



Out-of-Term, Out-of-Session, Out-of-County

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For many jurisdictions the concept of a session or term of court is not as important as it is in North Carolina with the state's legacy of traveling superior court judges. In this state the commonly stated rule, for both criminal and civil cases in both superior and district court, 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, there are many instances when orders may be entered out-of-session and out-of-county, especially in civil cases. This bulletin will attempt to describe those situations.

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, 446 S.E.2d 289, 292, n.1, 2 (1994). See *Beaufort County Board of Education v. Beaufort County Board of Commissioners*, ___ N.C. ___, 656 S.E.2d 296, *disc. review allowed*, 661 S.E.2d 239 (2008); *State v. Trent*, 359 N.C. 583, 614 S.E.2d 498 (2005). In district court there is nothing comparable to the six-month term of superior court judges because district judges do not travel. As to a session of court, the common practice is for chief district judges, acting under the authority of North Carolina General Statutes 7A-146(1) (hereinafter G.S.), to assign district judges by the day, and therefore a day of district court is considered a session. A chief district judge also may assign a specific case to a judge, and the hearing of that single case, however long it lasts, constitutes a session as well. *Routh v. Weaver*, 67 N.C. App. 426, 313 S.E.2d 793 (1984).

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In Vacation or In Chambers Jurisdiction

This bulletin generally is about the entry of an order after a matter has been heard in a regularly scheduled session of court. Sometimes, however, the hearing itself may take place out-of-session and out-of-county, and the issue to consider is not only the validity of the order but the validity of the entire proceeding. For that reason it will be useful to review briefly when a judge may hear a matter outside a scheduled session of court.¹

Most questions about a superior court judge's authority to hear matters outside a regular courtroom session are answered by 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, 131 S.E.2d 478 (1963); *Patterson v. Patterson*, 230 N.C. 481, 484, 53 S.E.2d 658 (1949). The resident judge, or special judge who resides in the district, need not be currently assigned to the district to 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. As to him, it is limited, ordinarily, to the district to which he is assigned by statute.

Baker v. Varser, 239 N.C. 180, 188, 79 S.E.2d 757 (1954) (quoting *Shepard v. Leonard*, 223 N.C. 110, 25 S.E.2d 445 (1943)).

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, 325 S.E.2d 522 (1985); *Towne v. Cope*, 32 N.C. App. 660, 233 S.E.2d 624 (1977).

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, but that a civil in chambers matter may be heard in any county within the district. In *House of Style Furniture Corporation v. Scronce*, 33 N.C. App. 365, 235 S.E.2d 258 (1977), the resident judge of the Twenty-Second Judicial District, which included both Iredell and Alexander counties, heard in chambers in Statesville (Iredell County) a motion to dismiss an Alexander County case. The court of appeals voided the order because the hearing was conducted outside the county even though it was within the district.

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, 25 S.E.2d 445, 448 (1943)). Also see *Patterson v. Patterson*, *supra*, 230 N.C. at 484 (under G.S. 7A-47.1 "the resident judge of

1. N.C. GEN. STAT. § 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*, 248 N.C. 55, 100 S.E.2d 315 (1957); *Whedbee v. Powell*, 41 N.C. App. 250, 254 S.E.2d 645 (1979). A judge assigned to a civil session still would have in chambers jurisdiction to hear criminal nonjury matters, however.

the judicial district has concurrent jurisdiction with the judge holding the courts of the district” in nonjury matters, but the resident judge’s actions were void in this instance because he was out of the district when he heard the matter and entered the order).

In 2005 the General Assembly rewrote Rule 7(b)(4) of the Rules of Civil Procedure to provide 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. There is no comparable rule or statute for criminal cases, however, so it seems that an in chambers motion in a criminal case must be heard in the county in which the case arose, unless the parties agree otherwise.

