

## **DWI SENTENCING IN DISTRICT COURT— G.S. 20-179.**

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)

The judge must hold a sentencing hearing to determine if there are aggravating or mitigating factors that affect the sentence.

The state must prove *beyond a reasonable doubt* that an aggravating factor exists. The defendant must prove *by a preponderance of the evidence* that a mitigating factor exists.

Before the hearing, the prosecutor must make all feasible efforts to secure the defendant's full record of traffic convictions, and must present to the judge that record for consideration in the hearing.

The judge must first determine whether there are any grossly aggravating factors in the case based upon the evidence presented at trial and in the hearing.

**Grossly Aggravating Factors** (if 1 GAF, Level 2 DWI. If 2 GAFs or more, Level 1 DWI):

- (1) A prior conviction for ***an offense involving impaired driving***<sup>1</sup> 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  - c. The conviction occurred in district court; the case was appealed to superior court; the appeal has been withdrawn or the case has been remanded back to district court; and a new sentencing hearing has not been held pursuant to G.S. 20-38.7.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).<sup>2</sup>
- (3) Serious injury to another person caused by the defendant's impaired driving at the time of the offense.
- (4) Driving by the defendant while a child under the age of 16 years was in the vehicle at the time of the offense.

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<sup>1</sup> 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
- 1st or 2nd 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

<sup>2</sup> 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 commercial impaired driving
- 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 2<sup>nd</sup> 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
- 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

**Aggravating Factors:**

- (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 5 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 flee/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 (5a) and (5b), conduct must occur during same transaction as 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 DWI).
- (4) A safe driving record (no four-point traffic convictions or for which the person's license is subject to revocation within five years).
- (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 from alcohol consumption as proven by a continuous alcohol monitoring system of a type approved by Dep't of Correction.
- (7) Any other factor that mitigates the seriousness of the offense.

Except for factors in (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

*The judge must note in the judgment the factors found. G.S. 20-179(f).*

## **DWI PUNISHMENT**

*(For **any suspended sentence**, defendant must obtain 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.)*

### **Level One**

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 continuous alcohol monitoring for minimum of 30 days to maximum of 60 days as condition of probation. Total cost to defendant for continuous alcohol monitoring system may not exceed \$1,000. If court finds defendant should not be required to pay cost of monitoring, must not impose this condition unless local government agrees to pay.

### **Level Two**

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 continuous alcohol monitoring for minimum of 30 days to maximum of 60 days as condition of probation. Total cost to defendant for continuous alcohol monitoring system may not exceed \$1,000. If court finds defendant should not be required to pay cost of monitoring, must not impose this condition unless local government agrees to pay.

### **Level Three**

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 within 90 days.

Fine – up to \$1,000

### **Level Four**

Imprisonment – min 48 hours, max 120 days. If suspended, (1) special probation active term of 48 hours and/or (2) 48 hours community service within 60 days.

Fine – up to \$500

### **Level Five**

Imprisonment – min 24 hours, max 60 days. If suspended, (1) special probation active term of 24 hours and/or (2) 24 hours community service within 30 days.

Fine – up to \$200

***Credit for Inpatient Treatment*** – 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.

- Defendant pays unless judge orders State to pay.
- 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 defendant appears at jail to serve time with alcohol or a controlled substance remaining in his 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 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).

# Sentencing for Impaired Driving: G.S. 20-179

Level	Factors	Minimum Sentence	Maximum Sentence	If Suspended, <sup>1</sup> Special Probation Requiring:	Maximum Fine
1	2+ GA Factors	30 days	24 months	Active term of at least 30 days	\$4,000
2	1 GA Factor	7 days	12 months	Active term of at least 7 days	\$2,000
3	Agg. > Mitigating	72 hours	6 months	Active term of at least 72 hours -- And/or at least 72 hours community service within 90 days	\$1,000
4	Agg. = Mitigating	48 hours	120 days	48 hours active -- And/or 48 hours community service within 60 days	\$500
5	Mitig. > Agg.	24 hours	60 days	24 hours active -- And/or 24 hours community service within 30 days	\$200

<sup>1</sup> For any suspended sentence, 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.



DWI Sentencing  
Special Topic Seminar -- Sentencing  
April 2009  
UNC School of Government  
Shea Denning

A. Lori Smith is convicted of DWI after a two-hour trial. She was pulled over by a city police officer who saw her driving 10 miles per hour under the speed limit, saw the car weave within the lane and then saw the left tires of the vehicle cross over the center line of a two lane road. Ms. Smith's BAC was .11. She is 25 years old, and has a prior conviction six years ago for driving after consuming in violation of G.S. 20-138.3. The assistant district attorney has stated that the prior conviction is a grossly aggravating factor. Is she correct?

