

DWI SENTENCING

G.S. 20-179. For Offenses Committed On or After 12/1/2011 (S.L. 2011-191 and S.L. 2011-329)

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Applies to convictions of:

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

Upon conviction or upon remand to district court after appeal to superior court, the judge must hold a sentencing hearing to determine if there are aggravating or mitigating factors that affect the sentence.

The prosecutor must:

- prove *beyond a reasonable doubt* that an aggravating factor exists;
- before the sentencing hearing, make all feasible efforts to secure the defendant's full record of traffic convictions;
- present to the judge at sentencing the defendant's record of traffic convictions;
- upon the defendant's request, furnish the defendant or his attorney a copy of the defendant's record of traffic convictions at a reasonable time prior to introducing the record into evidence;
- present all grossly aggravating and aggravating factors of which he or she is aware;
- present evidence of the resulting alcohol concentration from any valid chemical analysis of the defendant; and
- provide the defendant with notice of the State's intent to use one or more aggravating factors in superior court at least 10 days before trial.

The defendant:

- *may* present all appropriate mitigating factors;
- *must prove by a preponderance of the evidence* that a mitigating factor exists; and
- *may* admit to an aggravating factor, which will result in the factor being treated as though it were found by a jury.

Determination of aggravating factors in superior court

- If the defendant does not admit an aggravating factor, a jury must determine if an aggravating factor is present.
- The jury impaneled for the trial 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.
- If a separate proceeding to determine aggravating factors is required, the proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned.
- If any juror dies, becomes incapacitated or disqualified, or is discharged for any reason before the trial jury begins its deliberations on the issue of whether one or more aggravating factors exist, an alternate juror becomes a part of the jury

- If the trial jury is unable to reconvene for a hearing on the issue of whether one or more aggravating factors exist after having determined guilt, the trial judge must impanel a new jury to determine the issue.
- If the defendant admits that an aggravating factor exists, but pleads not guilty to the underlying charge, a jury must be impaneled to dispose of the charge only. In that case, evidence that relates solely to the establishment of an aggravating factor is inadmissible at trial.
- If the defendant pleads guilty to the charge, but contests the existence of one or more aggravating factors, a jury must be impaneled to determine if the aggravating factor or factors exist.
- At the sentencing hearing, the jury must **first** determine whether there are any grossly aggravating factors in the case.
- The judge determines whether a prior conviction exists under G.S. 20-179(c)(1) or G.S. 20-179(d)(5).

Determination of mitigating factors

- The judge determines whether any mitigating factors apply. G.S. 20-179(e).
- It is not a mitigating factor that the driver of the vehicle was suffering from alcoholism, drug addiction, diminished capacity, or mental disease or defect. Evidence of these matters may be received in the sentencing hearing, however, for use by the judge in formulating terms and conditions of sentence after determining which punishment level is to be imposed. G.S. 20-179(f).

Findings required for aggravating and mitigating factors

- All aggravating and mitigating factors must be entered in writing. G.S. 20-179(c1).
- For each impaired driving conviction (other than a conviction based upon aiding and abetting) there must be a determination of whether aggravating and mitigating factors apply unless the impaired driving charge is consolidated with a charge carrying a greater punishment. G.S. 20-179(f2).
- A person convicted of impaired driving under G.S. 20-138.1 as an aider and abettor is subject to Level Five punishment. The judge is not required to find grossly aggravating, aggravating, or mitigating factors in such cases. G.S. 20-179(f1).

Level of punishment

- If three or more grossly aggravating factors apply, the judge must impose Aggravated Level One punishment. G.S. 20-179(c).
- If two grossly aggravating factors apply, the judge must impose Level One punishment. *Id.*
- If the grossly aggravating factor in G.S. 20-179(c)(4) applies (minor or disabled person in vehicle), the judge must impose Level One punishment. G.S. 20-179(c).
- If only one grossly aggravating factor applies (other than G.S. 20-179(c)(4)) the judge must impose Level Two punishment. *Id.*
- In imposing a Level One or Two punishment, the judge may consider aggravating and mitigating factors in determining the appropriate sentence.
- If there are no grossly aggravating factors, the judge must weigh the seriousness of each aggravating factor and the degree of mitigation of each mitigating factor in light of the particular circumstances of the case.
- If the aggravating factors substantially outweigh any mitigating factors, the judge must impose Level Three punishment. G.S. 20-179(f)(1).

- If there are no aggravating and mitigating factors or the aggravating factors are substantially counterbalanced by mitigating factors, the judge must impose Level Four punishment. G.S. 20-179(f)(2).
- If mitigating factors substantially outweigh aggravating factors, the judge must impose Level Five punishment. G.S. 20-179(f)(3).

