Arrest of Judgment

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Categories : Procedure, Sentencing, Uncategorized

Tagged as : arrest of judgment, double jeopardy, indictments, prior record level

Date : July 17, 2019

When can a court arrest judgment in a case? And what does it mean to do so?

The concept of arresting judgment has been around for a long time in North Carolina. In cases dating back to the 1790s, such a motion was the vehicle for raising all sorts of issues, from defective charging instruments, State v. Adams, 1 N.C. 56 (1793), to "the late hour at which the court came to the cause," State v. Higgins, 1 N.C. 36, (1792).

Nowadays the common-law motion in arrest of judgment has, at least in part, been supplanted by the broad statutory authority of a motion for appropriate relief. G.S. 15A-1411(c) ("The relief formerly available by motion in arrest of judgment . . . is available by motion for appropriate relief."). But arrest of judgment is still the proper course of action in certain circumstances.

Those circumstances fall into two broad categories that lead to different results.

The first type of arrest of judgment is one that vacates a judgment in response to a "fatal flaw on the face of the record"—usually a defect in the indictment. *See, e.g.*, State v. Harris, 219 N.C. App. 590 (2012). The effect of that sort of arrest of judgment is to vacate a conviction. *See* State v. Pendergraft, 238 N.C. App. 516 (2014).

The second type of arrest of judgment is used to remedy double jeopardy or cumulative punishment concerns that contravene legislative intent. A common example in the case law involves a defendant convicted of first-degree murder under a felony murder theory. Under what the courts sometimes call the felony murder "merger rule," *see* State v. Barlowe, 337 N.C. 371 (1994)—which is different from the other "merger rule" that prevents certain assaults from serving as the underlying felony for felony murder, as Jeff and Shea have written about in the past—the court must arrest judgment on the underlying felony conviction supporting the felony murder charge, because that underlying felony "provides no basis for an additional sentence," *id.* at 381; *see also* State v. Stroud, __ N.C. App. __, 797 S.E.2d 34 (2017). Along similar lines, when a person is convicted of both larceny and possession of stolen goods related to the same stolen property, the trial judge must arrest judgment on one conviction or the other. *See, e.g.*, State v. Garner, __ N.C. App. __, 798 S.E.2d 755 (2017). Likewise when a defendant is convicted of either rape or sexual offense and kidnapping elevated to first-degree kidnapping based on the sexual assault, the court must either arrest judgment on the sexual assault or arrest judgment on the first-degree kidnapping conviction and impose a sentence for second-degree kidnapping. State v. Freeland, 316 N.C. 13 (1986).

A judgment arrested to alleviate double jeopardy or other similar concerns is not vacated. Rather, "the underlying guilty verdict remains intact" so that it can be entered if the other conviction—the murder in the felony murder example, or the first-degree kidnapping in the kidnapping-plus-rape scenario—is overturned. State v. Pakulski, 326 N.C. 434 (1990).

There are hints of third type of arrest of judgment in the case law—a purely discretionary one, similar to a prayer for judgment continued. In State v. Garris, for example, a defendant was convicted of two offenses: attempted murder and assault with a deadly weapon with intent to kill. 191 N.C. App. 276 (2008). The court of appeals noted that those two crimes did not have identical elements, and thus "the trial court did not need to arrest either of defendant's convictions." *Id.* at 287. Nevertheless, the appellate court said the "trial court . . . acted within its discretion in deciding

to arrest judgment and in deciding which judgment to arrest." *Id.* And so perhaps that is something a trial judge generally has discretion to do, albeit not in a DWI case, apparently, as Shea discussed here in light of State v. Petty, 212 N.C. App. 368 (2011).

A question that comes up from time to time is whether a conviction for which judgment has been arrested factors into a defendant's prior record level. Often the question will be moot because there will be at least one other prior conviction from the same week of court—the one that prompted the arrest of judgment in the first place—and only the more serious of them could count under G.S. 15A-1340.14(d). However, you could imagine a situation where the conviction for which judgment was arrested might matter for establishing the "same elements" bonus point under G.S. 15A-1340.14(b)(6), or could conceivably count for prior record points if a contemporaneous conviction were used in support of a habitual felon charge (as allowed under State v. Truesdale, 123 N.C. App. 639 (1996)).

I'm not aware of an appellate case considering whether an arrested judgment could count for points in those situations or any other. On the one hand, G.S. 15A-1331(b) indicates that, for sentencing purposes, a person "has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest." As noted in *Pakulski*, for an arrested judgment of the "double jeopardy" variety, "the underlying guilty verdict remains intact," suggesting that it may yet qualify as a prior conviction in the same way a PJC does. On the other hand, the same rationale that prompted the arrest of judgment to begin with—that the legislature didn't intend for the defendant to be punished for this conviction if he or she was already being punished for a related one—could be used to argue against using it later as a prior conviction to elevate a person's punishment for a subsequent offense.