

APPEAL

Because Trial Court's Instructions to Individual Juror Violated Defendant's Right to Unanimous Verdict Under Art. I, Sec. 24 of North Carolina Constitution, Error Was Preserved for Appellate Review Despite Defendant's Failure to Object—Ruling of Court of Appeals Is Affirmed

State v. Wilson, 363 N.C. 478, 681 S.E.2d 325 (28 August 2009), affirming, 192 N.C. App. 359, 665 S.E.2d 751 (2008).

The defendant was on trial for armed robbery. The jury during its deliberations notified the court that there was a problem with the foreperson that needed to be addressed. Instead of summoning all the jurors to the courtroom to hear the jury's request, the trial court proposed to the attorneys for the state and defendant that only the foreperson be summoned. They agreed. After the foreperson told the court on the record that the jury seemed to believe that he had already had his "mind made up," the court conducted an unrecorded bench conference with the foreperson and both attorneys, then a conversation on the record, and then another unrecorded bench conference. The court summoned all the jurors to the courtroom and instructed them on their duty to consult with one another. The court then directed the jurors, except the foreperson, back to the jury room but not to resume deliberations. The court then held a third unrecorded bench conference with the foreperson and two attorneys. The court instructed the foreperson not to discuss what occurred during the bench conference with the other jurors, kept the foreperson as a juror because the court determined he could be fair and impartial, and brought the other jurors back into the courtroom and instructed all jurors to continue their deliberations. The court ruled that because trial court's instructions to the individual juror, the foreperson, violated the defendant's right to a unanimous verdict under Art. I, Sec. 24 of the North Carolina Constitution, the error was preserved for appellate review despite the defendant's failure to object. The court also ruled that the error was not harmless beyond a reasonable doubt and ordered a new trial. The court in footnote one stated that the dissent characterized the conversations between the court and foreperson as mere bench conferences and surmised that the court's opinion will lead to inconsistency and confusion in future cases and a chilling effect on juror communication. The court stated that those dire consequences will be avoided because its ruling is limited to instructions and not all communications between a judge and juror.

(1) State Did Not Have Right to Appeal to North Carolina Court of Appeals a Superior Court's Order Involving a District Court's Preliminary Finding Granting Defendant's Pretrial Motion to Dismiss DWI Under G.S. 20-38.6

State v. Fowler, ___ N.C. App. ___, ___ S.E.2d ___ (19 May 2009).

The defendant was charged with DWI. He made a pretrial motion in district court under G.S. 20-38.6(a) alleging that the arresting officer lacked probable cause to arrest him. The district court entered a preliminary finding granting the pretrial motion under G.S. 20-38.6(f) and ordered dismissal of the DWI charge. The state gave notice of appeal to superior court under G.S. 20-38.7(a). The superior court entered an order finding that the district court's conclusions of law granting the

motion to dismiss were based on findings of fact cited in its order. The superior court further concluded that G.S. 20-38.6 and 20-38.7, which allow the state to appeal pretrial motions from district to superior court for DWI cases, violated various constitutional provisions. The superior court remanded the matter to district court for the entry of an order consistent with the superior court's findings. The state gave notice of appeal and filed a petition for a writ of certiorari to the North Carolina Court of Appeals. The defendant filed a motion to dismiss the state's appeal. (1) The court ruled that the state did not have a right to appeal the superior court's order to the North Carolina Court of Appeals. The order was interlocutory and did not grant the defendant's motion to dismiss. The legislature did not provide the state with the right to appeal to North Carolina Court of Appeals under these circumstances. However, the court granted the state's petition for certiorari to review the issues in this case.

State's Notice of Appeal to Superior Court of District Court's Preliminary Notice of Intention to Grant Defendant's Motion to Suppress in DWI Case Was Properly Perfected

State v. Palmer, ___ N.C. App. ___, ___ S.E.2d ___ (19 May 2009).

The court examined the facts and ruled that the state's notice of appeal to superior court of the district court's preliminary notice of its intention to grant the defendant's motion to suppress in a DWI case was properly perfected. The court cited *State v. Fowler*, ___ N.C. App. ___, ___ S.E.2d ___ (19 May 2009), in noting that the procedures in G.S. 15A-1432(b) are a guide but are not binding; instead, an appeal must be taken and perfected within a reasonable time, which depends on the circumstances of each case. See the court's discussion of the facts concerning the state's notice of appeal in this case.

