



North Carolina Criminal Law

AT THE UNC SCHOOL OF GOVERNMENT

January 24, 2024

When Can the State Use Testimony from the Probable Cause Hearing at Trial?

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My colleague, Phil Dixon, blogged about the Court of Appeals' decision in *State v. Joyner*, 284 N.C. App. 681 (2022), [here](#). In *Joyner*, the court ruled that the State did not run afoul of the Confrontation Clause when it introduced the victim's testimony from a civil 50C hearing at the defendant's criminal trial. Last year, the court decided *State v. Smith*, 287 N.C. App. 614 (2023) (unpublished), a case that provides an interesting counterpoint to *Joyner*. In *Smith*, the State recorded the victim's testimony from the probable cause hearing in district court and moved to admit the testimony at trial in superior court after the victim became unavailable. The trial court admitted the testimony, but the Court of Appeals reversed. It ruled that the opportunity to cross-examine the victim at the probable cause hearing was not "adequate" to comport with constitutional requirements, vacated the convictions for first-degree kidnapping and human trafficking, and ordered a new trial.

Although the **opinion** is **unpublished**, the State did not seek further review, and the *Smith* decision has important implications for practitioners. This post examines those issues and offers advice for defenders when the State attempts to introduce recorded testimony from a probable cause hearing at trial.

Proceedings in *Smith*

The facts of *Smith* involved two women who called 9-1-1 from a McDonald's restaurant to report that a man in an orange van was trying to kidnap them and force them into prostitution. Officers initially charged the man with two counts of second-degree kidnapping, one for each victim. Three weeks later, the younger

woman testified for the State at a recorded probable cause hearing in district court.

The State subsequently obtained indictments for first-degree kidnapping and attempted human trafficking of a minor, both charges relating to the younger woman. Before trial, the State made a motion to declare the younger woman unavailable and sought to admit her testimony from the probable cause hearing at trial. Over the defendant's objection on confrontation grounds, the trial court ruled that the prior testimony would be admissible at trial. The defendant was convicted.

The COA's Analysis

Under *Crawford v. Washington*, 541 U.S. 36 (2004), the Confrontation Clause of the Sixth Amendment to the U.S. Constitution bars the State from introducing testimonial statements unless certain exceptions apply. Where the witness is unavailable for trial and the defendant had prior motive and opportunity to cross-examine the witness concerning the statement, the State may introduce the statement. *See id.*; *State v. Rollins*, 226 N.C. App. 129 (2013).

But what constitutes adequate "motive" and "opportunity" to cross-examine to satisfy constitutional requirements?

The Court of Appeals in *Smith* addressed this question and pointed to three aspects of the proceedings in district and superior court in concluding that the defendant's confrontation rights had been violated.

First, the court stressed that the defendant faced different charges in district court from the charges ultimately pursued at trial in superior court. The probable cause hearing in district court involved two counts of second-degree kidnapping, but the State subsequently obtained indictments on first-degree kidnapping and attempted human trafficking. These charges involved new elements to prove and new facts at issue, elements and facts that the defendant could not possibly have tested through cross-examination at the probable cause hearing because they were not on the table in district court.

Second, the court noted that the defense lacked discovery at such an early stage of the proceedings. By statute, the probable cause hearing must be held within 15 working days of the initial appearance before a district court judge. *See* G.S. 15A-606(d). Generally, both the State and the defense are just getting a handle on the

case at this point and statutory discovery requirements do not yet apply. The Court of Appeals noted that the defense could not mount a robust cross-examination sufficient to comport with constitutional requirements without having received the State's investigative file.

Third, the Court of Appeals quoted the transcript from the district court proceedings at length to demonstrate that the defense's cross-examination was curtailed by the State's sustained objections. For example, when the defense inquired into whether the victim feared the defendant, the State objected, noting that it was a probable cause hearing, not a trial in superior court. The Court of Appeals was concerned that the defense did not have free rein to engage with the witness, and thus the opportunity to cross-examine was inadequate.

Weighing these three concerns, the Court of Appeals concluded that the defendant's confrontation rights had been violated and vacated the convictions.

