# DWI Sentencing

Excerpts from the North Carolina Criminal Law blog
http://sogweb.sog.unc.edu/blogs/ncclaw

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# Sentencing in Impaired Driving Cases

Posted By Shea Denning On November 5, 2009 @ 9:00 am In Sentencing,Uncategorized | 1 Comment

I first encountered North Carolina's impaired driving sentencing scheme several years ago when I worked as an Assistant Federal Public Defender for the Eastern District of North Carolina. I represented defendants charged under the Assimilative Crimes Act, 18 U.S.C. § 13, with committing violations of assimilated state offenses on a certain federal enclave in Fayetteville. I recall trying to determine whether a defendant charged with violating the assimilated state law offense of driving while impaired was automatically entitled to a jury trial in federal court, given that the punishment for impaired driving can only exceed six months based on a finding of at least one grossly aggravating factor. I was practicing at the time in a post-*Apprendi v. New Jersey* (530 U.S. 466), but pre-*Blakely v. Washington* (542 U.S. 296) world, and I (and others) wondered: Did G.S. 20-138.1 and 20-179 define five separate impaired driving offenses or one offense with five levels of punishment?

North Carolina's impaired driving statutes were amended post-*Blakely* to require that aggravating factors that increased the maximum punishment be found by a jury (in superior court) and be proven beyond a reasonable doubt. By affording element-like constitutional protections to these sentencing factors, the 2006 amendments largely (though not entirely) rendered academic the question of whether G.S. 20-138.1 and G.S. 20-179 defined one-or five-offenses.

While the finder of fact and burdens of proof were altered by 2006 and 2007 amendments to the impaired driving statutes, the five-level punishment structure in G.S. 20-179 (which governs sentencing for conviction of (i) impaired driving under G.S. 20-138.1, (ii) impaired driving in a commercial vehicle under G.S. 20-138.2, (iii) a second or subsequent conviction for operating a commercial vehicle after consuming alcohol under G.S. 20-138.2A, and (iv) a second or subsequent conviction for operating a school bus, school activity bus, or child care vehicle after consuming alcohol under G.S. 20-138.2B) remains intact. Given the relative complexity of this statutory sentencing scheme, I thought the topic of sentencing in impaired driving cases might be worthy of a blog post (or two).

Let's start with the grossly aggravating factors (GAF). A finding of one GAF requires that the defendant receive a Level Two punishment, which bumps the statutory maximum sentence from six to twelve months. If the fact-finder finds more than one GAF, Level One punishment, which carries a 24-month maximum, must be imposed.

There are four types of GAFs:

1. A prior conviction for ***an offense involving impaired driving***, defined as
   - 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 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; or
   - a substantially similar offense committed in another state or jurisdiction

if

   a. The conviction occurred within seven years before the date of the offense for which the defendant is being sentenced;
   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.

2. Driving while license revoked 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).

   ***An impaired driving license revocation*** is 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 second-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.

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.

Level Two punishment requires a minimum sentence of seven days. If a judge suspends a Level Two sentence, the judge must impose special probation requiring an active term of at least seven days. Level One punishment requires a minimum sentence of thirty days. If a judge suspends a Level One sentence, the judge must impose special probation requiring an active term of at least thirty days. There is only one substitute for jail time: A judge may order that time be served and award credit for time served as an inpatient in a facility operated or licensed by the State for the treatment of alcoholism or substance abuse. See G.S. 20-179(k1).

The rules governing credit for jail time are closely prescribed. A judge may not award credit for the first twenty-four hours of time spend in jail pending trial. See G.S. 20-179(p). And, while a judge may order a term of imprisonment to be served on weekends, any term of 48 hours or more must be served in increments of 48 continuous hours. Credit for jail time is given hour for hour for time actually served. See G.S. 20-179(s)(1).

If there are no GAFs, then Level Three, Four, or Five punishment may be imposed, depending upon the relevant weight of aggravating (as distinguished from grossly aggravating) and mitigating factors. Each of these lower-level punishments may be satisfied by conditions other than active time. But that is a post for another day.

# Level 3, 4 and 5 Punishment in Impaired Driving Cases

Posted By Shea Denning On December 21, 2009 @ 9:29 am In Sentencing,Uncategorized | 1 Comment

I wrote here about grossly aggravating factors (GAFs) and Level One and Two punishment in impaired driving cases sentenced under G.S. 20-179, leaving discussion of Level Three, Four, and Five punishment for another day. That day is upon us.

