OUT-OF-TERM, OUT-OF-SESSION, OUT-OF-COUNTY

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Contents

I. Introduction. For many jurisdictions the concept of a session or term of court is not as important as it is in North Carolina because judges in other states no longer move from one district to another as North Carolina's superior court judges still do. Here, a judge's jurisdiction over a matter still can depend on where the judge is assigned and when the judge acts.

The commonly stated North Carolina rule is that a judgment or order affecting substantial rights may not be entered without the consent of the parties (1) after the session of court has expired, or (2) while the judge is out of the county or district. Actually, as explained below, the law is more complicated than that and there are many instances when orders may be entered out-of-session and out-of-county. A better summary of the rule would be:

- A superior court judge may not enter an order in a criminal or civil case after the term, i.e., the six-month assignment by the master calendar, has ended, unless the parties consent.
- In criminal cases a superior court judge may not enter an order affecting substantial rights after the session of court — typically a one-week assignment — has ended unless the decision was announced during the session or the parties have consented to the judge deciding the matter and entering the order after the session is over.
- In civil cases a superior court judge may decide a matter and enter an order

after the session has concluded, so long as the matter was heard during the assigned session.

- A superior court judge may hear and decide at any time non-jury matters, both criminal and civil, arising from the judge's home district, regardless of where the judge may be assigned. This is the judge's in chambers jurisdiction. If it is a criminal matter, the in chambers hearing must be in the county where the matter arose, unless the parties agree to being heard elsewhere. In civil cases, the motion may be heard in any county within the judge's home district.
- In criminal cases a sentence does not have to be entered during the session but must be entered within a reasonable time thereafter.
- Other statutes authorize some particular criminal matters, such as habeas corpus writs and motions for appropriate relief, to be heard regardless of the judge's current assignment.

II. Meaning of "Session" and "Term". In common parlance "term of court" and "session" sometimes are used interchangeably, but they have distinct meanings. Under the rotation system for superior court judges mandated by article IV, section 11 of the North Carolina Constitution — "The principle of rotating Superior Court Judges among the various districts of a division is a salutary one and shall be observed" — judges are assigned on six-month schedules. Thus in superior court the "use of 'term' has come to refer to the typical six-month assignment of superior court judges, and 'session' to the typical one-week assignment within the term." Capital Outdoor Advertising v. City of Raleigh, 337 N.C. 150, 154 n.1, 2 (1994). *See* Beaufort County Board of Education v. Beaufort County Board of Commissioners, 188 N.C. App. 399, 407-10 (2008), *reversed on other grounds*, 363 N.C. 500 (2009); State v. Trent, 359 N.C. 583, 585 (2005).

III. In Chambers Jurisdiction. Sometimes what might otherwise be an out-of-session issue can be resolved by relying on a judge's in chambers jurisdiction, the authority to hear matters from the judge's home district regardless of the judge's current assignment. Thus it is useful to review briefly when a judge may hear a matter outside a scheduled session of court.[1]

A. The In Chambers Statute, G.S. 7A-47.1. A superior court judge's authority to hear matters outside a regular courtroom session is described in G.S. 7A-47.1. The statute defines the judge's jurisdiction to hear matters "in vacation"—that is, when there is no session of court scheduled—also referred to as "in chambers" jurisdiction. Generally any nonjury matter arising in the district may be heard in vacation, and it may be heard by either the judge currently assigned to the district, a resident judge of the district, or a special superior court judge who resides in the district. Scott v. Scott, 259 N.C. 642, 646 (1963); Patterson v. Patterson, 230 N.C. 481, 484 (1949).

B. Resident Judge Need Not Be Assigned. The resident judge, or a special judge who resides in the district, need not be currently assigned to the district to

[1] G.S. 7A-49.2 delineates when civil motions may be heard during criminal sessions of superior court and vice versa. The statute allows motions in civil cases to be heard during criminal sessions, and it authorizes civil trials during criminal sessions with consent of the parties. The statute prohibits hearing criminal matters during a civil session. *In re* Renfrow, 247 N.C. 55, 60-61(1957); Whedbee v. Powell, 41 N.C. App. 250, 255 (1979). A judge assigned to a civil session still would have in chambers jurisdiction to hear criminal nonjury matters, however.

exercise in chambers jurisdiction.

