

SENTENCING: PRIOR RECORD LEVEL

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1. When does a conviction count for prior record level purposes?

- a. A person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime:
 - i. In the district court and the person has not given notice of appeal and the time for appeal has expired;
 1. For prior record level purposes, the date of a conviction in district court is the date the original district court judgment was entered, not the date the case was remanded from superior court after the withdrawal of an appeal. *State v. Wilkins*, 128 N.C. App. 315 (1998).
 - ii. In the superior court, regardless of whether the conviction is on appeal to the appellate division;
 - iii. In the courts of another jurisdiction, regardless of whether the offense would be a crime in North Carolina. G.S. 15A-1340.11(7).
- b. A prior conviction counts no matter how far back in time it occurred. *State v. Rich*, 130 N.C. App. 113 (1998).
- c. Convictions that occur between sentencing and resentencing may be counted for prior record level purposes. *State v. Pritchard*, 186 N.C. App. 128 (2007).

2. What counts as a conviction for prior record level purposes?

- a. For the purpose of imposing sentence, a person has been “convicted” when he or she has been adjudged guilty or has entered a plea of guilty or no contest. G.S. 15A-1331(b).
 - i. This does not mean formal entry of judgment, but rather the return by the jury of verdict of guilty. *State v. Fuller*, 48 N.C. App. 418 (1980).
 - ii. A no contest plea is a conviction. *State v. Hatcher*, 136 N.C. App. 524 (2000)
 - iii. A guilty plea followed by a prayer for judgment continued is a conviction. *State v. Canellas*, 164 N.C. App. 775 (2004).
- b. Count only the most serious conviction from a single session of court (week of superior court or day of district court). G.S. 15A-1340.14(d).
 - i. It was permissible under G.S. 15A-1340.14(d) to count two separate convictions obtained on the same day in the same county, one in district court and one in superior court. *State v. Fuller*, 179 N.C. App. 61 (2006).
- c. It is improper to count prior record points when sentencing for charges joined for trial.
 - i. For example, it was error when the court sentenced the defendant for several felonies before recessing for lunch, and then assigned prior record points for those felonies when sentencing the defendant for second degree murder after lunch. *State v. West*, 180 N.C. App. 664 (2006).

3. How much does a prior conviction count for?

- a. In determining prior record level, the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is now being sentenced was committed. *State v. Frady*, 175 N.C. App. 393 (2006).

4. What additional prior record level points are possible?

- a. Additional point if all elements of the present offense are included in a prior offense. G.S. 15A-1340.14(b)(6)
 - i. A question of law, proven by the preponderance of the evidence; cannot be stipulated to. *State v. Prush*, 185 N.C. App. 472 (2007).
 - ii. If the defendant is sentenced pursuant to a consolidated judgment, the additional point should only be added if one of the defendant's prior offenses includes all the elements of the most serious offense in the consolidated judgment. *State v. Mack*, 188 N.C. App. 365 (2008).
 1. For example, if the defendant is convicted of possession with intent to sell or deliver cocaine and resisting a public officer and those convictions are consolidated for judgment, the additional sentencing point cannot be added based on a prior conviction for resisting a public officer (the less serious charge). Only the most serious charge in a consolidated judgment may be considered for the purpose of this additional point.
- b. Additional point if the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision, or while the offender was serving a sentence of imprisonment, or while the offender was escaped. G.S. 15A-1340.14(b)(7).
 - i. This is a question of fact that must be proven to the jury beyond a reasonable doubt or admitted to by the defendant.
 - ii. Defendant in juvenile training school was not "imprisoned" under the meaning of this section, and should not have received the additional point. *State v. Tucker*, 154 N.C. App. 653 (2002).

