

DWI Sentencing

The following offenses are sentenced pursuant to G.S. 20-179 rather than Structured Sentencing:

- 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 alcohol) or
 - G.S. 20-138.2B (operating a school bus, child care vehicle, emergency, or law enforcement vehicle after consuming).
- A person convicted of impaired driving under G.S. 20-138.1 under the common law concept of aiding and abetting is subject to Level Five punishment. The judge need not make any findings of grossly aggravating, aggravating, or mitigating factors in such cases.

1 Determine the Applicable Law

Choose the appropriate sentencing grid and potentially applicable sentencing factors (form AOC-CR-311) based upon the date of the defendant's offense.

Offenses committed on or after October 1, 2013

Offenses committed on or after December 1, 2012, and before October 1, 2013

Offenses committed on or after December 1, 2011, and before December 1, 2012

Offenses committed on or after December 1, 2007, and before December 1, 2011

2 Determine Whether Any Grossly Aggravating Factors Exist

There are four grossly aggravating factors:

- (1) a qualifying prior conviction for an offense involving impaired driving;
- (2) driving while license revoked for an impaired driving revocation;
- (3) serious injury to another person caused by the defendant's impaired driving; and
- (4) driving with one of the following types of individuals in the vehicle:
 - (i) a child under the age of 18,
 - (ii) a person with the mental development of a child under 18, or
 - (iii) a person with a physical disability preventing unaided exit from the vehicle.

In superior court, the jury is the finder of fact for all aggravating (including grossly aggravating) factors other than whether a prior conviction exists under G.S. 20-179(c)(1) or (d)(5). Any factor admitted by the defendant is treated as though it was found by the jury. In district court, the judge is the finder of fact.

3 Enter Factors on Determination of Sentencing Factors Form (AOC-CR-311)

If the jury finds aggravating factors, the court must enter those factors on the Determination of Sentencing Factors form. Judge-found grossly aggravating factors must also be entered on the form.

4 Count the Grossly Aggravating Factors

If there are no grossly aggravating factors, skip to step 6.

5 Determine the Sentencing Level

If there are three or more grossly aggravating factors, the judge must impose Aggravated Level One punishment. (For offenses committed before December 1, 2011, Level One punishment must be imposed in any case in which two or more grossly aggravating factors are found.)

If the grossly aggravating factor in G.S. 20-179(c)(4) exists (driving while a child, person with the mental capacity of a child, or a disabled person is in the vehicle) or if two other grossly aggravating factors exist, the judge must impose Level One punishment. (For offenses committed before December 1, 2011, the presence of factor G.S. 20-179(c)(4) does not require Level One punishment.)

If only one grossly aggravating factor exists (other than the factor in G.S. 20-179(c)(4)), the judge must impose Level Two punishment.

6 Consider Aggravating and Mitigating Factors

If one or more grossly aggravating factors is found, decide whether to consider aggravating and mitigating factors in determining the appropriate sentence within the applicable level of punishment.

In district court, the judge may elect not to formally determine the presence of aggravating or mitigating factors if there are grossly aggravating factors. In superior court, the jury will determine before the sentencing hearing whether there are aggravating factors. If one or more grossly aggravating factors is found, a superior court judge may elect not to formally determine the presence of mitigating factors. If the judge elects *not* to determine such factors, skip to step 10.

7 Determine Aggravating Factors

If there are no grossly aggravating factors, or if the judge elects to consider aggravating and mitigating factors in a case in which there are grossly aggravating factors, determine whether aggravating factors exist. The State bears the burden of proving beyond a reasonable doubt that any aggravating factor exists.

There are nine aggravating factors, eight of them defined and a ninth “catch-all” aggravating factor:

1. Gross impairment of the defendant’s faculties while driving or an alcohol concentration of 0.15 or more.
2. Especially reckless or dangerous driving.
3. Negligent driving that led to a reportable accident.
4. Driving by the defendant while his or her driver’s license was revoked.
5. Two or more prior convictions of certain motor vehicle offenses within five years of the instant offense or one or more prior convictions of an offense involving impaired driving that occurred more than seven years before the instant offense.
6. Conviction under G.S. 20-141.5 of speeding to elude.
7. Conviction under G.S. 20-141 of speeding by the defendant by at least 30 miles per hour over the legal 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 the fifth factor (which involves prior convictions), the conduct constituting the aggravating factor must occur during the same transaction or occurrence as the impaired driving offense.

Note any aggravating factors found on the Determination of Sentencing Factors form.

8 Determine Mitigating Factors

Determine whether mitigating factors exist.