If the judge or jury in the sentencing hearing determine that there are no GAFs, the judge must weigh all aggravating and mitigating factors. Aggravating factors, which must be proved beyond a reasonable doubt, and, in superior court, found by a jury, consist of the following:

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. Driving by the defendant while his driver's license was revoked.
5. 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, if the convictions occurred within five years of the date of the offense for which the defendant is being sentenced, or one or more prior convictions of an offense involving impaired driving that occurred more than seven years before the date of the offense for which the defendant is being sentenced.
6. Conviction under G.S. 20-141.5 of speeding to elude.
7. Conviction under G.S. 20-141 of speeding 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 prior convictions factor in subdivision (5), the conduct constituting the aggravating factor must occur during the same transaction or occurrence as the impaired driving offense.

Mitigating factors are:

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 at the time of the offense that was safe and lawful except for the impairment of the defendant's faculties.
4. A safe driving record, with the defendant's having no conviction for any motor vehicle offense for which at least four points are assigned under G.S. 20-16 or for which the person's license is subject to revocation within five years of the date of the offense for which the defendant is being sentenced.
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. The defendant's voluntary submission to a mental health facility for assessment after he was charged with the impaired driving offense for which he is being sentenced, and, if recommended by the facility, his 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 an approved continuous alcohol monitoring system

7. Any other factor that mitigates the seriousness of the offense.

Except for the factors in 4, 6, 6a, and 7, the conduct constituting the mitigating factor must occur during the same transaction or occurrence as the impaired driving offense. Thus, while the catch-all aggravating factor may involve only conduct that occurred during the impaired driving offense, the catch-all mitigating factor may consist of conduct entirely unrelated to the offense.

The judge must weigh all aggravating and mitigating factors. If the aggravating factors substantially outweigh any mitigating factors, the judge must impose Level Three punishment. If there are no aggravating or mitigating factors, or the aggravating factors are substantially counterbalanced by mitigating factors, the judge must impose Level Four punishment. Finally, if the mitigating factors substantially outweigh the aggravating factors, the judge must impose Level Five punishment.

Level 3 punishment *may* consist of a fine of up to $1,000 and *must* consist of a term of imprisonment that includes a minimum term of not less than 72 hours and a maximum term of not more than six months. This term of imprisonment may be suspended upon condition that the defendant be imprisoned for a term of at least 72 hours as a condition of special probation, perform community service for a term of at least 72 hours, or any combination of these conditions. The requirement that the defendant not operate a motor vehicle for a specified period no longer satisfies the statutory requirements for a suspended sentenced imposed under Level 3, 4, or 5. See S.L. 2006-253. For offenses committed before December 1, 2006, non-operation was the condition of probation chosen by judges in sentencing out-of-state defendants when the judge did not deem it necessary for the defendant to return to North Carolina to serve jail time or perform community service. (The Department of Correction's community service alternative punishment program for Level 3, 4, and 5 offenders established pursuant to G.S. 20-179.4 does not allow the service to be performed in another state.) Nonresidents sentenced to Level 3, 4, or 5 punishment for an impaired driving offense committed December 1, 2006 or later now must return to North Carolina not only for sentencing but also to serve a term of imprisonment or perform community service.

Level 4 punishment may consist of a fine of up to $500 and must consist of a term of imprisonment that includes a minimum term of not less than 48 hours and a maximum term of not more than 120 days. The term of imprisonment may be suspended upon condition that the defendant be imprisoned for a term of 48 hours as a condition of special probation or perform community service for a term of 48 hours, or any combination of these conditions.

Level 5 punishment may consist of a fine of up to $200 and must consist of a term of imprisonment that includes a minimum term of not less than 24 hours and a maximum term of not more than 60 days. The term of imprisonment may be suspended on condition that the defendant be imprisoned for a term of 24 hours as a condition of special probation, perform community service for a term of 24 hours, or any combination of these conditions.

A person convicted of aiding and abetting impaired driving is subject to Level 5 punishment, and there is no requirement that the judge make findings of grossly aggravating, aggravating, or mitigating factors in such cases.

Those are the basics. Look for future posts on the bedeviling details.

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1 Comment (Open | Close)

**1 Comment To "Level 3, 4 and 5 Punishment in Impaired Driving Cases"**

**#1 Comment** By Shea Denning On May 19, 2010 @ 9:28 am

Note that G.S. 20-179.4 was repealed by S.L. 2009-372 effective December 1, 2009. This legislation amended G.S. 143B-262.4(a) to codify therein provisions governing the community service program for DWI offenders.

