Sentencing Law for Superior Court Judges

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Advanced Issues: Common Errors and Frequently Asked Questions

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A. Prior Record Level

Prior convictions from other jurisdictions. 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.

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).[1] 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, __ N.C. App. __, 681 S.E.2d 801 (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).

[1] In some jurisdictions, it may be difficult to determine whether certain crimes are felonies or misdemeanors. In New Jersey, for example, misdemeanors are classified into four degrees, three of which are considered "high misdemeanors" that are treated as felonies for some purposes. California has certain crimes that are known as "wobblers," in that they may be charged as felonies or misdemeanors in certain circumstances. How the other jurisdiction classifies those crimes may be a mixed question of law and fact.

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 court can base its determination on a comparison of the other state's criminal statutes to the criminal laws of North Carolina. *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. Wright, __ N.C. App. __ (Mar. 1, 2011) (remanding for resentencing when the State did not provide copies of the New York and Connecticut statutes under which the defendant had been convicted); 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).

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 (4/11) of the Prior Record Level Worksheet includes a check-box for the court to record its determination of substantial similarity.

Additional point if all elements of a conviction offense are included in a prior offense. If the court finds that all the elements of a defendant's present offense are included in any prior offense for which the defendant was convicted, the defendant receives an additional prior record level point under G.S. 15A-1340.14(b)(6). The point applies regardless of whether the prior offense was used in calculating the offender's prior record level. *Id.*; State v. Bethea, 122 N.C. App. 623 (1996) (permissible to count the additional point when all the elements of the defendant's current crime were included in a prior offense that did not factor in his record level because it was used to establish his status as a habitual felon). A defendant qualifies for the additional point only when the most serious conviction in a consolidated judgment for which the defendant is now being sentenced is included within the elements of a prior offense. State v. Mack, 188 N.C. App 365 (2008).

Like substantial similarity of an out-of-state offense, the same-elements finding is a question of law to which the defendant cannot validly stipulate. State v. Prush, 185 N.C. App. 472 (2007). Qualification for this point is proved through a comparison of the elements of the offense of conviction with the elements of prior convictions. A defendant convicted of attempted felony larceny can qualify for the point by virtue of prior felony larceny convictions, even when the prior convictions did not include as elements that the defendant took property valued over $1,000. State v. Ford, 195 N.C. App. 321 (2009) (holding that for purposes of G.S. 15A-1340.14(b)(6), it does not matter under what provision of G.S. 14-72 defendant's prior larceny crimes were elevated from misdemeanors to felonies). Similarly, a defendant convicted of delivery of a controlled substance under G.S. 90-95(b) can qualify for the additional point if he or she has a prior conviction for delivery of a controlled substance, even if the precise controlled substance delivered is not the same in each case. State v. Williams, __ N.C. App. __, 684 S.E.2d 898 (2009) (additional point proper for defendant convicted for delivery of a Schedule II controlled substance, cocaine, who had a prior conviction for delivery of a Schedule VI controlled substance, marijuana).

Prior record when sentencing a conviction for possession of firearm by a felon. When a defendant is convicted of possession of a firearm by a felon, the prior felony that established him or her as a felon counts toward his or her prior record level. State v. Best, __ N.C. App. __ (Aug. 2, 2011). A similar rule applies when sentencing a conviction for failure to register as a sex offender; the prior conviction used to establish that the defendant was required to register nonetheless counts toward his or her prior record level. State v. Harrison, 165 N.C. App. 332 (2004).

B. Consecutive Sentences

Consecutive sentences not mandatory for convictions sentenced together. Under G.S. 14-7.6, when a defendant is sentenced as a habitual felon, the sentence "shall run consecutively with and shall commence at the expiration of any sentence being served." Similar language appears in G.S. 14-7.12 (the violent habitual felon law); G.S. 90-95(h)(6) (drug trafficking); and G.S. 20-138.5(b) (habitual impaired driving). 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, __ N.C. App. __ (Apr. 6, 2010) (allowing 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.

Limits on consecutive sentencing of 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, __ N.C. App. __ (Jan. 19, 2010), and regardless of whether the sentences are entered in district or superior court.

C. Judge's Authority at Resentencing

Under G.S. 15A-1355, when a conviction or sentence is 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. The law is North Carolina's statutory codification of the rule from North Carolina v. Pearce, 395 U.S. 711 (1969), in which the Supreme Court of the United States held that due process "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." The statute goes beyond *Pearce* to the extent that it does not allow for a more severe sentence even if the record affirmatively shows the existence of new factors that would justify a more severe sentence—something the Supreme Court allowed for in *Pearce* itself. To the contrary, G.S. 15A-1335 is a bar to a more severe sentence.

The rule from G.S. 15A-1335 is easy to apply when the defendant has a single conviction or sentence overturned on appeal. It is more difficult, however, when multiple convictions are involved. It is not obvious whether the limitation in the statute applies to each conviction individually or to the total sentence. Case law—some of it recent—helps shed light on how the statute applies when multiple convictions are involved, as well as several other wrinkles.