Mitigating factors are set forth in subsections (e)(1)–(7) of G.S. 20-179. There are eight mitigating factors (one is set forth in G.S. 20-179(e)(6a)), including a catch-all factor. The judge in both district and superior courts determines the existence of any mitigating factor. The defendant bears the burden of proving by a preponderance of the evidence that a mitigating factor exists. Except for the factors in subdivisions (4), (6), (6a), and (7), the conduct constituting the mitigating factor must occur during the same transaction or occurrence as the covered offense.

The following are mitigating factors listed by the subdivision of G.S. 20-179(e) in which they appear.

- (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) Driving that was safe and lawful except for the defendant’s impairment.
- (4) A safe driving record.
- (5) Impairment caused primarily by a lawfully prescribed drug for an existing medical condition, and the amount of drug taken was within the prescribed dosage.
- (6) Voluntary submission to a substance abuse assessment and to treatment.
- (6a) Completion of a substance abuse assessment, compliance with its recommendations, and 60 days of continuous abstinence from alcohol consumption, as proven by a continuous alcohol monitoring (CAM) system.
- (7) Any other factor that mitigates the seriousness of the offense.

Record any factors found on the Determination of Sentencing Factors form.

Note: The fact that the driver was suffering from alcoholism, drug addiction, diminished capacity, or mental disease or defect is *not* a mitigating factor. 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 the punishment level.

9 Weigh Aggravating and Mitigating Factors

If aggravating factors substantially outweigh any mitigating factors, or if there are only aggravating factors, find that the defendant is subject to Level Three punishment.

If there are no aggravating or mitigating factors, or if aggravating factors are counterbalanced by mitigating factors, find that the defendant is subject to Level Four punishment.

If the mitigating factors substantially outweigh any aggravating factors, or if there are only mitigating factors, find that the defendant is subject to Level Five punishment.

10 Select a Sentence of Imprisonment

The imprisonment, mandatory probation conditions, and fines for each level of impaired driving sentenced under G.S. 20-179 are set forth in the DWI sentencing grids. The judgment must impose a maximum term and may impose a minimum term. A judgment may state that a term is both the minimum and maximum term. G.S. 15A-1351(b).

Place of Confinement

For sentences imposed on or after January 1, 2015, imprisonment of any duration under G.S. 20-179, other than imprisonment required as a condition of special probation, is served in the Statewide Misdemeanant Confinement Program. All imprisonment imposed as a condition of special probation must be served in a designated local confinement or treatment facility—regardless of whether the imprisonment is for continuous or noncontinuous periods. *See* **APPENDIX G**, Place of Confinement Chart, for additional rules.

11 Review Additional Issues, as Appropriate

The section of this handbook on “Additional Issues” includes information on the following matters that may arise at sentencing:

- Fines, costs, and other fees
- Restitution
- Sentencing multiple convictions
- Jail credit
- Sentence reduction credits
- DWI parole
- Obtaining additional information for sentencing

Punishment for Covered Driving While Impaired (DWI) Offenses Committed on or after **October 1, 2013**

Punishment Level Controlling Statute Factors	Imprisonment and Mandatory Probation Conditions	Fine
Aggravated Level One G.S. 20-179(f3) <i>Three or more grossly aggravating factors</i>	<ul style="list-style-type: none"> • 12 months minimum to 36 months maximum • If suspended <ul style="list-style-type: none"> – Imprisonment of at least 120 days as a condition of special probation – Requirement that defendant abstain from alcohol consumption for a minimum of 120 days to a maximum of the term of probation, as verified by continuous alcohol monitoring (CAM) system – Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6 	Up to \$10,000
Level One G.S. 20-179(g) <i>Grossly aggravating factor in G.S. 20-179(c)(4) or two other grossly aggravating factors</i>	<ul style="list-style-type: none"> • 30 days minimum to 24 months maximum • If suspended <ul style="list-style-type: none"> – Special probation requiring (1) imprisonment of at least 30 days or (2) imprisonment of at least 10 days and alcohol abstinence and CAM for at least 120 days – Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6 	Up to \$4,000
Level Two G.S. 20-179(h) <i>One grossly aggravating factor, other than the grossly aggravating factor in G.S. 20-179(c)(4)</i>	<ul style="list-style-type: none"> • 7 days minimum to 12 months maximum • If suspended <ul style="list-style-type: none"> – Special probation requiring (1) imprisonment of at least 7 days or (2) alcohol abstinence and CAM for at least 90 days <ul style="list-style-type: none"> ◦ If Level Two based on prior conviction or DWLR for an impaired driving revocation and prior conviction occurred within five years, sentence must require 240 hours of community service if no imprisonment imposed – Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6 	Up to \$2,000
Level Three G.S. 20-179(i) <i>Aggravating factors substantially outweigh any mitigating factors</i>	<ul style="list-style-type: none"> • 72 hours minimum to 6 months maximum • If suspended <ul style="list-style-type: none"> – Must require one or both of the following <ul style="list-style-type: none"> ◦ Imprisonment for at least 72 hours as a condition of special probation ◦ Community service for a term of at least 72 hours – Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6 	Up to \$1,000
Level Four G.S. 20-179(j) <i>No aggravating and mitigating factors or aggravating factors are substantially counterbalanced by mitigating factors</i>	<ul style="list-style-type: none"> • 48 hours minimum to 120 days maximum • If suspended <ul style="list-style-type: none"> – Must require one or both of the following <ul style="list-style-type: none"> ◦ Imprisonment for 48 hours as a condition of special probation ◦ Community service for a term of 48 hours – Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6 	Up to \$500
Level Five G.S. 20-179(k) <i>Mitigating factors substantially outweigh aggravating factors</i>	<ul style="list-style-type: none"> • 24 hours minimum to 60 days maximum • If suspended <ul style="list-style-type: none"> – Must require one or both of the following <ul style="list-style-type: none"> ◦ Imprisonment for 24 hours as a condition of special probation ◦ Community service for a term of 24 hours – Requirement that defendant obtain a substance abuse assessment and education or treatment required by G.S. 20-17.6 	Up to \$200

