ADVANCED ISSUES IN SENTENCING

Sentencing Law for Superior Court Judges

September 7, 2012

COMMON ERRORS

Common Error #1: Wrong sentencing grid

A defendant must be sentenced under the law that existed at the time his or her offense occurred. There are five possible sentencing grids for felony sentencing under Structured Sentencing.

- Offenses committed on or after October 1, 1994;
- Offenses committed on or after December 1, 1995;
- Offenses committed on or after December 1, 2009;
- Offenses committed on or after December 1, 2011;
- Reportable Class B1–E sex crimes committed on or after December 1, 2011 (table of maximums only).

Common Error #2: Improper stipulation to "substantial similarity" of an out-of-state conviction

By default, a prior conviction for a crime that another jurisdiction classifies as a felony counts as a Class I felony for record-level purposes in North Carolina. Convictions for crimes that another state classifies as misdemeanors count as Class 3 misdemeanors here—and so do not factor into a defendant's prior record level. G.S. 15A-1340.14(e).

If the defendant can prove by a preponderance of the evidence that an offense classified as a felony in another jurisdiction is *substantially similar* to an offense that is a misdemeanor in North Carolina, the conviction will be treated as that class of misdemeanor for prior record level purposes. Conversely, if the State proves by a preponderance of the evidence than an offense classified as either a misdemeanor or a felony in another jurisdiction is substantially similar to a particular felony in North Carolina, or that a misdemeanor offense from another jurisdiction is substantially similar to a Class A1 or Class 1 misdemeanor here, then the out-of-state crime is treated as the class of its North Carolina counterpart for prior record level purposes. G.S. 15A-1340.14(e).

A defendant may validly stipulate to the bare fact that an out-of-state conviction exists, and may also stipulate that the crime is a felony or misdemeanor in the other state. State v. Hinton, 196 N.C. App. 750 (2009). Those stipulations alone are a sufficient basis for the State to treat an out-of-state felony at the default Class I level for prior record purposes. *Id.*; State v. Bohler, 198 N.C. App. 631 (2009).

A defendant may not, however, validly stipulate that an out-of-state felony is substantially similar to a more serious offense in North Carolina. Substantial similarity is a question of law that must be determined by the trial court, not by the jury and not by stipulation. State v. Hanton, 175 N.C. App. 250 (2006); State v. Palmateer, 179 N.C. App. 579 (2006).

The General Statutes do not prescribe a particular method for determining whether out-of-state crimes are substantially similar to crimes in North Carolina. The cases, however, have made clear that **the trial court must compare the elements of the out-of-state offense with the elements of the purportedly similar North Carolina crime.** *See* State v. Rich, 130 N.C. App. 113 (1998) (holding that photocopies of statutes from New York and New Jersey were sufficient proof that the defendant's crimes in those states were substantially similar to crimes in North Carolina); State v. Hadden, 175 N.C. App. 492 (2006) (photocopies of statutes from New York and Illinois, along with testimony by a detective, sufficient to prove substantial similarity). *Cf.* State v. Cao, 175 N.C. App. 434 (2006) (computerized printout of defendant's criminal history record from Texas, showing only the names of offenses committed there, sufficient to prove existence of the convictions but insufficient evidence of substantial similarity to North Carolina crimes).

In State v. Rollins, __ N.C. App. __ (July 17, 2012), the court of appeals held that Florida's burglary law was not sufficiently similar to North Carolina's when the Florida crime does not require that the offense occur at night and does not require that there be a breaking as well as an entry. At most, the court held, the Florida offense was substantially similar to Class H felonious breaking or entering, and should count for prior record points accordingly.

More generally, if an out-of-state crime has elements that are substantially similar to multiple North Carolina offenses, and the prosecutor relies only on the statutory definitions in proving substantial similarity, the rule of lenity requires that the court assign record points corresponding to the less serious North Carolina offense. *Hanton*, 175 N.C. App. at 259.