Comparison with *Ross* and *Joyner*

The *Smith* Court considered *State v. Ross*, 216 N.C. App. 337 (2011), and *State v. Joyner*, 284 N.C. App. 681 (2022), in reaching its conclusion.

In *Ross*, the superior court allowed testimony from a probable cause hearing to be introduced at trial, and the Court of Appeals was not concerned about the defense's lack of discovery at the probable cause stage. However, the *Smith* Court distinguished *Ross* by stressing the numerous discrepancies between the victim's testimony at the probable cause hearing and the victim's statements in the discovery. Such discrepancies **were not present** in *Ross*.

In *Joyner*, the Court of Appeals concluded that there was no error when the State used victim testimony from a civil 50C hearing against the defendant at a subsequent criminal trial after the victim died. The Defendant argued that the central issue at the civil hearing, essentially whether the defendant stalked or harassed the victim, differed from the issues in the criminal case, involving charges of fraud and elder exploitation. Further, the defendant stressed that he was not present at the civil hearing and had no right to counsel. However, the Court of Appeals determined that the defendant's absence from the 50C hearing actually counted against him. The Court held that the defendant waived his confrontation rights by failing to appear at the 50C hearing, and thus the State was justified in introducing the victim's testimony at the later criminal trial. In contrast, in *Smith*, the defendant was present and represented by counsel at the

probable cause hearing. Thus, he did not waive his confrontation rights by failing to participate in the hearing. Central to the *Smith* Court's determination was whether the defendant had an adequate motive and opportunity for cross-examination at the prior hearing. The defendant was able to cross-examine the victim at least to some extent, and the relationship between the probable cause hearing and the trial was arguably more congruent than that between the civil 50C hearing and the criminal trial in *Joyner*. Nonetheless, the *Smith* Court was sufficiently concerned by the three factors above to hold that a confrontation violation occurred.

Lessons for Practitioners

Practitioners can draw a variety of lessons from *Smith*.

First, when the State attempts to introduce recorded testimony from a probable cause hearing at trial, the defense should object if the charges have changed from district to superior court. Conversely, the State should consider at the probable cause stage whether additional charges are likely. If so, it may want to wait to have a probable cause hearing until the defendant is served with all counts (see G.S. 15A-606(f) for when and how parties can move to continue probable cause hearings).

Second, when the defense lacks information at the probable cause stage (as is often the case), the defense might consider moving to continue the hearing until discovery is provided. Alternatively, the defense should make a record that discovery was not provided to preserve the argument that the cross at the probable cause hearing was akin to shooting in the dark.

Third, the defense should mount a vigorous cross at the probable cause hearing, so that if discrepancies between the testimony and the investigative file later develop, the defense can document how the cross was inadequate. The defense should argue for wide latitude in its cross-examination in light of *Smith*. If the State objects, the defense may later assert that the State improperly curtailed the cross-examination and infringed on the defendant's confrontation rights. The State might consider limiting its objections at the probable cause stage to avoid this issue.

More broadly, the question of whether the State will later be able to introduce testimony from a probable cause hearing at trial is a factor the defense should consider when deciding whether to waive the probable hearing altogether.

Waiver of the probable cause hearing triggers a mandatory transfer to superior court, see G.S. 15A-606(c), preventing the State from generating sworn testimony that could be used at trial. See G.S. 8C-1, Rule 804(b)(1) (discussing hearsay exception for unavailable witness's former testimony). However, there are risks involved, as the waiver of the hearing could later be deemed a waiver of confrontation rights with respect to other testimonial statements, especially given the willingness of the Court of Appeals to declare that waiver occurred in *Joyner* (note though that hearsay objections may still apply to out-of-court statements). The defense may justifiably prefer to take advantage of the relatively **rare** opportunity to cross-examine a key witness prior to trial rather than waive the hearing.

In sum, the *Smith* case provides additional guidance from our appellate courts in understanding the Confrontation Clause and its contours. The case demonstrates how the strategic decisions at the probable cause stage can have critical repercussions.