdivision specifically states that a superior court judge cannot grant a motion for a continuance unless it is in writing and he has made written findings supporting the continuance. Second, the judge who grants the continuance now has authority to specify a period of delay that must be excluded in determining when a case must be tried.

Delay from trying other charges against the defendant. Paragraph b. of G.S. 15A-701(b)(1) excludes periods of delay that result from trying other charges against the defendant. The defendant in State v. Hunter[21] was charged with both child abuse (G.S. 14-318.2) and child neglect (G.S. 14-316.1) arising from the same incident. In district court he pled guilty to child neglect in return for the state's dismissal of the child-abuse charge. When he broke the plea bargain by appealing the child-neglect charge to superior court, the state reopened the child-abuse charge and sent it to superior court. But the child-abuse charge was remanded[22] to district court, and the defendant was acquitted on September 10, 1979. He was tried on the child-neglect charge in superior court on November 19, 1979, and convicted.

The defendant noted on appeal that more than 120 days elapsed before the state tried the child-neglect case in superior court. But the Court of Appeals agreed with the state's argument that all time until the district court acquittal of the child-abuse charge should be excluded under paragraph b. of

---

19. 49 N.C. App. 426, 271 S.E.2d 533 (1980), cert. denied and appeal dismissed, 301 N.C. 724, 276 S.E.2d 289 (1981).

20. Cases concerning continuances include: State v. Bradsher, 49 N.C. App. 507, 271 S.E.2d 915 (1980) (delay from defense-requested continuance properly excluded); State v. Hartman, 49 N.C. App. 83, 270 S.E.2d 609 (1980) and State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907 (1981) (proper exclusions of time for continuances due to absences of defendants' essential witnesses); State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981) (delay properly excluded from time of continuance to next criminal session of superior court); State v. Melton, 52 N.C. App. 305, 278 S.E.2d 309 (proper exclusion of delay for continuance to hear motions); State v. Letterlough, ___ N.C. App. ___, 281 S.E.2d 749 (1981) (delay from state-requested continuance for trial preparation properly excluded; court notes that "[i]t is not the purpose of the Speedy-Trial Act to force the state to trial absent essential witnesses or proper preparation.").

21. 48 N.C. App. 656, 270 S.E.2d 120 (1980).

22. Although G.S. 15A-1431(b) authorizes the state to take this action, the subsection was not in effect when this action was taken, which probably explains why the case was remanded to district court.

G.S. 15A-701(b)(1), since the state was awaiting the trial of the district court charge before trying the child-abuse charge in superior court.

Delay resulting from joint trials. G.S. 15A-701(b)(6) excludes a period of delay when the defendant is joined for trial with a co-defendant whose time for trial has not run. The defendant in State v. Shelton[23] was indicted on March 24, 1980, and tried on August 11, 1980--a 140-day period. However, his case was joined for trial with co-defendant Gaither on June 9, 1980; on that date Gaither's motion for a continuance until July 21, 1980, for a psychiatric examination was granted. On the basis of G.S. 15A-701(b)(6), the Court of Appeals upheld the exclusion of time in Shelton's case from June 9 to July 21, 1980. Therefore Shelton was tried within 120 days from indictment.

New G.S. 15A-701(b)(12): stopping speedy-trial clock for judge's dismissal. Under G.S. 15A-701(a1)(3), if a charge is dismissed (other than at a probable cause hearing or as a result of a violation of the speedy-trial law) and later the same or a similar charge is brought, the speedy-trial clock for the new charge runs from the last event for the original charge. However, G.S. 15A-701(b)(5) (prosecutor's voluntary dismissal) and new G.S. 15A-701(b)(12) (dismissal by a judge other than at a probable cause hearing or as a result of a violation of the speedy-trial law) interact with G.S. 15A-701(a1)(3) to stop the clock from running from the time of the dismissal until the last event for the new charge occurs.

What happens when a prosecutor takes a voluntary dismissal?[24] The speedy-trial clock stops until it begins again when a new charge is brought.[25] But the exclusionary provision in G.S. 15A-701(b)(5) does not erase the accrued time that already ran. It must be counted toward the speedy-trial clock for the new charge.

