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***State v. Neal*—Are North Carolina Criminal Defendants Adequately Protected from Judicial Comments on Verdicts?**

As a general rule, the presiding judge in a criminal trial is prohibited from commenting on a verdict rendered in that session if his comments can be heard by prospective jurors for that session.¹ This rule is intended to prevent prejudice to defendants tried before those jurors,² and to ensure the protection of the defendant's sixth amendment right to a fair and impartial trial.³ Although the defendant has a right to be tried before jurors unbiased by comment from the bench, it is unclear what remedy a defendant should have in the event that members of the jury are exposed to such judicial comment. The North Carolina legislature has enacted two statutes that address this issue. The first is North Carolina General Statutes section 1-180.1, enacted in 1955, which prohibits judicial comment on any verdict before jurors or prospective jurors⁴ and has been interpreted as providing that a motion for continuance is a defendant's sole remedy for such comment.⁵ The second is section 15A-1239, enacted in 1977 as part of the Trial Stage and Appellate Procedure Act,⁶ which contains similar language prohibiting comment on a verdict.⁷ This latter statute, however, does not contain the restrictive language of section 1-180.1 that has been interpreted to limit a defendant's remedy to a motion for a continuance. Thus, the question arises whether the absence of this restrictive language in the recently adopted section 15A-1239 is to be interpreted as repealing by implication the older statute, or whether these two statutes are to be

1. See *State v. Carriker*, 287 N.C. 530, 215 S.E.2d 134 (1975); *State v. Brown*, 29 N.C. App. 391, 224 S.E.2d 206 (1976).

2. See *State v. Carriker*, 287 N.C. 530, 215 S.E.2d 134 (1975).

3. U.S. CONST. amend VI. The sixth amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

4. N.C. GEN. STAT. § 1-180.1 (1983) states:

In criminal actions the presiding judge shall make no comment in open court in the presence or hearing of all, or any member or members, of the panel of jurors drawn or summoned for jury duty at any session of court, upon any verdict rendered at such session of court, and if any presiding judge shall make any comment as herein prohibited, or shall praise or criticize any jury on account of its verdict, whether such comment, praise or criticism be made inadvertently or intentionally, such praise, criticism or comment by the judge shall constitute valid grounds as a matter of right, for the continuance for the session of any action remaining to be tried during that week at such session of court, upon motion of a defendant or upon motion of the State. The provisions of this section shall not be applicable upon the hearing of motions for a new trial, motions to set aside the verdict of a jury, or a motion made in arrest of judgment.

5. See *State v. Carriker*, 287 N.C. 530, 215 S.E.2d 134 (1975); *State v. Neal*, 60 N.C. App. 350, 299 S.E.2d 654, *disc. rev. denied*, 308 N.C. 389, 302 S.E.2d 256 (1983).

6. Act of June 23, 1977, ch. 711, 1977 N.C. Sess. Laws 853, 863 (codified at N.C. GEN. STAT. § 15A-1239 (1983)).

7. N.C. GEN. STAT. § 15A-1239 (1983) states:

The trial judge may not comment upon the verdict of a jury in open court in the presence or hearing of any member of the jury panel. If he does so, any defendant whose case is calendared for that session of court is entitled, upon motion, to a continuance of his case to a time when all members of the entire jury panel are no longer serving.

read in conjunction with one another, so that a motion for continuance still is a defendant's "exclusive remedy" for judicial comment on the verdict.⁸ The North Carolina Court of Appeals addressed this issue for the first time in *State v. Neal*⁹ and concluded that section 1-180.1 had not been repealed by implication, but was still in effect. Thus, a defendant's sole remedy for prejudicial comment on a verdict from the bench remains a motion for continuance.¹⁰

This note questions the ruling in *Neal*, focusing particularly on the policy implications of the court's interpretation of the relevant statutes. In addition, the note questions the court's rejection of defendant's argument that he was entitled to a new trial under another statute, North Carolina General Statutes section 15A-1414(b)(3), which provides for a new trial if "[f]or any other cause the defendant did not receive a fair and impartial trial."¹¹ The note concludes that, although sections 1-180.1 and 15A-1239 might be reconcilable logically, a better result, and one more in keeping with the general philosophy of the Trial Stage and Appellate Procedure Act, is to eliminate the restrictive language of section 1-180.1.