# Sentence Reduction Credits and Parole for DWI Inmates

Posted By Jamie Markham On January 13, 2010 @ 9:09 am In Sentencing,Uncategorized | 8 Comments

Last April, I wrote a post touching on the sentence reduction credit rules applicable to DWI inmates. In short, DWI inmates fall under the same "good time" credit rules applicable to certain pre–Structured Sentencing inmates: one day of credit for every day served in custody without an infraction of inmate conduct rules. In other words, a well-behaved inmate can expect to have his or her sentence cut in half by good time credit. (Sound familiar? That's the same credit rule that may or may not apply to certain life-sentenced inmates from the 1970s. We'll soon find out if it does.)

The good time credit rule is set out in Department of Correction administrative rules enacted pursuant G.S. 148-13(b), which authorizes the Secretary of Correction to issue regulations regarding sentence deductions for inmates serving prison or jail terms for impaired driving. The Secretary's rules, available here, *must* be distributed to and followed by local jail administrators under G.S. 148-13(e). The rules do not, however, apply to inmates serving split sentences for DWI; G.S. 148-13(f) exempts special probation terms from the rules' coverage. Additionally, G.S. 20-179(p)(2) places a limit on the extent to which punishment may be ameliorated: good time credit may not reduce a DWI inmate's sentence below the mandatory minimum period of imprisonment required for impaired driving. For example, a person sentenced to a 50 days active for a Level One DWI could receive only 20 days of good time credit, not the 25 days that would cut the sentence in half; the sentence could never dip below the 30-day mandatory minimum.

So that's how you figure sentence reduction credits for DWI inmates. But good time credits are not the only way DWI inmates might get out of jail or prison early. DWI is the last bastion of parole.

Under G.S. 15A-1370.1, all prisoners serving sentences for impaired driving are subject to the parole-eligibility rules of Article 85 of Chapter 15A of the General Statutes. The basic rule is that a DWI inmate is eligible for parole after serving his or her minimum sentence or one-fifth the maximum penalty allowed by law for the offense, whichever is less. It's not crystal clear what G.S. 15A-1371(a) means by the "maximum penalty allowed by law for the offense," but the Post-Release Supervision and Parole Commission uses the maximum sentence for each *level* of offense (for example, 2 years for a Level One, 1 year for a Level Two, 6 months for a Level Three, and so on). [There's some authority suggesting that 24 months is the theoretical maximum penalty for *any* DWI, *see* State v. Gregory, 154 N.C. App. 718 (2002) (DWI considered as a Class 1 misdemeanor for Rule 609 impeachment purposes), but the Commission's level-specific rule seems a better fit in this context.] The parole-eligibility period is reduced by good time credits (see G.S. 15A-1371(a) and G.S. 15A-1355(c)), but in no case can the defendant be paroled before serving the mandatory minimum period of imprisonment for his or her level of DWI punishment. G.S. 20-179(p)(3). Once someone is parole eligible, the Post-Release Supervision and Parole Commission decides whether to parole them under criteria set out in G.S. 15A-1371(d).

An example might be helpful to illustrate the basic parole-eligibility rule. Suppose a Level One offender is sentenced to a minimum of 6 months and a maximum of 18 months. If he serves his time without infraction, he will reach his *outright release* (or "max-out") date in 9 months—that's 18 months cut in half by good time credit. He will be *parole eligible* after 2.4 months—that's one-fifth of 24 months (the maximum penalty allowed for a Level One offender) cut in half by good time credit. Notice how the 6-month minimum imposed by the court in this example is essentially meaningless; one-fifth of the maximum possible penalty is less than the minimum, and so it controls parole eligibility. If the court wanted to impose a minimum with any bite, it would need to choose something between 30 days (the mandatory minimum) and 4.8 months (one-fifth the maximum authorized penalty).

That's pretty complicated, but unfortunately it's just the beginning. In addition to the rules already described, for DWI inmates with a maximum sentence of not less than 30 days nor as great as 18 months, parole is *presumptive* after the inmate completes one-third of the maximum sentence. G.S. 15A-1371(g). In other words,

DOC or the jailer may, in their discretion, parole the inmate unless the Post-Release Supervision and Parole Commission tells them they may not for one of the reasons set out in G.S. 15A-1371(~~f~~g). (That provision does not, however, make any reference to credit reductions, which I interpret to mean none should apply.)

