

Sentencing Under G.S. 20-179

Presented by:

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G.S. 20-179: Covered Offenses



- G.S. 20-138.1 (impaired driving)
- G.S. 20-138.2 (impaired driving in a commercial vehicle)
- 2nd or subsequent conviction of G.S. 20-138.2A (operating commercial vehicle after consuming)
- 2nd or subsequent conviction of G.S. 20-138.2B (operating school bus or child care vehicle after consuming)

The more things change . . .

- "Except for death penalty cases, no sentence requires more documentation."
- Loeb & Drennan (2000)

... the more they stay the same.

- "A distinguishing characteristic of the impaired driving statutes is the extent to which they limit prosecutorial and judicial discretion. Nowhere is that limitation more evident than in the restrictions on sentencing."



Significant amendments

2006



Aggravators must be proved beyond a reasonable doubt

Sentences vacated upon appeal



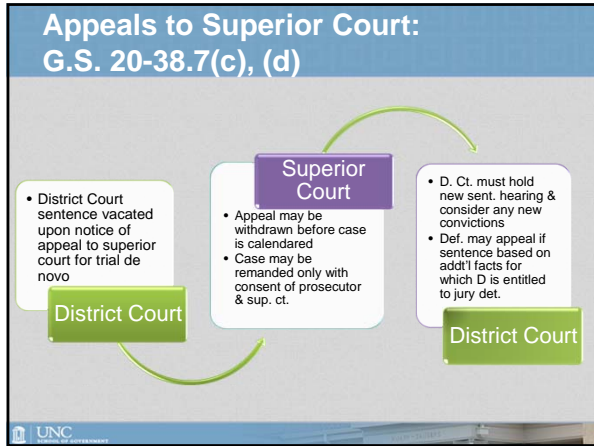
Significant amendments

2007



Count convictions for withdrawn/ remanded appeals









Significant amendments

A timeline showing significant amendments from 2006 to 2012. Each year is represented by a purple circle with text below it, and a series of colored circles (blue, orange, yellow) below each year.

- 2006**: Expanded a responsibility to include mental health services
- 2007**: Convictions for marijuana offenses
- 2011**: New Level A1, Super GAF
- 2012**: Level 1, 10 days + 10 days CMI, Level 2, 10 days + 10 days CMI, Level 3, 10 days + 10 days CMI

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Sentencing under G.S. 20-179

- Separate scheme from structured sentencing
- No indefinite PJs
- Mandatory minimums
- Good time credit
- Parole
- Substance abuse assessment and education or treatment required as condition of probation

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Why?

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Purposes of sentencing

- To impose a punishment commensurate with the injury the offense has caused
 - taking into account factors that may diminish or increase the offender's culpability
- To protect the public by restraining offenders
- To assist the offender toward rehabilitation and restoration to the community as a lawful citizen
- To provide a general deterrent to criminal behavior.

§ 15A-1340.12



Which of the following best expresses your view of sentencing under G.S. 20-179?

1. I often wish I had more discretion.
2. Generally, I'm satisfied with the amount of discretion I have. But there are certain cases in which I would like to have more.
3. G.S. 20-179 gives me all the discretion I desire.
4. I wish I had less discretion.

Which of the following best expresses your view of sentencing under G.S. 20-179?

1. Having special sentencing rules for misdemeanor DWI is a good system.
2. DWI should be sentenced like a structured sentencing misdemeanor.
3. DWIs sentenced at Level A1, One, and Two ought to be reclassified as felonies.
4. None of the above.


Level	Factors	Minimum Sentence	Maximum Sentence	If Suspended, Special Probation Requiring:	Maximum Fine
1	2+ GAFs	30 days	24 months	Imprisonment of at least 30 days	\$4,000
2	1 GAF	7 days	12 months	Imprisonment of at least 7 days	\$2,000
3	Aggravating > Mitigating	72 hours	6 months	Imprisonment of at least 72 hours -- And/or at least 72 hours community service	\$1,000
4	Aggravating = Mitigating	48 hours	120 days	48 hours imprisonment - And/or 48 hours community service	\$500
5	Mitigating > Aggravating	24 hours	60 days	24 hours Imprisonment- And/or 24 hours community service	\$200