With an appropriate determination of substantial similarity, an out-of-state conviction for impaired driving may count for a prior record point under G.S. 15A-1340.14(e). In State v. Armstrong, __ N.C. App. __, 691 S.E.2d 433 (2010), the defendant argued that DWI offenses from Alabama were not substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina because DWI is an unclassified misdemeanor here. The court of appeals disagreed, holding that DWI is considered a Class 1 misdemeanor under G.S. 14-3, and is thus covered by G.S. 15A-1340.14(e).

The latest version of the Prior Record Level Worksheet includes a check-box for the court to record its determination of substantial similarity.

Common Error #3: Judge mistakenly believes consecutive sentences are required

Various sentencing statutes require that sentences imposed under a certain law "shall run consecutively to any sentence being served." That language appears in the following statutes:

- Habitual felon. G.S. 14-7.6
- Violent habitual felon. G.S. 14-7.12
- Habitual breaking and entering. G.S. 14-7.31
- Habitual impaired driving. G.S. 20-138.5(b)
- Drug trafficking. G.S. 90-96(h)

The appellate courts have consistently interpreted that language to allow for concurrent or consolidated sentences when the conviction subject to the consecutive sentence rule is sentenced at the same time as another conviction. State v. Haymond, 203 N.C. App. 151 (2010) (speaking approvingly of consolidation of habitualized sentences); State v. Bozeman, 115 N.C. App. 658 (1994) (drug trafficking). The courts' rationale is that when the convictions are sentenced at the same time, neither is "being served" yet.

Common Error #4: Excessive sentence for consecutive misdemeanors

Under G.S. 15A-1340.22(a), when a trial court imposes consecutive sentences for misdemeanors the cumulative length of the sentence of imprisonment may not exceed twice the maximum sentence authorized for the class and prior conviction level of the most serious offense. If all the convictions are for Class 3 misdemeanors, the court may not impose consecutive sentences. State v. Remley, 201 N.C. App. 146 (2009). The rule applies regardless of whether the terms of imprisonment are active or suspended, State v. Wheeler, 202 N.C. App. 61 (2010), and regardless of whether the sentences are entered in district or superior court.

Common Error #5: Insufficient evidence of restitution amount

A prosecutor's statement, standing alone, is insufficient to support an award of restitution. State v. Wilson, 340 N.C. 720 (1995). Likewise, a restitution worksheet, unsupported by testimony or documentation, is insufficient to support a restitution amount. State v. Mauer, 202 N.C. App. 546 (2010). There must either be a stipulation to the amount or evidence adduced at trial or at the sentencing hearing to support the restitution amount. State v. Dallas, 205 N.C. App. 216 (2010). The

burden of demonstrating the amount of the loss sustained by a victim as a result of the offense is on the State. The standard of proof is a preponderance of the evidence. State v. Tate, 187 N.C. App. 593 (2007). There is a check-box on the transcript of plea form (AOC-CR-300), where the court may note that as part of a plea arrangement the defendant stipulates to restitution in the amount set out on the restitution worksheet.

