

**DWI Sentencing Law:  
Something Old, Something New**

*Presented  
by:*

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**Something Borrowed . . .**

- “Except for death penalty cases, no sentence requires more documentation.”
- Loeb & Drennan (2000)



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**G.S. 20-179**

**Governs sentencing for**

- G.S. 20-138.1 (impaired driving)
- G.S. 20-138.2 (impaired driving in a commercial vehicle)
- 2<sup>nd</sup> or subsequent conviction of G.S. 20-138.2A (operating commercial vehicle after consuming)
- 2<sup>nd</sup> or subsequent conviction of G.S. 20-138.2B (operating school bus or child care vehicle after consuming)

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## Something Borrowed . . .

- "A distinguishing characteristic of the impaired driving statutes is the extent to which they limit prosecutorial and judicial discretion. Nowhere is that limitation more evident than in the restrictions on sentencing."



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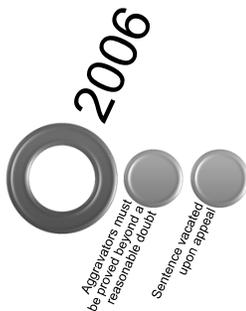
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## Significant amendments



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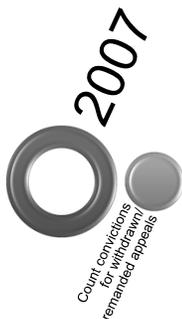
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## Significant amendments



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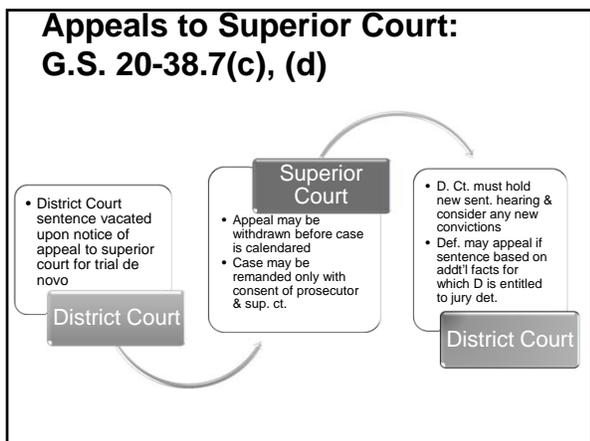
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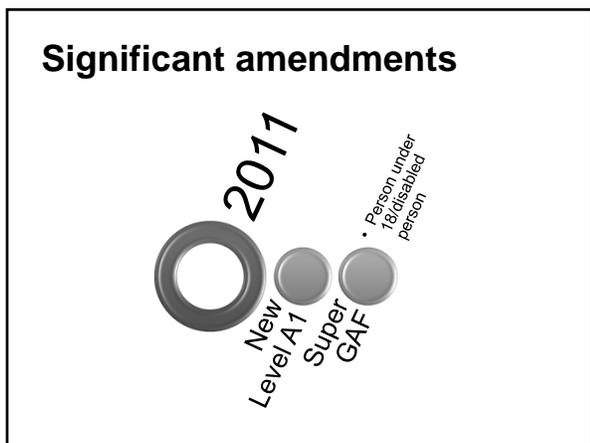
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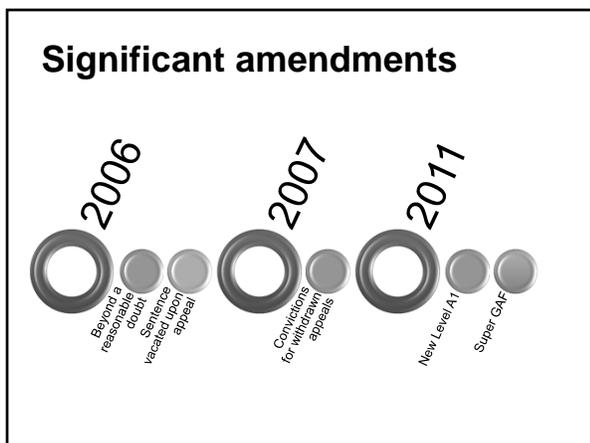
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**In General**

- Mandatory minimums
- Good time credit
- Parole
- Substance abuse assessment and education or treatment required as condition of probation

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**Why?**

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**Purposes of sentencing**

The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

§ 15A-1340.12.