In *State v. Neal*¹² defendant was charged with the misdemeanor of assault upon a female.¹³ Defendant's trial was set in Forsyth Superior Court during the criminal jury session beginning on March 15, 1982.¹⁴ On the first day of the session, the case of *State v. Wilson* was heard and the jury found Wilson not guilty.¹⁵ Following that trial, the presiding judge addressed the jury, admonishing them to pay close attention to what future witnesses might say, and reminding them of their vital role as the triers of fact.¹⁶ Neither defendant Neal nor his attorney was present at the time these comments were made. On the following day defendant's trial began before three of the same jurors. On March 17, 1982, defendant was convicted and sentenced to two years in

8. This was one of the issues raised by defendant in *State v. Neal*, 60 N.C. App. 350, 299 S.E.2d 654, *disc. rev. denied*, 308 N.C. 389, 302 S.E.2d 256 (1983).

9. 60 N.C. App. 350, 299 S.E.2d 654, *disc. rev. denied*, 308 N.C. 389, 302 S.E.2d 256 (1983).

10. *Id.* at 353, 299 S.E.2d at 656 (1983).

11. N.C. GEN. STAT. § 15A-1414(b)(3) (1978).

12. 60 N.C. App. 350, 299 S.E.2d 654, *disc. rev. denied*, 308 N.C. 389, 302 S.E.2d 256 (1983).

13. *Id.* at 351, 299 S.E.2d at 654.

14. *Id.*

15. *Id.* at 352, 299 S.E.2d at 655.

16. *Id.* The trial record reveals the judge's admonitions upon the return of the verdict:

COURT: All right, I'm going to let you folks go until tomorrow. Let me say this. In view of this question, I don't believe you were listening carefully to the evidence in this case and I caution you that if you're called on another jury, do listen to what the witnesses say because you are the triers of facts. I ask you to please do that. Because if you don't listen—these cases are right important cases.

Now, as I recall the evidence there which would have been improper for me to give you my recollection of it because I'm not the trier of fact, but as I recall the evidence in this case, the officer said that when he came up there, the defendant put his hand in his pocket, that he told him—he put his hand on his shoulder or arm, and said take your hands out and he took his hands out and the substance dropped to the ground underneath him. But it would have been improper for me to tell you that. That's the way I heard the evidence.

I say this simply to you, you're going to be on the jury the rest of the week. Do listen carefully. It's important that you do (jury excused).

Id. at 351-52, 299 S.E.2d at 655.

prison.¹⁷

On March 24, 1982, defendant filed a motion for appropriate relief, in which he alleged that "he did not discover that the presiding judge . . . had made the comments listed above, until after [the] verdict in . . . [his] case."¹⁸ The relief sought was "for a new trial because the comments of the trial judge were made in contravention of N.C.G.S. 15A-1239, the VI Amendment of the Constitution of the United States, and Article 1, Section 24 of the Constitution of North Carolina."¹⁹ This motion was denied.²⁰ In the court of appeals, defendant relied on one argument—that his motion for a new trial should have been granted because of the trial judge's indiscretion in commenting on the verdict of a prior trial. The court of appeals held that defendant's motion for a new trial was denied correctly because neither of the statutes that deal with judicial comment on the verdict provide for a new trial as a remedy; instead, they provide, as an exclusive remedy, continuance.²¹ The court of appeals further held that defendant's failure to make a motion for continuance prior to trial resulted in a waiver of that right, and finally, that the trial court had not abused its discretion in denying defendant's motion for a new trial.²²

A brief overview of sections 1-180.1 and 15A-1239, including a consideration of the policy concerns underlying these statutes, is helpful in understanding the issues in *Neal*. Section 1-180.1 states that "[i]n criminal actions the presiding judge shall make no comment in open court in the presence or hearing of all, or any member or members, of the panel of jurors drawn or summoned for jury duty at any session of court, upon any verdict rendered at such session of court."²³ Prior to the enactment of section 1-180.1, there was no statute that dealt specifically with the matter of judicial comment on the verdict. A previously enacted statute, North Carolina General Statutes section 1-180,²⁴ commanded that the judge, in making his charge to the jury, explain the law, but offer no opinion on the facts of the case. In *State v. Canipe*²⁵ the North Carolina Supreme Court held that the expression of an opinion of the facts of a particular case by a trial judge constituted a violation of section 1-180, even though made to prospective jurors during the selection process.²⁶ Despite this expansive reading of section 1-180, the General Assembly enacted section 1-180.1 to "supplement [section 1-180 and] . . . to further prevent the trial judge from invading the province of the jury."²⁷

On July 1, 1978, the Trial Stage and Appellate Procedure Act went into

17. *Id.* at 351, 299 S.E.2d at 654.