A district court judge’s jurisdiction to hear matters in chambers is limited by G.S. 7A-192. Under that statute a district judge may hear matters in chambers only if designated to do so by the chief district judge. The designation must be filed with the clerk of court for each county in the district and remains in effect until revoked by written order. An order entered in chambers without such designation is void. *Stroupe v. Stroupe*, 301 N.C. 656, 273 S.E.2d 434 (1981); *Austin v. Austin*, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

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. Locklear*, 174 N.C. App. 547, 621 S.E.2d 254 (2005). There is no comparable statute for extensions of sessions in district court, but the authority of the judge to do so when necessary to complete a trial seems to be the accepted practice.²

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, 187, 311 S.E.2d 552 (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

2. A short continuance of a criminal trial from one session to another to allow completion does not put the defendant in double jeopardy. *State v. Carter*, 289 N.C. 35, 220 S.E.2d 313 (1975), *vacated on other grounds*, 428 U.S. 904 (1976). Double jeopardy may arise, however, if following the continuance the next proceeding is treated as a new trial with the defendant entering a plea again. *State v. Coats*, 17 N.C. App. 407, 194 S.E.2d 366 (1973).

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.

Out-of-Session Orders in Criminal Cases

The North Carolina Supreme Court most recently affirmed its commitment to the out-of-session rule in criminal cases in *State v. Trent*, 359 N.C. 583, 585, 614 S.E.2d 498, 499 (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.*

Although the language in *Trent* is strong, the case itself involved circumstances that were unusual and will not be repeated often.

In *Trent* the defendant, charged with armed robbery, moved to suppress a victim’s identification of him as well as the defendant’s own incriminating statements. The hearing on the motions to suppress was heard in October, then continued until January. At the end of the January hearing, the judge said he was taking the motions under advisement. No order was entered during the remainder of that term of court which ended on June 30. When the trial opened in August the judge announced that the motions to suppress were denied. The Supreme Court held that the decision to suppress was void because it was rendered after the session and term of court had expired 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.³

Note that *Trent* is really an out-of-term case rather than an out-of-session decision. 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.⁴

3. The *Trent* majority opinion prompted a strong dissent which argued, “The 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 action and should be required to show prejudice from the delay.

4. *Capital Outdoor Advertising, Inc., v. City of Raleigh*, discussed on page 7 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

Trent discusses two earlier cases to further explain when an order may be entered after a session has expired. An order may be entered after a session has expired if the ruling was announced in open court during the session. That is the holding in *State v. Horner*, 310 N.C. 274, 311 S.E.2d 281 (1984). By contrast, in *State v. Boone*, quoted above and decided on the same day as *Horner*, the trial judge had not announced the decision during the session, and the Supreme Court declared void the judge's order denying a motion to suppress because the order was signed out-of-session and while the judge was out of the district. Moreover, the court in *Boone* held that the defendant did not have to object to the procedure and did not have to show that he was prejudiced by the entry of the out-of-session order.

The *Boone* court further explained the purpose of the 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.

The Sentencing Exception

The out-of-session rule does not apply to sentencing. "A trial court is authorized to continue the case to subsequent date for sentencing." *State v. Degree*, 110 N.C. App. 638, 640, 430 S.E.2d 491, 493 (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 adjudicated." *Id.* at 641, 430 S.E.2d at 493. 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, 576 S.E.2d 131, 132 (2003).

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.

“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. In *Degree* the court found a sixty-day delay reasonable, based largely on the defendant’s failure to request entry of judgment. In *State v. Lea*, quoted above, the court of appeals upheld a five-year delay in sentencing under unusual circumstances. After the defendant was convicted of attempted second-degree murder and several assaults, sentencing was withheld on the assaults while he appealed whether there was such a crime as attempted second-degree murder. Following the North Carolina Supreme Court’s decision in another case that there was no crime of attempted second-degree murder, the *Lea* defendant moved for appropriate relief on that charge. The court then sentenced him on the assaults. As in *Degree* the appellate court noted that the defendant had not objected to the continuation nor requested that judgment be entered; neither was there any evidence that the delay affected his ability to present evidence on the sentencing for assault.

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 cases in which prayer for judgment is continued with conditions and cases 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, 436 S.E.2d 365 (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, 430 S.E.2d 433 (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, 268 S.E.2d 879, *review denied*, 301 N.C. 403 (1980).

Other Actions Out-of-Session in Criminal Cases

In addition to sentencing, there are other situations in which 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 in session or in vacation.”⁵ 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 even if that judge is assigned to another district at the time or the judge’s commission has expired.

5. 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.