Level	Factors	Minimum Sentence	Max Sentence	If Suspended, Special Probation Requiring:	Max Fine
A1	3 GAFs	12 months	36 months	Imprisonment of at least 120 days + 120 days CAM	\$10,000
1	2 GAFs or 1 minor/ disabled GAF	30 days	24 months	Imprisonment of at least 30 days	\$4,000
2	1 GAF	7 days	12 months	Imprison. of at least 7 days	\$2,000
3	Agg. > Mitig.	72 hours	6 months	Imprison. of at least 72 hrs And/or at least 72 hrs CS	\$1,000
4	Agg= Mitig.	48 hours	120 days	48 hrs imprisonment And/or 48 hrs CS	\$500
5	Mitig. > Agg.	24 hours	60 days	24 hrs imprisonment And/or 24 hrs CS	\$200

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1	2 GAFs or 1 minor/ disabled GAF	30 days	24 months	Imprisonment of at least 30 days, or imprisonment of at least 10 days + at least 120 days CAM	\$4,000
2	1 GAF	7 days	12 months	Imprison. of at least 7 days, or at least 90 consec. days CAM	\$2,000
3	Agg. > Mitig.	72 hours	6 months	Imprison. of at least 72 hrs And/or at least 72 hrs CS	\$1,000
4	Agg= Mitig.	48 hours	120 days	48 hrs imprisonment And/or 48 hrs CS	\$500
5	Mitig. > Agg.	24 hours	60 days	24 hrs imprisonment And/or 24 hrs CS	\$200


Grossly Aggravating Factors (Offenses before 12/1/2011)

1. Qualifying prior conviction for an offense involving impaired driving.
2. DWLR and revocation was an impaired driving revocation
3. Serious injury to another person
4. Child under 16 in vehicle




Grossly Aggravating Factors (Offenses committed 12/1/2011 or later)

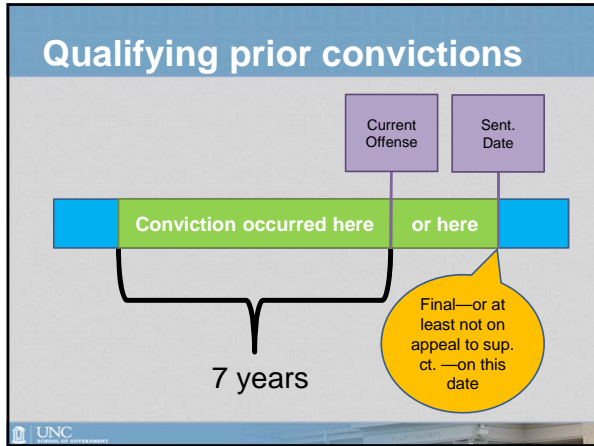
1. Qualifying prior convictions for an offense involving impaired driving.
2. DWLR and revocation was an impaired driving revocation
3. Serious injury to another person
4. Driving with any of the following in the vehicle
 - a. Child under 18, or
 - b. Person with mental development of child under 18, or
 - c. Person with disability barring unaided exit from vehicle



1. Qualifying prior convictions

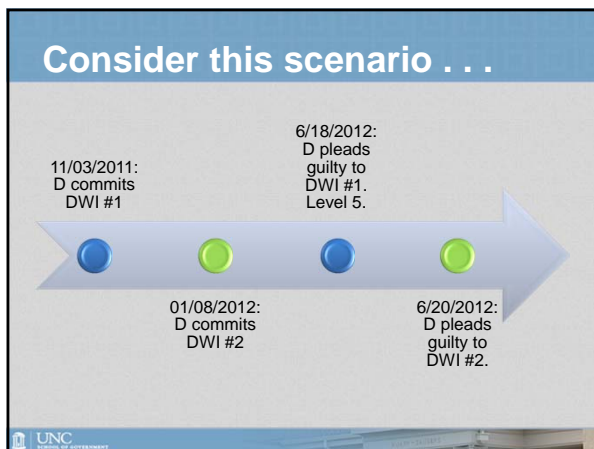
- Offense involving impaired driving:
 - Impaired driving under G.S. 20-138.1
 - Habitual impaired driving under G.S. 20-138.5
 - Impaired driving in a commercial vehicle under G.S. 20-138.2
 - Any offense under G.S. 20-141.4 based on impaired driving
 - First or second-degree murder under G.S. 14-17 based on impaired driving
 - Involuntary manslaughter Under G.S. 14-18 based on impaired driving
 - Substantially similar offenses committed in another state or jurisdiction