> The general "vacation" or "in chambers" jurisdiction of a regular judge arises out of his general authority. Usually it may be exercised anywhere in the district and is never dependent upon and does not arise out of the fact that he is at the time presiding over a designated term of court or in a particular county.

Baker v. Varser, 239 N.C. 180, 188 (1954) (quoting Shepard v. Leonard, 223 N.C. 110 (1943)).

C. Parties' Consent Not Needed. A judge's exercise of in chambers jurisdiction does not require the parties' consent. E.B. Grain Co. v. Denton, 73 N.C. App. 14, 24 (1985); Towne v. Cope, 32 N.C. App. 660, 665-66 (1977).

D. Where The Hearing May Be Held. It appears that a superior court judge hearing an in chambers matter in a criminal case must be in the county in which the matter arose, unless the parties agree to being heard outside the county. A civil in chambers matter, on the other hand, may be heard in any county within the district.

Although *Baker v. Varsa, supra*, seems to say that in chambers jurisdiction does not depend on the judge being in the county, the court of appeals later said in *House of Style Furniture Corporation v. Scronce*, 33 N.C. App. 365 (1977):

> Even as to regular judges, "it is the uniform holding in this jurisdiction that, except by consent, or unless authorized by statute, a judge of the Superior Court even in his own district, has no authority to hear a cause or to make an order substantially affecting the rights of the parties, outside the county in which the action is pending."

33 N.C. App. at 369 (quoting Shepard v. Leonard, 223 N.C. 110, 114 (1943)).

Subsequent to the decision in *House of Style Furniture*, the General Assembly enacted Rule 7(b)(4) of the Rules of Civil Procedure providing that a motion in a civil case may be heard in any county in the district. The rule appears to apply regardless of whether the motion is being heard during a regular session or in chambers. Because there is no comparable rule or statute for criminal cases, however, it seems that *House of Style Furniture* continues to apply to criminal cases, requiring an in chambers motion in a criminal case to be heard in the county in which the case arose, unless the parties agree otherwise.

If the hearing was held in the correct county, it does not matter that the judge is sitting in another county when the order is entered. State v. Collins, ___ N.C. App. ___, ___, 761 S.E.2d 914, 919-920 (2014).

IV. Extension of a Session. Sometimes a potential out-of-session problem may be avoided by the extension of the session. G.S. 15-167 authorizes a superior court judge to extend a criminal session if a trial cannot be completed by the end of the day Friday; it also authorizes extension of sessions for civil cases except when the trial of a civil case began after Thursday of the last week of the civil session. Although the statute provides

for an order extending a session to be entered in the record, the extension will be upheld if it is announced in open court and there is no objection from the parties. State v. Hunt, 198 N.C. App. 488, 493-94 (2009); State v. Locklear, 174 N.C. App. 547, 551 (2005).

V. Most Common Statement of the Out-of-Session, Out-of-County Rule. The North Carolina Supreme Court's statement of the out-of-session, out-of-county rule in *State v. Boone*, 310 N.C. 284, 287 (1984) is typical:

> "[J]udgments and orders substantially affecting the rights of parties to a cause pending in the Superior Court at a term must be made in the county and at the term when and where the question is presented, and our decisions on the subject are to the effect that, except by agreement of the parties or some express provision of law, they cannot be entered otherwise, and assuredly not in another district and without notice to the parties interested." *State v. Humphrey*, 186 N.C. 533, 535, 120 S.E. 85, 87 (1923). In prior and subsequent cases, this rule has been stated in various forms, and it has been consistently applied in both criminal and civil cases.

Several keys to the rule are covered in that quote. First, of course, the parties may consent to a decision out-of-session or out-of-county, and judges routinely ask for consent when taking a matter under advisement. Second, the rule only applies when the order substantially affects the rights of the parties; other orders may be entered out-of-session and out-of-county. Third, some other provision of law may authorize an action out-of-session and out-of-county. The legislature has done so in various circumstances, particularly in civil cases.