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**What percentage of drivers (nationally) with a 0.08 or higher BAC who were involved in a fatal crash had a prior DWI conviction?**

1. 2%
2. 8%
3. 27%
4. 43%

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**What is the rate of re-arrest for DWI within 3 years for individuals who have completed substance abuse treatment (in North Carolina)?**

1. 2 percent
2. 13 percent
3. 27 percent
4. 38 percent

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Level	Factors	Minimum Sentence	Maximum Sentence	If Suspended, Special Probation Requiring:	Maximum Fine
1	2+ GAFs	30 days	24 months	Active term of at least 30 days	\$4,000
2	1 GAF	7 days	12 months	Active term of at least 7 days	\$2,000
3	Aggravating > Mitigating	72 hours	6 months	Active term of at least 72 hours -- And/or at least 72 hours community service	\$1,000
4	Aggravating = Mitigating	48 hours	120 days	48 hours active -- And/or 48 hours community service	\$500
5	Mitigating > Aggravating	24 hours	60 days	24 hours active -- And/or 24 hours community service	\$200

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**Grossly Aggravating Factors  
(Offenses before 12/1/2011)**

- 1. Qualifying prior convictions for an offense involving impaired driving.
- 2. DWLR if revocation was an impaired driving revocation
- 3. Serious injury
- 4. Child under 16 in vehicle

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**1. Qualifying prior conviction for offense involving impaired driving**

- Offense involving impaired driving:
  - Impaired driving under G.S. 20-138.1
  - Habitual impaired driving under G.S. 20-138.5
  - Impaired driving in a commercial vehicle under G.S. 20-138.2
  - Any offense under G.S. 20-141.4 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

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**1. Qualifying prior conviction for offense involving impaired driving**

- (1) the conviction occurred within seven years before the date of the offense for which the defendant is being sentenced; or
- (2) 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
- (3) for offenses committed on or after August 30, 2007, 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).

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**What counts as a conviction?**

- G.S. 20-4.01(4a)
- Conviction means “final conviction of a criminal offense, including a no contest plea”
- When is a district court conviction final?

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**Consider this scenario**

- Defendant is charged with DWI on 11/3/11. (Case 1)
- Defendant is charged with second DWI on 12/8/11. (Case 2)
- Defendant pleads guilty in Case 1 today. He is sentenced at Level Five.
- Defendant also pleads guilty in Case 2 today. Is the conviction in Case 1 a GAF for Case 2?

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**Is the conviction in Case 1 a GAF for Case 2?**

1. Yes
2. No

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**2. DWLR for impaired driving rev.**

- Elements of G.S. 20-28 must be satisfied
  - Driving a motor vehicle on a street or highway while license revoked
  - Revocation by another state with no corresponding action by NCDMV likely is not a revocation for purposes of DWLR
- Impaired driving license revocation defined in G.S. 20-28.2(a)
  - Includes CVRs under G.S. 20-16.5

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**3. Serious injury to another person caused by impaired driving**

- State v. Ferguson, 261 N.C. 558 (1964)
  - Whiplash may be serious injury depending upon severity and painful effect
- State v. Barber, 93 N.C. App. 42 (1989)
  - Broken right leg, hospitalization for blood clots in lungs and compressed vertebra amounted to serious injury

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**4. Driving with child under 16 in vehicle**



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### Let's consider Les

- Drove while impaired on August 1, 2011
- Twin daughters, ages 15, were in the car.
- Refused breath test
- Previously convicted of DWI on June 2, 2010
- License suspension for 2010 DWI conviction is listed as *indefinite* on DMV record.
- Spent 30 days after arrest in residential substance abuse treatment at a private facility licensed by the State
- Obtained substance abuse assessment and completed recommended treatment



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### Grossly Aggravating Factors

1. Qualifying prior convictions for an offense involving impaired driving.
2. DWLR if revocation was an impaired driving revocation
3. Serious injury
4. Child under 16 in vehicle

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### Level One sentencing options

- Minimum sentence: 30 days
- Maximum sentence: 24 months
- Special probation: Active term of at least 30 days
  - Split can be up to ¼ statutory maximum (in this case, 6 months)
- Maximum Fine: \$4,000
- May impose CAM for 30 – 60 days



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### Active sentence

- Minimum: 6 months, Maximum: 18 months
- Credit for 30 days of inpatient treatment
  - G.S. 20-179(k1) (discretionary)
- Payment of costs
  - G.S. 7A-304: to waive, written finding of just cause
- Fine of \$4,000
- Recommend work release
- How much time will Les serve?



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### What is the minimum time Les will serve?

1. 30 days
2. 2.4 months
3. 3 months
4. 4.8 months
5. 9 months

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### Good Time Credit: G.S. 148-13

- Sentence: Minimum 6 months, Maximum 18 months
- Day for day credit (assuming no infractions) reduces maximum to 9 months
- Credit may not reduce sentence below mandatory minimum – for Level One, 30 days



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### Parole Eligibility: G.S. 15A-1371

- Sentence: Minimum 6 months, Maximum 18 months
- Eligible after serving minimum sentence or 1/5 statutory maximum, whichever is less, cut in half by good time credit
- Minimum sentence: 6 months
- Statutory maximum: 24 months
- 1/5 statutory maximum is 4.8 months
- 1/2 of 4.8 months is 2.4 months
- Parole eligible at 2.4 months




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### Suspended sentence

- Minimum 6 months, Maximum 18 months
- Credit for 30 days of inpatient treatment to apply against term of special probation
- Sentence suspended and defendant placed on supervised probation for 24 months Active term of 30 days as a condition of special probation
- Obtain substance abuse assessment and all recommended education or treatment
- Abstain from alcohol consumption for 60 days as verified by CAM. Defendant to pay costs not to exceed \$1,000.
- Costs, fine