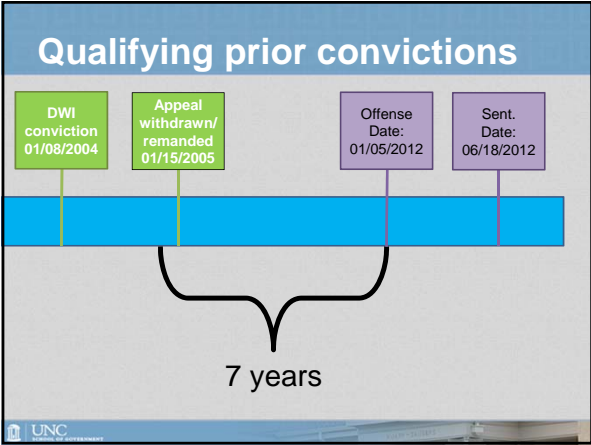
What counts as a conviction?

- Conviction means “final conviction of a criminal offense, including a no contest plea.” G.S. 20-4.01(4a)
- When is a district court conviction final?
 - NOT final when subject of pending appeal to superior court for trial de novo



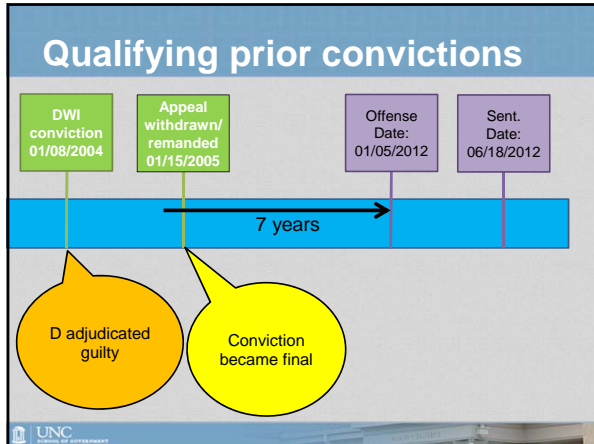
Is the conviction in Case 1 a GAF in Case 2?

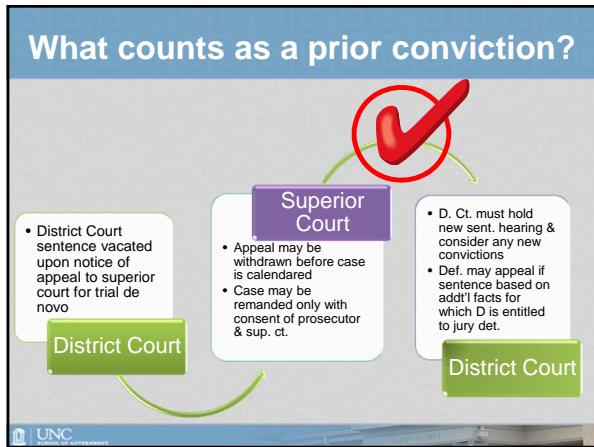
1. Yes
2. No



Is the conviction in Case 1 a GAF in Case 2?

1. Yes
2. No





Qualifying prior convictions

Each qualifying prior conviction is a separate grossly aggravating factor.

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2. DWLR and impaired driving revocation

- G.S. 20-28
- Impaired driving revocation



Is this an impaired driving revocation?

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10-25-10 INDEF SUSP: 1 OFFENSE OF DRIVING WHILE IMPAIRED
6-25-10 10-25-10 CONV: *(625) DRIVING WHILE IMPAIRED
COURT: CLEVELAND COUNTY COURT
COURT: AOC #: 10CR 12345
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3. Serious injury to another person

- Relevant factors
 - Pain and suffering
 - Loss of blood
 - Hospitalization
 - Time lost from work



Consider this scenario . . .