VI. Out-of-Session Orders in Criminal Cases. The North Carolina Supreme Court affirmed its commitment to the out-of-session rule in criminal cases in *State v. Trent*, 359 N.C. 583, 585 (2005):

> Furthermore, this court has held that "an order of the superior court, in a criminal case, must be entered during the term, during the session, in the county and in the judicial district where the hearing was held." *State v. Boone*, 310 N.C. 284, 287, 311 S.E.2d 552, 555 (1984). Absent consent of the parties, an order in violation of these requirements is null and void and without legal effect. *Id.*

In *Trent* the judge heard a motion to suppress evidence in January but did not enter an order until the trial opened in August. The supreme court held that the decision to suppress was void because it was rendered after the session and term of court had expired and without the defendant's consent. The court rejected the argument that the defendant had consented to the out-of-session order by not objecting when the judge said he was taking the matter under advisement.[2] Nor does the defendant have to show

[2] The *Trent* majority opinion prompted a strong dissent which argued, "[t]he out-of-term, out-of-session rule is now out of date." The dissent asserted that historical factors which led to the rule no longer existed. The rule was justified in the past when judges rode circuit on horseback and held court in a district only a few days a year. Because it might be months before a judge returned to a specific court, it was necessary for the judge to act before the session ended. The dissent also said that crowded dockets now require judges to continue cases from one term or session to the next and that requiring the court to obtain and record all parties' consent would put the trial courts at the mercy of the parties. The dissent argued that, at a minimum, a party should be required to object during the session to the holding of an order for later

prejudice from the late entry of the order. State v. Boone, 310 N.C. 284, 287 (1984).

(Note that if after hearing the motion in January the judge had entered the order before his six-month term expired at the end of June, the in-chambers jurisdiction of G.S. 7A-47.1 might have been applied to uphold the order.[3])

The *Trent* opinion acknowledged that *State v. Horner*, 310 N.C. 274, 279 (1984), provides an exception to the out-of-session rule, holding that an order may be entered after a session has expired if the ruling was announced in open court during the session.

A. Reason for the Rule. In *Boone* the court further explained the purpose of the out-of-session rule and the procedure that should be followed when issuing a judgment or order affecting substantial rights:

> Although we realize that there are situations where it would be more convenient for a judge to mail his ruling to the clerk, and then allow the clerk to notify the respective parties of the judge's decision, we are convinced that the better practice, in criminal cases, is for the judge to announce his rulings in open court and direct the clerk to note the ruling in the minutes of the court. When the judge's ruling is not announced in open court, the order or judgment containing the ruling must be signed and filed with the clerk in the county, in the district and during the session when and where the question is presented. These rules serve to protect the interests of the defendant, the State, and the public, by allowing all interested persons to be informed as to when a judgment or order has been rendered in a particular matter. Since many rights relating to the appeals process are "keyed" to the time of "entry of judgment," it is imperative that the judge's decisions become part of the court's records and that all interested persons know the exact date on which judgment is entered.

310 N.C. at 290–91.

B. The Sentencing Exception. The out-of-session rule does not apply to sentencing. "A trial court is authorized to continue the case to a subsequent date for sentencing." State v. Degree, 110 N.C. App. 638, 640 (1993). "This procedure . . . is an exception to the general rule that the court's jurisdiction expires with the expiration of the session of court in which the matter is

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action and should be required to show prejudice from the delay.

[3] *Capital Outdoor Advertising, Inc., v. City of Raleigh*, discussed in Section VII and decided eleven years before *Trent*, relied upon the in chambers jurisdiction of G.S. 7A-47.1 to sustain an order entered in a civil case the week after the session expired but still within the six-month term of the judge's assignment to that district. *Trent* emphasizes that the order was entered well after the term had expired and does not discuss the effect of G.S. 7A-47.1 or the holding in *Capital Outdoor Advertising*. There was no reason to discuss *Capital Outdoor Advertising*, of course, since no argument could be made about in chambers jurisdiction once the term ended. It would seem that in chambers jurisdiction might have been applied to uphold the out-of-session order in *State v. Boone*, where the order was entered out-of-session and out-of-county but still several days before the term expired at the end of June. *Boone* was decided ten years before *Capital Outdoor Advertising* and its construction of G.S. 7A-47.1, however, and the opinion muddles the distinction between a session and a term of superior court.

adjudicated." *Id.* at 641. The continuance for sentencing, most commonly referred to as a prayer for judgment continued, may be for a definite or indefinite period of time, provided that the sentence is entered within a reasonable time after the conviction or guilty plea. Although such a continuance is recognized in G.S. 15A-1334(a), the authority to delay sentencing predates the statute and is considered the trial court's "inherent power to designate the manner by which its judgments shall be executed." State v. Lea, 156 N.C. App. 178, 180 (2003).