18. *Id.* at 352, 299 S.E.2d at 655.

19. *Id.*

20. *Id.* at 351, 299 S.E.2d at 654.

21. *Id.* at 352-53, 299 S.E.2d at 655-56.

22. *Id.* at 353-54, 299 S.E.2d at 656-57.

23. N.C. GEN. STAT. § 1-180.1 (1983). *See supra* note 4.

24. N.C. GEN. STAT. § 1-180 (1983).

25. 240 N.C. 60, 81 S.E.2d 173 (1954).

26. *Id.* at 64, 81 S.E.2d at 176-77.

27. *State v. Carriker*, 287 N.C. 530, 534, 215 S.E.2d 134, 138 (1975).

effect.²⁸ This Act, which was drafted by the Criminal Code Commission, is essentially a "codification of the [criminal] procedures developed by case law and an attempt to make them uniform."²⁹ The expansive scope of the Act encompasses the procedure from the outset of trial through the exhaustion of all appeals.³⁰ Section 15A-1239 was enacted in 1978 as part of the Trial Stage and Appellate Procedure Act. This statute, like section 1-180.1, deals with judicial comment on the verdict, and states in language similar to that of its older counterpart that "[t]he trial judge may not comment upon the verdict of a jury in open court in the presence or hearing of any member of the jury panel."³¹ There is certain language in section 1-180.1, however, that, either by design or oversight, was omitted from section 15A-1239. This language is the restrictive provision at the end of section 1-180.1, which states that "[t]he provisions of this section shall not be applicable upon the hearing of motions for a new trial, motions to set aside the verdict of a jury, or a motion made in arrest of judgment."³²

The underlying purpose of these two statutes is the protection of the criminal defendant from potentially prejudicial remarks made by the judge in the presence of prospective jurors. One of the fundamental rights of a criminal defendant is the right to a fair trial—one free from bias or prejudice on the part of the judge or the jurors. An aspect of this right is the assurance that the judge, "the embodiment of even and exact justice,"³³ will say or do nothing that might prejudice the rights of the defendant. This basic principle is stated as follows:

[T]he rule appears to be that the practice of addressing the prospective jurors does not of itself constitute reversible error, although suggestions or statements which are likely to influence the decisions of the jurors when called upon later to sit in a given case may constitute error and should be avoided, as should misstatements of the law or remarks disparaging legitimate defenses that may be made in cases to be tried, as well as references made directly or by innuendo to particular cases which might come before the jurors.³⁴

This principle was expressed by the Supreme Court of North Carolina in *State v. Carriker*:³⁵ "Every suitor is entitled by the law to have his cause considered with the "cold neutrality of the impartial judge" and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged."³⁶

28. 1977 N.C. Sess. Laws 853 (codified at N.C. GEN. STAT. § 15A-1239 (1983)).

29. Bailey, *Trial Stage and Appellate Procedure Act: An Overview*, 14 WAKE FOREST L. REV. 899, 900 (1978).

30. *Id.*

31. N.C. GEN. STAT. § 15A-1239 (1983).

32. *Id.* § 1-180.1.

33. Withers v. Lane, 144 N.C. 184, 191, 56 S.E. 855, 857 (1907).

34. Annot., 89 A.L.R.2d 197, 234 (1963).

35. 287 N.C. 530, 215 S.E.2d 134 (1975).

36. *Id.* at 534, 215 S.E.2d at 138 (quoting Withers v. Lane, 144 N.C. 184, 192, 56 S.E. 855, 857 (1907)).