REVIEW OF SENTENCING LAWS THAT MAKE SENTENCES HARSHER

Aggravating Factors

1. Notice
    a. The State must provide the defendant written notice of its intent to prove aggravating factors at least 30 days before trial or the entry of a guilty or no contest plea. The notice must list all the factors the State seeks to establish. A defendant may waive that right to notice. G.S. 15A-1340.16(a6). The State should use form AOC-CR-614 to give notice.
    b. Statutory aggravating factors need not be pled in the charging document. Non-statutory (ad hoc) aggravating factors must be pled. G.S. 15A-1340.16(a4).
2. Proof of aggravating factors
    a. The State must prove an aggravating factor to the jury beyond a reasonable doubt, or the defendant must admit to the aggravating factor. G.S. 15A-1340.16(a).
    b. Admissions of the existence of an aggravating factor must be consistent with the provisions of G.S. 15A-1022.1. (Among other things, the court must address the defendant personally and advise him or her that of the right to a jury trial on the aggravating factor and the right to prove mitigating factors to the sentencing judge.)
    c. The jury impaneled for the trial of the felony may, in the same trial, also determine if one or more aggravating factors is present, unless the court determines that the interests of justice require that a separate sentencing proceeding be used to make that determination.
3. Weighing of aggravating factors
    a. If aggravating factors are present and the court determines they are sufficient to outweigh any mitigating factors that are present, it may impose a sentence that is permitted by the aggravated range.
    b. The weighing of aggravating and mitigating factors is a matter of discretion for the judge. State v. Vaughters, __ N.C. App. __, 725 S.E.2d 17 (trial court did not err when it found that 1 aggravating factor outweighed 19 mitigating factors).
4. Additional rules for aggravating factors
    a. Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation. The trial judge must instruct the jury on this point. State v. Barrow, __ N.C. App. __, 718 S.E.2d 673 (2011).
    b. The same item of evidence shall not be used to prove more than one factor in aggravation.
    c. Evidence necessary to establish that an enhanced sentence is required under G.S. 15A-1340.16A may not be used to prove any factor in aggravation.
    d. The judge shall not consider as an aggravating factor the fact that the defendant exercised the right to a jury trial. G.S. 15A-1340.16(d).

Revised Habitual Felon Law

1. For substantive felonies occurring on or after December 1, 2011, the habitual felon law is a four-class enhancement, capped at Class C.
    a. Class I felonies are sentenced as Class E
    b. Class H felonies are sentenced as Class D
    c. All other felonies are sentenced as Class C
2. The previous felonies alleged in support of the habitual felon charge may not be used in determining the defendant's prior record level under Structured Sentencing. G.S. 14-7.6.
    a. The State may elect which of a defendant's prior felonies to use for the habitual felon charge, leaving the most serious felonies available for prior record level purposes. State v. Cates, 154 N.C. App. 737, 739-40 (2002).
    b. 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, 642 (1996)

New Habitual Breaking and Entering Status Offense (G.S. 14-7.25 through -7.31)

1. A defendant charged with felony "breaking and entering" who has one or more prior felony breaking and entering convictions can, in the prosecutor's discretion, be charged as a habitual breaking and entering status offender.
2. If convicted, the second or subsequent felony breaking and entering crime is sentenced as a Class E felony.
3. Felony breaking and entering is defined to include the following crimes:
    a. First- and second-degree burglary (G.S. 14-51);
    b. Breaking out of a dwelling house burglary (G.S. 14-53);
    c. Breaking or entering buildings generally, felony (G.S. 14-54(a));
    d. Breaking or entering a place of religious worship (G.S. 14-54.1);
    e. Any repealed or superseded offense substantially similar to the offenses above;
    f. Any offense from another jurisdiction substantially similar to the offenses above.
4. A second B/E offense only qualifies if committed after conviction of the first offense.
5. The principal offense must occur after the defendant turns 18.
6. Habitual B/E sentences must run consecutively to any sentence being served.
7. The law applies to substantive offenses occurring on or after December 1, 2011.

REVIEW OF SENTENCING LAWS THAT MAKES SENTENCES LESS HARSH

Extraordinary Mitigation

1. Through extraordinary mitigation, a court may impose intermediate punishment for a defendant whose offense class and prior record level would otherwise require an active sentence. G.S. 15A-1340.13(g). The law thus allows for a probationary judgment in an "A" cell

on the sentencing grid. It does not allow for any departure from the range of permissible minimum sentences set out in the sentencing grid. State v. Messer, 142 N.C. App. 515 (2001).

2. The court may suspend a sentence through extraordinary mitigation if it finds in writing that:
    a. Extraordinary mitigating factors of a kind significantly greater than in the normal case are present;
    b. Those factors substantially outweigh any factors in aggravation; and
    c. It would be a manifest injustice to impose an active punishment in the case.
3. Extraordinary mitigation may not be used if the defendant is being sentenced for a Class A or Class B1 felony; drug trafficking or a drug trafficking conspiracy offense; or of the defendant has five or more prior record points. G.S. 15A-1340.13(h).
4. An extraordinary mitigating factor must be of a "kind significantly greater than in the normal case." State v. Melvin, 188 N.C. App. 827 (2008). There must be facts over and above the facts required to support a normal statutory mitigation factor. State v. Riley, 202 N.C. App. 299 (2010) (trial court erred by finding extraordinary mitigation based on two normal mitigating factors without additional facts).
5. Form AOC-CR-606 guides the court through the requisite findings in support of extraordinary mitigation.