Consolidation

- Two or more impaired driving charges may not be consolidated for judgment. G.S. 20-179(f2).

Grossly Aggravating Factors (If 1 GAF (other than GAF #4), Level Two DWI. If 2 GAFs or GAF #4, Level One DWI. If 3 or more GAFs, Aggravated Level One DWI.):

- (1) A prior conviction for **an offense involving impaired driving**¹ if:
- a. The conviction occurred within seven years before the date of the offense for which the defendant is being sentenced; or
 - b. The conviction occurs after the date of the offense for which the defendant is presently being sentenced, but prior to or contemporaneously with the present sentencing; or
 - c. The conviction occurred in district court; the case was appealed to superior court; the appeal has been withdrawn or the case has been remanded back to district court; and a new sentencing hearing has not been held pursuant to G.S. 20-38.7.

Each prior conviction is a separate grossly aggravating factor. G.S. 20-179(c)(1).

- (2) DWLR at the time of the offense under G.S. 20-28, and the revocation was an impaired driving revocation under G.S. 20-28.2(a).²

¹ An **offense involving impaired driving** is defined in G.S. 20-4.01(24a) as any of the following offenses:

- Impaired driving under G.S. 20-138.1
- Habitual impaired driving under G.S. 20-138.5
- Impaired driving in commercial vehicle under G.S. 20-138.2
- Any offense under G.S. 20-141.4 (felony and misdemeanor death by vehicle and serious injury by vehicle) 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

² An **“impaired driving license revocation”** is defined by G.S. 20-28.2(a) as a revocation made under any of the following statutes:

- G.S. 20-13.2: consuming alcohol/drugs or willful refusal by driver under 21
- G.S. 20-16(a)(8b): military driving while impaired
- G.S. 20-16.2: refused chemical test
- G.S. 20-16.5: pretrial civil license revocation
- G.S. 20-17(a)(2): impaired driving or impaired driving in a commercial motor vehicle
- G.S. 20-138.5: habitual impaired driving
- G.S. 20-17(a)(12): transporting open container
- G.S. 20-17.2: court order not to operate (repealed effective December 1, 2006)
- G.S. 20-16(a)(7): impaired driving out of state resulting in N.C. revocation
- G.S. 20-17(a)(1): manslaughter or second-degree murder involving impaired driving
- G.S. 20-17(a)(3): felony involving use of motor vehicle, involving impaired driving
- G.S. 20-17(a)(9): felony or misdemeanor death or serious injury by vehicle involving impaired driving

- (3) Serious injury to another person caused by the defendant's impaired driving at the time of the offense.
- (4) Driving by the defendant at time of offense with any of the following persons in vehicle: a child under the age of 18 years, a person with the mental development of a child under 18 years, or a person with a physical disability preventing unaided exit from the vehicle.

Aggravating Factors – G.S. 20-179(d):

- (1) Gross impairment of the defendant's faculties while driving or an alcohol concentration of 0.15 or more within a relevant time after the driving.
- (2) Especially reckless or dangerous driving.
- (3) Negligent driving that led to a reportable accident.
- (4) DWLR.
- (5a) Two or more prior convictions of a motor vehicle offense not involving impaired driving for which at least three points are assigned under G.S. 20-16 or for which the convicted person's license is subject to revocation, within five years of the date of the offense.
- (5b) One/more prior conviction of an *offense involving impaired driving* more than seven years before the date of the current offense.
- (6) Conviction under G.S. 20-141.5 of speeding to elude.
- (7) Conviction under G.S. 20-141 of speeding at least 30 mph over limit.
- (8) Passing a stopped school bus in violation of G.S. 20-217.
- (9) Any other factor that aggravates the seriousness of the offense.

Except for factors (5a) and (5b), the conduct must occur during the same transaction as the impaired driving offense.