"Deciding whether sentence has been entered within a 'reasonable time' requires consideration of the reason for the delay, the length of the delay, whether defendant has consented to the delay, and any actual prejudice to defendant which results from the delay." State v. Degree, 110 N.C. App. at 641 (sixty-day delay considered reasonable, based largely on defendant's failure to request entry of judgment). In an extreme case, a five-year delay in sentencing was upheld in *State v. Lea, supra,* because the trial court was awaiting an appellate ruling in another case which would affect the validity of one of defendant's convictions. The defendant had not objected to the continuation nor requested that judgment be entered.

When deciding whether a trial court may delay action on a sentence to a later session, it is important to remember that there is a distinction between a case in which prayer for judgment is continued with conditions and a case in which the continuance is without conditions. If conditions are imposed (e.g., prayer for judgment is continued for one year upon payment of a fine and costs and good behavior) and the defendant meets the conditions, the court may not impose a different sentence at a later time. State v. Absher, 335 N.C. 155, 157 (1993). Conditions amounting to punishment turn a prayer for judgment continued into a final judgment, subject to no further action by the trial court; conditions that do not amount to punishment leave the door open for imposition of additional sanctions by the trial court. A condition that the defendant "obey the law" or pay the costs of court is not a condition amounting to punishment, but imprisonment or payment of a fine, or a condition that the defendant continue psychiatric treatment, is a punishment which makes the sentence final and bars the trial court from acting further. State v. Brown, 110 N.C. App. 658, 659-60 (1993).

Subsection (c) of G.S. 15A-1334, the sentencing statute, specifically authorizes a judge who orders a pre-sentence report to direct that the sentencing hearing be before the same judge in another county or district at a later session. State v. Fuller, 48 N.C. App. 418, 419-20 (1980).

C. Statutes Authorizing Other Actions Out-of-Session in Criminal Cases.

Several statutes specifically authorize a judge to act on a criminal case after a session has ended. G.S. 17-6 specifies that an application for a writ of habeas corpus may be made to any appellate judge or any superior court judge "either during a session or in vacation."[4] A motion for appropriate relief under G.S. 15A-1414 may be made within ten days after an entry of judgment, which usually would be after the end of the session in which the judgment was entered, and G.S. 15A-1413 states that it may be heard by the judge who presided at the trial

[4] Rule 25(5) of the General Rules of Practice for the Superior and District Courts requires that when the application for habeas corpus in a capital case raises a meritorious challenge (other than the jurisdiction of the sentencing court) the judge who receives the application is to refer it to the senior resident superior court judge for the district where the defendant was sentenced.

> even if that judge is assigned to another district at the time or the judge's commission has expired.

VII. Civil Cases. The out-of-session rule has had little effect in civil cases since the supreme court's decision in *Capital Outdoor Advertising, Inc., v. City of Raleigh*, 337 N.C. 150, 159 (1994). There the court held that G.S. 7A-47.1 and Rule 6(c) of the Rules of Civil Procedure authorize a judge to decide a matter and sign an order in a civil case after the session has concluded, provided that the hearing was held in session. When acting pursuant to that statute or rule, a judge does not need the parties' consent.

G.S. 7A-47.1, the statute on in chambers jurisdiction, was discussed above. Rule 6(c) is broader than the statute and provides:

> The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a session of court. The continued existence or expiration of a session of court in no way affects the power of a court to do any act or take any proceeding, but no issue of fact shall be submitted to a jury out of session.

In addition, Rule 58 was amended subsequent to *Capital Outdoor Advertising* to say: "Subject to the provisions of Rule 7(b)(4) [the rule allowing a motion in superior court to be heard in any county in the district, with the permission of the senior resident] consent for the signing and entry of a judgment out of term, session, county, and district shall be deemed to have been given unless an express objection to such action was made on the record prior to the end of the term or session at which the matter was heard."