Another illustration would probably be helpful. Suppose a Level Two DWI inmate is sentenced to a minimum of 30 days and a maximum of 12 months (and suppose further that she serves her time without infraction). She will reach her outright release date after 6 months—that's 12 months cut in half by good time credit. What about parole? Under the baseline parole rule discussed above, she will be *parole eligible* after 15 days—that's 30 days (the minimum, which in this case *is* less than one-fifth the maximum) cut in half by good time credit. That means the Parole Commission *could* parole her after 15 days. ~~But~~ Additionally, because her maximum falls within the 30-day-to-18-month window, parole is *presumptive* for her after ~~2~~ four months—that's one-third of the maximum~~, cut in half by good time credit~~. Unless the Parole Commission affirmatively steps in to say otherwise, DOC (or the jailer if she's serving her time in a jail) may parole her after ~~two~~ four months.

The final catch—and it's a big one—is that a defendant may not be released on parole unless he has obtained a substance abuse assessment and completed any recommended treatment or training program. G.S. 20-179(p)(3). Because it's difficult to get that done in prison or jail, many inmates cannot be released on DWI parole. But defendants who complete their assessment and training before sentencing (which they sometimes do to qualify for the mitigating factor available under G.S. 20-179(e)(6)) may be parole eligible or presumptively parolable well in advance of their outright release date. Which brings me to my final question: are any jailers out there paroling DWI inmates?

# DWLR as a Grossly Aggravating Factor for DWI Sentencing

Posted By Shea Denning On June 27, 2011 @ 8:55 am In Crimes and Elements,Motor Vehicles,Sentencing,Uncategorized | 1 Comment

Grossly aggravating or just grossly confusing? When is a DWI defendant driving while revoked for an impaired driving revocation?

Several earlier posts (here , here and here) have discussed sentencing for the offense of impaired driving. The punishment for driving while impaired is based on the presence and weighing of statutorily defined aggravating and mitigating factors. The factors with the greatest influence upon the sentence imposed are denominated grossly aggravating factors (GAFs). One GAF requires a Level Two punishment. More than one GAF requires punishment at Level One, the level with the highest mandatory minimum and maximum sentence.

The GAF about which I receive the most questions is set forth in G.S. 20-179(c)(2): "Driving by the defendant at the time of the offense while his driver's license was revoked under G.S. 20-28, and the revocation was an impaired driving revocation under G.S. 20-28.2(a)."

The following four scenarios are those about which folks most often inquire.

*1. The defendant's license previously was revoked upon conviction of driving while impaired. The time period set forth for that revocation pursuant to G.S. 20-19(c1) (one year) or (d) (four years) had expired at the time of the current offense. However, the defendant's license had not been restored when he committed the current offense. Does the GAF apply?*

It depends. If the defendant failed to obtain a certificate of completion for receiving a substance abuse assessment and completing an ADET school or substance abuse treatment program, the revocation period is extended until DMV receives the certificate of completion. See G.S. 20-17.6(b). If the revocation period was extended for this reason at the time the person committed the instant offense, then his or her license was revoked for an impaired driving revocation. The GAF factor thus applies if the defendant met the other requirements for the offense of driving while license revoked under G.S. 20-28(a) by driving a motor vehicle on a street or highway.

If, however, the defendant had obtained a certificate of completion but simply failed to seek restoration of his license, which requires proof of insurance (G.S. 20-19(k)) and payment of a $100 restoration fee (G.S. 20-7(i1)), then the defendant's license was not revoked at the time of the driving. In such a circumstance, the GAF does not apply.

If a suspension *for a DWI conviction* is listed on a defendant's DMV record as "indefinite," that means the term of revocation has expired, but DMV has not received a certificate of completion.

*2. The defendant previously was revoked for an impaired driving revocation. During the period of revocation, the defendant drove and was convicted of driving while license revoked. The impaired driving revocation was no longer in effect at the time of the instant impaired driving offense, but the revocation for driving while license revoked was in place. Does the GAF apply?*

No. Regardless of the reason for which the defendant was revoked at the time he committed the earlier offense of driving while license revoked, the revocation in effect at the time of the instant impaired driving offense was pursuant to G.S. 20-28(a), which is not among the "impaired driving license revocations" set forth in G.S. 20-28.2(a). Those revocations must be made pursuant to one of the following statutes:

- G.S. 20-13.2: consuming alcohol or drugs, willful refusal, or impaired driving by driver under age twenty one
- G.S. 20-16(a)(8b): driving while impaired on a military installation
- G.S. 20-16.2: willful refusal to submit to a chemical analysis
- G.S. 20-16.5: pretrial civil license revocation
- G.S. 20-17(a)(2): impaired driving or impaired driving in a commercial vehicle
- G.S. 20-138.5: habitual impaired driving
- G.S. 20-17(a)(12): second or subsequent conviction of transporting an open container of alcohol
- G.S. 20-17.2: court order not to operate motor vehicle (repealed effective December 1, 2006)
- G.S. 20-16(a)(7): impaired driving while out of state resulting in revocation of North Carolina driver's license
- G.S. 20-17(a)(1): manslaughter or second-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 felony serious injury by vehicle involving impaired driving
- G.S. 20-17(a)(11): assault with a 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 that, if committed in North Carolina, would result in a revocation listed under any of the statutes listed above. (*This type of revocation is defined as an impaired driving license revocation for purposes of the applying the laws governing seizure and forfeiture of motor vehicles, discussed here. However, since driving while license revoked pursuant to G.S. 20-28(a) requires a North Carolina revocation, license revocation by another jurisdiction will not support application of the GAF discussed in this post*).

Note that the aggravating factor of driving by the defendant while his driver's license was revoked as set forth in G.S. 20-179(d)(4) *does* apply on these facts.

*3. The defendant's license was civilly revoked several years ago pursuant to G.S. 20-16.5. The minimum revocation period has expired, but at the time she committed the instant offense, the defendant had not paid the restoration fee required to end the civil revocation. Does the GAF apply?*

Yes. Impaired driving license revocations are defined by G.S. 20-28.2(a) to include G.S. 20-16.5 revocations. Moreover, a person who drives while her license is civilly revoked commits the offense of DWLR under G.S. 20-28(a). This is true even when the minimum revocation period has expired at the time of the driving and the person is eligible to have his or license returned upon payment of costs. G.S. 20-28(a1) provides that a person convicted of DWLR for driving after the minimum revocation period expired but before reclaiming his or her license is *punished* as if the person has been convicted of the less serious offense of driving without a license. This reduced punishment does not alter the charge or conviction of DWLR.

*4. The defendant drove a bicycle in the commission of the instant impaired driving offense. At the time of the instant offense, the defendant's driver's license was revoked for an impaired driving revocation. Does the GAF apply?*

No. In addition to being revoked for an impaired driving revocation, for this GAF to apply the defendant must have committed the offense of driving while license revoked as defined in G.S. 20-28(a), which requires driving a motor vehicle on a highway while the defendant's license is revoked. Because a bicycle is a *vehicle* but is not a *motor vehicle* the defendant has not violated G.S. 20-28(a). Thus, the GAF does not apply.

# Laura's Law

Posted By Shea Denning On July 13, 2011 @ 5:39 pm In Motor Vehicles,Sentencing,Uncategorized | 4 Comments

In yesterday's post, Jeff mentioned Laura's Law, which increases the maximum punishment for impaired driving. Today's post discusses those provisions in more detail.

S.L. 2011-191, dubbed Laura's Law in recognition of 17-year-old Laura Fortenberry, who died last summer when the car she was riding in was struck by an impaired driver who had previous DWI convictions, increases the maximum punishment for impaired driving, increases the length of time that continuous alcohol monitoring may be required as a condition of probation, and makes other changes applicable to defendants charged with and sentenced for DWI. The act is effective for offenses committed on or after December 1, 2011.

Currently, the most severe sentence that can be imposed for any of the impaired driving offenses sentenced pursuant to G.S. 20-179 is a Level 1 sentence, which carries a maximum term of imprisonment of 24 months and a maximum fine of $4,000. A person convicted of impaired driving is sentenced at Level 1 if two or more grossly aggravating factors exist. (You can read more about grossly aggravating factors and the offenses sentenced pursuant to G.S. 20-179 here.) S.L. 2011-191 requires that a judge impose Aggravated Level One punishment when there are at least three grossly aggravating factors in an impaired driving case sentenced under G.S. 20-179. (For ease of reference, I'll refer to this as a Level A1 DWI.) Level A1 DWI requires a minimum term of 12 months imprisonment up to a maximum term of 36 months. The maximum fine is $10,000. A defendant sentenced for a Level A1 DWI is not eligible for parole. Level A1 defendants must, however, be released from imprisonment four months before the end of the "maximum imposed term of imprisonment" and must be placed on post-release supervision with a requirement that they abstain from alcohol during this four-month period as verified by a continuous alcohol monitoring system. Continuous alcohol monitoring systems (CAM) employ ankle bracelets that test the wearer's sweat for signs of alcohol use. *See* Ames Alexander, *DWI tool is curbed in N.C.*, available here (describing technology and chronicling past controversy regarding use of CAM.); *see also* G.S. 15A-1343.3 (defining a "'continuous alcohol monitoring system' as a device that is worn by a person that can detect, monitor, record, and report the amount of alcohol within the wearer's system over a continuous 24-hour daily basis"). A defendant's post-release supervision may be revoked for consuming alcohol or failing to comply with continuous alcohol monitoring requirements.

