

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1020

Filed: 19 May 2015

Union County, No. 11 CRS 050840

STATE OF NORTH CAROLINA

v.

ALEKSANDR SERGEYEVICH KISELEV

Appeal by the State of North Carolina from order entered 2 June 2014 by Judge Tanya T. Wallace in Union County Superior Court. Heard in the Court of Appeals 4 February 2015.

*Attorney General Roy Cooper, by Assistant Attorney General Teresa M. Postell, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender Paul M. Green, for defendant-appellee.*

DIETZ, Judge.

At the close of the evidence in Defendant Aleksandr Sergeyevich Kiselev's criminal trial for driving while impaired, Kiselev moved to dismiss for insufficient evidence. The trial court determined that it needed to review the transcript of certain trial testimony by the arresting officer before ruling on the motion. While waiting for the court reporter to prepare the transcript, the trial court permitted the jury to begin deliberations.

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The parties concede that the trial court's decision to take Kiselev's motion under advisement and permit the jury to deliberate was error. By statute, when a defendant moves to dismiss based on insufficient evidence, the trial court "must rule on a motion to dismiss for insufficiency of the evidence before the trial may proceed." N.C. Gen. Stat. § 15A-1227(c) (2013).

Shortly after the jury returned a guilty verdict, the court reporter completed preparation of the transcript and the trial court reviewed it. The court then granted Kiselev's motion to dismiss, explaining that the transcript showed the State had not met its burden of proof as a matter of law. The State appealed, and Kiselev moved to dismiss the appeal.

As explained below, double jeopardy prevents the State from appealing the grant of a motion to dismiss for insufficient evidence if it comes *before* the jury verdict. But the State can appeal that ruling if it comes *after* the verdict (because, if the State prevails, the trial court on remand can enter judgment consistent with the jury verdict without subjecting the defendant to a second trial). This is why the General Assembly enacted § 15A-1227(c), which prohibits trial courts from reserving judgment on these motions until after the verdict, to the defendant's detriment.

In an earlier case, this Court held that a violation of § 15A-1227(c) is prejudicial if the defendant can show that the trial court would have ruled in his favor had the court ruled at the proper time. *See State v. Hernandez*, 188 N.C. App. 193, 205, 655

S.E.2d 426, 434 (2008). Kiselev made that showing here; the trial court stated on the record that its ruling turned on what was in the transcript (which would not have changed) and further explained that the ruling should be treated as having been made before the jury returned its verdict.

Consistent with *Hernandez*, we hold that a trial court's violation of § 15A-1227(c) that prejudices a defendant precludes an appeal by the State. Had the trial court complied with the law, no appeal would be possible. Our only remedy for this prejudicial error is to return the parties to the position they would be in absent that error—meaning the State is not permitted to appeal. Accordingly, we dismiss this appeal and let the trial court's grant of the motion to dismiss stand as if it were rendered before the jury returned a verdict, as the law required.

### **Facts and Procedural History**

In the early morning hours of 7 February 2011, Deputy Allen Nolan observed Defendant Aleksandr Sergeyevich Kiselev driving north on a highway in Union County. Kiselev approached an intersection, stopping at a red light. He remained stationary the entire time the light was green, then accelerated to drive through the intersection once the light turned yellow.

As Kiselev continued driving, his speed fluctuated between 40 and 50 miles per hour in a 45-mile-per-hour zone. He weaved in his lane of travel. On three separate

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occasions, Kiselev crossed the center double yellow lines with both of his driver's-side tires.

Based on these observations, Deputy Nolan activated his patrol lights, and Kiselev pulled into a grocery store parking lot. When Deputy Nolan approached Kiselev's vehicle to request his license and registration, he noticed an odor of alcohol. Deputy Nolan also observed that Kiselev's eyes were red and glassy. Kiselev admitted that he had been drinking earlier that evening.

Deputy Nolan then asked Kiselev to step out of his car and perform field sobriety tests. Kiselev passed most of the tests, but when asked to recite the alphabet, Kiselev twice made the identical mistake—leaving out the letter “Y” when reciting the alphabet from “A” to “Z.” Kiselev was born in Russia and speaks both Russian and English. He later explained that he mistakenly left out the letter “Y” because of confusion between the English alphabet and the Russian one. Kiselev also did not count out loud as Deputy Nolan had instructed during the walk-and-turn test, although he properly performed the other portions of the walk-and-turn test. Based on his observations of the sobriety tests, Deputy Nolan placed Kiselev under arrest.

The State ultimately charged Kiselev with driving while impaired. In Union County District Court, Kiselev pleaded not guilty but stipulated to facts sufficient to convict him of the crime. The district court found Kiselev guilty and sentenced him

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to 120 days unsupervised probation, with a condition that he serve two days in custody. Kiselev appealed to Superior Court.