Civil Cases

The import of the out-of-session rule in civil cases has been diminished significantly by the North Carolina Supreme Court's construction of G.S. 7A-47.1 and Rule 6(c) of the Rules of Civil Procedure in *Capital Outdoor Advertising, Inc., v. City of Raleigh*, 337 N.C. 150, 446 S.E.2d 289 (1994), and by the subsequent revision of Rule 58. In *Capital Outdoor Advertising* the trial judge had been assigned to Wake County. He heard a motion to dismiss on Tuesday, but waited until the following Monday to rule. Although the judge still was in Wake County, the one-week session of court at which the motion was heard had expired on Friday and he had begun a new session at the time of his ruling. The court of appeals upheld his order of dismissal, however, concluding that G.S. 7A-47.1 and Rule 6(c) 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 vacation 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 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.

Not long after the *Capital Outdoor Advertising* decision an amendment to Rule 58 of the Rules of Civil Procedure went into effect, stating: "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] 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 district court judge has the same authority as a superior court judge to enter an order and judgment after a session has ended, provided that the trial on the merits was conducted at a regularly scheduled session. *Ward v. Ward*, 116 N.C. App. 643, 448 S.E.2d 862 (1994).

Clarification of Order Entered during Session

In *Minton v. Lowe's Food Stores, Inc.*, 121 N.C. App. 675, 468 S.E.2d 513 (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. The judge in *Minton*, a case heard in Caldwell County, decided that the plaintiff was to pay costs. Later, when a question arose about costs that were not originally taxed by the clerk, a hearing was held before the same judge, but by that time he was holding a session of criminal court in McDowell County. Nevertheless, the court of appeals ruled the order on additional costs was valid under Rule 6(c), regardless of the parties' consent, because the initial substantive order awarding costs had been entered in session

in Caldwell County and this subsequent order, entered out-of-session and out-of-county, was merely “perfunctory” in assessing those costs.

Out-of-District and Out-of-County

A hearing in a criminal case must be in the county in which the action arose unless the parties agree otherwise, and in a civil case it must be within the district. As discussed above under “In Vacation or In Chambers Jurisdiction,” the court of appeals in *House of Style Furniture Corporation* voided an order entered by a resident superior court judge because he heard the motion outside the county in which the lawsuit arose. The judge had in chambers jurisdiction to hear the motion to dismiss because the case was from his district, but without the parties’ agreement he could not conduct the hearing in a different county than where the lawsuit was filed. The legislature subsequently rewrote the Rules of Civil Procedure to allow a motion in a civil case to be heard in any county in the district, but no comparable change was made for motions in criminal cases.

A more difficult question is 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. Much of the case law which speaks about out-of-district and out-of-county orders is not particularly helpful because typically the hearing itself was out of the county or district or the order was entered out-of-session, and those are the facts which really controlled the courts’ decisions. The most recent North Carolina Supreme Court discussion about signing orders out-of-district and out-of-county came in the *State v. Horner* and *State v. Boone* decisions, discussed above.

In *Horner* the North Carolina Supreme Court upheld the out-of-session order because the decision had been announced in open court during the session. At the same time the court sidestepped the argument that the order was entered out-of-district, saying that, first, if “entered” meant “filed” the order had been entered in the correct county, and, second, that if “entered” meant “signed” there was no evidence as to where the judge was physically located when he signed the order. The court then went on to say that “these technicalities” were not determinative.

The questioned order in *Boone* also was signed out-of-session, but it had not been announced during the session and thus was void. The record in *Boone* showed that the judge was in another county and district when he signed and mailed the order to the clerk of court for the correct county. As support for its decision voiding the order, the Supreme Court emphasized that an order cannot be “entered” until it is received and recorded by the clerk. If a judgment or decision is announced in open court, it is considered entered as soon as the clerk records the decision in the court minutes. If, on the other hand, the judgment or decision is rendered later by the judge, it is not considered entered until received and recorded by the clerk. In *Boone*, therefore, the order was not entered until the copy mailed by the judge was received by the clerk several days later, clearly well after the session of court had expired.

Based on *Horner* and *Boone* it does not appear that the physical location of the judge when signing the order is likely to determine its validity. No matter when and where the order is signed, it is not entered until received and recorded by the clerk, which is the more important event. Nevertheless, given the lack of clarity in the law about the significance of where the order is signed, the better practice is 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.

