

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA02-359

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

STATE OF NORTH CAROLINA

v.

Cleveland County
No. 01 CRS 51764

SAMUEL CHRISTOPHER McCLUNEY

Appeal by defendant from judgment entered 13 November 2001 by Judge James W. Morgan in Cleveland County Superior Court. Heard in the Court of Appeals 28 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General M. Janette Soles, for the State.

Angela H. Brown for defendant-appellant.

EAGLES, Chief Judge.

Samuel Christopher McCluney ("defendant") appeals from the trial court's judgment entered on a jury verdict finding him guilty of resisting a public officer. On appeal, defendant asserts three assignments of error: (1) that the trial court erred in denying his request for a continuance; (2) that the trial court erred by trying defendant immediately after his arraignment; and (3) the trial court should have granted defendant's motion to dismiss. After careful review of the briefs and record, we hold that defendant is entitled to a new trial.

The record shows that the matter came before the superior court on 12 November 2001 for trial *de novo* after defendant was convicted in district court on 15 October 2001. At the call of the case for trial, defendant moved for a continuance on the ground that defendant's counsel had been given information that morning by defendant regarding his medical status at the time of the offense. In response to inquiry by the court, defendant indicated that he had the information for about three weeks, and that the information concerned injuries he sustained, including a broken neck and brain hemorrhage, in an automobile accident on 23 December 2000. According to the prosecutor, defendant sought this information to prove temporary insanity. Based upon the information presented, the court denied the motion to continue. The prosecutor then stated that defendant needed to be arraigned. Defendant thereupon entered a plea of not guilty. The court then inquired whether there were any pretrial matters to be decided before bringing the prospective jurors into the courtroom. After the parties indicated there were no pretrial matters, the court began defendant's trial.

Defendant contends that the trial court erred by trying defendant on the same day he was arraigned. Our General Assembly has established that in a county having twenty or more weeks of superior court at which criminal cases are heard, the defendant "may not be tried without his consent in the week in which he is arraigned." G.S. § 15A-943(b) (2001). This Court takes judicial notice that the 2001 trial calendar prepared by the Administrative Office of the Courts indicates that Cleveland County had more than

twenty weeks of superior court in which criminal cases were heard. Therefore, G.S. § 15A-943(b) applies to the present case.

Generally, a violation of G.S. § 15A-943(b) is reversible error *per se* and no showing of prejudice is required. *State v. Shook*, 293 N.C. 315, 319-20, 237 S.E.2d 843, 847 (1977). However, the statute may be waived by the defendant's failure to object. *State v. Davis*, 38 N.C. App. 672, 675, 248 S.E.2d 883, 886 (1978). To preserve the statutory right to a minimum of a week's passage between arraignment and trial, the defendant's objection need not explicitly cite the statute and is sufficient if the objection or a motion to continue relates to the purposes for which the statute was enacted. *State v. Cates*, 140 N.C. App. 548, 551, 537 S.E.2d 508, 510 (2000). The statute is "designed to insure both the state and the defendant a sufficient interlude to prepare for trial." *Shook*, 293 N.C. at 318, 237 S.E.2d at 846.

Here, defendant sought a continuance so he could obtain additional evidence in preparation for trial. We conclude defendant adequately invoked the protection of the statute. Consequently, the court committed reversible error in proceeding to try defendant on the same day as he was arraigned. Defendant is entitled to a new trial.

The award of a new trial renders moot defendant's other assignments of error as they may not recur.

New trial.

Judges McCULLOUGH and HUDSON concur.

Report per Rule 30(e).