Mitigating Factors:

- (1) Slight impairment of the defendant's faculties resulting solely from alcohol, and an alcohol concentration that did not exceed 0.09 at any relevant time after the driving.
- (2) Slight impairment of the defendant's faculties, resulting solely from alcohol, with no chemical analysis having been available to the defendant.
- (3) Safe and lawful driving (except for the impairment).
- (4) A safe driving record (no convictions within five years for four-point motor vehicle offenses or for motor vehicle offenses for which the person's license is subject to revocation).
- (5) Impairment of the defendant's faculties caused primarily by a lawfully prescribed drug for an existing medical condition, and the amount of the drug taken was within the prescribed dosage.
- (6) Voluntary submission for assessment after charge and, if recommended, voluntary participation in the recommended treatment.
- (6a) Completion of a substance abuse assessment, compliance with its recommendations, and simultaneously maintaining 60 days of continuous abstinence

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- G.S. 20-17(a)(11): assault with motor vehicle involving impaired driving
 - G.S. 20-28.2(a)(3): The laws of another state and the offense for which the person's license is revoked prohibits substantially similar conduct which if committed in this State would result in a revocation listed under any of the above statutes

- from alcohol consumption as proven by a continuous alcohol monitoring system of a type approved by the Department of Correction.
- (7) Any other factor that mitigates the seriousness of the offense.

Except for factors (4), (6), (6a), and (7), the conduct must occur in the same transaction as the impaired driving offense.

- Aggravating > Mitigating, Level 3
- Aggravating = Mitigating, Level 4
- Mitigating > Aggravating, Level 5

LEVELS OF PUNISHMENT

*(For **any suspended sentence**, the defendant must obtain a substance abuse assessment and the education or treatment required by G.S. 20-17.6 for the restoration of a driver's license and as a condition of probation.)*

Aggravated Level One – G.S. 20-179(f3)

Imprisonment — min 12 months, max 36 months. If suspended, special probation requiring active term of at least 120 days and 120 days of continuous alcohol monitoring.

Fine — up to \$10,000

Level One - G.S. 20-179(g).

Imprisonment – min 30 days, max 24 months. If suspended, special probation requiring active term of at least 30 days

Fine – up to \$4,000

May impose, as a condition of probation, continuous alcohol monitoring for minimum of 30 days to maximum of the term of probation. G.S. 20-179(h1).

Level Two - G.S. 20-179(h).

Imprisonment – min 7 days, max 12 months. If suspended, special probation requiring active term of at least 7 days

Fine – up to \$2,000

May impose, as a condition of probation, continuous alcohol monitoring for minimum of 30 days to maximum of the term of probation. G.S. 20-179(h1).

Level Three - G.S. 20-179(i).

Imprisonment – min 72 hours, max 6 months. If suspended, (1) special probation active term of at least 72 hours and/or (2) at least 72 hours community service.

Fine – up to \$1,000

Level Four - G.S. 20-179(j).

Imprisonment – min 48 hours, max 120 days. If suspended, (1) special probation active term of 48 hours and/or (2) 48 hours community service.

Fine – up to \$500

Level Five - G.S. 20-179(k).

Imprisonment – min 24 hours, max 60 days. If suspended, (1) special probation active term of 24 hours and/or (2) 24 hours community service.

Fine – up to \$200

Credit for Inpatient Treatment (G.S. 20-179(k1)). Pursuant to G.S. 15A-1351(a), the judge may order that a term of imprisonment imposed as a condition of special probation under any level of punishment be served as an inpatient in a facility operated or licensed by the State for the treatment of alcoholism or substance abuse where the defendant has been accepted for admission or commitment as an inpatient.

- The defendant must pay unless the judge orders that the costs be absorbed by the State.
- The judge may impose restrictions on the defendant's ability to leave the premises of the treatment facility and require that the defendant follow the rules of the treatment facility.
- The judge may credit against the active sentence imposed on a defendant the time the defendant was an inpatient at the treatment facility, provided such treatment occurred after the commission of the offense for which the defendant is being sentenced.

Method of Serving Sentence

- With respect to the minimum or specific term of imprisonment imposed as a condition of special probation under this section, the judge may not give credit to the defendant for the first 24 hours of time spent in incarceration pending trial. G.S. 20-179(p).
- Judge may order a term of imprisonment to be served on weekends, even if the sentence cannot be served in consecutive sequence. But if the defendant must serve 48 hours or more, defendant must serve 48 continuous hours to receive credit. G.S. 20-179(s).
- Credit for jail time is given hour for hour for time actually served. G.S. 20-179(s)(1).
- If the defendant appears at jail to serve time with alcohol or a controlled substance remaining in his or her body, the defendant must be refused entrance and be reported back to court (unless the substance was lawfully obtained and taken in therapeutically appropriate amounts). G.S. 20-179(s)(2).
 - If the defendant is reported back to court, the court must hold a hearing. The court must order the defendant to serve jail time immediately and not on weekends if the court determines that at the time of the entrance to the jail the defendant had alcohol or a controlled substance in his body (unless the substance was lawfully obtained and taken in therapeutically appropriate amounts). G.S. 20-179(s)(3).

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