Drew Davidson, 17, and his girlfriend, Madeleine Grady, 17, attended a party on January 9, 2012 at a friend's house. They drank rum at the party and left around 1 a.m. in Davidson's car. On the way to Grady's house, while driving in heavy rain, Davidson, who was driving 55 mph in a 45 mph zone, lost control of the car. He skidded off the roadway and collided with a tree. Several bones in Grady's right wrist and hand were fractured in the collision. She has undergone surgery to repair the damage and has missed 5 days of school as a result. Davidson was not injured in the crash. He submitted to a breath test, which revealed an alcohol concentration of 0.08.



Does the GAF for serious injury to another person apply on these facts?

- 1. Yes
- 2. No

4. Driving with child/disabled person in vehicle



**If three children are in the car,
how many GAFs exist?**

- 1. One
- 2. Three

4. Driving with child/disabled person in vehicle



**Person with the
mental
development of
a child under 18.**

LINC

STATE OF NORTH CAROLINA
County _____ In The General Court of Justice
 District Superior Court Division

Name of defendant: STATE VERSUS

**IMPAIRED DRIVING
DETERMINATION OF SENTENCING FACTORS**
(For Offenses Committed On Or After Dec. 1, 2011)
G.S. 20-179

District Court: Based upon the evidence presented at the trial and sentencing hearing in District Court, the Court determines that (1) the State has proved the grossly aggravating factors and aggravating factors marked below beyond a reasonable doubt and (2) the defendant has proved the mitigating factors marked below by a preponderance of the evidence.

Superior Court: Based upon the evidence presented at the trial and sentencing hearing in Superior Court, (1) the jury has determined that the State has proved the grossly aggravating factors and aggravating factors marked below beyond a reasonable doubt, or the defendant has established by a preponderance of the evidence the mitigating factors marked below; (2) the Court determines that the defendant has proved the mitigating factors marked below by a preponderance of the evidence; (3) the Court determines that the State has proved that grossly aggravating factor beyond a reasonable doubt. For purposes of this section, the Court determines that the State has proved that aggravating factor beyond a reasonable doubt.

(GROSSLY AGGRAVATING FACTORS - G.S. 20-179(c))

- i. drove, at the time of the current offense, while a child under the age of 18 years was in the vehicle.
- j. drove, at the time of the current offense, while a person with the mental development of a child under the age of 18 years was in the vehicle.
- k. drove, at the time of the current offense, while a person with a physical disability preventing unaided exit from the vehicle was in the vehicle.

No. 11, 12, or 13 applies to this defendant.

3. There are no grossly aggravating factors.

If two children and one disabled person are in the car, how many GAFs exist?

1. One
2. Two
3. Three

Duties of the prosecutor

- Obtain full record of traffic convictions and present to judge
- Present all other GAFs and AFs of which he or she is aware



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Let's consider Les


- Drove while impaired on November 15, 2011
- Refused breath test
- Previously convicted of DWI on June 2, 2008
- License suspension for 2008 DWI conviction is listed as *indefinite* on DMV record.



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Grossly Aggravating Factors

1. Qualifying prior convictions for an offense involving impaired driving.
2. DWLR if revocation was an impaired driving revocation
3. Serious injury
4. Child under 16 in vehicle





Level One sentencing options

- Minimum sentence: 30 days
- Maximum sentence: 24 months
- Probation:
 - Imprisonment of at least 30 days (Split can be up to ¼ statutory maximum—in this case, 6 months)
 - CAM: 30 to 60 days
- Maximum Fine: \$4,000



Active sentence

- Minimum: 12 months, Maximum: 24 months
- Fine of \$4,000
- How much time will Les serve?