In Union County Superior Court, Kiselev waived formal arraignment and the matter was calendared for a jury trial. At trial, Deputy Nolan testified for the State, recounting the night he arrested Kiselev and offering his opinion “[t]hat [Kiselev’s] mental and physical faculties were impaired by an impairing substance . . . of alcohol.” At the close of the State’s evidence, Kiselev moved to dismiss, arguing that the State failed to present an “adequate showing as to appreciable impairment.” The trial court denied this motion. Kiselev then testified on his own behalf, and the State recalled Deputy Nolan for rebuttal evidence.

At the close of all evidence, Kiselev again moved to dismiss the charge against him for insufficient evidence. The trial court called counsel to the bench and indicated that the court had a concern about Deputy Nolan’s testimony. The court then informed counsel that it would hold the motion “open under advisement” pending preparation of a portion of the transcript that the court needed to review before ruling on the motion. Neither Kiselev nor the State objected to the trial court’s decision to defer ruling on the motion.

Although the trial court had not yet ruled on Kiselev’s motion to dismiss because it was awaiting a copy of the transcript, the trial court charged the jury and let them begin deliberations. The jury returned a guilty verdict later that day.

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By the following day, the court reporter had prepared the portion of the transcript requested by the trial court. The court and the parties reviewed the transcript and the court heard additional argument on Kiselev's still-pending motion to dismiss. Noting that the proceedings were "[s]omewhat out of order," the trial court explained that it deferred ruling on the motion because "the Court had a concern which the Court believed was not hers to share, that the officer had not particularly stated appreciable impairment in his opinion, and had left out the term appreciably." The State responded that there was evidence in the record sufficient to show appreciable impairment, but the trial court rejected that argument:

[T]he Court also notes that under that argument, as long as I take it there was an odor, the requisite driving, and something noticeable to the officer; such as red glassy eyes, under that argument, that would be noticeable impairment, and therefore that no opinion would be necessary, and the Court can't go that far.

The trial court announced its ruling, explaining that it was "allow[ing], however belatedly, the defendant's motion . . . at the close of all the evidence" and dismissing all charges against Kiselev. The State appealed the trial court's ruling on Kiselev's motion to dismiss.

**Analysis**

The dispositive issue in this appeal is whether the State has any right to appeal. Indeed, Kiselev's appellate brief does not even address the merits of the trial court's ruling on the motion to dismiss. Kiselev's only argument is that the State has

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no right to appeal under the circumstances present in this case. For the reasons discussed below, we agree with Kiselev and dismiss this appeal.

The State may appeal an adverse ruling in a criminal prosecution only in narrow circumstances authorized by statute. *See State v. Scott*, 146 N.C. App. 283, 285, 551 S.E.2d 916, 918 (2001), *rev'd on other grounds*, 356 N.C. 591, 573 S.E.2d 866 (2002). Section 15A-1445(a)(1) of our General Statutes authorizes an appeal by the State “[w]hen there has been a decision or judgment dismissing criminal charges as to one or more counts,” but not if “the rule against double jeopardy prohibits further prosecution.” N.C. Gen. Stat. § 15A-1445(a)(1) (2013).

Ordinarily, if a criminal defendant is subjected to a trial and then has the charges against him dismissed *before* the jury returns a verdict, the State cannot appeal. In that circumstance, a reversal on appeal would require a new trial (because there was no jury verdict), thus subjecting the defendant to a second trial for the same offense in violation of the double jeopardy clause of the U.S. Constitution. *See State v. Murrell*, 54 N.C. App. 342, 344-45, 283 S.E.2d 173, 174 (1981).

But where a motion to dismiss is granted *after* a jury renders a guilty verdict, reversal of the ruling on appeal does not implicate the double jeopardy clause. On remand after reversal, the trial court can simply enter judgment in accordance with the jury’s verdict, without subjecting the defendant to a second trial.

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As a result of these timing issues, it is in the State's interest, and against the criminal defendant's interest, for a trial court to defer ruling on a motion to dismiss until after the jury returns its verdict. This is a common practice in civil trials, where the court will take a motion for directed verdict under advisement and wait to see what the jury does. Recognizing the potential injustice of this practice in criminal cases, the General Assembly prohibits it. Section 15A-1227(c) of the General Statutes states that the trial court "must rule on a motion to dismiss for insufficiency of the evidence before the trial may proceed." N.C. Gen. Stat. § 15A-1227(c).

It is undisputed in this case that the trial court violated this statutory mandate and impermissibly permitted the trial to proceed without first ruling on the motion to dismiss.<sup>1</sup> But that does not end our inquiry. To resolve this appeal, we must also determine whether that error prejudiced Kiselev and what remedy, if any, is available to him as a result of that violation.

