ARRAIGNMENT IN SUPERIOR COURT

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Contents

I. Arraignment – Generally. During the arraignment:

- The defendant is brought in open court before a judge having jurisdiction to try the offense;
- The judge advises the defendant of the charges;
- The judge directs the defendant to plead;
- The prosecutor reads the charges or fairly summarizes them to the defendant; and
- If the defendant fails to plead, the court must record that fact, and the defendant must be tried as if the defendant had pleaded not guilty. G.S. 15A-941(a).

Form AOC-CR-216 is designed to effectuate waiver of arraignment (discussed below) and for recording of the defendant's plea at arraignment. If the defendant does not file a written request for an arraignment, then the court must enter a not guilty plea on the defendant's behalf. G.S. 15A-941(d).

II. Method for Conducting Arraignment.

A. Defendant Present. Except as discussed in this section, a defendant must appear in open court at the arraignment and personally enter a plea. G.S. 15A-941(a); 15A-1011. Limited exceptions to the requirement that the defendant personally appear are specified in G.S. 15A-1011(a), and include when there is a waiver of arraignment (discussed below).

B. "Remote" Arraignment.

1. Established Statutory Procedure. G.S. 15A-941(b) provides that in a non-capital case, an arraignment may be done by way of an audio and video transmission between the judge and the defendant, in which the parties can see and hear each other. In such a situation, if the defendant has counsel, the defendant must be allowed to communicate fully and confidentially with his attorney during the proceeding. *Id.* Additionally, before use of such a transmission for an arraignment, the procedures and type of equipment used must be approved by the Administrative Office of the Courts. G.S. 15A-941(c).

2. Pilot Project. A 2009 law, S.L. 2009-270, provides for a pilot program that would allow videoconferencing of arraignments and other court proceeding for defendants in the custody of the Department of Correction. As of the writing of this section, that program had not been implemented.

C. Outside of the Presence of Prospective Jurors. A defendant must be arraigned outside of the presence of prospective jurors. G.S. 15A-1221(a)(1a).

III. Waiver of Arraignment.

A. By Failing to Make a Timely, Written Request. An arraignment only is required if the defendant files a written request with the clerk. G.S. 15A-941(d).

1. Time for Request. The defendant's written request for an arraignment must be made no later than 21 days after service of the bill of indictment or, if the bill of indictment is not required to be served, no later than 21 days from the return of a true bill. G.S. 15A-941(d).

2. Appeal for Trial *De Novo*. When a defendant appeals a conviction from district court for a trial *de novo* in superior court, there is no indictment to start the 21-day period in which to file a written request for an arraignment. Therefore, G.S. 15A-941(d) is inapplicable to such defendants and they are entitled to an arraignment in superior court even if not requested. *State v. Vereen*, 177 N.C. App. 233 (2006).

B. Express Waiver. According to G.S. 15A-945, a represented defendant who wishes to plead not guilty may waive arraignment by filing a written plea, signed by the defendant and counsel, prior to the day on which the arraignment is calendared. Oral waivers are valid thereafter. *State v. Benfield,* 55 N.C. App. 380 (1982) (G.S. 15A-945 did not apply because a valid oral waiver was made on the day of trial). The defendant's failure to sign a waiver does not invalidate the waiver in the absence of prejudice or impairment to the defendant's right to a fair trial. *State v. Andrews,* 306 N.C. 144 (1982).

If an unrepresented defendant wants to waive arraignment, the defendant must appear in court of the day of arraignment, unless an exception for his or her personal appearance applies. G.S. 15A-1011(a).

IV. Failure to Conduct Arraignment.

A failure to conduct an arraignment is not reversible error absent a showing of prejudice. *State v. Smith,* 300 N.C. 71 (1980).

V. Calendaring Issues.

A. Calendaring of Arraignment. G.S. 15A-943(a) provides that in counties in which there are regularly scheduled twenty or more weeks of trial sessions of

superior court at which criminal cases are heard, and in other counties the Chief Justice designates, the prosecutor must calendar arraignments in the superior court on at least the first day of every other week in which criminal cases are heard. The North Carolina Supreme Court has interpreted this provision to mean that every arraignment in the affected counties must be calendared and that absent a waiver, no arraignment may take place except when calendared. State v. Shook, 293 N.C. 315 (1977). The statute further provides that no cases in which a jury is required may be calendared for the day or portion of a day during which arraignments are calendared. Notwithstanding G.S. 15A-943(a), in any county where as many as three simultaneous sessions of superior court (criminal, civil, or mixed) are regularly scheduled, the prosecutor may calendar arraignments in any of the criminal or mixed sessions, at least every other week, upon any day or days of a session, and jury cases may be calendared for trial in any other court at which criminal cases may be heard, upon such days. G.S. 15A-943(c).

1. Violations. A violation of G.S. 15A-943(a) requires a new trial only if the defendant shows prejudice. *State v. Richardson*, 308 N.C. 470 (1983) (no prejudicial error); *State v. Vereen,* 177 N.C. App. 233 (2006); *see also State v. Elkerson,* 304 N.C. 658 (1982) (rejecting an argument that by arraigning two of the defendant's accomplices immediately before the defendant's trial, the court violated that portion of G.S. 15A-943(a) providing that no case in which a jury is required may be calendared on a day in which arraignments are calendared; the statute is designed to minimize the imposition on the time of jurors and witnesses, not to ensure the impartiality of jurors).