***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.

The out-of-district issue for a show cause order first arose in *In re License of Delk*, 103 N.C. App. 659, 406 S.E.2d 601 (1991), when a superior court judge who was neither a resident of nor assigned to the district ordered a lawyer to appear in Graham County on May 25, 1990, to show cause why he should not be disbarred. The judge who issued the order had presided over the trial in Graham County the previous year when the lawyer was convicted of extortion, but she had not imposed any discipline at that time and was not assigned to the district when she issued the show cause order. The court of appeals held that the judge acted without jurisdiction and the order was void, even though on May 1, 1990, two days before the show cause order was issued, the chief justice had given the judge a commission to hold a special session in Graham County starting May 25. The crucial fact for the court of appeals was that the judge was not assigned to Graham County at the time of issuing the show cause order, although she already had been assigned to be there for the May 25 session.

Following that court of appeals decision, the senior resident judge for Graham County ordered the lawyer to appear in the county to show why he should not be disciplined. At the time the resident judge issued the order, however, he was assigned to and holding court in Mecklenburg County. He then recused himself, and the hearing was held by another judge who disbarred the lawyer. The North Carolina Supreme Court in *In re License of Delk*, 336 N.C. 543, 444 S.E.2d 198 (1994), rejected the argument that the new show cause order was void because the judge could not act while outside the county in which the matter was pending. The court held 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 decision 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 in *In re Delk* that its decision did not depend on the show cause order being issued by the senior resident judge of the district. Unless the judge's residency in the district matters, however, it is difficult to reconcile the Supreme Court's decision with the court of appeals' earlier holding tossing out the show cause order issued by the nonresident judge.

Remands

In *Andrews v. Peters*, 89 N.C. App. 315, 365 S.E.2d 709 (1988), a personal injury case, the trial court ordered a new trial on damages after a jury awarded the plaintiff damages of only \$7,500. The court of appeals vacated the order for a new trial and remanded the case to the trial court to enter findings of fact sufficient to allow meaningful appellate review. The original trial judge did so, but the defendant then complained that the judge did not have jurisdiction to enter the findings because he was not the resident judge of the district and at the time of remand he was not assigned there. The court of appeals rejected the argument, ruling that the remand was only to enter findings for the original order; no other judge could have done so, and it did not make sense to say that the judge could not comply with the remand until reassigned to the district.

The Need for a Commission

When a judge is required to act in session, the crucial question to consider 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.

In *State v. Eley*, 326 N.C. 759, 392 S.E.2d 394 (1990), the defendant’s murder conviction was challenged on the ground that the presiding superior court judge had not been assigned by the chief justice to preside over that session of court. A commission had been issued for a special session for jury voir dire but not for a trial session because no one knew how long the voir dire would take. When the voir dire was completed, the judge reported to the chief justice’s administrative assistant who testified that he then followed his normal procedure, marking the new session on his master calendar and issuing a commission. The commission was never received, however. When, some months later, the error was discovered, a new commission was issued *nunc pro tunc*, dated back to the date of the trial.

The Supreme Court held in *Eley* that the judge had been assigned to the session, that the issuance of a commission is not essential to a proper assignment, and that the *nunc pro tunc* order could be issued to properly record the commission that inadvertently had not been entered in the court record.

The court made several broad pronouncements about commissions in *Eley*, including the statement 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, 392 S.E.2d at 397. 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. As any number of the other cases cited in this bulletin establish, 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.

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, 53 S.E.2d 658, 661 (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, 75 S.E.2d 133 (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, 409 S.E.2d 747 (1991).

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. In *Vance Construction Company, Inc., v. Duane White Land Corporation*, 127 N.C. App. 493, 490 S.E.2d 588 (1997), a dispute arose over construction of a boat storage facility in Warren County. The judge who first heard the case was from Edgecombe County, assigned for that term to Warren County. After the trial the parties entered a consent order concerning payment of damages and costs. When a disagreement arose about the consent order, it was heard by agreement of the parties before the same judge, this time in Edgecombe County. Because the judge was assigned at that time to a term in Edgecombe County, resided there, and was not assigned to Warren County, the court of appeals held the parties could not consent to his hearing the motion; his ruling on that matter was void. Without being a resident judge for Warren County, and lacking a commission to hold court there, the judge was without jurisdiction for the Warren County matter. The parties could not confer jurisdiction by agreement.

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 announced 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 (that week for superior court and that day for district court), the judge should be sure that the record shows the consent of the prosecutor and defense to act out-of-session and, for superior court, out-of-district. When that is not done, the superior court judge sometimes still can rely on in chambers jurisdiction to act, if the judge is resident in the district or still assigned there.

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