When analyzing the comments of a judge to determine whether section 1-180.1 has been violated, the courts have focused on "whether or not the language complained of might have so affected the prospective jury panel that it was likely defendant would be deprived of a fair and impartial trial."³⁷ Comments that might have prejudiced a jury are prohibited by section 1-180.1 regardless of the judge's motive in making those comments.³⁸ Recent cases have given some indication of the nature of judicial comments on a verdict that will trigger that statute. Remarks by a judge containing opinions regarding the use of marijuana,³⁹ expressions of contempt for those charged with its use or sale,⁴⁰ and statements regarding the undesirability of drug use⁴¹ made to a jury panel prior to the trial of a defendant in a drug case, have been held to entitle the defendant to a motion for a continuance under section 1-180.1. Remarks or comments such as these need not have been made immediately prior to the trial of a particular defendant for that defendant to invoke the protec-

37. *Id.* at 535, 215 S.E.2d at 138.

38. *See id.*

39. Defendant in *Carriker* was charged with "the willful and felonious distribution of a controlled substance, marijuana, to a minor." *Id.* at 530, 215 S.E.2d at 135. Defendant appealed this guilty verdict, alleging that the trial court had erred in denying a motion for continuance under § 1-180.1. Defendant argued for a continuance because of certain remarks made by the presiding judge before the jury panel—remarks which "prejudiced his right to a fair trial." These remarks were made by the trial judge before passing sentence in *State v. Bell*, the case preceding *Carriker's* case. In *Bell* defendant had entered a plea of guilty to possession of marijuana charges. The remarks that follow were those made by the trial judge and Mr. Lea, *Carriker's* attorney, shortly after judgement was imposed in *Bell*:

Mr. Lea: We make a Motion to continue on the basis of certain remarks made by the Presiding Judge in the sentencing of Roger Paul Bell, these remarks which I think—

The Court: —What remarks? I don't care about your opinion.

Mr. Lea: The first one was that marijuana was a habit-forming drug. The second remark—

The Court: —I didn't say that.

Mr. Lea: That is what I understood you to say.

The Court: I said when they got hooked on marijuana that my experience was that anything went, and I have tried them for robbery; they get desperate for money and anything goes, robbery or anything else.

Mr. Lea: I think that is close to what you said; and further, as the defendant in a previous case left the Courtroom, the Presiding Judge looked at the Jury and stated substantially as follows: That they all get religion when they come into the Courtroom. Is this a fair statement, Your Honor?

The Court: I don't know that I said they all do. I said a lot of them get religion when they come in the Courtroom.

Mr. Lea: Is it necessary for me to give the reasons for this?

The Court: I don't care anything about the reasons. You can take it up if you want to and tell the Court up there why you took it up. All I said in front of the Jury is what you get from the papers everyday, on the radio or on television anytime you want to turn it on, and those people sitting on the Jury are grown men and women. The Motion is DENIED.

Id. at 531-32, 215 S.E.2d at 136.

40. *Id.* at 535, 215 S.E.2d at 138.

41. *See State v. Brown*, 29 N.C. App. 391, 224 S.E.2d 206 (1976). The basis for defendant's motion, as in *Carriker*, was the utterance by the trial judge of comments concerning the undesirability of drug use. These comments were made with all prospective jurors present, immediately prior to defendant's arraignment on charges of "felonious sale and delivery of the controlled substance [LSD]." The court of appeals, following the holding of the supreme court in *Carriker*, held that the trial judge had erred in denying defendant's motion for continuance. *Id.* at 392-94, 224 S.E.2d at 206-08.

tion of section 1-180.1.⁴² In *State v. Brown*⁴³ the North Carolina Court of Appeals, emphasizing the reach of the statute, stated that “[u]nder G.S. § 1-180.1, if a judge comments on a *verdict* in a criminal case, all other defendants whose cases remain for trial during that week are entitled to continuance as a matter of right.”⁴⁴ In this way the statute guards against the possible long-range or cumulative effects of prejudicial remarks upon prospective jurors, and affords a safeguard to all defendants who might be prejudiced by those remarks.

