

THE JOURNEY FROM PD ATTORNEY TO PC ATTORNEY: TOP TEN ERRORS NOT TO MAKE

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1. NOT RECORDING JURY SELECTION, OPENING STATEMENTS AND CLOSING ARGUMENTS

2. PLEADING GUILTY AND “PRESERVING” THE RIGHT TO APPEAL THE DENIAL OF MOTIONS OTHER THAN MOTIONS TO SUPPRESS

In North Carolina, under G.S. 15A-1444, there are very limited grounds for appealing a sentence after a plea of guilty or no contest:

- 1) Whether the lengths of the minimum and maximum sentences are outside the chart for the class of offense and the defendant's prior record level;
- 2) Whether the defendant was improperly given an active or intermediate sentence, when only an intermediate or community sentence is authorized;
- 3) Whether the prior record level was properly calculated;
- 4) Whether a motion to withdraw the plea was improperly denied;
- 5) Whether a motion to suppress evidence based on constitutional grounds or on a substantial violation of Chapter 15A was improperly denied. (And assuming that the right to appeal the denial of the suppression motion was properly preserved at the time of the plea. See *State v. McBride*, 120 N.C. App. 623, 463 S.E.2d 403 (1995)).

Notice what is not included: denial of a speedy trial, denial of motion dismissing habitual felon status, denial of discovery motions and denial of double jeopardy motions. What to do about these?

- 1) If the motion has not been ruled upon before the plea is entered, it is, in legal terms, waived. Tell your client it is waved, as in “wave it bye-bye”.
- 2) If you have raised it, been heard, lost, and you have enough time before your plea offer expires, you could try an interlocutory certiorari petition.

- 3) The other possibility is that you could enter the plea and after the session of court expires, file a 10-day MAR pursuant to G.S. 15A-1414 re-raising the double jeopardy or speedy trial issue. When that is denied you can appeal the denial of the 10-day MAR under 15A-1422(b) and (c).
- 4) When you lose that and the N.C. Supreme Court won't hear it, you could challenge the issue in habeas but now we're talking Latin. You may safely assume that if you are using Latin in federal court about a guilty plea previously ruled upon by the State trial and appellate courts, the issue *es mortuus*.
- 5) With respect to a double jeopardy issue, however, the U.S. Supreme Court has said that the States cannot preclude defendants who have pled guilty from review of double jeopardy issues that were raised and decided before the plea was entered. (*Menna v. New York*, 423 U.S. 61 (1975)). Our appellate courts have said they can preclude them but leave the door open for defendants to challenge the plea with a Motion for Appropriate Relief. (*State v. Corbett*, 191 N.C.App. 1 (2008) See 4 above.

3. NOT ADVISING CLIENT OF REGISTRATION OR MONITORING FOR SEX OFFENDERS

4. NOT ENTERING AND FILING NOTICE OF APPEAL

5. RUNNING STATE TIME CONCURRENT WITH FEDERAL TIME

- 1) Whoever arrests the defendant first has primary custody. This is important because the primary custodian retains primary custody until the sentence is over. *Thomas v. Whalen*, 962 F.2d 358 (4th Cir. 1992)
- 2) Under federal law, a defendant cannot begin serving a federal sentence until he is in federal custody. 18 U.S.C. § 3585(a).
- 3) If the State has primary custody and pleads guilty in State court with an agreement that the State time will run concurrently with any time he may receive in federal court, your client will have to do his State time first, and then his federal time; essentially consecutive time.

- 4) If he gets arrested first by the State but then the feds writ him and he pleads guilty in federal court, the State still has primary custody. When he comes back to State court and the plea is to do concurrent time, he will still have to do his State time first before he is transferred back to federal custody.
- 5) What to do?

6. PLEADING TO LESSERS THAT ARE NOT

7. PROBATION VIOLATIONS AND EXPIRATION OF TIME TO FILE

- 1) G.S. 15A-1344(f) provides that once the period of probation has ended, the court may revoke probation only if:
 - a) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and
 - b) The court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier.