Appendix G: Place of Confinement Chart

	Felony G.S. 15A-1352(b)	Misdemeanor G.S. 15A-1352(a)	Driving While Impaired (DWI) G.S. 15A-1352(f)
Active	Division of Adult Correction and Juvenile Justice (DACJJ)	<p><i>Sentences imposed on/after 10/1/2014:</i> ≤ 90 days: Local jail > 90 days: Statewide Misdemeanant Confinement Program (SMCP)</p> <p><i>Sentences imposed before 10/1/2014:</i> ≤ 90 days: Local jail 91–180 days: SMCP > 180 days: DACJJ</p>	<p><i>Sentences imposed on/after 1/1/2015:</i> SMCP, regardless of sentence length</p> <p><i>Sentences imposed before 1/1/2015 (G.S. 20-176(c1)):</i></p> <ul style="list-style-type: none"> Defendants with no prior DWI or jail imprisonment for a Ch. 20 offense: Local jail Defendants with a prior DWI or prior jail imprisonment for a Ch. 20 offense: <ul style="list-style-type: none"> ≤ 90 days: Local jail 91–180 days: Local jail or DACJJ, in court's discretion > 180 days: DACJJ
Split Sentence at Sentencing G.S. 15A-1351(a)	<i>Continuous:</i> Local jail or DACJJ <i>Noncontinuous:</i> Local jail or treatment facility	Local jail or treatment facility	Local jail or treatment facility
Split Sentence as a Modification of Probation G.S. 15A-1344(e)	<i>Continuous:</i> Local jail or DACJJ <i>Noncontinuous:</i> Local jail or treatment facility	<i>Continuous:</i> Local jail or DACJJ <i>Noncontinuous:</i> Local jail or treatment facility	<i>Continuous:</i> Local jail or DACJJ <i>Noncontinuous:</i> Local jail or treatment facility
Confinement in Response to Violation (CRV) G.S. 15A-1344(d2)	DACJJ	Place of confinement indicated in the judgment suspending sentence	Place of confinement indicated in the judgment suspending sentence
Quick Dip G.S. 15A-1343(a1)(3) and -1343.2	Local jail	Local jail	N/A
Nonpayment of Fine G.S. 15A-1352	DACJJ	Local jail	N/A
Probation Revocation	Place of confinement indicated in the judgment suspending sentence	Place of confinement indicated in the judgment suspending sentence	Place of confinement indicated in the judgment suspending sentence

Notes

Work release. Notwithstanding any other provision of law, the court may order that a consenting misdemeanor (including DWI) be granted work release. The court may commit the defendant to a particular prison or jail facility in the county or to a jail in another county to facilitate the work release arrangement. If the commitment is to a jail in another county, the sentencing court must first get the consent of the sheriff or board of commissioners there. G.S. 15A-1352(d).

Overcrowded confinement. When a jail is overcrowded or otherwise unable to accommodate additional prisoners, inmates may be transferred to another jail or, in certain circumstances, to DACJJ, as provided in G.S. 148-32.1(b). A judge also has authority to sentence an inmate to the jail of an adjacent county when the local jail is unfit or insecure, G.S. 162-38, or has been destroyed by fire or other accident, G.S. 162-40.