> *Example:* Defendant is indicted on October 26, 1981, for armed robbery. On November 19, 1981, the prosecutor takes a voluntary dismissal. On January 4, 1982, the defendant is indicted again for the same armed robbery. If G.S. 15A-701(b)(5) did not exist, the speedy-trial clock for the new indictment would run continuously from October 26, 1981, since G.S. 15A-701(a1)(3) makes the clock begin from the original indictment. However, G.S. 15A-701(b)(5) stops the clock on November 19, 1981, and it does not begin again until January 4, 1982. The trial for

---

23. ___ N.C. App. ___, 281 S.E.2d 684 (1981).

24. If a prosecutor takes a voluntary dismissal with leave, G.S. 15A-701(b)(11) excludes the period of time from the date of the dismissal to the date the prosecutor reinstitutes the charge pursuant to G.S. 15A-932.

25. A prosecutor must initiate a new criminal pleading (preferably with a new criminal docket number) if he wants to charge a defendant again after he takes a voluntary dismissal. He cannot revive the dismissed pleading; he must bring new charges. See Official Commentary to G.S. 15A-931.

the new indictment must begin within 96 days of January 4, 1982 (120 days minus the 24 days that elapsed from October 26 until November 19, 1981).

New G.S. 15A-701(b)(12) interacts with G.S. 15A-701(a1)(3) the same way as does G.S. 15A-701(b)(5).

Example: Defendant is indicted for felonious larceny on October 30, 1981. A judge dismisses the charge on December 21, 1981, because of a fatal variance between the indictment's allegations of ownership and the proof at trial. Defendant is charged with the same offense in a new indictment issued and served on him on January 8, 1982. If G.S. 15A-701(b)(12) did not exist, the speedy-trial clock for the new indictment would run continuously from October 30, 1981, since G.S. 15A-701(a1)(3) makes the clock begin from the original indictment. But G.S. 15A-701(b)(12) stops the clock on December 21, 1981, and it does not begin again until January 8, 1982. The trial for the new indictment must begin within 68 days of January 8, 1982 (120 days minus the 52 days that elapsed from October 30 until December 21, 1981).

New G.S. 15A-701(b)(13), (14), and (15). New subdivisions (13), (14), and (15) of G.S. 15A-701(b) essentially prevent the speedy-trial clock from beginning to run again when the district attorney[26] is unaware that the defendant has become available for trial. Subdivision (13) excludes delay from the time criminal process is served on a defendant who has been previously called and failed until the district attorney receives notice[27] that criminal process has been served. Subdivision (14) excludes delay from the time the defendant was called and failed in open court until the district attorney is notified that the criminal process was stricken or never issued. Subdivision (15) excludes delay from the time a defendant has been returned from court-ordered or -approved hospitalization or treatment until the district attorney is notified that the defendant has returned.

III. CASES IN COUNTIES WITH LIMITED COURT SESSIONS

Proving that a case is in a county with limited court sessions. G.S. 15A-701(b)(8) excludes a period of delay "occasioned by the venue of the defendant's case being within a county where, due to limited number of court sessions scheduled for the county, the time limitations [of the speedy-trial law] . . . cannot reasonably be met . . . ." And G.S. 15A-702 allows a defendant with such a case to move for a prompt trial.

---

26. The term "district attorney" is used in all three new subdivisions. It is defined in G.S. 15A-101(4) to include only the elected district attorney. Thus notice to an assistant district attorney would not suffice.

27. It appears that notice to the district attorney could be in any reasonable manner. It need not be in writing.

A judge then may require the state to try the case in not less than 30 days.

Two Court of Appeals decisions in State v. Edwards[28] and State v. Vaughan[29] make it clear that no county is automatically exempt from the speedy-trial law simply because it has a limited number of court sessions. And judicial notice of the number of court sessions in the county of venue held between indictment and trial is insufficient to exclude time from the speedy-trial clock. Instead, the state has the burden of going forward with evidence to show why the case could not reasonably be tried wihin 120 days because of the limited number of scheduled court sessions.[30]

When a motion for prompt trial must be made. The Court of Appeals held in State v. Cornell[31] that a motion for prompt trial under G.S. 15A-702 is not properly before the court unless it is filed after 120 days have elapsed, including exclusionary periods. Defendant's motion for prompt trial in Cornell was filed when 126 days had elapsed, but 21 days were excludable because of the defendant's absence. Therefore the trial judge did not err in not considering the motion, since it was filed too soon.