(1) Defendant's Failure to Request Hearing to Contest Validity of 30-Day Civil DWI Revocation Barred Appellate Review of Revocation's Validity in Criminal Appeal

(2) State's Motion to Appeal District Court Judge's DWI Dismissal to Superior Court Properly Specified Legal Basis of Appeal

(3) State Properly Showed That Person Who Withdrew Blood Sample for DWI Chemical Testing Was Qualified Person Under G.S. 20-139.1(c)

(4) Admitting Lab Report With BAC Level and Witness's Testimony About Another's Chemical Analyst's Permit Did Not Violate Sixth Amendment Right to Confrontation Under *Crawford v. Washington*, 541 U.S. 36 (2004)

(5) 30-Day DWI Civil License Revocation Was Not Punishment Under Double Jeopardy Clause to Bar Later Prosecution of DWI Charge

State v. Hinchman, ___ N.C. App. ___, 666 S.E.2d 199 (16 September 2008). The defendant was convicted of DWI. On June 23, 2004, a trooper arrested the defendant for DWI and transported him to a hospital to obtain a blood sample, which was then sent to the SBI for a chemical analysis. An SBI chemical analyst completed a lab report on August 30, 2004, indicating a BAC of 0.10. On September 16, 2004, the lab report was served on the defendant. The trooper filed an affidavit and revocation report with the district court on November 2, 2004. The district court entered a revocation order on November 5, 2004, revoking the defendant's driver's license for a minimum of 30 days under G.S. 20-16.5. The defendant surrendered his license and did not request an hearing to contest the validity of the revocation order as provided in G.S. 20-16.5(g). A district court judge issued an order dismissing the DWI charge because the 140-day delay in revoking his driver's license was punishment under the Double Jeopardy Clause that prohibited the DWI prosecution. The state appealed the district court judge's order to superior court, which vacated the ruling. The defendant was then convicted of DWI in district court and later in superior court. He then appealed to the North Carolina Court of Appeals. (1) The court ruled that the defendant's failure to request a hearing to contest the validity of the revocation order barred appellate review of the revocation order's validity in the criminal appeal of the DWI conviction. (2) The court ruled that the state's motion to appeal to superior court the district court judge's order dismissing the DWI prosecution properly specified a legal basis of the appeal. The state's motion to appeal asserted there was no competent evidence to support the dismissal order, and the dismissal was contrary to law. (3) The court ruled that the state properly showed that the person who withdrew the blood sample for DWI chemical testing was a qualified person under G.S. 20-139.1(c). The trooper testified that he saw a person draw the blood sample at a hospital blood lab. The person was working at the lab and had a lab tech I uniform and name tag, and there was limited access to that area. (4) The court ruled, relying on *State v. Heinrich*, 183 N.C. App. 585 (2007), and *State v. Forte*, 360 N.C. 427 (2006), that the admission into evidence of the lab report containing the defendant's BAC level and a witness's testimony about another's chemical analyst's permit did not violate the defendant's Sixth Amendment right to confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004). (5) The court ruled, relying on *State v. Evans*, 145 N.C. App. 324 (2001), that the 30-day DWI civil license revocation was not punishment under Double Jeopardy Clause to bar the later prosecution of the DWI charge. The court rejected the defendant's argument that the delay of 135 days between the defendant's arrest and the license revocation in effect was punishment under the Double Jeopardy Clause.

State Did Not Have Right to Appeal to Superior Court a District Court Judge's Dismissal of DWI Charge When Dismissal Was Based on Finding of Insufficient Evidence to Support DWI Charge, Even Though Dismissal Was Erroneous

State v. Morgan, 189 N.C. App. 716, 660 S.E.2d 545 (15 April 2008).

The court ruled that the state did not have a right to appeal to superior court a district court judge's dismissal of a DWI charge when the dismissal was based on a finding of insufficient evidence to support the DWI charge, even though the dismissal was erroneous (see the court's opinion on the notary public issue that led to the dismissal). The state may not appeal a dismissal of a case to superior court if double jeopardy bars a retrial [G.S. 15A-1432(a)], and a finding of insufficient evidence bars a retrial under the Double Jeopardy Clause. The court noted that this case was tried before the enactment of G.S. 20-38.6, which requires (with limited exceptions) that motions to suppress evidence or dismiss DWI charges be made before trial.

(4) Defendant Is Permitted to Raise on Appeal That One Felony Alleged in Habitual Felon Indictment Was Actually a Misdemeanor Even Though in Trial Court Defendant Stipulated to Convictions in Indictment

State v. Moncree, 188 N.C. App. 221, 655 S.E.2d 464 (15 January 2008).

