

## Tolling the Statute of Limitations after *State v. Turner*

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The court of appeals held last month in *State v. Turner*, \_\_\_ N.C. App. \_\_\_, 793 S.E.2d 287 (2016), *temp. stay allowed*, \_\_\_ N.C. \_\_\_ (2016), that the issuance of a magistrate's order charging a defendant with driving while impaired did not toll the two-year statute of limitations applicable to misdemeanors. The court reasoned that the provision setting forth the statute of limitations, [G.S. 15-1](#), was explicit in requiring that an indictment or presentment be issued within two years. The court said that only one extension of this rule had been recognized: Pursuant to *State v. Underwood*, 244 N.C. 68 (1956), a defendant may be tried upon a misdemeanor charged by a warrant within two years of the offense. Because *Turner* was not charged by presentment, indictment or warrant and the State failed to "commence the prosecution of its case" within two years of the offense, the court of appeals ruled that the trial court properly dismissed the charges.

[Last month's blog commentary](#) included a lively dispute about whether trial courts are bound to follow *Turner* given the state supreme court's issuance of a stay. Regardless of whether *Turner* is binding precedent (and I don't think it yet is, given the stay), trial courts may rely on its reasoning. Moreover, the state supreme court may ultimately decline to review the opinion or, if it does grant review, may affirm its holding. Thus, prosecutors across the state are considering whether and how the State may satisfy or toll the statute of limitations for misdemeanors charged by citation or magistrate's order.

There are at least four categories of such misdemeanors, and the implications for each are discussed below.

### **Misdemeanors that occurred more than two years ago and were dismissed with leave due to the defendant's failure to appear**

The oldest outstanding misdemeanor charges in any given judicial district typically share one feature in common: the defendant failed to appear in court. When a defendant fails to appear in court after being charged with a misdemeanor offense, the court often issues an order for his or her arrest. [G.S. 15A-305](#). If the order remains unserved and the prosecutor believes the defendant cannot be readily found, he or she may enter a dismissal with leave for nonappearance pursuant to [G.S. 15A-932\(a\)](#). A dismissal with leave for nonappearance removes the case from the court's docket, but "all process outstanding retains its validity." [G.S. 15A-932\(b\)](#). In addition, "all necessary actions to apprehend the defendant, investigate the case, or otherwise further its prosecution may be taken, including the issuance of nontestimonial identification orders, search warrants, new process, initiation of extradition proceedings, and the like." *Id.*

*Turner* did not explore the interplay between the dismissal with leave statute and the statute of limitations. The State may argue that the provision in [G.S. 15A-932\(b\)](#) stating that "all process outstanding retains its validity" operates to toll the statute of limitations as of the date of the dismissal. The defendant may argue, on the other hand, that the State was required to obtain a presentment, indictment or warrant within two years of the offense if it wished to toll the limitations period.

Beyond marshaling its legal arguments, I don't know of any action that the State can take at this point – more than two years after the commission of the misdemeanor offense – to ensure that its prosecution may proceed.

## **Misdemeanors that occurred within the last two years and are charged by magistrate's order**

To toll the statute of limitations for these offenses under *Turner*, the State has two options.

First, it may dismiss the magistrate's order and seek a warrant for arrest under [G.S. 15A-304](#) charging the same offense. The risk of pursuing this course of action is that a judicial official might decline to issue an arrest warrant given that such warrants may be issued only when it appears to the judicial official that the person named in the warrant should be taken into custody. A judicial official who finds probable cause for an offense but does not deem it necessary to take the charged defendant into custody may opt to instead issue a criminal summons, a process that *Turner* did not recognize as tolling the statute of limitations. Thus, a law enforcement officer who is seeking issuance of a warrant for arrest in these circumstances should be prepared to explain the need for this type of process.

The second option the State may pursue is seeking a presentment and then an indictment for the misdemeanor charge from the grand jury. Bob Farb wrote [here](#) about the presentment process. If the State elects this option and the grand jury returns a presentment and indictment, the misdemeanor will be tried in superior court.

If no warrant, indictment or presentment issues within two years of a misdemeanor offense, the State must "commence the prosecution" within two years of the offense to satisfy the rule set forth in *Turner*. It isn't clear what action by the State, short of swearing the first witness at trial or swearing and impaneling a jury in superior court, constitutes the commencement of the prosecution.

## **Misdemeanors that occurred within the last two years and are charged by citation**

For these misdemeanors, the State may seek to toll the statute of limitations by obtaining a warrant for the defendant's arrest. [G.S. 15A-302\(f\)](#). The State is not required to first dismiss the charges alleged in the citation. It must, however, convince the judicial official from whom it seeks issuance of the warrant to issue that process rather than a criminal summons.

As with a misdemeanor charged by magistrate's order, the State may seek a presentment and indictment charging a cited misdemeanor. Though the process is available, it would be unusual for a misdemeanor for which a defendant was initially cited and released to be first adjudicated in superior court.

## **Misdemeanors for which process has not yet been issued**

For new misdemeanor charges, the most straightforward way for the State to toll the statute of limitations under *Turner* is for it to seek a warrant for the defendant's arrest, which again will require that it convince the judicial official that it is necessary to take the defendant into custody.

The Criminal Procedure Act does not, however, contemplate the issuance of a warrant for arrest in lieu of a magistrate's order when a person has already been arrested. Instead, [G.S. 15A-511\(c\)](#) directs magistrates to issue a magistrate's order upon finding probable cause to believe that a crime has been committed by a person arrested without prior issuance of a warrant. If magistrates follow this process, then the State may subsequently opt to dismiss the charges and seek issuance of a warrant for the defendant's arrest.

I've previously shared my view that *Turner* was a surprise. I also think that a wholesale effort by prosecutors to bring about tolling under *Turner* will up-end misdemeanor criminal procedure as we know it, resulting in more arrests and more misdemeanor prosecutions in superior court. Have your own thoughts about the case and its potential impact? Share them using the comment feature below.