



Another Salvo in the District Court Calendar Wars

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Categories : [Procedure](#), [Uncategorized](#)

Tagged as : [calendar](#), [calendar](#), [district court](#), [friend](#), [sheppard](#), [speedy trial](#)

Date : February 28, 2013

In *State v. Friend*, ___ N.C. App. ___, 724 S.E.2d 85 (2012), the Court of Appeals addressed the district court's authority when, after the court refuses to allow a continuance, the State takes a voluntary dismissal and subsequently refiles the case. In *Friend*, the State voluntarily dismissed an impaired driving charge after the district court denied the State's motion for a continuance; and when the State filed a new impaired driving charge nine days later based on the same incident, the district court dismissed the charge in light of its earlier refusal to grant the State a continuance. The Court of Appeals found that dismissal was not a proper remedy. The court found that the State's taking of a voluntary dismissal and reinstatement of the charges after the district court's denial of a continuance did not interfere with the district court's authority over the calendar and therefore did not constitute a separation of powers violation. The court also found in the circumstances of the case that proceeding with prosecution of the charges did not violate the defendant's speedy trial and due process rights. My colleague Shea Denning summarized the case [here](#).

In *State v. Sheppard*, ___ S.E.2d ___ (Feb. 19, 2013), the Court of Appeals in an unpublished opinion further considered the problem of delay in district court, this time upholding dismissal of the charges on speedy trial grounds. In *Sheppard*, as in *Friend*, the defendant was charged with impaired driving. Also as in *Friend*, when the district court denied the State's request for a continuance (in this case after an 11-month delay following arrest), the State took a voluntary dismissal and, later the same day, refiled the charges and rearrested the defendant. The district court denied the defendant's motion to dismiss for a speedy trial violation, and the defendant was tried and convicted in district court, but on appeal for a trial de novo the superior court granted the motion to dismiss for a speedy trial violation. The Court of Appeals affirmed the superior court's ruling, holding that the fourteen-month delay from the defendant's arrest to her trial in district court supported the motion. In reaching its conclusion, the Court of Appeals rejected the State's argument that the defendant waived her speedy trial right by objecting to the chemical analyst's affidavit and asserting her right to confront the analyst at trial, recognizing that a defendant may not be required to give up one constitutional right to assert another.

The general takeaways from *Friend* and *Sheppard* on calendaring in district court can be summarized as follows:

1. The district court has ultimate authority over its calendar and may refuse to grant a request for a continuance by the State. *Friend* recognized this authority in light of *Simeon v. Hardin*, 339 N.C. 358 (1994), which addressed the limits on prosecutorial control over the criminal calendar, and *Sheppard* reinforces the principle. See also Michael Crowell, [Control of the Calendar in Criminal District Court](#) (UNC School of Government, July 2010). (Note that G.S. 20-139.1(e2) contains special provisions on continuances in impaired driving cases involving testimony by a chemical analyst; the statute was not directly at issue in either case.)
2. If the district court refuses to grant a continuance, the State must proceed with the case or take a voluntary dismissal. Because the court has ultimate authority to manage cases on its calendar, the State may not ignore the court's order denying a continuance and unilaterally reschedule the case to a different date. See generally Crowell at 4. If the State does not take a voluntary dismissal, the district court may order the State to call its first witness and, if the State does not proceed, may acquit the defendant for a failure of proof. See *State v. Watts*, 35 So.3d 1, 7 (Ala. Crim. App. 2009); *People v. Mooar*, 416 N.E.2d 81, 84 (Ill. App. Ct. 1981).

3. If the State takes a voluntary dismissal and subsequently refiles the charges, the district court may not dismiss the case solely because the court previously denied the State's request for a continuance. Although refileing of the charges may seem in derogation of the court's previous scheduling orders, *Friend* found that refileing does not unconstitutionally interfere with the court's authority over the calendar.

4. A district court has the authority to dismiss a case after refileing if prosecution of the charges violates other of the defendant's rights. (Note that G.S. 20-38.6 contains special provisions on dismissal motions in impaired driving cases.) Thus:

- If the two-year statute of limitations for misdemeanors has run (measured from the offense date to the refileing date), the defendant is entitled to dismissal. See generally *State v. Madry*, 140 N.C. App. 600 (2000).
- If there was delay in prosecution of the case before the State took a dismissal, the district court may consider that delay along with any delay after refileing of the case in ruling on a motion to dismiss for violation of the right to a speedy trial. See *United States v. Columbo*, 852 F.2d 19, 23–24 (1st Cir. 1988) (“Were it otherwise, the government would be able to nullify a defendant’s speedy trial right by the simple expedient of dismissing and reindicting whenever speedy trial time was running out on its prosecution.”). In *Friend*, the court stated that it did not need to consider the delay in district court because the defendant did not make a speedy trial demand until after he appealed for a trial de novo in superior court; therefore, only the delay in superior court was relevant. This interpretation seems inconsistent with the four-factor analysis for speedy trial claims in *Barker v. Wingo*, 407 U.S. 514 (1972), under which a request for a speedy trial is one factor and not determinative. (Notwithstanding its initial statement, the court in *Friend* went on to consider the entire delay in assessing and ultimately rejecting the defendant’s speedy trial claim.) *Friend*’s view of the applicable period of delay was not at issue in *Sheppard*, in which the defendant made eight speedy trial requests in district court and another four requests in superior court.
- A due process violation may also provide grounds for dismissal. In *Simeon v. Hardin*, 339 N.C. at 377–78, a civil action for declaratory and injunctive relief, the Court found that the plaintiff’s allegations about the district attorney’s calendar practices were sufficient to state a claim of a due process violation (and potentially other constitutional violations), and the case was remanded for further proceedings. The plaintiffs alleged that the practices included, among other things: manipulating the calendar to exact pretrial punishment on incarcerated defendants and pressure defendants to plead guilty; calling cases for trial without adequate notice, thereby impairing the quality of representation; and calendaring cases repeatedly and causing defendants unnecessary expense and inconvenience. *Friend* found no violation of due process; *Sheppard* did not address the issue.

5. If the State refiles the charges after taking a voluntary dismissal and issues an arrest warrant rather than a criminal summons, rearrest may lend support to a claim of a speedy trial violation per the prejudice factor in *Barker v. Wingo* or a due process violation per *Simeon v. Hardin*. While the court probably could not dictate the criminal process to be used by the State should it decide to refile, the court certainly could unsecure any bond for a defendant if rearrested.

Friend and *Sheppard* are probably not the last words on calendaring in district court, but they advance our understanding of the applicable principles and procedures.