8. PRIOR CONVICTIONS & STIPULATIONS

- 1) The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction. G.S. 15A-1340.14(f) (2003).
- 2) The Court of Appeals has held that a printout of the defendant's Division of Criminal Information (DCI) record is a proper method to prove prior convictions under N.C. G. S. 15A-1340.14(f). *See State v. Rich*, 130 N.C.App. 113, 116, 502 S.E.2d 49, 51 (copy of computerized record maintained by DCI constituted reliable method of proving prior conviction), *disc. review denied*, 349 N.C. 237, 516 S.E.2d 605 (1998).
- 3) What to do? DO NOT STIPULATE!

- 4) For out-of-state convictions, the trial court must classify all prior out-of-state felony convictions as Class I felonies *unless* the State proves by the preponderance of the evidence that the out-of-state conviction is substantially similar to a North Carolina offense that is classified as a Class I felony or higher. Although G.S. § 15A-1340.14(f) allows a defendant to stipulate to the *existence* of prior convictions, nothing in our structured sentencing statutes allows for stipulation as to *classification*.

9. STIPULATION TO INCORRECT RECORD- CAN YOU FIX IT LATER?

Many times, you may not go over each and every prior in-state conviction on the Prior Record Level worksheet. You may tell yourself, or even your client, not to worry because it can be fixed later. The State may even agree to do so afterward and enter into a consent agreement to make it right. They do not have to, however, and then we are in the land of “Ineffective Assistance of Counsel”. Cue the organ music. What happens next?

- 1) To challenge to a guilty plea based on ineffective assistance of counsel, one must demonstrate that the attorney’s “representation fell below an objective standard of reasonableness” and “that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668 (1984).
- 2) In a guilty plea, the defendant must also show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial in order to satisfy the “prejudice” requirement. *Hill v. Lockhart*, 474 U.S. 52 (1985).
- 3) It is not enough for the defendant to be willing to testify that, had he received accurate information, he would have rejected the plea and gone to trial. Reviewing courts evaluate what they believe a “reasonable defendant,” would do. *Hooper v. Garraghty*, 845 F.2d 471, 475 (4th Cir.), *cert. denied*, 488 U.S. 843, 102 L. Ed. 2d 91, 109 S. Ct. 117 (1988).
- 4) In evaluating the prejudice prong, reviewing courts place heavy emphasis on the potential strength of the State's case. Courts believe that a “reasonable defendant,” in large part, would form his decision

on whether to accept a plea in on the strength of the State's case. *Ostrander v. Green*, 46 F.3d 347, (4th Cir. Va. 1995).

10) WHEN TO CALL PLS

- 1) When We Call You!
- 2) Motions for Appropriate Relief
 - a) Under G.S. 15A-1415, the following are MAR grounds:
 - (1) crime was not a crime at the time
 - (2) lack of jurisdiction of the person or the subject matter (bad indictments)
 - (3) conviction obtained in violation of the U.S. or N.C. constitutions (IAC, discovery violations, etc)
 - (4) statute unconstitutional
 - (5) defendant's conduct constitutionally protected
 - (6) significant changes in the law, either substantive or procedural
 - (7) illegal sentence at the time
 - (8) defendant's time has been served (usually a jail credit issue)
 - (9) newly discovered evidence
 - b) What is newly discovered evidence?
 - (1) that the witness or witnesses will give newly discovered evidence;
 - (2) that such newly discovered evidence is probably true;
 - (3) that it is competent, material and relevant;
 - (4) that due diligence was used and proper means were employed to procure the testimony at the trial;
 - (5) that the newly discovered evidence is not merely cumulative;
 - (6) that it does not tend only to contradict a former witness or to impeach or discredit him;
 - (7) that it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail. *State v. Stukes*, 153 N.C.App. 770, 773, 571 S.E.2d 241, 244 (2002).
- 3) **BONUS QUESTION: WHAT CLAIM IS MISSING?**