1. Yes
2. No

B. John Brown's driver's license was revoked on 9/1/2007 based upon his conviction for impaired driving. His BAC was .16. On 10/1/2008, his driver's license was restored subject to an ignition interlock requirement. On 12/1/2008, Mr. Brown was charged with DWI and DWLR for driving in violation of the ignition interlock requirement. He pled guilty to both offenses before you on April 1, 2009. The assistant district attorney contends that there are two grossly aggravating factors that apply at sentencing. The first is that Mr. Brown has a prior conviction for an offense involving impaired driving within seven years of the instant offense. The second is that Mr. Brown was driving at the time of the offense while his license was revoked and the revocation was an impaired driving revocation. Mr. Brown's attorney contends that Mr. Brown's license was not revoked at the time of the driving as a result of a *prior impaired driving license revocation* because Mr. Brown's license was not revoked once it was conditionally restored. You find:

1. One GAF based on the prior conviction and sentence Mr. Brown for a Level 2 DWI
2. Two GAFs based on the prior conviction and DWLR at the time of the instant offense, and sentence Mr. Brown for a Level 1 DWI



C. Jane Brown's license is revoked on 9/1/2008 based upon her conviction for impaired driving. She is granted a limited privilege on 10/15/2008. On 12/1/2008, she is charged with DWI. Jane Brown pleads guilty to the second DWI on April 1, 2009. The assistant district attorney contends that there are two grossly aggravating factors: the prior conviction and DWLR at the time of the instant offense. You find:

1. 1 GAF based on the prior DWI and sentence Ms. Brown for a Level 2 DWI
2. 2 GAFs based on the prior DWI and DWLR at the time of the instant offense and sentence Ms. Brown for a Level 1 DWI.

D. James Johnson is a fifty-year-old carpenter. At 9 pm on Friday night in February 2008, he was driving down Highway 70. He ran off the shoulder of the road, overcorrected, crossed the lane of oncoming traffic and drove off the embankment, flipping the car. Johnson's friend and co-worker, Larry Reynolds, was riding with him. He suffered a laceration on his forehead that required 10 stitches and a broken collar bone. Both Johnson and Reynolds had been drinking at a nearby bar before the accident. Johnson's BAC was .14. Johnson was convicted of impaired driving in 1998. Johnson was convicted of DWI arising out of the February 2008 incident after a two-hour trial. At the sentencing hearing, the state argues that the injuries caused were serious and thus constituted a grossly aggravating factor. The defense argues that they were not "serious" and that Mr. Johnson should be punished at no more than a level three. The defense argues that the case should be mitigated, based on two factors—Mr. Johnson's safe driving record and his voluntary submission to an assessment (which resulted in a finding that he undergo treatment, which his attorney stated he was going to do as soon as the trial was concluded). Your ruling?

1. Sentence Mr. Johnson for a Level 2 DWI based upon serious injury to Mr. Reynolds
2. Sentence Mr. Johnson for a Level 3 DWI
3. Sentence Mr. Johnson for a Level 4 DWI
4. Sentence Mr. Johnson for a Level 5 DWI

E. Brian Jones pleads guilty before you to a level five DWI. He had an alcohol concentration of .09 when he was stopped at a checkpoint in Chapel Hill at 1:00 a.m. on a Saturday morning. He was visiting friends in NC for the weekend during that trip. He is 35, and has no criminal or traffic record of any kind. He is employed as a financial analyst in Tampa, Florida. He is married and has an 11 month old daughter. He has been assessed and the assessment indicated that he should attend ADETS. His attorney requests that Mr. Jones be allowed to serve any sentence imposed in Florida. Your sentence?

1. Suspended sentence, 24 hours community service, X months probation
2. Suspended sentence, special probation with special active term of 24 hours
3. 24 hours active
4. None of the above

## DWI Sentencing: What is a prior conviction?

Shea Denning

1. Darren Driver is convicted on 12/1/2008 of impaired driving arising from his driving on 4/1/2008 (Case #08-CR-100). Driver is sentenced in district court for a Level 5 offense. Driver appeals his conviction to superior court. Pursuant to G.S. 20-38.7, Driver's notice of appeal vacates the sentence imposed by the district court.
  - a. Driver is also charged with impaired driving arising from an offense that occurred on 8/1/2008 (Case #08-CR-500). Driver pleads guilty to that offense on April 1, 2009, while the appeal in Case #08-CR-100 is still pending.

Is the conviction in Case #08-CR-100 a grossly aggravating factor for Case #08-CR-500?

- b. Suppose, however, that Driver has withdrawn the appeal in Case #08-CR-100 at the time of sentencing for Case #08-CR-500, but a new sentencing hearing for Case #08-CR-100 has not yet been held.

Is the conviction in Case #08-CR-100 a grossly aggravating factor in Case #08-CR-500?

- c. Suppose further that at the sentencing hearing on April 1, 2009, Driver is sentenced as a Level 2 offender in Case #08-CR-500 (based upon the prior conviction in Case #08-CR-100). The sentencing hearing for Case #08-CR-100 is then held May 1, 2009.

Is the conviction in Case #08-CR-500 now a grossly aggravating factor in Case #08-CR-100?

Driver is sentenced as a Level 2 offender in Case #08-CR-100 (based upon the conviction in Case #08-CR-500). May Driver appeal the sentence imposed on May 1, 2009 in Case #08-CR-100?

2. Rhonda Rover was charged with impaired driving on March 1, 2008 (Case # 08-CR-200). She was again charged with impaired driving on August 1, 2008 (Case #08-CR-800). She pleads guilty to both offenses on April 1, 2009. On both occasions, Rover was driving alone and was stopped at a checkpoint. Her BAC was .08 in both cases. Is either case a grossly aggravating factor for the other? If so, are both cases properly sentenced as Level 2 impaired driving cases?