Failure to Appear on DWIs

Jeff Welty
UNC School of Government
December 2009

Suppose that a defendant is charged with DWI. He is released on bond and fails to appear for court. An order for arrest issues. Eventually, the defendant's bond is forfeited, and his case is dismissed with leave. Ten years later, he decides that he wants to get his driver's license back, so he contacts the DA's office and asks that his case be reinstated. Knowing that the officer involved in the case has probably retired, moved away, or forgotten the facts, the defendant states that he wants to plead not guilty. The state is not happy about the possibility that the defendant will benefit from his decision to abscond.

Must the state reinstate the case?

Generally, yes. Under G.S. 15A-932(d), when the defendant has been, or is about to be, apprehended, the prosecutor "may reinstitute the proceedings by filing written notice with the clerk." Although the statute uses the discretionary term "may," once the defendant has appeared, he is constitutionally entitled to a speedy trial, and so it would be improper for the state to refuse to reinstate the case indefinitely. Even if the state refuses, the defendant has another avenue for reinstatement of the case. Under G.S. 20-24.1(b1), he is entitled to a trial "within a reasonable time of [his] appearance," and upon motion of the defendant, a court must order a trial within a reasonable time.

Must the order for arrest be served and the defendant be arrested?

The order for arrest must be resolved in some way. The options are for the judge to strike the order for arrest based on the defendant's reappearance, or for the order for arrest to be executed. The latter is preferable. The defendant's original bond has long since been forfeited, meaning that unless the defendant is arrested and released with new bond conditions, he will effectively be under no bond.

Must the state dismiss the case if the officer is no longer available or cannot recall the arrest?

Probably so. Rule 3.1 of the State Bar's *Rules of Professional Conduct* prohibits a lawyer from bringing a "proceeding . . . unless there is a basis in law and fact for doing so." Likewise, Rule 3.8 requires a prosecutor to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." One might try to argue that the charge is still supported by probable cause, notwithstanding the state's present inability to adduce evidence supporting it, but a proposed ethics opinion from the State Bar tends to undercut this argument. *See Proposed 2009 Formal Ethics Opinion 15* (stating that a prosecutor is obligated by Rule 3.1 to dismiss a DWI charge when virtually all the evidence supporting the charge has been suppressed and the prosecutor has not appealed the suppression order).[1]

---

[1] Even if the state were not obligated to dismiss the case, it might be required to disclose the officer's unavailability or inability to recall, which would likely result in the defendant insisting on a trial. This depends on the scope of the state's obligation under *Brady v. Maryland*, 373 U.S. 83 (1963). The leading case is *People v. Jones*, 375 N.E.2d 41

In some instances, a prosecutor will determine that the prosecution cannot be sustained even before the case has been reinstated. In such a circumstance, the prosecutor should dismiss the case completely (VD, not VL) and should notify the court so that the order for arrest may be recalled.

May the state charge the defendant with failure to appear under G.S. 15A-543?

Not clear. DWI is a misdemeanor. Failure to appear for a misdemeanor is itself a misdemeanor. Under G.S. 15-1, the statute of limitations for most misdemeanors is two years. The two years begins to run when the elements of the crime are complete. In the example above, the elements of failure to appear were satisfied when the defendant absconded, ten years ago. Thus, the statute of limitations arguably expired eight years ago. Although the statute of limitations is a waivable affirmative defense, it may be unethical to charge a crime when the defendant clearly has a meritorious affirmative defense. In any event, it may be fruitless.

However, the state may argue that failure to appear is a continuing offense, and therefore, the statute of limitations does not begin to run until the defendant reappears, voluntarily or otherwise. No North Carolina case addresses this argument, and the cases from other jurisdictions are split. *Compare People v. Barnes*, 499 N.Y.S.2d 343 (N.Y. Sup. Ct. 1986) (holding that New York's bail jumping statute, which applies when the defendant is released on bond and "does not appear personally on the required date or voluntarily within thirty days thereafter" is not a continuing offense: "Although a defendant's *status* as a bail jumper continues until such time as he appears or is apprehended, the *crime* is finalized and the limitations clock begins to run thirty one days subsequent to defendant's absence."), *with United States v. Elliott*, 467 F.3d 688 (7th Cir. 2006) (holding that the federal statute criminalizing failure to appear to serve a prison sentence is a continuing offense, meaning that the statute of limitations begins to run only once the defendant has been apprehended), *and Woolsey v. State*, 906 P.2d 723 (Nev. 1995) (holding that failure to appear is a continuing offense under Nevada law).

May the state charge the defendant with failure to appear on an implied consent charged under G.S. 20-28(a2)?

Not clear, for the same reasons as above. G.S. 20-28(a2) makes it a Class 1 misdemeanor to "fail[] to appear for two years from the date of the charge after being charged with an implied-consent offense." Because it is a misdemeanor, the two-year statute of limitations in G.S. 15-1 applies. Because the offense defined in G.S. 20-28(a2) isn't complete until two years after the defendant's failure to appear, the statute of limitations certainly doesn't begin to run until that point. But two years after that,

---

(N.Y. 1978), which holds that the state is *not* obligated under *Brady* or otherwise to disclose the death of a key prosecution witness, because the witness's death is not "evidence" relevant to the case. But this holding is controversial. *See People v. Perez*, 749 N.Y.S.2d 850 (N.Y. Just. Ct. 2002) (holding that the fact that an officer retired is not exculpatory and need not be disclosed under *Brady* where the officer is available to testify, but suggesting that if a retired officer is unavailable, the state may be required to disclose that fact); Barry R. Temkin, *Misrepresentation by Omission in Settlement Negotiations*, 18 Geo. J. Legal Ethics 179 (2004) (discussing *Jones* and noting the disagreement about this issue); David Aaron, Note, *Ethics, Law Enforcement, and Fair Dealing: A Prosecutor' s Duty to Disclose Nonevidentiary Information*, 67 Fordham L. Rev. 3005 (1999) (suggesting that *Jones* is authoritative as to the *Brady* issue, but that prosecutors may have an ethical obligation to disclose witness unavailability).

i.e., four years after the defendant was charged with DWI, the statute of limitations may have run on the failure to appear. However, if G.S. 20-28(a2) defines a continuing offense, the statute of limitations does not begin to run until the defendant reappears.[2]

What can the state do to avoid this situation?

Unfortunately, in many old DWI cases, the defendant may benefit from his flight. Although there is no way for the state to eliminate this problem entirely, the state can avoid any uncertainty about the viability of a failure to appear charge by bringing such a charge within two years of the defendant's failure to appear (under G.S. 15A-543) or four years of the original DWI charge (under G.S. 20-28(a2)).

[2] Note also that this provision became effective December 1, 2006, for offenses committed on or after that date. Even if the statute of limitations is effectively inapplicable to this offense because of its continuing nature, it is an open question whether a defendant who was charged with DWI before December 1, 2004, and who therefore completed all the elements of this offense prior to December 1, 2006, may be charged with it. Arguably, such a defendant did not "commit" this offense after December 1, 2006. And arguably, charging such a defendant is precluded by the Ex Post Facto clause.