Laura's Law does not except Level A1 DWIs from Department of Correction regulations regarding the awarding of sentence reduction credits for sentences imposed upon conviction of G.S. 20-138.1. See G.S. 148-13(b). Thus, Level A1 sentences appear to be subject to the day-for-day credit sentence reduction credits described in DOC's sentence credit policy, available here, subject to the limitation set forth in G.S. 20-179(p)(2), which provides that good time credit may not reduce the mandatory minimum period of imprisonment.

An example may help to illustrate the application of these provisions to a Level A1 sentence. Suppose a defendant convicted of impaired driving is sentenced at Level A1 to a term of imprisonment of 18 months. The defendant is eligible for one day of credit for each day served in custody without an infraction, resulting in a possible 9 months of good time credit. However, pursuant to G.S. 20-179(p)(2), good time credit cannot reduce the sentence below the mandatory minimum period, which, in this case, is 12 months. It's possible that this defendant may, nevertheless, be released before the expiration of 12 months. Recall the post-release supervision provisions described earlier, which require that a Level A1 defendant be released to post-release supervision four months before the end of the "maximum imposed term of imprisonment." What is the maximum imposed term? Eighteen months? Or the 12 months that result after accounting for good time credit? If it is the latter, then (assuming a full award of good time credit) this defendant must be released to post-release supervision after serving 8 months of her sentence. If it is the former, then the defendant would not be released until serving 14 months (four months before the end of the 18-month term imposed at sentencing). Look for a future post from sentencing-guru Jamie Markham addressing post-release supervision generally and interpreting "maximum imposed term of imprisonment" for purposes of calculating a Level A1 defendant's release date.

The term of imprisonment for a Level A1 DWI may be suspended only if a condition of special probation is imposed to require the defendant to serve a term of imprisonment of at least 120 days. Note that this term of special probation imprisonment is significantly shorter than the mandatory minimum active term of 12 months. In this respect, Level A1 punishment departs from the sentencing requirements for other levels of impaired driving for which the mandatory minimum term of imprisonment matches the minimum term of imprisonment required as a condition of special probation. If a Level A1 defendant is placed on probation, the judge must require the defendant to abstain from alcohol for at least 120 days and may require abstinence verified by CAM for the entire term of probation. As is the case for probationary sentences imposed for other levels of DWI, the judge must require as a condition of probation for a Level A1 sentence that the defendant obtain a substance abuse assessment and the education or treatment required by G.S. 20-17.6. Upon conviction of Level A1 impaired driving, the defendant's driver's license is permanently revoked pursuant to amended G.S. 20-19(e). Though a license permanently revoked under G.S. 20-19(e) may, under certain circumstances, be conditionally restored after it has been revoked for three years, a person whose license was revoked for conviction of Level A1 DWI must, in addition to meeting other conditions, have ignition interlock in order to have his or her license restored.

Laura's Law affects other types of DWI sentencing as well. The act increases from 60 days to the term of probation the maximum period for which abstinence and CAM may be required of defendants sentenced for Level 1 or Level 2 DWIs. The act repeals G.S. 20-179~~(h1)~~ (h2), which formerly prohibited a court from requiring CAM if it determined the defendant "should not be required to pay the costs" of CAM and the local government entity responsible for the incarceration of the defendant was unwilling to pay for CAM.

The act further sanctions CAM by amending G.S. 15A-534(i) to authorize abstinence from alcohol and CAM as a pretrial release condition for a defendant charged with an offense involving impaired driving who has been convicted of an offense involving impaired driving within seven years of the offense for which the defendant is being placed on pretrial release.

Laura's Law also enacts new G.S. 7A-304(a)(10), which requires that a defendant sentenced pursuant to G.S. 20-179 pay, in addition to other applicable costs, a fee of $100.

