I Want a New Trial! Now What? A District Court Judge's Authority to Act Following Entry of Notice of Appeal for Trial De Novo (Part II)

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Categories : Procedure, Uncategorized

Tagged as : appeals, bond, pretrial, trial de novo

Date : February 23, 2010

Recall from yesterday's post that we are considering the following scenario:

Jay Jones is charged with possession of drug paraphernalia and given an unsecured bond of $1,000. He is convicted following a bench trial in district court. Noting that Jones is a prior conviction level III and has previously violated probation, the judge imposes an active sentence of 120 days. Jones enters notice of appeal in open court because he wants a jury trial. What may the district court judge properly say at this point?

(1) Bailiff, he's in your custody to begin serving his active sentence unless and until a different result is reached in superior court.

(2) Mr. Jones, it is your right to appeal. However, I am securing and doubling your bond pending your trial in superior court. Bailiff, he's in your custody.

(3) Mr. Jones, you are free to leave after the DA notifies you of your court date for superior court. The current bond remains in effect and this court has no power to do anything further in this matter.

Yesterday's post addressed statement (1). Now, let's consider the others.

Statements (2) and (3). The issue here is whether the district court judge retains jurisdiction to modify conditions of pretrial release after the defendant has entered notice of appeal. The statutes are not clear on this point. G.S. 15A-534(e)(1) states that a district court judge may modify a pretrial release order at any time prior to the noting of an appeal. This provision suggests that as soon as the defendant utters the words "I appeal" or files notice with the clerk, the district court is divested of jurisdiction to modify conditions of pretrial release.

Other statutes refer to the judge's authority to modify bond pending appeal. *See* G.S. 7A-290 ("[t]he original bail shall stand pending appeal, unless the judge orders bail denied, increased, or reduced"); G.S. 15A-1431(e) ("[a]ny order of pretrial release remains in effect pending appeal by the defendant unless the judge modifies the order"); G.S. 15A-1431(f1) ("the judge may order any appropriate condition of pretrial release, including confinement in a local confinement facility, pending the trial de novo in superior court"). The fundamental question is: which judge is "the judge" for purposes of these statutes?

According to the Prosecutor's Manual, "The enactment of G.S. 15A-1431(f1) cleared up any inconsistency between G.S. 15A-1431(e) and G.S. 15A-534(e) by giving a district court judge the authority to modify the defendant's conditions of pretrial release after the defendant has given notice of appeal for trial de novo, up to the ten days after the judge entered judgment in district court." *North Carolina Prosecutor's Trial Manual* at 337 (January 2007). The "ten days" in the quoted passage refers to G.S. 15A-1431(c) and G.S. 7A-290, which provide that in cases appealed for a trial de novo the clerk of court transfers the case to superior court ten days after the district court's judgment if the appeal has not been withdrawn. Prosecutors may argue that during these ten days, the case is not a CRS—it is not in the superior court division; thus, the district court judge is the appropriate judge to modify conditions under G.S.

15A-539(a). Under this theory, a case is not "before the superior court" for purposes of G.S. 15A-534(e), until it has been calendared there. The position that the district court judge retains jurisdiction to modify conditions pending appeal is consistent with the way bond is handled in appeals from superior court to the appellate division. *See* G.S. 15A-536; G.S. 15A-1453. However, this argument may not carry much weight because appeals to the superior court and appeals to the appellate division "are distinct and are designed to protect different interests and achieve different ends." *State v. Smith*, 359 N.C. 618, 621 (2005). When a case is being appealed to the appellate division, there is an incentive to leave jurisdiction with the trial court so that a local judge can hear the matter; this incentive is lacking when a case is being appealed from the district court to the superior court.

Defense attorneys with whom I work do not agree that the language of G.S. 15A-1431(f1) resolves a discrepancy in the statutes. The way they see it, the language of G.S. 15A-534(e)(1) unequivocally deprives the district court of authority to act following notice of appeal. Rules of statutory construction require that G.S. 15A-1431 be read in conformity with the clearly enunciated rule of G.S. 15A-534(e)(1); statutes *in pari materia* must be interpreted in light of each other with the more specific statute informing the more general one. The language in G.S. 15A-534(e), which refers to "a superior court judge" as the person who may modify bond following entry of notice of appeal is more specific than "the judge" referenced in G.S. 7A-290, and G.S. 15A-1431(e),(f1). Thus, they argue, "the judge" of G.S. 7A-290, and G.S. 15A-1431(e),(f1) is in fact the superior court judge; the district court judge, who is never explicitly mentioned, has no jurisdiction to modify pretrial release conditions once notice of appeal has been entered. The enactment of G.S. 15A-1431(f1) in August of 2005, I have heard it argued, merely served to clarify what portions of the district court sentence were stayed by an appeal in the wake of the Court of Appeals' opinion in *State v. Smith*, 165 N.C. App. 256 (2004), *reversed*, 359 N.C. 618 (2005) (holding that while prior G.S. 15A-1431(f) failed to state that probation was stayed pending appeal, logic required this reading because a defendant remains on pretrial release pending appeal and may not simultaneously be on pretrial release and on probation for the same offense).

In sum, it is not crystal clear that the district court judge has authority to modify pretrial release conditions following entry of notice of appeal in light of the language to the contrary in G.S. 15A-534(e). If G.S. 7A-290 and G.S. 1431 do give a district court judge such authority, it appears that the outside time limit for the judge to act would be ten days after judgment in light of the case transfer provisions in G.S 7A-290 and G.S. 15A-1431(c). Some defenders have adopted a practice of filing written notice of appeal with the clerk on the afternoon of the tenth day after judgment, so that there is no chance for the judge who heard the evidence to penalize the defendant for appealing by setting a high appeal bond.

As a final matter, returning to statement (2), increasing a defendant's bond upon appeal for a trial de novo raises potential constitutional problems. Suppose the judge had more pointedly said, "Mr. Jones, you are not going to get out of the sentence I imposed by appealing. If you want to appeal, I will secure and double your bond." Assuming that a district court judge is authorized to modify conditions of pretrial release after notice of appeal and before expiration of the ten-day period following judgment, it is unconstitutional for the judge to use that authority to penalize the defendant for appealing. *See generally North Carolina v. Pearce,* 395 U.S. 711 (1969) (due process prohibits judge from increasing sentence on retrial to discourage appeal); *see also In re* Renfer, 345 N.C. 632 (1997) (Judicial Standards Commission recommended removal of district court judge from office for, among other things, improperly raising defendant's bond in response to appeal).

Thanks to Troy Page, Associate Legal Counsel for the NC Administrative Office of the Courts, for his input on these posts. The conclusions are my own.