- When multiple sentences are involved, the statute bars imposing an increased sentence for any of the individual convictions, even if the total term of imprisonment does not exceed the original sentence. State v. Nixon, 119 N.C. App. 571 (1995); State v. Daniels, __ N.C. App. __ (Apr. 6, 2010).
- The law does not prohibit the trial court from changing the way in which it consolidated convictions at the first sentencing, State v. Ransom, 80 N.C. App. 711 (1986), provided the overall length of the resentenced convictions does not exceed the original sentence, State v. Moffitt, 185 N.C. App. 308 (2007).
- The law does not prohibit a judge at resentencing from changing concurrent sentences to consecutive sentences, provided no individual sentence nor the aggregate sentence exceeds that imposed at the original sentencing hearing. State v. Oliver, 155 N.C. App. 209 (2002).
- When a conviction other than the lead conviction in a consolidated Structured Sentencing judgment is vacated on appeal, the trial judge does not err by entering the same sentence on remand that was entered at the original

sentencing. State v. Skipper, __ N.C. App. __ (Aug. 16, 2011) (distinguishing prior law under Fair Sentencing that reached a different conclusion).

- The law does not protect the defendant from a more severe sentence when that sentence is statutorily required. State v. Williams, 74 N.C. App. 728 (1985).
- If the defendant is successful in having a guilty plea vacated on appeal or by collateral attack, any charges that had been dismissed by the State as part of the negotiated plea agreement could be reinstated, and G.S. 15A-1335 does not bar the imposition of a sentence on those reinstated charges since that statute only applies to "conviction[s] or sentence[s] imposed in superior court [that] ha[ve] been set aside on direct review or collateral attack." State v. Williams, 180 N.C. App. 477 (2006) (unpublished).

D. Extraordinary Mitigation and Substantial Assistance

Extraordinary mitigation. Under G.S. 15A-1340.13(g), a court may impose intermediate punishment for a defendant whose offense class and prior record level would otherwise require an active sentence. The court may suspend a sentence through extraordinary mitigation if it finds in writing that:

- Extraordinary mitigating factors of a kind significantly greater than in the normal case are present;
- Those factors substantially outweigh any factors in aggravation; and
- It would be a manifest injustice to impose an active punishment in the case.

G.S. 15A-1340.13(g). Form AOC-CR-606 guides the court through the requisite findings in support of extraordinary mitigation.

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, __ N.C. App. __ (Feb. 2, 2010).

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). In light of those limitations, extraordinary mitigation only applies to defendants who fall in six cells on the felony sentencing grid: B2–I & II, C–I & II, and D–I & II. Offense classes below that already allow intermediate and/or community punishment, meaning the defendant would not be helped by a finding of extraordinary mitigation in any event.

Extraordinary mitigation does not allow a deviation from the applicable sentencing range—the court is limited to the same numbers in the same cell, but it can suspend a sentence that would otherwise have to be active. State v. Messer, 142 N.C. App. 515 (2001).

Substantial assistance in drug trafficking cases. Under G.S. 90-95(h)(5), the judge sentencing a defendant for drug trafficking may reduce the fine, or 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. 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.

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 (9 months for Class C–E trafficking offenses committed before December 1, 2011; 12 months for Class C–E offenses and 9 months for Class F–H offenses committed on or after December 1, 2011). If the sentence does not include additional time for post-release supervision, the Department of Correction will not give the defendant post-release supervision.

E. Probation

*Improper period of probation.*G.S. 15A-1343.2(d) sets out the presumptive lengths for periods of probation imposed under Structured Sentencing as follows:

> Misdemeanants sentenced to community punishment: 6–18 months.
> Misdemeanants sentenced to intermediate punishment: 12–24 months.
> Felons sentenced to community punishment: 12–30 months.
> Felons sentenced to intermediate punishment: 18–36 months.

The sentencing court may always deviate from these defaults and order probation of up to 5 years if it "finds at the time of sentencing that a longer period of probation is necessary." (There is a check-box on the AOC suspended sentence judgment forms to indicate that the judge has made the requisite finding.)

Sometimes a court sentences a defendant to a probation term longer than the defaults set out above without making the requisite findings. When the error is discovered early on and the defendant appeals, the appellate courts remand the case for resentencing with instructions to the trial court to make the requisite finding or order a shorter period of probation. *See, e.g.*, State v. Riley, __ N.C. App. __, 688 S.E.2d 477 (2010).

If the error is not discovered right away, the probationer could also file a motion for appropriate relief at any time under G.S. 15A-1415(b)(8) on the ground that the sentence was unauthorized at the time imposed. Sometimes the error is not discovered until the defendant has already violated probation. It is not clear whether the court retains power to act over a case that would have expired if the probation term had been within the durational limits, especially if the violation occurred after a lawful period would have ended.

Improper extension of probation. The General Statutes describe two different types of probation extensions, *ordinary* extensions under G.S. 15A-1344(d), and *special-purpose* extensions under G.S. 15A-1343.2. (I use the terms "ordinary" and "special-purpose" for clarity; the terms themselves do not appear in the General Statutes.)