IV. DISMISSAL SANCTIONS

Judge should make findings when he determines exclusionary periods. The Court of Appeals in State v. Rogers[32] stated that a judge should make findings of fact and conclusions of law when he determines exclusionary periods under the speedy-trial law.

Judge should make findings when he dismisses case. In determining whether to dismiss a case with or without prejudice, G.S. 15A-703 requires a judge to consider the following factors: seriousness of the offense, facts and circumstances of the case that lead to the dismissal, and the impact of reprosecution on the administration of the speedy-trial law and the administration of justice. The Court of Appeals in State

---

28. 49 N.C. App. 426, 271 S.E.2d 533, cert. denied and appeal dismissed, 301 N.C. 724, 276 S.E.2d 289 (1981).

29. 51 N.C. App. 408, 276 S.E.2d 518, cert. granted, 303 N.C. 319, 281 S.E.2d 658, cert. vacated as improvidently granted, ___ N.C. ___, 283 S.E.2d 525 (1981).

30. Other cases that involve cases in counties with limited court sessions: State v. Parnell, ___ N.C. App. ___, 281 S.E.2d 732 (1981) (continuance granted until next session where trial judge found that the case could not be tried during two-week session and case was in a county with a limited number of court sessions); State v. Berry, 51 N.C. App. 97, 275 S.E.2d 269 (1981) (a questionable decision that seems to place the burden of going forward with evidence on the defendant instead of on the state).

31. 51 N.C. App. 108, 275 S.E.2d 857 (1981).

32. 49 N.C. App. 337, 271 S.E.2d 535, cert. denied, 301 N.C. 530, 273 S.E.2d 464 (1980). For a case with detailed findings, see State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907 (1981).

v. Moore[33] stated that a judge should establish in the record that he has considered these factors when he decides whether to dismiss with or without prejudice.

Dismissal without prejudice: state's right of appeal and time limit for retrial. The Court of Appeals in State v. Ward[34] held that when a case is dismissed without prejudice, the state has 120 days[35] from the date of dismissal to try it.[36] The court also held that the state has no right to appeal a dismissal without prejudice to the appellate division; it must seek review by writ of certiorari.

Time limit for retrial after appellate reversal of speedy-trial dismissal. The Court of Appeals in State v. Morehead[37] held that when the appellate division reverses a trial judge's speedy-trial dismissal, the case must be tried within 120 days[38] after the court's opinion is certified to the superior court.

---

33. 51 N.C. App. 26, 275 S.E.2d 257 (1981).

34. 46 N.C. App. 200, 264 S.E.2d 737 (1980).

35. Although the court indicated that the time period would be 90 days beginning October 1, 1981, corresponding to the effective date of the 90-day provisions in G.S. 15A-701(a), that subsection has been delayed until October 1, 1983. Thus the 120-day limitation should remain until October 1, 1983.

36. The Morehead holding is questionable. It would appear that the state should have 120 days from the last event for the new charge, since dismissals for speedy-trial violations are excepted from G.S. 15A-701(a1)(3). Such was the holding in State v. Boltinhouse, discussed in the text above, concerning probable cause hearing dismissals that are also excepted from G.S. 15A-701(a1)(3).

37. 46 N.C. App. 39, 264 S.E.2d 400, cert. denied, 300 N.C. 201, 269 S.E.2d 615 (1980).

38. Although the court indicated that the time period would be 90 days beginning October 1, 1980, corresponding to the effective date of the 90-day provisions in G.S. 15A-701(a), that subsection has been delayed until October 1, 1983. Thus the 120-day limitation should remain until October 1, 1983.

SUBCHAPTER VII. SPEEDY TRIAL: ATTENDANCE OF DEFENDANTS.

Article 35.

Speedy Trial.