5. Proof of Prior Offenses

- a. Generally, the State has the burden of proof by preponderance of the evidence
- b. Statutory methods of proof under G.S. 15A-1340.14(f):
 - i. Stipulation of the parties
 - ii. An original or copy of the court record of the prior conviction
 1. Can include an electronic version or a facsimile
 2. Unverified computerized printout not under seal was admissible to prove defendant's prior criminal convictions. *State v. Rich*, 130 N.C. App. 113 (1998).
 - iii. A copy of DCI, DMV, or AOC records
 - iv. Any other method found by the court to be reliable
 - v. Evidence presented by either party at trial may be utilized to prove prior convictions.

- vi. A prosecutor's mere unsupported statement is NOT sufficient proof of defendant's prior convictions. *State v. Silas*, 168 N.C. App. 627 (2005).

6. Stipulations to Prior Record Level

a. Generally

- i. A prior record level worksheet, standing alone, is insufficient. But defense counsel need not affirmatively state what the defendant's prior record level is to make a stipulation effective. Silence, under some circumstances, may be deemed assent. *State v. Alexander*, 359 N.C. 824, reversing 167 N.C. App. 79 (2004).
- ii. When a sentencing worksheet is submitted to the trial court by the State, the appellate courts examine the dialogue between the court and defense counsel at the sentencing hearing to determine whether defendant stipulated to the prior convictions shown on the worksheet. *State v. Cromartie*, 177 N.C. App. 73 (2006).
- iii. In 2003, the AOC changed AOC-CR-600 (Prior Record Level Work Sheet) to add the new "STIPULATION" language in Section III. A signed worksheet is now sufficient to establish a defendant's prior record level. *State v. Hussey*, ___ N.C. App. ___, 669 S.E.2d 864 (2008).

b. Statements by defendant or defense counsel—stipulation effective

i. *State v. Cromartie*, 177 N.C. App. 73 (2006):

- 1. Defense counsel said: "I don't have the work sheet in front of me, but it is my recollection that most of Mr. Cromartie's offenses were nonviolent. . . . It is my recollection that he had some drug offenses, and I don't believe there were any serious assaults in his history. And again, Your Honor, I don't have the sheet in front of me, but I don't believe he's been convicted of anything since '97, Your Honor."
- 2. Acknowledgment of the worksheet, specific reference to it, and failure to dispute any convictions on it, supported the conclusion that defendant stipulated to the worksheet. The defendant cannot "have his cake and eat it too" by using the worksheet to seek a lesser sentence and then later disputing the prior offenses.

ii. *State v. Crawford*, 179 N.C. App. 613 (2006):

- 1. During discussion of a plea bargain, defense counsel said "[Defendant] is a Level IV, Judge." This affirmative statement constituted a stipulation.

iii. *State v. Eubanks*, 151 N.C. App. 499 (2002):

- 1. The court of appeals held the following colloquy could reasonably be construed as a stipulation:

THE COURT: "Do you have a prior record level worksheet?"

PROSECUTOR: "Yes, sir, I do."

THE COURT: "All right. Have you seen that, Mr. Prelipp [defense attorney]?"

MR. PRELIPP: "I have, sir."

THE COURT: “Any objections to that?”

MR. PRELIPP: “No, sir.”