As Jeff noted earlier this week, we're fortunate to have such wonderful colleagues at the School of Government. Two of those folks, Jamie Markham and Alyson Grine, deserve special mention here for sharing their thoughts on Laura's Law, which have informed and improved this post.

# Post-Release Supervision for Aggravated Level One DWI Offenders

Posted By Jamie Markham On July 28, 2011 @ 2:06 pm In Motor Vehicles,Sentencing,Uncategorized | No Comments

Shea Denning summarized S.L. 2011-191, Laura's Law, in a prior post. To recap, the law adds a new punishment level for impaired driving sentencing, Aggravated Level One (hereinafter Level A1), for situations in which three or more grossly aggravating factors apply. Today's post picks up on some of the points Shea mentioned in her earlier post. I especially want to focus on the law's requirement of post-release supervision of Level A1 offenders.

The permissible punishment for a Level A1 sentence is a fine of up to $10,000 and sentence that includes a minimum term of not less than 12 months and a maximum term of not more than 36 months. The court can suspend the sentence only if it requires the offender to serve a split sentence of 120 days. Though the law appears to instruct the judge to impose a minimum sentence, the effect of that minimum is not altogether clear. Typically, the minimum imposed in a DWI sentence is for determining parole eligibility under G.S. 15A-1371 (which says that a DWI inmate is parole eligible upon completion of the lesser of the minimum or one fifth of the maximum penalty allowed by law, less good time), but Laura's Law says that Level A1 inmates are not eligible for parole.

The law does, however, say that Level A1 inmates shall be released from the Department of Correction "on the date equivalent to the defendant's maximum imposed term of imprisonment less four months and shall be supervised by the Division of Community Corrections under and subject to the provisions of Article 84A of Chapter 15A of the General Statutes . . . ." Article 84A of Chapter 15A is the post-release supervision article. Up to now, it has only applied to Class B1 through E felons, but come December 1—under Laura's Law and Justice Reinvestment—it will apply to all felons and Level A1 DWI misdemeanants. Though no conforming change was made to Article 84A (G.S. 15A-1368.2(c), specifically), new G.S. 20-179(f3) indicates the period of supervised release for Level A1 DWI offenders will be the same as the amount of time the offender will have remaining on his or her active sentence when released: four months.

So when exactly does a Level A1 DWI inmate get released onto PRS? On "the date equivalent to the defendant's maximum imposed term of imprisonment less four months," right? The problem is that that statutory language is slightly different from the language in existing law for determining PRS release dates for felons. Under G.S. 15A-1368.2(a), a felon is released from prison for post-release supervision "on the date equivalent to his maximum imposed prison term less nine months [or 12 months for Class B1–E felons or 60 months for sex offenders, as the case may be under new law], *less any earned time awarded by the Department of Correction."* DWI inmates don't get earned time, but they do get good time under G.S. 15A-1355(c), G.S. 148-13(b), and applicable DOC regulations. And the good time rule—which applies to all DWI offenders regardless of punishment level—is more generous to inmates than the earned time rule in that it cuts DWI sentences in half. The thing is, there is no parallel provision in Laura's Law about subtraction of good time from the offender's "maximum imposed term of imprisonment" for determining the PRS release date. In other words, the law does *NOT* say the person is released four months early, *less good time*.

It remains to be seen how DOC and the Post-Release Supervision and Parole Commission will interpret that difference. The fiscal note accompanying the bill, prepared in consultation with DOC, figured that Level A1 offenders would serve the same average proportion of their maximum term as Level One DWI offenders, 41 percent, so they must have assumed that good time will apply. If that's right, then any Level A1 DWI maximum sentence from 12 months to 24 months will be functionally the same from the (well-behaved) defendant's point of view. It will be a 12-month sentence, because that's as low as you can go without dipping below the statutory mandatory minimum under G.S. 20-179(p)(2), which says that good time credit "may not be used to reduce that mandatory minimum period." There is no requirement that the inmate have completed substance abuse and assessment and treatment prior to release on post-release supervision; that limitation applies only to releases on parole under G.S. 20-179(p)(3).