Although these provisions demonstrate the legislature’s resolve to ensure that the criminal defendant be given every opportunity to receive a fair and impartial trial, the remedy for infringement of this right is limited. Section 1-180.1 expressly provides that “[t]he provisions of this section shall not be applicable upon the hearing of motions for a new trial, motions to set aside the verdict of a jury, or a motion made in arrest of judgement.”⁴⁵ The Supreme Court of North Carolina has interpreted this to mean that the exclusive remedy for judicial comment on the verdict is a motion for continuance.⁴⁶

Despite the restrictive language in section 1-180.1—limiting the remedies available to a defendant in the event of judicial comment on the verdict—there is no equivalent language in its more current counterpart, section 15A-1239.⁴⁷ Curiously, section 15A-1239, while omitting the restrictive language of section 1-180.1, adds nothing substantive to the latter statute. The question that inevitably arises from the coexistence of these two otherwise identical statutes, is whether section 15A-1239, by virtue of the absence of restrictive language, might be interpreted to repeal section 1-180.1. A comprehensive list of the statutes repealed and replaced by the Trial Stage and Appellate Procedure Act is enumerated in section 33, chapter 711 of the 1977 Session Laws. Section 1-180.1, however, is not included in that list. *State v. Neal*⁴⁸ represents the court of appeals’ first attempt to address the question whether section 1-180.1 was repealed by implication.

The question presented in this case was, in part, one of legislative intent: Did the legislature intend the two statutes to be read in conjunction with one another, thereby providing that a motion for continuance is the exclusive remedy for judicial comment on the verdict under section 1-180.1? *Neal* answered this question in the affirmative, holding that the two statutes were reconcilable, and that section 1-180.1 had not been repealed by implication.⁴⁹ Indeed, there is authority to support the court’s determination. In *State ex rel Commis-*

42. *See id.* at 394, 224 S.E.2d at 207.

43. 29 N.C. App. 391, 224 S.E.2d 206 (1976).

44. *Id.* at 394, 224 S.E.2d at 207.

45. N.C. GEN. STAT. § 1-180.1 (1983).

46. *Carriker*, 287 N.C. at 535, 215 S.E.2d at 138. The court in *Carriker* stated: “Hence, in order to obtain the benefit of the statute a defendant must, as defendant did in this case, move for a continuance.” *Id.*

47. *See* N.C. GEN. STAT. § 15A-1239 (1983). *See supra* note 7.

48. 60 N.C. App. 350, 299 S.E.2d 654, *disc. rev. denied*, 308 N.C. 389, 302 S.E.2d 256 (1983).

49. *Id.* at 353, 299 S.E.2d at 656.

*sioner of Insurance v. North Carolina Automobile Administrative Rate Office*⁵⁰ the North Carolina Supreme Court stated that "[p]arts of the same statute dealing with the same subject matter must be considered and interpreted as a whole"⁵¹ and "statutes dealing with the same subject matter [should] be reconciled and effect [should be] given to all unless some are irreconcilable with others."⁵² In light of the court's conclusion in *Automobile Administrative Rate Office*, the *Neal* court would have been challenged to find that section 15A-1239, simply by virtue of the absence of certain restrictive language, overruled section 1-180.1 by implication.

Although the court might logically find, as it did, that the statutes are reconcilable, this determination presents unsettling implications. If the statutes are to stand together, then the sole remedy available to the defendant, whose right to a fair trial at the hands of an impartial jury has been impaired by comments of the presiding judge, is a motion for continuance.⁵³ In most situations, such a remedy, which delays the trial until twelve impartial jurors can be found, is adequate.⁵⁴ If the defendant and his attorney are absent from the court at the time such comments are made, and remain oblivious to the fact that potentially prejudicial and damaging comments were made, however, no pre-trial motion for continuance could be made as required.⁵⁵ Such was the situation in *Neal*. Under the court's reading of the statute, Neal was precluded from making "motions for a new trial, motions to set aside the verdict of [the] jury, or a motion made in arrest of judgement."⁵⁶ Under such a reading, the chance presence or absence of a criminal defendant when the judge utters potentially damaging or prejudicial remarks to future or prospective jurors might be determinative of whether that defendant receives a fair and impartial trial.