§ 15A-701. Time limits and exclusions.--(a) The trial of the defendant charged with a criminal offense shall begin within the time limits specified below:

(1) Within 90 days from the date the defendant is arrested, served with criminal process, waives an indictment or is indicted, whichever occurs last;

(2) Within ~~90~~ *120* days from the first regularly scheduled criminal session of superior court, *for which a calendar has not been published at the time of notice of appeal,* held after the defendant has given notice of appeal in a misdemeanor case for trial de novo in the superior court;

(3) When a charge is dismissed, other than under G.S. 15A-703 *or a finding of no probable cause pursuant to G.S. 15A-612,* and the defendant is afterwards charged with the same offense or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, then within 90 days from the date that the defendant was arrested, served with criminal process, waived an indictment, or was indicted, whichever occurs last for the original charge;

(4) When the defendant is to be tried again following a declaration by the trial judge of a mistrial, then within ~~60~~ *90* days of that declaration; or

(5) Within ~~60~~ *120* days from the date the action occasioning the new trial becomes final when the defendant is to be tried again following an appeal or collateral attack.

(a1) Notwithstanding the provisions of subsection (a) the trial of a defendant charged with a criminal offense who is arrested, served with criminal process, waives an indictment or is indicted, on or after October 1, 1978, and before October 1, ~~1981~~ *1983*, shall begin within the time limits specified below:

(1) Within 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last;

(2) Within 120 days from the first regularly scheduled criminal session of superior court, *for which a calendar has not been published at the time of notice of appeal,* held after the defendant has given notice of appeal in a misdemeanor case for trial de novo in the superior court;

(3) When a charge is dismissed, other than under G.S. 15A-703, or a finding of no probable cause pursuant to G.S. 15A-612, and the defendant is afterwards charged with the same offense or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, then within 120 days from the date that the defendant was arrested, served with criminal process, waived an indictment, or was indicted, whichever occurs last, for the original charge;

(4) When the defendant is to be tried again following a declaration by the trial judge or a mistrial, then within 120 days of that declaration; or

(5) Within 120 days from the date the action occasioning the new trial becomes final when the defendant is to be tried again following an appeal or collateral attack.

(b) The following periods shall be excluded in computing the time within which the trial of a criminal offense must begin:

(1) Any period of delay resulting from other proceedings concerning the defendant including, but not limited to, delays resulting from:

a. A mental or physical examination of the defendant, *including all time when he is awaiting or undergoing treatment or examination,* or a hearing on his mental or physical capacity; or

b. Trials with respect to other charges against the defendant;

c. Interlocutory appeals; or

d. Hearings on *any* pretrial motions or the granting or denial of such motions.

The period of delay under this subdivision must include all delay from the time a motion or other event occurs that begins the delay until the time a judge makes a final ruling on the motion or the event causing the delay is finally resolved;

(2) Any period of delay during which the prosecution is deferred by the prosecutor pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct;

(3) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness for the defendant or the State. For the purpose of this subdivision, a defendant or an essential witness shall be considered

a. Absent when his whereabouts are unknown and he is attempting to avoid apprehension or prosecution or when his whereabouts cannot be determined by due diligence; and

b. Unavailable when his whereabouts are known but his presence for testifying at the trial cannot be obtained by due diligence or he resists appearing at or being returned for trial;

(4) Any period of delay resulting from the fact that the defendant is mentally incapacitated or physically unable to stand trial;

(5) When a charge is dismissed by the prosecutor under the authority of G.S. 15A-931 and afterwards a new indictment or information is filed against the same defendant or the same defendant is arrested or served with criminal process for the same offense, or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, any period of delay from the date the initial charge was dismissed to the date the time limits for trial under this section would have commenced to run as to the subsequent charge;

(6) A period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for serverance has been granted.

(7) Any period of delay resulting from a continuance granted by any judge if the judge granting the continuance finds that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial and sets forth in writing in the record of the case the reasons for so finding. *A superior court judge must not grant a motion for continuance unless the motion is in writing and he has made written findings as provided in this subdivision.*

The factors, among others, which a judge shall consider in determining whether to grant a continuance are as follows:

a. Whether the failure to grant a continuance would be likely to result in a miscarriage of justice; and
b. Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the time limits established by this section;
c. Repealed by Session Laws 1977, 2nd Sess., c. 1179, s.6.

When a judge grants a continuance pursuant to this subsection, he may specify in his order the period of time which shall be excluded from the time within which the trial of the criminal case must begin.