- iv. *State v. Alexander*, 359 N.C. 824 (2004):
 - 1. Defense counsel said: “[U]p until this particular case he had no felony convictions, as you can see from his worksheet.”
 - 2. The Supreme Court determined that “[t]his statement indicates not only that defense counsel was cognizant of the contents of the worksheet, but also that he had no objections to it.”
- v. *State v. Bethea*, 173 N.C. App. 43 (2005):
 - 1. The court of appeals held the following colloquy was a stipulation, because “defense counsel certainly failed to make clear that he was not stipulating to the State’s prior record worksheet and presented no contrary information to the court at the time the stipulation was being discussed”:
 - STATE: “The only evidence I have on sentencing is the prior record work sheet that I prepared. I believe counsel has seen this. I show him with 11 prior record points, placing him in Record Level IV. . . . Do you stipulate he has 11 points, Record Level IV?”
 - DEFENSE: “I stipulate that the document is the same as what I looked at and researched; yes.”
- c. Statements by defendant or defense counsel—stipulation ineffective
 - i. *State v. Jeffery*, 167 N.C. App. 575 (2004):
 - 1. Defendant’s general assent to a plea agreement, in which he agreed to sex consecutive sentences of 20–24 months in prison, was of insufficient specificity to rise to the level of a stipulation.
 - ii. *State v. McIlwaine*, 169 N.C. App. 397 (2005):
 - 1. The following colloquy was not sufficient to support a stipulation:
 - PROSECUTOR: “Your Honor, [defense counsel] and I —actually the last time [defendant] was going to possibly plead, so we did discuss what the sentence would be, the level, if he was convicted of Habitual Felon Status. We found that, and I’ll hand up the [worksheet].”
 - THE COURT: “Um-hmm.”
 - DEFENSE COUNSEL: “And Your Honor, the only thing I would say on behalf of [defendant], is that I would ask you to sentence him to the low end of the presumptive. That’s still a lot of time on this charge.”
 - 2. The court of appeals determined that “[e]ven though the defendant did not disagree with statements made by the prosecutor or the trial court as to his prior convictions, defendant did not clearly stipulate to his prior convictions”
- d. Defendant’s failure to object deemed a stipulation
 - i. *State v. Wade*, 181 N.C. App. 295 (2007):

1. Based on the following colloquy, the court of appeals determined that defendant “had an opportunity to object and instead of doing so, began describing mitigating factors to the court instead”:

THE COURT: “So the State contends his prior record level will be II?”

PROSECUTOR: “That’s correct, Your Honor.”

THE COURT: “All right. Mr. Donadio [defense counsel], I’ll hear from you on sentencing, sir.”

MR. DONADIO: “Your Honor, Courtney is here this week supported by various members of his extended family. He has no prior conviction approaching this type of incident. He is a young man. . . .”

- ii. *State v. Hurley*, 180 N.C. App. 680 (2006):

1. The court of appeals determined that based on the following exchange, the defendant had an opportunity to object to the State’s characterization of his record, but instead simply asked for work release:

PROSECUTOR: “Judge, as you can see from his record, it’s enough to make you cringe how many convictions he has. . . . A Level Five as a Class D. . . .”

THE COURT: “[Defense Counsel], I’ll hear from you.”

[DEFENSE COUNSEL]: “Your Honor, I request whatever sentence the Court gives him he be granted work release.”

THE COURT: “Okay. Mr. Hurley [defendant], anything you want to say, sir?”

DEFENDANT: “No, Sir.”

- iii. *State v. Mullinax*, 180 N.C. App. 439 (2006):

1. The defendant’s failure object in the following colloquy was deemed a stipulation:

THE COURT: “I’ve reviewed the work sheet which indicates that he is a Level 2. So just going from that, the possible maximum punishment—and you can check me on this, Counsel—would be 294 months on the Level 2. Does that sound right?”

PROSECUTOR: “Yes, sir.”

DEFENSE COUNSEL: “Yes, Your Honor.”

- e. Substantial similarity to crimes from other jurisdictions

- i. By default, felonies from other jurisdictions count as Class I felonies; misdemeanors from other jurisdictions count as Class 3 misdemeanors (and thus do not count at all for felony sentencing purposes). G.S. 15A-1340.14(e). If the State proves by the preponderance of the evidence that the crime is “substantially similar” to a North Carolina crime with a higher classification, it will be treated as that class of crime for prior record level calculation purposes. Conversely, if the defendant can prove by the preponderance of the evidence that an out-of-state felony is substantially similar to a misdemeanor in North Carolina, it will be treated as that class of misdemeanor for prior record level calculation purposes.