How, then, might the statutes accommodate a defendant like Neal, who, at some point during trial or soon thereafter, learns of remarks made by the judge that might have had a prejudicial effect? One possible answer, and one that the court in *Neal* rejected, is provided by section 15A-1414(b)(3).⁵⁷ This statute, which "regulates the post-trial correction of errors,"⁵⁸ provides that the defendant may make a motion for a new trial based on any cause other than the causes expressly specified in the statute for which defendant did not receive a fair and impartial trial.⁵⁹ *Neal*, however, rejected defendant's argument that his motion for a new trial be permitted under this statute. The court reasoned that because the ground for defendant's motion for a new trial under

50. 294 N.C. 60, 241 S.E.2d 324 (1978).

51. *Id.* at 66, 241 S.E.2d at 328.

52. *Id.* at 67, 241 S.E.2d at 329.

53. See N.C. GEN. STAT. §§ 1-180.1, 15A-1239 (1983).

54. See *State v. Carriker*, 287 N.C. 530, 215 S.E.2d 134 (1975); *State v. Brown*, 29 N.C. App. 391, 224 S.E.2d 206 (1976).

55. See *Neal*, 60 N.C. App. at 351-52, 299 S.E.2d at 655.

56. N.C. GEN. STAT. § 1-180.1 (1983). See *Neal*, 60 N.C. App. at 353, 299 S.E.2d at 655-56.

57. N.C. GEN. STAT. § 15A-1414(b)(3) (1983).

58. Bailey, *supra* note 29, at 905.

59. See N.C. GEN. STAT. § 15A-1414(b)(3) (1983).

section 15A-1414(b)(3) was comment on the verdict by a judge, and because the statute governing that matter disallows motions for a new trial,⁶⁰ such a motion was unavailable to defendant.⁶¹ Such reasoning restricts the scope of section 15A-1414(b)(3) in two ways. First, it refuses to consider the possibility that section 15A-1414(b)(3) might function in one capacity as a "safety net" for situations that the legislature could not have anticipated, and without which defendant might otherwise be denied a fair trial. Second, such reasoning places too narrow a construction on the "[f]or any other cause" language⁶² of the statute.

Thus, the court in *Neal*, although constrained to deny defendant's motion under section 15A-1239 by the holding in *Automobile Administrative Rate Office*,⁶³ nevertheless might have construed section 15A-1414(b)(3) to cover a situation like that presented. Neal's right to receive a fair trial was jeopardized by the presiding judge's comments on the verdict rendered prior to his case. These comments constituted valid grounds, as a matter of right, for the continuance of his case.⁶⁴ By virtue of his absence from the courtroom at that point, however, he was unaware of the need to make such a motion. The court stated: "Ignorance of a factual basis on which to move for a continuance affords no relief once the trial has begun."⁶⁵ Although this might be so, it must be questioned whether the court was overly hasty in dismissing defendant's motion for a new trial pursuant to section 15A-1414(b)(3), and making a ruling that seems more in keeping with the "letter" than the "spirit" of the law.

As long as both sections 1-180.1 and 15A-1239 remain in effect, the sole remedy for judicial comment will be the motion for continuance provided in section 1-180.1. Although this remedy is usually sufficient to counter the effects of the judge's disparaging or prejudicial remarks, in situations in which the defendant is unaware of the utterance of such remarks, their effect on the jury will go unremedied. For that reason, courts need an alternative means to ensure that the defendant, who is absent from the courtroom when such remarks are made, is afforded the same opportunity to receive a fair and impartial trial as the defendant who happens to hear the judge's comments. Section 15A-1414(b)(3) provides that alternative means. This statute, however, will remain ineffective to remedy judicial comment on the verdict so long as courts interpret section 1-180.1 to preclude any remedies other than a motion for continuance. As there is every indication that the courts will continue to do so, it remains in the hands of the legislature to remedy this situation by repealing section 1-180.1 and its restrictive language. In this way, the right of the crimi-

60. *Id.* § 1-180.1.

61. *Neal*, 60 N.C. App. at 352-53, 299 S.E.2d at 656.

62. N.C. GEN. STAT. § 15A-1414(b)(3) (1983).

63. 294 N.C. 60, 241 S.E.2d 324 (1978).

64. N.C. GEN. STAT. § 1-180.1 (1983).

65. *Neal*, 60 N.C. App. at 353, 299 S.E.2d at 656.

nal defendant to receive a fair and impartial trial, though not ensured, will be secured more completely.

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