(8) Any period of delay occasioned by the venue of the defendant's case being within a county where, due to limited number of court sessions scheduled for the county, the time limitations of this section cannot reasonably be met;

(9) A period of delay resulting from the defendant's being in the custody of a penal or other institution of a jurisdiction other than the jurisdiction in which the criminal offense is to be tried;

(10) A period of delay when the defendant or his attorney has an obligation of service to the State of North Carolina or to the United States government and the court, with the consent of both the defendant and the State, continues the case for a period of time consistent with that obligation; ~~and~~

(11) A period of delay from time the prosecutor enters a dismissal with leave for the nonappearance of the defendant until the prosecutor reinstitutes the proceedings pursuant to G.S. 15A-932.;

(12) When a charge is dismissed by a judge other than under G.S. 15A-703 or a finding of no probable cause pursuant to G.S. 15A-612, and afterwards a new indictment or information is filed against the same defendant or the same defendant is arrested or served with criminal process for the same offense, or an offense based on the same act or transaction or on the same series of transactions connected together or constituting parts of a single scheme or plan, any period of delay from the date the intital charge was dismissed to the date the time limits for trial under this section would have commenced to run as to the subsequent charge;

(13) Any period of delay from the time criminal process is served on a defendant who has previously been called and failed until the time that the district attorney receives notice that the criminal process has been served;

(14) Any period of delay from the time the defendant has been called and failed in open court until the time that the district attorney receives notice that the criminal process was stricken or was never issued; and

(15) Any period of delay from the time that a defendant has been returned from court-ordered or -approved hospitalization, treatment, or examination until the time that the district attorney receives notice that the defendant has returned.

(c) If trial does not begin within the time limitations specified in this section because the defendant entered a plea of guilty or no contest which was subsequently withdrawn to any or all charges, the applicable period of time limits as specified in this section shall begin to run on the day the order permitting withdrawal of the plea of guilty or no contest becomes final.

§ 15A-702. Counties with limited court sessions.--(a) If the venue of the defendant's case lies within a county where, due to the limited number of court sessions scheduled for the county, the applicable time limit specified by G.S. 15A-701 has not been met, the defendant may file a motion for prompt trial with (i) a superior court judge presiding over a mixed or criminal session within the same judicial district where the defendant is charged with an offense within original jurisdiction of the superior court or with a misdemeanor docketed in the superior court for trial de novo; or (ii) a district court judge presiding in the county in which the venue of the case lies, or in the event that there is no district court judge presiding in that county, in the judicial district embracing the county in which the venue lies where the defendant is charged with a misdemeanor pending in district court.

(b) The judge with whom the petition for prompt trial is filed may order the defendant's case be brought to trial within not less than 30 days.

(c) A defendant who files a petition for prompt trial under this section accepts venue anywhere within the judicial district and may not continue or delay his case except on the basis of matters which arise after he files the petition and which he or his counsel could not have reasonably anticipated. The defendant may withdraw the petition for prompt trial only on order of the court, for good cause shown or with the consent of the prosecutor.

§ 15A-703. Sanctions.--*(a)* If a defendant is not brought to trial within the time limits required by G.S. 15A-701 or within the time prescribed by the judge in his order for prompt trial under G.S. 15A-702(b), the charge shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting that motion but the State shall have the burden of going forward with evidence in connection with excluding periods from computation of time in determining whether or not the time limitations under this Article have been complied with. In determining whether to order the charge's dismissal with or without prejudice, the court shall consider, among other matters, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; the impact of a re-prosecution on the administration of this Article and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of the plea of guilty of no contest shall constitute a waiver of the right to dismissal under this section. A dismissal with prejudice shall bar further prosecution of the defendant for the same offense or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme of plan; a dismissal without prejudice shall not bar further prosecution.

(b) The 120-day limitation as provided in G.S. 15A-701 is the State policy in the district court division of the General Court of Justice, but none of the sanctions provided in this section shall apply to the proceedings in the district court division. [Subsection (b) expires October 1, 1983]

§ 15A-704. No bar to claim of denial of speedy trial.--No provision of this Article shall be interpreted as a bar to any claim of denial of a speedy trial as required by the Sixth Amendment to the Constitution of the United States.