The defendant was convicted of two misdemeanor counts of possession of marijuana and one count of possession of a controlled substance (marijuana) on the premises of a local confinement facility. After a vehicle stop in which an officer discovered a marijuana joint and a chunk of marijuana in the front passenger seat, the defendant was arrested and transported to the sheriff's department where the jail was also located. He was required to take off his shoes and socks, and marijuana was found in his left shoe. The marijuana found in the defendant's shoe was not sent to the SBI for testing. Instead, an SBI agent with education and experience in forensic analysis was allowed to offer his opinion that the substance was marijuana. (4) After his conviction of the felony of possession a controlled substance in a local confinement facility, the defendant stipulated to the convictions alleged in the habitual felon indictment and pled guilty to being a habitual felon. On appeal, the defendant was permitted to argue (successfully) that one of the convictions, which occurred in New Jersey, was actually a misdemeanor, not a felony. The court ruled that the defendant was permitted to raise this issue for the first time on appeal because the indictment failed to confer jurisdiction on the trial court by failing to allege three predicate felonies as required by the habitual felon statute.

To the Extent That North Carolina Evidence Rule 103(a)(2) Directly Conflicts with North Carolina Appellate Rule 10(b)(1), It Is Unconstitutional

State v. Oglesby, 361 N.C. 541, 648 S.E.2d 819 (24 August 2007), affirming, 174 N.C. App. 658, 622 S.E.2d 152 (2005).

North Carolina evidence Rule 103(a)(2) provides that once a trial court rules definitively on the record admitting or excluding evidence, either at or before trial, a party need not review an objection or offer of proof to preserve a claim of error for appeal. The court ruled that this rule is in direct conflict with North

Carolina Rule of Appellate Procedure 10(b)(1), which has been interpreted to provide that a trial court's evidentiary ruling on a pretrial motion is not sufficient to preserve the issue of the admissibility of evidence for appeal unless a defendant renews the objection during trial. Because the Constitution of North Carolina exclusively vests the authority to make appellate rules with the North Carolina Supreme Court, the court ruled that to the extent evidence Rule 103(a)(2) conflicts with appellate Rule 10(b)(1), it is unconstitutional.

Defendant Failed to Properly Present Legal Argument in Trial Court During Proceedings on Motion for Appropriate Relief and Thus Did Not Preserve Argument for Appellate Review

State v. Moore, ___ N.C. App. ___, 648 S.E.2d 288 (7 August 2007).

The defendant was convicted and then later filed a motion for appropriate relief, seeking a new trial based on newly discovered evidence. At the hearing on the motion, the defendant sought to expand on the legal grounds alleged in his written motion for appropriate relief. However, the defendant failed to file a written amendment to his motion, nor could the defendant's argument be considered a new motion for appropriate relief under G.S. 15A-1420, based on the facts in this case. The court ruled that the defendant failed to properly present the legal argument in the trial court during the proceedings on the motion for appropriate relief and thus did not preserve the argument for appellate review.

Appeal and Error -- Preservation of Issues -- Failure to Cite Authority -- Incongruity Alone Will Not Invalidate Verdict

State v. Teel, 180 N.C. App. 446 (2006)

Although defendant contends the trial court erred by denying defendant's motion for appropriate relief to set aside the verdicts of misdemeanor fleeing to elude arrest and reckless driving as being inconsistent with the jury's other verdicts, this assignment of error is dismissed because: 1) defendant failed to cite any authority in support of his assignment of error; and 2) defendant's assignment of error is without merit when it is well-established in North Carolina that a jury is not required to be consistent and that incongruity alone will not invalidate a verdict.

Appeal and Error -- Right to Appeal -- Aggrieved Party

State v. Bradley 179 N.C. App. 551 (2006)

The trial court did not err in a double indecent liberties with a child and statutory sex offense case by denying defendant's motion to dismiss Duke University Health Systems' (DUHS) appeal, because: 1) DUHS is an aggrieved party and is asserting its legal rights which have been directly affected by the trial court's order; and 2) the trial court's order effectively requires DUHS to disclose

information concerning a research subject's privacy which it is obligated, under the Certificate of Confidentiality and federal statutes, to protect.