Taken together, G.S. 7A-47.1, Rule 6(c), and Rule 58 effectively eliminate questions about a judge entering an order in a civil case after a session has expired, so long as the hearing was held during the session. A party who wants to contest the jurisdiction of the court to act after the session expires must object on the record before the session is over.

A. Clarification of Order Entered During Session. In *Minton v. Lowe's Food Stores, Inc.*, 121 N.C. App. 675, 679 (1996), the court of appeals held that Rule 6(c) allows a hearing out of the county and after the end of the session when the original hearing was conducted during a regularly scheduled session and the subsequent hearing is only for the purpose of clarifying or filling out the original decision.

VIII. Where the Hearing is Held and Order Signed. A hearing in a criminal case must be in the county in which the action arose unless the state and defense agree otherwise, and in a civil case it must be within the district. See the discussion about "Where The Hearing May Be Held" in Section III.D., above.

A more complicated question has been whether a judge's signing of an order while out of the county or district makes it void even though the hearing was properly held within the county or district and was held in session or pursuant to in chambers jurisdiction. That question appears to be answered in *State v. Collins*, ___ N.C. App. ___, ___, 761 S.E.2d 914, 919-20 (2014), where the court held that the fact the judge was sitting in another county when the order was signed did not matter if the hearing was held in the correct county.

As noted in *Collins* and various other cases, an order is not entered and has no effect until it is put in writing and filed with the clerk of court. An announcement of the decision in open court is a mere rendering of the judgment and is not binding until reduced to writing and filed. *See* In re Thompson, ___ N.C. App. ___, ___, 754 S.E.2d 168, 171-72

(2014); In re Pittman, 151 N.C. App. 112, 114 (2002); Worsham v. Richbourg's Sales and Rentals, 124 N.C. App. 782, 784 (1996); N.C. R. CIV. P. 58.

It still is the better practice for a judge to sign an order in the district or county where a matter arose and was heard or to have the parties consent to the signing at a different location.

IX. ***Ex Parte*** **Show Cause Orders.** As stated earlier, the out-of-session rule applies only when the order substantially affects the rights of the parties. The North Carolina Supreme Court has held that a show cause order does not substantially affect the party's rights and, consequently, a resident superior court judge may issue a show cause order *ex parte* for the judge's home district even when the judge is assigned and holding court out of the district. A previous ruling in the same case by the court of appeals creates some confusion, however.

The court of appeals held in *In re License of Delk*, 103 N.C. App. 659, 661 (1991), that a superior court judge who was neither a resident of nor assigned to the district could not order a lawyer to appear in Graham County to show cause why he should not be disbarred. The judge had presided over the lawyer's trial in Graham County the previous year but had imposed no discipline and was not assigned to the district when she issued the show cause order.

Subsequently, the senior resident judge for Graham County, while holding court in Mecklenburg, ordered the lawyer to appear in Graham to show why he should not be disciplined. The supreme court held in *In re License of Delk*, 336 N.C. 543, 547-48 (1994), that a show cause order does not substantially affect the rights of a party and, therefore, is not subject to the general rule about a judge acting out-of-district. So long as the hearing on discipline was to be decided in Graham County, it did not matter where the show cause order was issued.

The supreme court stated explicitly that its decision did not depend on the show cause order being issued by a resident judge of the district. Unless the judge's residency in the district matters, however, it is difficult to understand why the order issued by the resident judge was valid, as held by the supreme court, but the same type order issued by the nonresident judge was invalid, as the court of appeals determined.

X. **Remands.** When an appellate court remands a case to the trial court to enter findings of fact sufficient to allow meaningful appellate review, the case may and should be heard by the original trial judge even if not presently assigned to the district nor a resident judge there. No other judge could enter the findings and it would not make sense to say that the judge could not comply with the remand until reassigned to the district. Andrews v. Peters, 89 N.C. App. 315, 317-18 (1988).