With regard to prejudice, our analysis is controlled by *State v. Hernandez*, 188 N.C. App. 193, 204, 655 S.E.2d 426, 433 (2008), which established the test for whether a violation of § 15A-1227(c) prejudiced the defendant. *Hernandez* involved a nearly identical procedural history. The defendant moved to dismiss at the close of all the evidence and, as in this case, the trial court reserved its ruling on the motion until

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<sup>1</sup> Kiselev did not object to the trial court's violation of the statute during the trial. But this Court previously has held that the defendant need not object to a violation of § 15A-1227(c) in order to preserve the issue for appeal. *Hernandez*, 188 N.C. App. at 204, 655 S.E.2d at 433.



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after the jury deliberated, in violation of § 15A-1227(c). This Court held that “[t]o determine whether or not the error was prejudicial, the issue is whether there is a reasonable possibility that the trial court would have granted defendants’ motions to dismiss” if the trial court had complied with the statute and ruled before sending the case to the jury. *Id.* at 205, 655 S.E.2d at 434. The defendants in *Hernandez* were unable to show prejudice under that test. *Id.*

Here, unlike *Hernandez*, the record readily demonstrates a reasonable possibility (indeed, a near certainty) that the trial court would have granted Kiselev’s motion had it ruled at the proper time. The trial court deferred ruling on the motion to review a portion of the transcript involving Deputy Nolan’s testimony. That transcript took time to be prepared, so the trial court permitted the jury to deliberate in the interim. But in later granting Kiselev’s motion to dismiss after the jury returned a guilty verdict, the trial court explained that its ruling turned on what it found in that transcript, and even stated that it considered its ruling as one made “at the close of all the evidence”:

[T]his matter came about somewhat under unusual circumstances or awkwardly, in that the defendant made a general motion to dismiss at both the close of the State’s evidence and all the evidence. *That in reviewing – it was the Court that had a concern which the Court believed was not hers to share*, that the officer had not particularly stated appreciable impairment in his opinion, and had left out the term appreciably. *However, the Court was not absolutely certain of that fact and required the court reporter to go over that and indeed print out the relevant*

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*portions of the officer's opinion, which the Court does find does not state an opinion that the defendant was appreciably impaired. . . . So the Court will specifically find there was no statement by the officer that the defendant was appreciably impaired and will allow, however belatedly, the defendant's motion at the close of – and actually I'm going to say at the close of all the evidence, because the officer was re-tendered and still didn't state appreciable impairment. So the case is dismissed at the close of all the evidence.*

In short, the trial court expressly stated that its ruling turned on a review of the transcript. Had the court waited on preparation of that transcript without sending the jury to deliberate, as the law required, the transcript still would have been the same. Thus, the trial court's ruling would have been the same.

Moreover, the trial court expressly indicated that its ruling would have been the same by stating that it considered the ruling one made “at the close of all the evidence.” Thus, it is clear that the court was not merely waiting (improperly) to see what the jury would decide in the case. Accordingly, Kiselev has satisfied his burden to show prejudice by demonstrating “a reasonable possibility that the trial court would have granted [his] motion[ ] to dismiss” had the court ruled at the proper time. *Hernandez*, 188 N.C. App. at 205, 655 S.E.2d at 434.

We must now determine what remedy is appropriate—a determination not made in *Hernandez* because the Court found no prejudice in that case. We hold that dismissal of the State's appeal is the appropriate remedy for a violation of § 15A-1227(c) that prejudiced the defendant. Dismissal is the only remedy that can do

justice on these unique facts. We cannot reverse the trial court's ruling—the typical remedy for reversible error—because Kiselev is the appellee and seeks to affirm the court's ultimate ruling. But we are unwilling to affirm the trial court's judgment both because we have not reached the merits of the trial court's decision and because we *should not* reach the merits. After all, the prejudice to Kiselev in this case is the State's ability to appeal the trial court's decision to this Court in the first place.

The purpose of remedying prejudicial error in criminal cases is to actually *remedy* the prejudice—to provide the defendant with the outcome that would have resulted had the trial been free of prejudicial error. The only means to do so in this case is to return the parties to the position they would be in absent that error—which would preclude any appeal by the State. Accordingly, we remedy the trial court's prejudicial error by dismissing this appeal and returning the parties to the positions they would be in had the trial court complied with the statutory command of N.C. Gen. Stat. § 15A-1227(c).

### **Conclusion**

The trial court violated N.C. Gen. Stat. § 15A-1227(c) by reserving judgment on the defendant's motion to dismiss for insufficiency of the evidence until after the jury returned a verdict. That error prejudiced the defendant by permitting the State to appeal a ruling that otherwise would be unappealable. We remedy this prejudicial error by dismissing the appeal.

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DISMISSED.

Judges STEELMAN and INMAN concur.