Appeal and Error -- Appealability -- Trial Court's own Motion for Appropriate Relief -- Writ of Certiorari -- Habitual Felon

State v Starkey 177 N.C. App. 264 (2006)

The State had no right to appeal from an order granting the trial court's own motion for appropriate relief vacating defendant's sentence for having attained the status of an habitual felon and sentencing defendant to a term of eight to ten months' imprisonment, and the State's petition for writ of certiorari is denied, because: 1) the State did not have a right to appeal from the underlying judgment when it did not dismiss a charge against defendant and the term of imprisonment was not unauthorized, and this appeal is not one regularly taken, N.C.G.S. § 15A-1445; and 2) the State's petition did not satisfy any of the conditions of N.C. R. App. P. 21, and the Court of Appeals declined to invoke N.C. R. App. P. 2.

Appeal And Error -- Writ Of Certiorari -- Effective Appellate Review -- No Trial Transcript

State v. Upshur, 176 N.C. App. 174 (2006).

Defendant is not entitled to a new trial on first-degree rape and assault with a deadly weapon inflicting serious injury charges even though he contends he is unable to obtain effective appellate review of the trial proceedings in the absence of the trial transcript, because: 1) defendant's appeal in 2000 is presented by writ of certiorari years after the entry of judgment in 1988 and where a transcript is simply not available due to no fault of the State; 2) neither due process nor equal protection require the granting of a new trial to a defendant when certain factual situations necessitate practical accommodation, including where transcripts are no longer available and where there exists the presumption that he who had a lawyer at the trial had one who could protect his rights on appeal; and 3) defendant has made no assertion on appeal that he received ineffective assistance from his counsel at trial or regarding the steps taken to procure an appeal as of right despite the trial court's conclusion that trial counsel did not inform defendant of his appellate right or relevant time limits to exercise them, and appellate counsel does not fail to render effective assistance simply based on the fact that he cannot examine a transcript that is unavailable.

A Six-Year Delay In Producing A Trial Transcript For Appeal Did Not Violate Defendant's Statutory And Due Process Rights

State v Berryman, 360 N.C. 209 (2006)

A six-year delay in producing a trial transcript for appeal did not violate defendant's statutory and due process rights. Appellate review in a criminal proceeding is provided and governed by the North Carolina General Statutes and Appellate Rules, and alleged violations of the right to an appeal shall be considered under the four-factor analysis of *Barker v. Wingo*, 407 U.S. 514. Here, a six-year delay was sufficient to trigger examination of the remaining factors; the record was devoid of any indication of why the delay occurred; although defense counsel made some efforts to expedite defendant's appeal, defendant did not sufficiently assert his right to appeal; and, considering the recognized protected interests, defendant has not shown prejudice.

Trials -- Incomplete Transcript -- Presumption of Regularity

In re S.W. 171 N.C. App. 335 (2005)

Defendant juvenile is not entitled to a new delinquency hearing based on an incomplete transcript of his adjudication where portions of the transcript contain the word “inaudible” omitting sections of missing testimony, because the juvenile failed to demonstrate, and a review of the record failed to disclose, any specific affirmative showing that error was committed in the inaudible portions of the transcript to overcome the presumption of regularity at trial.

Appeal and Error -- Failure to Comply With Appellate Rules -- Untimely Notice of Appeal -- Purported Petition For Writ of Certiorari

State v. McCoy, 171 N.C. App. 636 (2005)

When a defendant has not properly given notice of appeal, an appellate court is without jurisdiction to hear the appeal. It is not the role of the appellate courts to create an appeal for an appellant.

Appeal and Error -- General Supervisory Authority -- Supreme Court's Authority to Review Court of Appeals Determination of Motion For Appropriate Relief

State v. Blackwell 359 N.C. 814 (2005)

Although defendant contends our Supreme Court lacks jurisdiction to review the Court of Appeals determination of his motion for appropriate relief he filed in that court where he successfully argued that his aggravated sentence was imposed in violation of the United States Constitution based on the fact that N.C.G.S. § 15A-1422(f) provides that decisions of the Court of Appeals on motions for appropriate relief that embrace matters set forth in N.C.G.S. § 15A-1415(b) are final and not subject to further review by appeal, certification, writ, motion, or otherwise, our Supreme Court's general supervisory authority under Article IV, Section 12, Clause 1 of the North Carolina Constitution permits review of this matter because a prompt and definitive resolution of this issue is necessary to

ensure the continued fair and effective administration of North Carolina's criminal courts.

