

## POST-CONVICTION CLAIMS: SENTENCING ERRORS



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### QUESTIONS

1. A defendant is convicted of assault on a government officer. He is sentenced to *community* punishment, 24 months of supervised probation. The trial court does not make a finding that a period of probation longer than 18 months is necessary. Error or No Error?
2. As part of a plea agreement, a defendant stipulates in writing to the information on a prior record worksheet, making him a prior record level III. Included on the worksheet are several Virginia convictions. The defendant stipulates to the “classification and points assigned to any out-of-state convictions.” Error or No Error?
3. At sentencing, a defendant stipulates to the additional prior record point available under G.S. 15A-1340.14(b)(6) when all elements of the present offense are included in any prior offense for which the offender was convicted. The additional point raises the offender’s record level from IV to V. Error or No Error?
4. A defendant pleads guilty to financial card theft and to having attained habitual felon status. The lowest minimum sentence on the grid for this offender (Class C, Level IV, mitigated) is 80 months, but the court finds extraordinary mitigation and sentences the defendant to a minimum term of 64 months. The court runs the habitualized financial card theft sentence concurrent with a federal sentence the defendant is serving at the time of sentencing. Error(s) or No Error(s)?
5. In sentencing a defendant for trafficking in cocaine and conspiracy to traffic cocaine, the trial court says “General Statute 90-95(h) requires these sentences to run consecutively.” He sentences the defendant to two consecutive terms of imprisonment. Error or No Error?
6. At a probationer’s violation hearing, two sentences that had been set to run concurrently by the original sentencing judge are run consecutively by the revoking judge. Error or No Error?
7. A defendant’s sentence was overturned on appeal and remanded for resentencing. At the resentencing, the trial court counts for prior record points a conviction that occurred between the sentencing and the resentencing. The elevated record level results in a longer sentence. Error or No Error?

8. A defendant is convicted of involuntary manslaughter. At sentencing, the court counts prior record points for a felony habitual DWI and the three misdemeanor DWIs that led to the habitual DWI conviction. Error or No Error?

9. A defendant is convicted of failure to register as a sex offender. The court counts for prior record points the defendant's conviction for second-degree rape—the crime that got him placed on the registry. Error or No Error?

10. A defendant convicted of four counts of forgery and one count of embezzlement was ordered to spend 90 days at DART-Cherry as a special condition of probation. He did so, successfully completing the program. He later violates probation and has his probation revoked. The defendant argues that the 90 days spent at DART-Cherry should be credited against his activated sentence. Credit or No Credit?

11. A defendant spent 211 days on electronic house arrest as a condition of pretrial release. After conviction, she petitions the court for credit against her sentence for this time. Credit or No Credit?

12. A probationer has her probation revoked in 2005. In 2003 she had been found in contempt of court under G.S. 15A-1344(e1) and jailed for 30 days. She petitions the court for credit against the activated sentence for the time spent jailed pursuant to the contempt finding. Credit or No Credit?

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### ANSWERS and EXPLANATIONS

1. **Error**—and perhaps the most common sentencing error. G.S. 15A-1343.2 sets out default lengths for periods of probation 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 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 check-box on the AOC forms to indicate that the judge has made the requisite finding. *State v. Branch*, \_\_\_ N.C. App. \_\_\_, 669 S.E.2d 18 (2008).

2. **Error.** The question of whether an out-of-state conviction is substantially similar to a North Carolina offense is a question of law to be resolved by the trial court. Stipulations as to questions of law are generally invalid. *State v. Palmateer*, 179 N.C. App. 579 (2006). Note, however, that findings of substantial similarity are only required when the state or the defendant seeks to have an out-of-state conviction treated as something other than the statutory default for out-of-state crimes (Class 3 for misdemeanors and Class I for felonies). *State v. Hinton*, \_\_\_ N.C. App. \_\_\_ (May 5, 2009). Form AOC-CR-600, Worksheet for Prior Record Level, includes a check-box for this finding.