B. Calendaring of Trial. When a defendant pleads not guilty at an arraignment required by G.S. 15A-943(a), the defendant may not be tried that same week without his or her consent. G.S. 15A-943(b). By its terms, the statute only applies when the arraignment is required by G.S. 15A-943(a). *State v. Sellars,* 52 N.C. App. 380 (1981) (no violation where the defendant was tried in the same week as an arraignment not required by G.S. 15A-943(a)); *see also State v. Roache,* 358 N.C. 243, 277 (2004) ("If section 15A-943(a) applies, then section 15A-943(b) provides a criminal defendant with the right not to be tried without his or her consent during the week following arraignment.").

1. Violations. Unless the defendant has waived the statutory protection, a violation of G.S. 15A-943(b) is reversible error; no prejudice must be shown. *State v. Shook,* 293 N.C. 315 (1977) (reversible error where trial court proceeded with trial over the defendant's objection on the same day as arraignment)*; State v. Vereen,* 177 N.C. App. 233 (2006); *State v. Cates,* 140 N.C. App. 548 (2000).

2. Waiver.

a. By Failing to Object. A defendant waives the statutory protection of not being tried in the same week as arraignment by failing to object to the timing of the trial. *Roache*, 358 N.C. 243 (capital defendant waived right by failing to object). However, the defendant "need not explicitly cite the statute in his [or her] objection;" it is sufficient if the defendant's objection or motion to continue relates to the purpose of the statute: to allow sufficient time to prepare to trial. *Vereen*, 177 N.C. App. at 236 (reversible

error even though the defendant's motions to continue did not expressly mention the statute; defendant's motions requested a continuance so that he could obtain subpoenaed evidence and ensure the presence of his witnesses; counsel specifically mentioned insufficient time to prepare); *Cates*, 140 N.C. App. 548 (same). *But see State v. Davis*, 38 N.C. App. 672 (1978) (the defendant moved to continue on grounds that a subpoena had been issued but had not yet been served on a witness who could not be located; in a holding later distinguished by *Vereen*, the court held that the defendant waived the statutory right by failing to object).

b. By Failing to Request Arraignment. Even if an arraignment is held, the statutory protection against trial in the same week does not apply if the defendant waived arraignment by not timely requesting an arraignment. *State v. Lane,* 163 N.C. App. 495 (2004); *State v. Trull,* 153 N.C. App. 630 (2002).

VI. Counsel Issues.

A. Constitutional Right to Counsel. Because an arraignment is a critical stage of the criminal prosecution, a defendant has a constitutional right, under the Sixth Amendment, to representation at arraignment. *Hamilton v. Alabama,* 368 U.S. 52 (1961); *State v. Pait,* 81 N.C. App. 286 (1986).

B. When Defendant Appears Without Counsel. G.S. 15A-942 provides that if a defendant appears at the arraignment without counsel, the court must:

- inform the defendant of the right to counsel,
- give the defendant opportunity to exercise that right, and
- take any action necessary to effectuate the right.

Failure to follow the statute is error. *State v. Sanders,* 294 N.C. 337 (1978) (new trial). The court must inform a defendant of his or her right to counsel in substantially the same manner as is done at a district court first appearance pursuant to G.S. 15A-603. *State v. Williams,* 65 N.C. App. 498 (1983).

C. When Arraignment is Not Requested. G.S. 15A-942 provides that if the defendant fails to file a written request an arraignment, the trial court must verify that the defendant is aware of the right to counsel and has been given the opportunity to exercise that right; and take any action necessary to effectuate that right on the defendant's behalf.

VII. Effect of Announcing Charge at Arraignment.

In superior court, jeopardy attaches when the jurors are sworn and impaneled. *Serfass v. United States,* 420 U.S. 377 (1975). Thus, jeopardy does not bar a prosecutor from withdrawing a statement made at arraignment indicating that the defendant will be tried for a lesser offense of the one charged and then proceeding on a greater offense, provided the defendant has adequate notice before trial. *State v. Hickey,* 317 N.C. 457 (1986).

VIII. Arraignment on Prior Convictions.

A. Generally. G.S. 15A-928(c) provides for a special arraignment that applies when a prior conviction raises an offense of lower grade to one of higher grade, such as with habitual impaired driving or habitual misdemeanor assault. The statue provides that after the trial begins and before the close of the State's case, the judge, outside of the presence of the jury, must arraign the defendant upon the special indictment or information (or separate count in the indictment charging the principal offense) charging the prior conviction, and must advise the defendant that he or she may admit the prior conviction, deny it, or remain silent. Although G.S. 15A-928(c) does not apply to habitual felon indictments, *State v. Marshburn,* 173 N.C. App. 749 (2005) (reversible error to dismiss habitual felon indictment under G.S. 15A-928(c)), the general arraignment statute does apply. *State v. Lane,* 163 N.C. App. 495 (2004) (rejecting the State's argument that a defendant need not be arraigned on a habitual felon charge).

1. If the Defendant Admits. If the defendant admits the prior conviction, that element of the offense is established and the no evidence of it may be introduced at trial. G.S. 15A-928(c)(1). The judge must submit the case to the jury without reference to the prior conviction and may not submit any lesser included offense distinguished from the offense charged solely by the fact that the lesser does not require proof of the prior conviction. *Id.*

2. If the Defendant Denies or Remains Silent. If the defendant denies the prior conviction or remains silent, the State may prove that element as a part of its case. G.S. 15A-928(c)(2).

B. Failure to Arraign on a Prior Conviction. A failure to conduct the required arraignment is reversible error only where the defendant establishes prejudice. *State v. McDonald,* 165 N.C. App. 237 (2004) (no prejudice); *State v. Jernigan,* 118 N.C. App. 240 (1995) (same).