Unpublished Cases: What's the Law?

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As far as I know, July 21, 2015, was a pretty normal day at the North Carolina Court of Appeals. The court published around a dozen opinions. Most of them dealt with issues like worker's compensation and equitable distribution, but there were a few criminal cases. One of them was State v. Saldierna, a juvenile interrogation case, which was later reversed. Bob Farb blogged about that here.

In other words, just another day at the office.

The court also released **more than 30** additional opinions on the same day, on the same website, written by the same judges, and many of them addressed hot-button criminal topics like lay witness identification of drugs, custodial interrogations of juveniles, sufficiency of a drug indictment, and improper closing arguments.

But those cases were marked as "unpublished," so we all pretty much just ignored them and pretended they didn't happen.

Wait… what? What *are* unpublished cases? We're told that citing to them is "disfavored," so are they good law or not? Who decides which cases make the cut for publication? And more importantly -- why? In a digital world where cases are available online, what does "unpublished" really mean? And why are we talking about July 21, 2015?

So many questions. I have one or two answers.

Why Do We Have Unpublished Cases?

I'm hardly the first person to ask this question. For a more detailed and well-researched answer, readers can consult this law review article, this summary, this blog post, this commentary, or this article.

The short answer is that unpublished cases were adopted as a tool to deal with the growing volume of appellate decisions coming out of bigger and bigger court dockets. These expanding dockets caused two main problems. First, as a practical matter, there was the logistical burden it placed on courts and libraries to publish and store this ever-expanding inventory. Second, sifting through the growing sea of cases was making it more difficult for attorneys to identify and cite the "leading cases" on any given point of law.

In the mid-1960's, the federal courts began implementing a formal practice of marking certain decisions as "not selected" for publication in the federal registers. The courts also directed that citation to or reliance on those decisions would be discouraged, if not outright prohibited. Other jurisdictions soon followed suit.

The first version of Rule 30 of the North Carolina Rules of Appellate Procedure, which addresses unpublished opinions, was adopted in 1975. The current version of Rule 30(e)(1) succinctly explains that "[i]n order to minimize the cost of publication and providing storage space for the published reports, the Court of Appeals is not required to publish an opinion in every decided case." Instead, these unpublished cases are posted on the court's website, and "reported

only by listing the case and the decision in the advance sheets and the bound volumes of the North Carolina Court of Appeals Reports." N.C.R. App. P., Rule 30(e)(2).

Why Does a Particular Case End Up On the Unpublished List?

"If the panel that hears the case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent, it may direct that no opinion be published." N.C.R. App. P., Rule 30(e)(1).

The part about "involves no new legal principles" is pretty clear, but what factors go into deciding that a case "would have no value as precedent?" The rule doesn't say, and the Court of Appeals does not announce the reason for its decision. But based on the content of the cases themselves, there seem to be a couple of guiding principles at work.

First, there are those cases where not only is the law firmly settled, but also the particular facts at issue in the case are so routine or commonplace that there is simply no need to add it to the existing body of published cases. See, e.g., State v. Jeffries, 242 N.C. App. 384 (July 21, 2015) (unpublished) (affirming denial of defendant's motion to dismiss, despite the fact that some conflicting evidence was presented at trial: "[c]ontradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve"), quoting *State v. Phillpott*, 213 N.C. App. 468 (2011).

Second, there appear to be some cases where the court is making a discretionary decision that this just isn't the "right" case to hold up as an authoritative example of the law on the subject. Maybe the facts are too odd, or the procedural posture was improper, or the legal issue was not fully before the court for argument and consideration. See, e.g., State v. Smyre, 242 N.C. App. 385 (July 21, 2015) (unpublished) (analyzing and rejecting defendant's argument that a photographic lineup was improper, but ultimately dismissing the appeal on other grounds because defendant failed to properly preserve and allege the argument).

Are Unpublished Cases Good Law or Not?

Before 2002, the old version of Rule 30(e)(3) stated that:

> A decision without a published opinion is authority only in the case in which such decision is rendered and should not be cited in any other case in any court for any purpose, nor should any court consider any such decision for any purpose except in the case in which such decision is rendered. (emphasis added)

So that was a hard "no" on using unpublished cases for any purpose whatsoever in arguments or briefs. But Rule 30(e)(3) has been amended several times since then, and the current version of the rule now provides that:

> An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion, issue preclusion, or the law of the case. If a party believes, nevertheless, that an unpublished opinion has precedential value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion if that party serves a copy thereof on all other parties in the case and on the court in which the citation is offered. (emphasis added)

So They Are Not "Controlling Legal Authority," But They Can Have "Precedential Value…?"

Even under the modern version of Rule 30(e)(3), citing to an unpublished case is probably your authority of last resort for an appellate brief. If you have any doubts, just read Judge Stroud's concurrence in State v. Hensley, __ N.C. App.

__, 802 S.E.2d 744 (2017), in which she notes with strong disapproval that "these citations are increasing in frequency" despite the fact that "there are still many excellent reasons courts generally discourage reliance upon unpublished opinions, which have been specifically designated as being non-precedential."

Fair enough. But what about when prosecutors and defense attorneys are arguing motions or evidentiary questions at the trial level? I think that situation calls for a different analysis, and there are some instances where unpublished cases can be a gold mine for practitioners.

The very reason why the Court of Appeals might decide to label a particular case as unpublished (strange facts, intertwined issues, and so on) could be precisely what makes that case so helpful at the trial level. After all, in many cases the key issue in dispute is not "what the law is," but rather "how do the facts of *this case* fit within that law?"

For example, we all know the police need at least reasonable suspicion to stop a vehicle. That's well-settled law. But the key question to be decided at a typical suppression hearing is whether the specific set of facts in this particular case were sufficient to raise that reasonable suspicion in the mind of the stopping officer. If the state or the defense can show the trial judge that a panel of judges at the Court of Appeals was faced with a very similar fact pattern, and after careful consideration they decided the same question in the party's favor… that may not be "controlling legal authority," but it sure seems like it has "precedential value."

What's So Special About July 21, 2015?

Nothing, really. That just happened to be the date when the court released the set of unpublished cases I was digging through when I wrote this post.

But the reason *why* I was reading through those cases is because I was doing research on authenticating printouts of digital evidence. One of the most relevant and helpful cases I found was State v. Hamlin, 242 N.C. App. 384 (July 21, 2015) (unpublished) (discussing the admissibility of digital records for gift cards, and whether an employee was qualified to authenticate them: "we hold that Mr. Howell's testimony provided a sufficient foundation for the admission of the computer printouts as a business record").

What really caught my attention, though, was the fact that as *authority* for that holding, the court cited back to State v. Hall, 220 N.C. App. 417 (2012) (unpublished) (finding that the manager at a sweepstakes gambling center was qualified to authenticate computer logs).

That's right, the Court of Appeals cited to one of its own unpublished decisions, because the earlier case was such a close match to the facts at issue in the current case, and that similarity made it helpful in deciding how to apply the law. The court added this almost apologetic footnote to the citation: "We recognize that this case is unpublished and is not binding; however, this Court's holding is relevant to the case at bar."

No apology necessary. I couldn't have said it better myself.