(1) Ordinary extensions may, after notice and hearing, be ordered at any time prior to the expiration of probation for "good cause shown" (no violation need have been alleged). The total maximum probation period for extensions under this provision is 5 years. G.S. 15A-1344(d).
(2) Special-purpose extensions can be used to extend the probationer's period of probation by up to 3 years beyond the original period of probation, including beyond the five-year maximum, if all of the following criteria are met:
    - The probationer consents to the extension;
    - The extension is being ordered during the last six months of the original period of probation (note: if probation has previously been extended, the offender is no longer in his or her original period of probation); and
    - The extension is necessary to complete a program of restitution or to complete medical or psychiatric treatment. G.S. 15A-1343.2.

Extensions for these special purposes are the only way to extend a period of probation beyond 5 years, and only when the original period was 5 years could probation be extended to as long as 8 years under this provision.

Tolling. Under G.S. 15A-1344(g) (formerly, G.S. 15A-1344(d)), "[i]f there are pending criminal charges against the probationer in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against the probationer for violation of the terms of this probation, the probation period shall be tolled until all pending criminal charges are resolved." A defendant's probationary period is automatically suspended when new criminal charges are brought. State v. Henderson, 179 N.C. App. 191 (2006); State v. Patterson, 190 N.C. App. 193 (2008). When a probationer has a pending charge for any offense other than a Class 3 misdemeanor, time stops running on the person's period of probation immediately, by operation of law, when the charge is brought, and does not start running again until the charge is resolved, by way of acquittal, dismissal, or conviction.

In 2009 the General Assembly made several changes to the tolling law. The changes made clear that a probationer remains subject to the conditions of probation,

including supervision fees, during the tolled period. The amended law also provided that if a probationer whose case was tolled for a new charge is acquitted or has the charge dismissed, he or she receives credit for the time spent under supervision during the tolled period. The credit-back provision applies to persons on probation for offenses that occurred on or after December 1, 2009.

For defendants placed on probation on or after December 1, 2011, the tolling law is repealed. S.L. 2011-62 (H 270).

Waiver of counsel. A probationer can waive the right to assistance of counsel at a probation violation hearing and proceed pro se, Faretta v. California, 422 U.S. 806 (1975), but before that can happen the trial court must determine that the waiver is knowing, intelligent, and voluntary. The judge does that through the "thorough inquiry" required by G.S. 15A-1242, which the appellate courts have deemed applicable at probation violation hearings. State v. Warren, 82 N.C. App. 84 (1986). The statute requires the trial judge to satisfy himself or herself that the defendant:

(1) Has been clearly advised of his right to the assistance of counsel, including the right to the assignment of counsel if he is entitled;
(2) Understands and appreciates the consequences of the decision to waive counsel; and
(3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

Form AOC-CR-227 tracks the language of G.S. 15A-1242 and it should be completed any time a defendant waives counsel. However, a written waiver, standing alone is insufficient to satisfy G.S. 15A-1242. In State v. Sorrow, __ N.C. App. __ (July 19, 2011), for example, the trial judge failed to address the second and third prongs of G.S. 15A-1242 when she did not confirm that the defendant understood and appreciated the consequences of his decision to proceed pro se and never told the defendant the "range of permissible punishments"—which in this context would be the length of his suspended sentence. The court of appeals vacated the probation revocation and remanded the case for a new hearing.

The section on Counsel Issues in Jessica Smith's online Survival Guide (available at http://www.sog.unc.edu/sites/www.sog.unc.edu/files/CounselIssues.pdf) includes a checklist of questions to ask when taking a waiver of counsel. The bullet covering the maximum permissible punishment could be modified in the probation violation context to read:

> Do you understand that you are alleged to have violated the conditions of your probation and that if you are found to have violated, your probation may be revoked and you could be imprisoned to serve your

sentence of [_____ to _____ months (if a felony)] [___ days (if a misdemeanor)]?

Willfulness of violations. In general, a trial court may revoke a defendant's probation when it is reasonable satisfied that the defendant has violated a valid condition of probation. The burden is upon the State to show that a condition has been violated.

A suspended sentence may not be activated, however, unless the defendant's failure to comply is willful or without lawful excuse. The burden is on the defendant to offer evidence of his or her inability to comply—including any inability to pay money according to the terms of the judgment. State v. Williamson, 61 N.C. App. 531 (1983).

If the defendant does not offer evidence of his or her inability to comply, the State's evidence of the failure to comply is sufficient to justify revocation. State v. Jones, 78 N.C. App. 507 (1985). But if a defendant does put on evidence of his or her inability to comply, the court must consider that evidence and make findings of fact clearly showing that it did so. *Id.*

- The trial court erred by failing to make findings of fact that clearly show it considered the defendant's evidence that he was unable to pay the cost of his sexual abuse treatment program. The defendant presented evidence, corroborated by his probation officer, that he was unable to pay for the program because he had lost his job. State v. Floyd, __ N.C. App. __ (July 19, 2011).
- Defendant's explanation that she was addicted to drugs was not a lawful excuse for violating probation by failing to complete a drug education program. State v. Stephenson, __ N.C. App. __ (July 19, 2011).