XI. **Attempting to Solve the Problem with a Later Order.** If a judge has issued an order out of session without authority, having the judge sign and re-issue the order during a later session does not fix the problem, even if it is the same judge. The judge's authority expired with the end of the session, and actions at a later session have no effect. See *State v. Trent,* 359 N.C. 583, 585 (2005) for example. Likewise, entering a new order *nunc pro tunc*, backdating it to the time of the original session, has no effect. A *nunc pro tunc* order is proper only when the order originally was signed on the prior date but was not entered due to accident, mistake or neglect of the clerk. Whitworth v. Whitworth, 222 N.C. App. 771, 777-78 (2012). *Nunc pro tunc* may not be used to correct an error of law or to cause an order that was never previously entered to be placed on the record. State v. Mandina, 91 N.C. App. 686, 693 (1988); Elmore v. Elmore, 67 N.C. App. 661, 666-67 (1984).

XII. The Need for a Commission. When a judge is required to act in session, the crucial question is whether the judge has been properly assigned to that session—not whether a commission has been issued. The commission is evidence of the assignment, but a proper assignment may occur even if there is a defect in the issuance of the commission. State v. Eley, 326 N.C. 759, 761-62 (1990) (judge was properly assigned to murder trial, had jurisdiction, although the judge's commission was never received, when the chief justice's administrative assistant testified that he followed his normal procedure, marking the new session on his master calendar and issuing a commission).

The *Eley* court made several broad pronouncements about commissions, including that the trial judge's "jurisdiction, power, and authority as a superior court judge flowed from the Constitution of North Carolina and his appointment and commission by the Governor as a superior court judge," and that a commission from the chief justice to hold a session of court does not grant jurisdiction but "merely manifests that such judge has been duly assigned pursuant to our Constitution to preside over such session of court." 326 N.C. at 764. In relying upon *Eley*, however, it is important to note that there was strong and uncontested evidence about the assignment of the trial judge and the routine issuance of the commission, even though it was not received. Therefore, it is recommended to be cautious about relying on the more general proposition that jurisdiction is conferred by the constitution regardless of the issuance of a commission. When a judge is required to act in session, the judge has to be properly assigned to that session, and the commission is the strongest evidence of the assignment.

XIII. Consent. When the parties' agreement is required to hear or decide a matter out-of-session or out-of-district, "the consent must appear on [the] face of [the] record." Patterson v. Patterson, 230 N.C. 481, 484 (1949). A party consents by appearing in a hearing out of the county and not objecting to the judge's authority. Griffin v. Griffin, 237 N.C. 404, 407-08 (1953). Consent is not to be implied, however, from a party's submission of a proposed order to the judge, at the judge's request, after a session has concluded. Turner v. Hatchett, 104 N.C. App. 487, 490 (1991).

XIV. Parties Cannot Grant Jurisdiction. Jurisdiction may not be conferred by consent. Thus the parties cannot give a judge authority to hear a matter that has been filed in a county outside the district in which the judge resides or to which the judge is assigned. Vance Construction Company, Inc., v. Duane White Land Corporation, 127 N.C. App. 493, 495-96 (1997) (the judge who presided when a consent order was entered had no authority to hear a later dispute over the terms of the order, even though the parties agreed, since the judge was no longer assigned to nor a resident judge for the district).

XV. Summary. The out-of-session, out-of-district rule is not very important anymore for civil cases, but it still can be a trap for an unsuspecting judge in criminal cases. In civil cases a judge may decide a matter and enter an order after the session has expired and while the judge is out of the district, provided that the hearing was held during the session. The parties' consent is not needed, but a party can stop the judge from acting out-of-session or out-of-district by objecting before the session concludes.

For criminal cases, though, there is no rule implying that the parties have consented to an order being entered out-of-session and out-of-district. By case law, if a judge announces a ruling during session, there is no legal problem with submitting the ruling to writing later. Also, sentencing may be delayed until after the session without creating a legal problem. For other situations, however, the parties must consent to a judge acting after the session has ended. Thus, when a judge wishes to take a matter under

advisement and is not likely to decide during that session of court, the judge should be sure that the record shows the consent of the prosecutor and defense to act out-of-session and, if appropriate, out-of-district. When that is not done, the judge sometimes still can rely on in chambers jurisdiction to act, if the judge is resident in the district or still assigned there.