Good Time Credit: G.S. 148-13

- Sentence: Minimum 12 months, Maximum 24 months
- Day for day credit (assuming no infractions) reduces maximum to 12 months
- Credit may not reduce sentence below mandatory minimum – for Level One, 30 days



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Parole Eligibility: G.S. 15A-1371

- Min. 12 months, Max. 24 months
- Eligible after
 - serving minimum sentence or
 - 1/2 statutory maximum
 - whichever is less (cut in half by good time credit)
- Minimum sentence: 12 months
- Statutory maximum: 24 months
- 1/2 statutory maximum is 4.8 months
- 1/2 of 4.8 months is 2.4 months
- Parole eligible at 2.4 months



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Consider Drew Davidson . . .


- Min. 30 days, Max. 12 months, suspended
 - Supervised probation for 24 months
 - Imprisonment for 30 days as a condition of probation
- Credit for 30 days of inpatient treatment to apply against special probation. (G.S. 20-179(k1)).



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Level A1 DWI

- 3+ grossly aggravating factors
 - Min: 12 mo; Max. 36 mo; Fine: Up to \$10k
 - No parole
 - Released 4 months before maximum
 - Subject to post-release supervision
 - CAM for 4 months
 - If placed on probation
 - CAM required for at least 120 days





I have sentenced a defendant for a Level A1 DWI

1. Yes
2. No


Let's consider Lois . . .

- Drove while impaired on January 14, 2012
- Husband, who is confined to a wheelchair, was in the car.
- Previously convicted of DWI on June 2, 2006.
- License suspension for 2006 DWI conviction is listed as *indefinite* on DMV record.




Grossly Aggravating Factors

1. Qualifying prior convictions for an offense involving impaired driving.
2. DWLR if revocation was an impaired driving revocation
3. Serious injury
4. Child under 18 in vehicle or person with mental development of child under 18 or person with disability barring unaided exit from vehicle





Aggravated Level One sentencing options

- Minimum sentence: 12 months
- Maximum sentence: 36 months
- Special probation: Imprisonment of at least 120 days and 120 days CAM
- Maximum fine: \$10,000
- May impose CAM for up to term of probation
- Four months post-release supervision





Active sentence

- Minimum 36 months, Maximum 36 months
- Eligible for good time credit?
- Release to post-release supervision 4 months before end of "maximum imposed term of imprisonment."




Suspended sentence

- Min. 36 months, Max. 36 months
- Sentence suspended, defendant placed on supervised probation for 36 months
- Imprisonment of 120 days as a condition of special probation and 120 days CAM
- Obtain substance abuse assessment and recommended education/treatment
- Abstain from alcohol consumption for 4 months (could be up to term of probation) as verified by CAM system. Defendant to pay costs (\$12 day).
- Costs, fine

Jail or prison?


- Defendants sentenced for a covered offense who have
 - no prior DWI convictions (if current covered offense is DWI) or
 - have never been jailed for Chapter 20 violation
- Must be sentenced to local jail.



Jail or prison?


- DWI defendants with a prior DWI or
- Defendants who previously have served time in jail for Chapter 20 offense

Jail	Jail or DAC	DAC
1 → 90	91 → 180	181 →




**Rule against consolidation:
G.S. 20-179(f2)**

- Two or more impaired driving charges may not be consolidated for judgment
- Judge must determine if aggravating and mitigating factors apply unless impaired driving charge is consolidated with a charge carrying a greater punishment
- Two or more impaired driving sentences may run concurrently




Sentencing upon remand

- District court sentence vacated upon notice of appeal to superior court for trial de novo
- When case is remanded, district court must hold a new sentencing hearing and must consider any new convictions
- After sentencing hearing, defendant has right of appeal to superior court only if:
 - Sentence based on additional facts
 - Defendant entitled to jury determination of facts



Due process concerns

- North Carolina v. Pearce, 395 U.S. 711 (1969)
 “[W]henver a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for doing so must affirmatively appear [and] [t]hose reasons must be based on objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.”
- Right to appeal must be “free and unfettered”



G.S. 15A-1335

When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.



If *Pearce* applies . . .

- District court may make fresh determination of aggravating and mitigating factors
- But may not impose harsher sentence unless increase results from a finding of convictions that became final after date of sentencing
 - Or if increase is required to render sentence legally valid



Does *Pearce* apply to resentencing on remand under G.S. 20-38.7?

1. Yes
2. No
3. I haven't heard this argument before and haven't had time to form an opinion