- ii. Substantial similarity is a question of law that cannot be stipulated to. *State v. Palmateer*, 179 N.C. App. 579 (2006).
- iii. When the state classifies out-of-state felony convictions as Class I felonies (the default classification), it is not required to prove that the convictions are substantially similar to corresponding North Carolina felonies. Thus, a defendant can stipulate to the existence an out-of-state felony treated as Class I. *State v. Hinton*, __N.C. App. __, 2009 WL 1181496 (May 5, 2009).
 - 1. Though the court didn't say so, this rule probably only applies when the out-of-state felony is clearly delineated as a felony in that state.
 - 2. If any legal determination is required (for example, an analysis of whether the crime would be a felony at common law), a stipulation would probably be ineffective under *Palmateer*.
- iv. When the out-of-state offense has elements that are similar to multiple North Carolina offenses, the rule of lenity requires an interpretation in the defendant's favor. *State v. Hanton*, 175 N.C. App. 250 (2006).
- v. An FBI print-out is sufficient to prove the existence of an out-of-state conviction, but it alone cannot satisfy the state's burden of showing that those convictions are substantially similar to a North Carolina offense. *State v. Cao*, 175 N.C. App. 434 (2006).

7. Habitual Felon and Related Issues

a. Habitual felon

- i. Previous convictions alleged in support of a habitual felon charge may not be used in determining the defendant's prior record level. G.S. 14-7.6. This is so even if the state alleges more than three previous felonies in the habitual felon indictment (even though three would have been sufficient). *State v. Lee*, 150 N.C. App. 701 (2003).
- ii. The State may elect which felonies to allege in support of a habitual felon indictment, and is free to allege the least serious felonies in the indictment, leaving the most serious felonies available for prior record level purposes. *State v. Cates*, 154 N.C. App. 737 (2002).
- iii. When a previous felony conviction listed in a habitual felon indictment was consolidated with another conviction, the other conviction may be used to determine the defendant's prior record level. *State v. Truesdale*, 123 N.C. App. 639 (1996). Thus, when two convictions are obtained in a single week of superior court, one may be used in a habitual felon indictment, and the other may be used for prior record level purposes.
- iv. When a defendant who has been convicted as a habitual felon is released from prison and is later convicted of a new offense, the defendant is not treated as having a previous Class C conviction for the purpose of determining his prior record level. Rather, his prior record level is determined using the classification of the substantive felony on which the habitual felon conviction was based. *State v. Vaughn*, 130 N.C. App. 456 (1998).

- b. Habitual DWI:
 - i. When sentencing for habitual DWI, the prior misdemeanor DWIs used to habitualize the offender cannot also be used to elevate the prior record level for the purpose of sentencing the habitual DWI. *State v. Gentry*, 135 N.C. App. 107 (1999).
 - ii. By contrast, both misdemeanor DWI convictions and habitual impaired driving convictions may be used to elevate prior record level when sentencing for a subsequent non-DWI offense. Unlike habitual felon, which is a status, habitual DWI is itself a felony offense. *State v. Hyden*, 175 N.C. App. 576 (2006).
 - 1. For example, when a defendant was convicted of involuntary manslaughter, it was not improper to count three prior misdemeanor convictions for DWI and two felony habitual DWI convictions for prior record level purposes (even when the three misdemeanor DWI convictions were predicates to the habitual DWI convictions).
- c. Related situations
 - i. Failure to register as a sex offender
 - 1. It was permissible to use a conviction for rape to elevate the defendant's prior record level in a subsequent conviction for failure to register as a sex offender, even when the rape was the offense that triggered the reporting requirement. *State v. Harrison*, 165 N.C. App. 332 (2004).
 - ii. Possession of firearm by a felon—use of underlying felony to elevate prior record level
 - 1. It is permissible to assign prior record points to a prior offense of possession of a firearm by a felon as well as to the earlier felony that resulted in defendant's felon status. Possession of a firearm by a felon is a separate substantive offense from the prior felony. *State v. Goodwin*, ___ N.C. App. ___, 661 S.E.2d 46 (2008).