3. **Error.** Like “substantial similarity” of out-of-state convictions, the determination of whether all elements of the present offense are included in any prior offense is a question of law that cannot be stipulated to by the defendant. The judge must make a finding for that point to apply. *State v. Prush*, 185 N.C. App. 472 (2007). Note: AOC-CR-600 currently does not include a check-box for this finding, but a revised version of the form will include one.

4. **Errors.** As to the first issue, findings of extraordinary mitigation allow the court to suspend an otherwise “unsuspendable” sentence; they do *not* allow the judge to depart from the minimum sentences set out on the grid. As to the second issue, the defendant’s federal sentence was “being served” when he was sentenced as a habitual felon in North Carolina. Thus his state sentence should have been run consecutive to the federal sentence under G.S. 14-7.6. *State v. Watkins*, \_\_\_ N.C. App. \_\_\_, 659 S.E.2d 58 (2008).

5. **Error.** Though the court was certainly *authorized* to run these sentences consecutively, G.S. 90-96 does not *require* him to do so. The statute requires sentences under the trafficking law to run “consecutively with . . . any sentence being served by the person sentenced hereunder.” *State v. Watson*, \_\_\_ N.C. App. \_\_\_, 666 S.E.2d 872 (2008). The appellate courts have held that this language does not require consecutive sentences for offenses disposed of in the same proceeding, because neither sentence is technically “being served” at the moment the defendant is sentenced. *State v. Bozeman*, 115 N.C. App. 658 (1994).

6. **No error.** The court of appeals read G.S. 15A-1344(d) to permit a revoking court to impose consecutive sentences upon revocation of probation, without regard to whether the sentences were run concurrently or consecutively in the original judgment. *State v. Hanner*, 188 N.C. App. 137 (2008). Note: if you do not specify in a revocation judgment that you want sentences to run consecutively, DOC will run them concurrently—even if the original judgment ran the sentences consecutively.

7. **No error.** For the purposes of calculating a defendant’s prior record level at resentencing, a trial court may consider a defendant’s conviction that was entered after the defendant’s original sentencing, but prior to the defendant’s resentencing. *State v. Pritchard*, 186 N.C. App. 128 (2007).

8. **No error.** It would be improper to count the misdemeanor DWI convictions for prior record points when sentencing the felony habitual DWI itself, *State v. Gentry*, 135 N.C. App. 107 (1999), but there’s nothing wrong with counting all the prior offenses (misdemeanor DWIs and felony habitual DWI) when sentencing for a later offense. *State v. Hyden*, 175 N.C. App. 576 (2006).

9. **No error.** The court rejected the defendant’s argument that counting the underlying sex crime for prior record points in a failure to register prosecution was like counting the felonies used to habitualize a habitual felon. Failure to register is a separate substantive offense, not a “sentencing status” like habitual felon. *State v. Harrison*, 165 N.C. App. 332 (2004). The court reached a similar result in *State v. Goodwin*, \_\_\_ N.C. App. \_\_\_, 661 S.E.2d 46 (2008), holding that the felony that cost an offender his guns and a subsequent conviction for possession of a firearm by a felon could count for prior record points when he was later sentenced for a murder.

10. **Credit.** The defendant’s freedom at DART-Cherry was sufficiently limited for the time to count as “confinement” under G.S. 15-196.1. *State v. Lutz*, 177 N.C. App. 140 (2006).

11. **No credit.** Electronic house arrest is not confinement or custody under G.S. 15-196.1. *State v. Jarman*, 140 N.C. App. 198 (2000).

12. **Credit.** The court of appeals determined that the time a defendant spent jailed pursuant to a contempt finding is time spent “incarcerated for violation of her probation,” and thus ought to count for credit under G.S. 15-196.1. *State v. Belcher*, 173 N.C. App. 620 (2005).