Appeal and Error -- Denial of Post-Conviction DNA Testing -- Writ of Certiorari

State v. Brown 170 N.C. App. 601 (2005)

The Court of Appeals had no authority to allow defendant's petition for a writ of certiorari from the denial of post-conviction DNA testing. These motions cannot be treated as motions for appropriate relief, which would allow review by certiorari, because they do not involve the grounds specified by N.C.G.S. § 15A-1415(b). Review under Rule 21 of the Rules of Appellate Procedure is also not available.

Appeal and Error - Writ of Habeas Corpus - Effect of Fourth Circuit Decision - Tax on Seized Narcotics

State v. Wambach, 136 N.C. App. 842 (2000)

Defendant's appeal from the denial of his writ of habeas corpus petition seeking relief from an alleged double jeopardy violation as a result of a tax assessment on drugs and the subsequent conviction for possession with intent to sell and deliver those drugs is dismissed because no appeal lies from an order made in a habeas corpus proceeding instituted under Chapter 17 of the North Carolina General Statutes since the remedy, if any, is by petition for writ of certiorari, and the Court of Appeals declines to address these issues pursuant to a writ of certiorari since: 1) the constitutionality of the assessment and collection of the drug tax has been previously upheld by North Carolina appellate courts; and 2) federal appellate decisions are not binding upon either the appellate or trial courts of this State with the exception of decisions of the United States Supreme Court.

Appeal and Error – Appealability -- Order Reinstating Dismissed Charge-- Interlocutory Order

State v. Nichols 140 N.C. App. 597 (2000)

A defendant's appeal from the superior court's order reinstating the dismissed charge of assault on a female in violation of N.C.G.S. § 14-33(c)(2) and remanding the case to district court to be tried on the merits is dismissed because: 1) the order is interlocutory; and 2) although there is a statutory exception for interlocutory criminal appeals under N.C.G.S. § 15A-1432(d), there is nothing in the record to show that defendant or his attorney certified to the superior court that the appeal was not being taken for the purpose of delay, nor does the superior court's order reflect that it found defendant's cause was appropriately justiciable in the appellate division as an interlocutory matter.

Appeal and Error -- Preservation of Issues -- Objection When Witness Called -- No Objection When Evidence Introduced

State v. Thibodeaux 352 N.C. 570 (2000)

A defendant in a capital first-degree murder prosecution did not preserve for appellate review evidentiary issues where he objected when the witnesses were called; the trial judge removed the jury, considered the forecast of evidence and the legal arguments, and found the evidence admissible; and defendant did not object when the testimony was subsequently introduced before the jury. The arguments preceding the calling of the witnesses were tantamount to motions in limine and defendant must make an objection at the time the evidence is actually introduced to preserve the question of admissibility for appeal.

Setting Aside Guilty Verdict -- Entry of Not Guilty Verdict Improper

State v. Morgan, 108 N.C. App. 673 (1993) 425 S.E.2d 1

Though the district court could properly set aside a guilty verdict, it could not thereafter enter a verdict of not guilty; rather, the case must be remanded for a new trial.

Appeal And Error -- Criminal Action -- Appeal By State From District To Superior Court -- Notice Of Appeal Insufficient -- Reliance On Defense Counsel

State v. Hamrick, 110 N.C. App. 60 (1993) 428 S.E.2d 830

Appeal and Error § 233 (NCI4th) -- Appeal by State From District to Superior Court -- Notice Rather Than Motion -- No Prejudice

State v. Ward, 127 N.C. App. 115 (1997)

The State's notice of appeal to superior court from the dismissal in district court of criminal charges relating to a pyramid scheme was sufficient to vest the superior court with jurisdiction. Although defendants contended that the superior court was without jurisdiction because the State filed and served a notice of appeal instead of the statutorily required motion, the State specified the legal basis upon which it sought review and copies were filed with the clerk of court and served upon defendants. Defendant can demonstrate and the Court of Appeals could discern no prejudice.

Appeal and Error -- Capital Murder -- Verdict Sheet Lost -- Evidence Sufficient to Determine Appeal

State v. Gray, 347 N.C. 143 (1997)

The record was sufficient to determine the appeal in a capital prosecution for first-degree murder where the verdict sheet was lost in the office of the clerk of superior court. Although defendant argues that there is no way to determine whether the verdict was properly returned in the absence of a valid verdict sheet, and there are cases holding that the appeal may be dismissed if the verdict sheet is not included in the record, the transcript here reveals that the judge and the clerk examined the verdict sheet after it was taken by the bailiff from the jury and that each juror was polled. There can be no doubt that the jury found defendant guilty of first-degree murder.