Substantial assistance

1. Substantial assistance applies only in drug trafficking cases sentenced under G.S. 90-95(h).
2. The judge sentencing a defendant for drug trafficking may reduce the fine, impose a prison term less than the applicable minimum, or suspend the prison term and place the defendant on probation when the defendant has provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals, if the sentencing judge enters in the record a finding that the defendant has rendered such substantial assistance.
3. The decision of whether or not the defendant has provided substantial assistance is within the discretion of the trial court, State v. Hamad, 92 N.C. App. 282 (1988), and even when the court finds substantial assistance, the decision to reduce the defendant's sentence is also in the court's discretion, State v. Wells, 104 N.C. App. 274 (1991). The felony sentencing judgment forms include a box for the court to note its finding of substantial assistance.
4. When substantial assistance applies, the court may select a minimum sentence of its choosing; it is not bound by the regular sentencing grid. State v. Saunders, 131 N.C. App. 551 (1998). Generally, the court should use the corresponding maximum sentence that is 120% of the minimum imposed, plus the appropriate amount of time for post-release supervision.

Advanced Supervised Release (ASR)

1. Through ASR, certain inmates may be released from prison early if they complete risk reduction incentive programs in prison. G.S. 15A-1340.18.
2. When imposing an active sentence for an eligible defendant, the court may, in its discretion and without objection from the prosecutor, order the Division of Adult Correction to admit the defendant into the ASR program. Only defendants ordered by the court may be admitted.
3. If the court orders a defendant into the program it must impose both a regular sentence (pursuant to the ordinary felony sentencing grid) and an ASR date. If the defendant completes

certain programs in prison (or is unable to complete them through no fault of his own) then he will be released on the ASR date. If the defendant is terminated from the ASR program, the ASR date is nullified and the defendant's release date is determined based on the regular minimum and maximum term imposed by the court.

4. The date on which a person may be released early—the ASR date—is calculated differently depending on whether that regular sentence is (a) from the presumptive or aggravated range or (b) from the mitigated range.
    a. If the defendant's regular sentence is from the presumptive or aggravated range, no calculation is necessary: the ASR date is simply the shortest mitigated minimum sentence that the defendant could have received based on his or her conviction offense and prior record level.
    b. If the defendant's regular sentence is from the mitigated range, the ASR date is 80 percent of the minimum sentence imposed. Because the law does not include a rounding provision, the court should probably indicate fractional months in the "ASR date" block on the judgment form when necessary.
5. Defendants must be convicted and sentenced based upon the following felony classes and prior record levels to be eligible:
    a. Class D, Prior Record Level I-III
    b. Class E, Prior Record Level I-IV
    c. Class F, Prior Record Level I-V
    d. Class G, Prior Record Level I-VI
    e. Class H, Prior Record Level I-VI
6. The law appears to limit ASR eligibility to defendants for whom the court imposes an active sentence at the outset; defendants sentenced to probation but later revoked apparently are not eligible to be ordered into the program by the revoking judge.
7. ASR is effective for defendants who enter a plea or are found guilty on or after January 1, 2012, regardless of their offense date.
    a. It is unclear how ASR works for Class F, G, and H felons convicted after January 1, 2012 based on offenses that occurred prior to December 1, 2011. Those defendants do not receive post-release supervision, and therefore have no *supervised release* to be released to in *advance*
    b. The prison system and the Post-Release Supervision and Parole Commission have determined that those defendants will, upon successful completion of their risk reduction incentives, simply be released outright on their ASR date, with no supervision in the community.