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### Effective for offenses committed on or after 12/1/2011

- Aggravated Level One DWI
  - 3 or more grossly aggravating factors
  - No parole
  - Released four months before maximum period
    - Subject to post-release supervision
    - CAM for four months
  - If placed on probation
    - CAM required for at least 120 days
- Level One DWI if any of the following persons are in vehicle
  - Person under 18
  - Person with mental development of person under 18
  - Person with physical disability that prevents person from getting out of vehicle without assistance

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Level	Factors	Minimum Sentence	Max Sentence	If Suspended, Special Probation Requiring:	Max Fine
1A	3 GAFs	12 months	36 months	Active term of at least 120 days + 120 days CAM	\$10,000
1	2 GAFs or 1 minor/ disabled GAF	30 days	24 months	Active term of at least 30 d	\$4,000
2	1 GAF	7 days	12 months	Active term of at least 7 d	\$2,000
3	Agg. > Mitig.	72 hours	6 months	Active term of at least 72 hrs And/or at least 72 hrs CS	\$1,000
4	Agg= Mitig.	48 hours	120 days	48 hrs active and/or 48 hrs CS	\$500
5	Mitig. > Agg.	24 hours	60 days	24 hrs active and/or 24 hrs CS	\$200

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### Let's consider Les (again)

- Drives while impaired on January 1, 2012
- Daughters, ages 16, are in the car.
- Refuses breath test
- Previously convicted of DWI on June 2, 2010
- License suspension for 2010 DWI conviction is listed as *indefinite* on DMV record.
- Spent 30 days after arrest in residential substance abuse treatment at a private facility licensed by the State
- Obtained substance abuse assessment and completed recommended treatment




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### Grossly Aggravating Factors

1. Qualifying prior convictions for an offense involving impaired driving.
2. DWLR if revocation was an impaired driving revocation
3. Serious injury
4. Child under 18 in vehicle or person with mental development of child under 18 or person with disability barring unaided exit from vehicle

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### Aggravated Level One sentencing options

- Minimum sentence: 12 months
- Maximum sentence: 36 months
- Special probation: Active term of at least 120 days and 120 days CAM
- Maximum fine: \$10,000
- May impose CAM for up to term of probation
- No parole
- Four months post-release supervision



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### Active sentence

- Minimum 18 months, Maximum 18 months
- No credit for night he spent in jail upon his arrest
- Credit for 30 days of inpatient treatment (discretionary)
- Payment of costs
- Fine of \$10,000
- Recommend work release
- How much time will Les serve?



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### Good Time Credit: G.S. 148-13

- Sentence: Minimum 18 months, Maximum 18 months
- Day for day credit (assuming no infractions) would reduce maximum to 9 months
- But credit may not reduce sentence below mandatory minimum – for Aggravated Level One, 12 months



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**Post-release supervision:  
G.S. 20-179(f3)**

- Sentence: Minimum 18 months, Maximum 18 months
- Day for day credit (assuming no infractions) would reduce maximum to 9 months
- But credit may not reduce sentence below mandatory minimum – for Aggravated Level One, 12 months
- D must be released at “maximum imposed term” less four months
- Is Les released at 8 months?
  - 12 months?
  - 14 months?



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**Suspended sentence**

- Min. 18 months, Max. 18 months
- Credit for 30 days of inpatient treatment against term of special probation
- Sentence suspended, defendant placed on supervised probation for 24 months
- Active term of 120 days as a condition of special probation and 120 days CAM
- Obtain substance abuse assessment and recommended education/treatment
- Abstain from alcohol consumption for 24 months as verified by CAM system. Defendant to pay costs (\$12 day).
- Costs, fine



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**Which type of sentence?**

1. Active
2. Suspended

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**Jail or prison?**

- DWI defendants with no prior DWI convictions or who have never been jailed for Chapter 20 violation must be sentenced to local jail.
- DWI defendants with a prior DWI or who have served time in jail for Chapter 20 offense:
  - Must be sentenced to jail if sentence imposed is for 90 days or less
  - May be sentenced to jail or DAC if sentence or sentences imposed require confinement of 91 to 180 days
  - Must be sentenced to DAC if sentence or sentences imposed requires confinement of more than 180 days

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**Rule against consolidation:  
G.S. 20-179(f2)**

- Two or more impaired driving charges may not be consolidated for judgment
- Judge must determine if aggravating and mitigating factors apply unless impaired driving charge is consolidated with a charge carrying a greater punishment
- Two or more impaired driving sentences may run concurrently

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**State v. Hurt, \_\_ N.C. App. \_\_,  
702 S.E.2d 82 (2010)**

- Confrontation Clause applies to the proof at sentencing of sentencing factors that “if found, increase the defendant’s sentence beyond the statutory maximum.”
- Thus, the State may not, for example, introduce at a G.S. 20-179 sentencing hearing over a defendant’s objection the affidavit of a non-testifying chemical analyst to prove the aggravating factor in G.S. 20-179(d)(1), that the defendant had an alcohol concentration of 0.15.

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