Even if you set aside the good time credit issue, there is still a question about whether a person may be released on post-release supervision before serving the 12-month mandatory minimum for a Level A1 DWI. Different statutory provisions point in different directions. New G.S. 20-179(f3) says a person "shall be released" when he or she is four months from the maximum, but existing G.S. 20-179(p)(2) says a defendant "shall serve the mandatory minimum period of imprisonment." G.S. 20-179(p)(3) isn't really helpful either way; it says a person may not be *paroled* unless he has served his mandatory minimum, but it makes no mention of release on post-release supervision. To flesh that out a little, suppose a defendant is sentenced to a 14-month maximum. G.S. 20-179(f3) would say release him to PRS at 10 months (or 8 months if you allowed the maximum to be reduced to 12 months by good time credit). But G.S. 20-179(p)(2) says he *must* serve the statutory 12-month minimum. Comparable "truth-in-sentencing" principles under Structured Sentencing (G.S. 15A-1340.13(d)) would say he must serve the minimum, but Structured Sentencing minimums and maximums are designed to avoid this very problem: there is a constant 20 percent difference between every minimum and its corresponding maximum, with additional time built in to the maximum for the possibility of post-release supervision revocation. The DWI sentencing law simply isn't set up that way. So again, we'll need to wait to see how DOC will resolve the ambiguity.

(If it's any consolation, release-date calculation is little more straightforward for defendants who receive a split sentence for Level A1 DWI: under G.S. 148-13(f) and DOC regulations, split sentences are not eligible for good time.)

Once a person is released onto post-release supervision, he or she will have four months of PRS under the supervision of the Division of Community Corrections. There is no such thing as "unsupervised" PRS. An offender who violates a condition of that supervision can be arrested and held for a hearing under the procedure set out in G.S. 15A-1368.6 (a preliminary hearing within 7 days, a final hearing within 45 days, etc.). Under changes made by the Justice Reinvestment Act, the Parole Commission can only fully revoke PRS for sex offenders, offenders who commit a new crime, or offenders who abscond. Offenders who violate in other ways get returned to prison for three months—which, for these DWI offenders who have four months of active time left to serve, will just about max out the sentence. In fact, if DOC awards good time to those offenders who are returned to prison, they will finish their four remaining months of active time in two months, and will thus max out and not be re-released into the community at all. It's not clear, though, whether DOC will (or even can) do that. G.S. 15A-1368.3(c)(4) allows DOC to award earned time credit to reimprisoned Structured Sentencing offenders, but the new law does not mention any similar authority regarding good time for DWI offenders.

## DWI Sentencing Changes

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In addition to enacting the aggravated level one punishment for impaired driving discussed here, the 2011 General Assembly amended the requirements for imposing a Level One impaired driving sentence, effective for offenses committed on or after December 1, 2011. Most readers likely are familiar with the sentencing scheme set forth in G.S. 20-179, which governs sentencing for convictions under G.S. 20-138.1 (driving while impaired), G.S. 20-138.2 (driving while impaired in a commercial vehicle) and second or subsequent convictions under G.S. 20-138.2A (operating a commercial vehicle after consuming alcohol) and G.S. 20-138.2B (operating a school bus or child care vehicle after consuming alcohol). Those who aren't can read more about the current sentencing scheme here and here.

S.L. 2011-329 (S 241) amends G.S. 20-179 to require that persons convicted of covered impaired driving offenses be sentenced to Level One punishment if the grossly aggravating factor in G.S. 20-179(g)(4) exists. Before these amendments, a person could be sentenced at Level One upon a finding of at least two grossly aggravating factors. This factor formerly applied if the defendant drove while a child under the age of sixteen was in the car. The act also amends the factor itself, rendering it applicable if the defendant drives while impaired with any of the following types of persons in the car: a child under the age of eighteen, a person with the mental development of a child under the age of eighteen, or a person with a physical disability that prevents the person from getting out of the vehicle without assistance. If more than one of these types of persons is in the car, it appears that only one grossly aggravating factor applies. For further analysis of that issue under current law, read this post by Jeff Welty.

Thus, an 18-year-old convicted of a first offense of impaired driving based upon an incident occurring December 1, 2011 or later in which a 17-year-old passenger was in the car and in which there were no injuries must be sentenced at Level One, which requires that the defendant serve at least 30 days in jail. In contrast, a defendant convicted of impaired driving based on an incident with the same underlying facts occurring before December 1, 2011 might, depending upon the existence of mitigating factors, be sentenced at Level Five—the least punitive level. While a Level Five sentence requires a minimum term of imprisonment of not less than 24 hours, such a sentence may be suspended on the condition that a defendant be imprisoned for a term of 24 hours as a condition of special probation *or* perform community service for a term of 24 hours.

I've updated the one-page (front and back) sentencing chart that I use as a quick reference for G.S. 20-179 sentencing questions to reflect the changes effective for offenses committed on or after December 1, 2011. It's available here for readers who might find it useful.