State v. Hobson and the Presentment Controversy

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Presentments have been a hot topic lately and the court of appeals just issued a decision involving a presentment. This post explains the controversy and the significance of the recent opinion.

What's a presentment, again? According to G.S. 15A-641, a presentment is "a written accusation by a grand jury, made on its own motion and filed with a court, charging a person . . . with the commission of one or more criminal offenses." It "does not institute criminal proceedings against any person," but rather, obligates the District Attorney to investigate and, if appropriate, to request an indictment. Historically, presentments were issued when a grand jury organically became aware of a possible crime that it believed merited prosecution. *See, e.g.,* Sara Sun Beale, et al., *Grand Jury Law and Practice* § 1:8 (2d ed. 2017 update) (stating that "[a] presentment . . . is brought on the grand jurors' own initiative, based on facts already known to them or discovered by their investigation"); Renne B. Lettow, Note, *Reviving Federal Grand Jury Presentments*, 103 Yale L.J. 1333 (1994) ("A presentment is a charge the grand jury brings on its own initiative."). In the first years of the United States, grand juries frequently returned presentments, often against public officials, and issuing presentments was considered a central function of grand juries. Lettow, *supra*. Indeed, early in North Carolina's history, a presentment was itself sufficient to charge a crime – it was not necessary for the prosecutor to review the matter or to obtain an indictment. *See State v. Thomas*, 236 N.C. 454 (1952) (discussing the practice and noting that it was discontinued by statute in 1797 because presentments were often very informal or purported to charge matters that did not constitute any criminal offense). Over time the practice has declined, and today, only a handful of jurisdictions continue to allow presentments. *See* Beale, *supra*.

North Carolina is one of those states, but it is now vanishingly rare for a grand jury to issue a presentment on its own. Instead, presentments nowadays are virtually always issued based on a request from a prosecutor, who normally makes the request by submitting a draft presentment to the grand jury. The involvement of a prosecutor is contemplated to some extent by G.S. 15A-628(a)(4), which states that the grand jury "[m]ay investigate any offense as to which no bill of indictment has been submitted to it by the prosecutor and issue a presentment," but also that "[a]n investigation may be initiated upon . . . the request of . . . the prosecutor." (That provision has been in place since Chapter 15A was enacted in 1973. *See* S.L. 1973-1286.) Why would a prosecutor go this route? Because, as noted in this prior blog post by Bob Farb, when a presentment is returned concerning a misdemeanor, the misdemeanor may be indicted and then tried in superior court without first being tried in district court. *See* G.S. 7A-271(a)(2) (providing that "the superior court has jurisdiction to try a misdemeanor . . . [w]hen the charge is initiated by presentment"). From the state's perspective, then, using a presentment is a good way to avoid giving a defendant two bites at the apple – one trial in district court and a second one in superior court. That's especially appealing if the defendant is virtually sure to appeal a district court conviction or if the trial is expected to be lengthy and complex.

What's the controversy? Despite the above-mentioned advantages, most prosecutors don't use presentments very often. There are several reasons for that: they aren't a well-known tool; there's no NCAOC form for preparing them; and if there's any chance that a case can be resolved in district court, it is more efficient to handle the case there. However, there has been an uptick in presentments lately, driven in part by the *Turner* statute of limitations case about which I wrote last week and about which Shea wrote previously here and here. Before the state supreme court reversed the court of appeals, obtaining a presentment and then an indictment as a case approached the two-year mark was one way that a prosecutor could avoid having a misdemeanor dismissed based on the statute of limitations.

The increasing use of presentments may have led the defense bar to focus more on presentments than it had previously. Some defense attorneys now contend that the way that presentments have been used in recent years is so far removed from the historical practice that modern, prosecutor-driven presentments are inconsistent with the definition of a "presentment" in G.S. 15A-641, or perhaps even with Article I, section 22 of the North Carolina Constitution, which provides that "[e]xcept in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment." As I understand the argument, the thrust of it is that prosecutor-driven presentments aren't really "presentments" at all because: (1) they aren't issued sua sponte by the grand jury based on information obtained organically by its members, and (2) they aren't followed by an investigation by the District Attorney – indeed, it is not uncommon for the presentment to be returned and the indictment submitted on the very same day. And if these documents aren't really presentments at all, then they can't confer jurisdiction on the superior court.

These arguments haven't always been successful, but I have heard that several trial judges have found merit in them and have granted motions to dismiss misdemeanors pending in superior court based on a presentment for lack of jurisdiction.

The recent case: *State v. Hobson*. Last week, the court of appeals decided State v. Hobson. Jeffrey Hobson was charged with stalking an ex-girlfriend by, among other things, printing and distributing a flyer falsely accusing her of being a prostitute. Although Hobson was charged with misdemeanor stalking, the case was a "direct indictment" case – it was never pending in district court. On appeal, Hobson argued that the record didn't show a presentment and that without a presentment, there was no justification for seeking an indictment so the superior court lacked jurisdiction. The argument fell apart when the state was able to locate the presentment and add it to the record on appeal. However, the brief portion of the opinion addressing the presentment issue may strengthen the state's hand in the debate over presentment practice.

The presentment in *Hobson* had the same characteristics that form the basis of the defense argument described above. First, the presentment was not issued sua sponte by the grand jury. The formatting of the presentment is identical to the formatting of the indictment issued in the same case, and the presentment is signed by a prosecutor. Thus, it is apparent that the district attorney's office drafted the document and submitted it to the grand jury. Second, the presentment and the indictment were both issued on the same day – December 15, 2014 – so it is extremely unlikely that the District Attorney conducted any additional investigation based on the presentment before seeking the indictment. Notwithstanding those characteristics of the presentment, the court of appeals ruled that "the stalking charge was properly initiated by a presentment." I don't place any great weight on that ruling, because the defendant's brief focused on what he thought was the absence of a presentment, not on whether the presentment was obtained through a proper procedure. But the court did not go out of its way to express any concern about the procedure used, and the statement that the case was "properly initiated by a presentment" may slightly bolster the position of those who believe current presentment practice to be acceptable.

Other pertinent appellate cases. Another case along the same lines is *State v. Petersilie*, 334 N.C. 169 (1993). In that case, the prosecutor submitted a presentment to the grand jury and followed up the next month with an indictment. The state supreme court ruled that this established jurisdiction in the superior court. The opinion cites and highlights the provision in G.S. 15A-628 allowing a prosecutor to request that the grand jury issue a presentment, and so may carry more weight than *Hobson* regarding the propriety of that procedure. A more recent case on a different issue involving presentments is *State v. Roberts*, 237 N.C. App. 551 (2014), where the court of appeals rejected an argument that the state violated equal protection principles when it chose to charge one DWI defendant via presentment while not doing the same in other cases. The defendant in *Roberts* was a Pitt County attorney, and the court of appeals found that considerations of judicial economy justified the practice as local court officials had recused themselves from the case and "proceeding against Defendant by presentment . . . obviated the necessity for utilizing a special prosecutor and a non-resident trial judge on two occasions, rather than one."

Conclusion. The controversy over presentments is significant enough that it may be squarely presented to the

appellate courts in the near future. G.S. 15A-628 and cases like *Hobson* and *Petersilie* make me think that challenges to prosecutor-driven presentments face an uphill battle, but there's no doubt that modern presentment practice is far removed from the historic norm.