



Criminal Law Update:

Sentencing, Corrections, and Sex Offenders





Jamie Markham
Associate Professor, UNC School of Government

June 2015



www.sog.unc.edu



Sentencing



Non-Statutory Aggravating Factors

- State v. Ortiz (p. 14)
 - Purported aggravating factor: Defendant committed a sexual offense knowing he was HIV positive
 - State gave 30-day notice under seal, out of concern for G.S. 130A-143, prohibiting disclosure of identity of person with HIV/AIDS

Non-statutory aggravating factors must be alleged in a charging instrument.



DVPO Sentence Enhancement

- State v. Jacobs (p. 14)
 - Defendant convicted of:
 - AWDWIKISI
 - Attempted second-degree kidnapping
 - Violating a DVPO using a deadly weapon. G.S. 50B-4.1(g)
 - ~~AWDWIKISI and kidnapping enhanced under DVPO sentencing enhancement G.S. 50B-4.1(d)~~
 - ~~One offense class higher if a known violation of a DVPO~~
 - The enhancement shall not apply to a person who is charged under G.S. 50B-4.1(g)



Remarks at Sentencing

- State v. Barksdale (p. 16)
 - Defendant sentenced to 106 years after jury trial



“These are long sentences and it may seem that they are more than your life time, but what I heard today, yesterday, and the day before, this sentence should be a statement for more than just one life time. You’ve affected two lives entirely, and you’ve affected 13 other people’s lives, not to mention everyone that heard anything about this case.”



Remarks at Sentencing

- Court of Appeals: Comment did not indicate that judge punished defendant for decision to go to trial



Remarks at Sentencing

“[T]ake care to avoid using language that could give rise to an appearance that improper factors have played a role in the judge's decision-making process even when they have not.”



Language to avoid . . .





“I regret that you [did] not choose to take the offer that had been made to you at the beginning of the trial to plead guilty for a lesser sentence. . . .”

“I told you that the best offer you’re gonna get was that ten-year thing, you know.”

“[The defendant] tried to be a con artist with the jury [and] rolled the dice in a high stakes game with the jury, and it’s very apparent that [he] lost that gamble. . . .”

“If you truly cared—if you had one ounce of care in your heart about that child—you wouldn’t have put that child through this. You would have pled guilty, and you didn’t.”

Prior Record Level

- State v. Sanders (p. 16)
 - Substantial similarity of out-of-state prior convictions

Prior Record Level

- Out-of-state prior convictions
 - Felonies: Count as Class I by default
 - Misdemeanors: Count as Class 3 by default
- May count like NC analogue if State or defendant proves “**substantial similarity**” to NC offense

Prior Record Level

Permissible stipulations

- Existence of out-of-state conviction
- Whether the other state deems it a felony or a misdemeanor
- Substantial similarity to NC offense



Prior Record Level

- State v. Sanders (2013 Court of Appeals decision)
 - Trial court: Tennessee “theft of property” and “domestic assault” deemed similar to NC Class A1 misdemeanors
 - Court of Appeals: Trial judge erred by comparing relative *punishments* of Tennessee and North Carolina crimes to determine similarity

Review similarity of ELEMENTS, not similarity of PUNISHMENT



Prior Record Level

- State v. Sanders on remand
 - Trial court: Tennessee “theft of property” and “domestic assault” deemed similar to NC Class A1 misdemeanors
 - Court of Appeals: Affirmed



Prior Record Level

- Proponent “must provide evidence of applicable law”
 - State failed to provide all the relevant Tennessee statutes regarding the assault
- Comparison must be based on elements of the purportedly similar offenses, NOT the underlying facts



Tennessee ≠ North Carolina
“Domestic Assault” Assault on Female

- NC offense requires opposite genders and defendant at least 18 years old; Tennessee offense does not
- Tennessee offense requires a “domestic relationship,” NC offense does not



Probation

- State v. Sitosky (p. 17)
 - Tolling



Probation

- “Original” (pre-2009) Tolling
 - Probation period clock stopped during pendency of a criminal charge

G.S. 15A-1344(d)

UNC

Probation

- 2009 Revised Tolling (“Credit Back”)
 - Amended for offenses committed on/after 12/1/09
 - If acquitted or charge dismissed, time spent in tolled status gets credited to probation period

G.S. 15A-1344(d) → G.S. 15A-1344(g)

UNC

Probation

- 2011: Tolling Repealed
 - Repealed for defendants placed on probation on/after December 1, 2011