Appeal and Error - Extension of Time for Taking Appeal - Trial Court Without Authority

State v. White, 127 N.C. App. 565 (1997)

The trial court exceeded its authority by entering an order extending the time for taking an appeal. N.C.R. App. P. 27(c).

Appeal and Error § 81 (Nci4th) - Motion to Suppress Cocaine Allowed - Appeal By State – No Certification by Prosecutor - Dismissed

State v. Judd, 128 N.C. App. 328 (1998)

An appeal by the State from the granting of a motion to suppress fifty-two grams of crack cocaine in a prosecution for cocaine possession and trafficking was dismissed where there was no indication in the record that the prosecutor certified to the trial court that the appeal was not taken to cause delay and that the suppressed evidence was essential to the State's case. N.C.G.S. § 15A-979(c).

Appeal and Error § 77 (Nci4th) - Order Reinstating Charges - Interlocutory Appeal - Refusal of Certification

State v. Thompson, 128 N.C. App. 547 (1998)

Trial judges would, in the exercise of their discretion, be well advised to refuse to certify cases pursuant to N.C.G.S. § 15A-1432 (d), which permits an interlocutory appeal of a superior court's reversal of a district court's dismissal of criminal charges if defendant or his attorney certifies that the appeal is not taken for delay and the judge finds the cause is appropriately justiciable in the appellate division as an interlocutory matter; instead, trial judges should proceed to judgment on the pending criminal charges so that defendants will be required to appeal all relevant issues in the case.

Searches and Seizures - Administrative Inspection Warrant - Adult Book Store - Probable Cause

South Blvd. Video & News v. Charlotte Z. Bd., 129 N.C. App. 282 (1998)

The affidavit of a zoning enforcement officer was sufficient to establish probable cause to believe that an adult business was in operation at a particular location and to issue an administrative inspection warrant.

Appeal - Denial of Motion In Limine - Admissibility Of Evidence - Preservation of Issue For Appeal - Objection at Trial

State v. Hayes, 350 N.C. 79 (1999)

Defendant failed to preserve for appeal the question of the admissibility of evidence that had been the subject of a motion in limine where he objected to the denial of the motion but failed to object to that evidence at the time it was offered at trial. The four-part test set forth in the opinion of the Court of Appeals in this case is disavowed.

Appeal and Error - Dismissal of Criminal Charge - Appeal by State - Defendant's Failure to Raise Double Jeopardy - Jurisdictional Review

State v. Vestal, 131 N.C. App. 756 (1998)

Defendant's failure to assert the double jeopardy issue on appeal did not preclude the appellate court from reviewing whether the State was barred under N.C.G.S. § 15A-1445(a) from appealing an order dismissing a criminal charge against defendant because the rule against double jeopardy prohibits further prosecution of the case.

Appeal and Error - Effect of Fourth Circuit Decision - Tax on Seized Narcotics

State v. Adams, 132 N.C. App. 819 (1999)

The trial court erred by dismissing charges against defendant for controlled substances violations based on double jeopardy where a judgment against defendant had been docketed for a tax liability on the seized drugs and a portion of that amount had been paid. The trial court ruling conflicted with decisions of the North Carolina appellate courts; although defendant proffered a Fourth Circuit decision as sustaining the trial court's action, federal appellate decisions are not binding upon either the appellate or trial courts of North Carolina with the exception of decisions of the United States Supreme Court. Reexamining the North Carolina appellate holdings in light of the Fourth Circuit opinion or modifying the statute are not within the province of the Court of Appeals.

Courts - District Court Convictions - Correction of Clerical Errors - Appeal to Superior Court - Untimeliness (See Farb's Synopsis)

State v. Linemann, 135 N.C. App. 734 (1999)

In a case involving defendant's purported appeal to the superior court of his convictions in the district court for attempted simple assault, simple assault, and communicating threats, the superior court's order is vacated and remanded because the superior court did not have jurisdiction in this case and should have dismissed defendant's appeal since: 1) the district court's original judgment was entered on 22 September 1997; 2) defendant appealed the conviction on 2 October 1997, meeting the ten-day requirement under N.C.G.S. § 7A-290, but withdrew his appeal on 3 October 1997; 3) the district court's correction of clerical errors in the judgment on 10 March 1998 did not constitute a new judgment; and 4) defendant's purported appeal of 10 March 1998 pursuant to N.C.G.S. § 7A-290 was not timely since it was not made within ten days of the judgment on 22 September 1997.