UNC

Probation

- Revoked probationers (inmates)
- Existing probationers

• Tolling

- Placed on probation on/after 12/1/11: No tolling
- Placed on probation before 12/1/11:
 - Offense date on/after 12/1/09: Credit-back tolling under G.S. 15A-1344(g)
 - ~~Offense date before 12/1/09: Regular tolling under G.S. 15A-1344(d)~~

State v. Sitosky

2009 legislation: G.S. ~~15A-1344(d)~~ → G.S. 15A-1344(g)
 - 1344(g) created for "offenses committed on or after Dec. 1, 2009"
 - 1344(d) repealed for "hearings held on or after Dec. 1, 2009"

Sex Offenders

Petitions to terminate sex offender registration

- *In re Hall* (p. 18)
 - Convicted of first-degree rape in 1982
 - Registered upon release from prison in 2003
 - Petitioned to terminate registration in 2013

Petitions to terminate sex offender registration

- G.S. 14-208.12A
 - 2001: “The requirement that a person register under this Part automatically terminates 10 years from the date of initial county registration”
 - 2006: “A person required to register under this Part may petition the superior court . . . to terminate the registration requirement 10 years from the date of initial county registration”
- “[A]pplicable to persons for whom the period of registration would terminate on or after [December 1, 2006].”*



Findings

- IV. FINDINGS OF FACT
- After a hearing on this petition, the Court finds the following:
1. The petitioner was required to register as a sex offender under Part 2 of Article 27A of Chapter 14 of the General Statutes for the offense(s) set out above.
 2. The petitioner has been subject to the North Carolina registration requirements of Part 2 of Article 27A for at least ten (10) years beginning with the Date Of Initial NC Registration above.
 3. Since the Date Of Conviction above, the petitioner has not been convicted of any subsequent offense requiring registration under Article 27A of Chapter 14.
 4. Since the completion of his/her sentence for the offense(s) set out above, the petitioner has not been arrested for any offense that would require registration under Article 27A of Chapter 14.
 5. The petitioner served this petition on the Office of the District Attorney at least three (3) weeks prior to the hearing held on this matter.
 6. The petitioner is not a current or potential threat to public safety.
 7. The relief requested by the petitioner complies with the provisions of the federal Jacob Wetterling Act, 42 U.S.C. § 14071, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State.
 8. If the petitioner filed a previous petition for termination under G.S. 14-208.12A that was denied, one year or more has passed since the date of the denial.
 9. If the conviction requiring the petitioner's registration occurred in another state, the petitioner (i) provided written notice to the sheriff of the county where the petitioner was convicted that the petitioner is petitioning the court to terminate the registration requirement and (ii) included with the petition an affidavit, signed by the petitioner, that verifies that the petitioner notified the sheriff of the county where the petitioner was convicted of the petition and that provides the mailing address and contact information for that sheriff.



Finding #7

Judge may grant petition if:


“The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State.” G.S. 14-208.12A(a1)(2)



SORNA Registration Length Rules

- **Tier III (lifetime):**
 - “Sexual act” crimes: anal/oral/genital contact/penetration
 - “Sexual contacts” against children under 13
 - Kidnapping
- **Tier II (at least 25 years):**
 - “Sexual contact” crimes against minor
 - Prostitution/solicitation
 - Production/distribution of child pornography
- **Tier I (at least 15 years, reducible to 10):**
 - Everything not tier II or III
 - Crimes not punishable by more than one year

Would letting this person off the registry now comply with federal standards?


31

North Carolina Criminal Law

A UNC School of Government Blog

SORNA Tier Classification Definitions

When placing offenses into tiers, “jurisdictions generally may prmise the determination on the elements of the offense, and are not required to look to underlying conduct that is not reflected in the offense of conviction.” 73 Fed. Reg. 38030, 38053. However, tier classifications that depend on victim age must be obeyed even for crimes whose elements do not specify that the victim must be below the threshold age if the victim was in fact below it. *Id.*

Tier I	Tier II	Tier III
... 15 years (15 with “Sexual contact”) A sex offender other than a Tier II or Tier III sex offender. 42 U.S.C. § 19911(a)	25 years Defined in 42 U.S.C. § 19911(b) as an offense punishable by imprisonment for more than one year and	Lifetime Defined in 42 U.S.C. § 19911(c) as an offense punishable by imprisonment for more than one year and

NC Superior Court Judges’ Benchmark

Petitions for Termination Sex Offender Registration

Criteria	Score
A. Length of Registration	1
B. Type of Offense	2
C. Automatic Termination	2
D. Duration of Sex Offender Registration	2
E. Name Required to Register	2
F. Mandatory Hearing/Procedure	2
G. Home	2
H. Other	2