

## SENTENCING IN SUPERIOR COURT

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### STEPS FOR SENTENCING A FELONY UNDER STRUCTURED SENTENCING

1. Determine the applicable law
2. Determine the offense class
3. Determine the defendant's prior record level
4. Consider aggravating and mitigating factors
5. Select a minimum sentence
6. Determine the maximum sentence
7. Choose a sentence disposition

#### Step 1: DETERMINE THE APPLICABLE LAW

Look at the date of offense to determine the law applicable to the defendant's case:

- **Pre-Fair Sentencing.** Offenses committed before July 1, 1981.
- **Fair Sentencing.** Offenses committed on or after July 1, 1981, and prior to Oct. 1, 1994.
- **Structured Sentencing:**
  - Offenses committed on or after October 1, 1994;
  - Offenses committed on or after December 1, 1995;
  - Offenses committed on or after December 1, 2009;
  - Offenses committed on or after December 1, 2011;
  - Reportable Class B1-E sex crimes committed on or after December 1, 2011 (table of maximums only).
- Some crimes have their own sentencing rules aside from or in addition to Structured Sentencing:
  - First-degree murder, G.S. 15A-2000, *et seq.*;
  - Drug trafficking, G.S. 90-95.

#### Step 2: DETERMINE THE OFFENSE CLASS

- Offense class rules for inchoate offenses (unless otherwise provided by law):

| Offense Class | Aiding and abetting<br>Accessory before fact (14-5.2)<br><i>Same as principal felony</i> | Attempt (14-2.5)<br>Conspiracy (14-2.4)<br><i>One offense class lower</i> | Solicitation (14-2.6)<br>Accessory after fact (14-7)<br><i>Two offense classes lower</i> |
|---------------|--|---|--|
| A             | A  | B2  | C  |
| B1            | B1   | B2  | C  |
| B2            | B2   | C   | D  |
| C             | C  | D   | E  |
| D             | D  | E   | F  |
| E             | E  | F   | G  |
| F             | F  | G   | H  |
| G             | G  | H   | I  |
| H             | H  | I   | Class 1 misd.  |
| I             | I  | Class 1 misd.   | Class 2 misd.  |

### Step 3: DETERMINE THE DEFENDANT'S PRIOR RECORD LEVEL

Use the appropriate prior record level worksheet (AOC-CR-600), based on the offense date of the crime being sentenced. The point ranges assigned to each record level (set out in G.S. 15A-1340.14(c)) were amended for offenses committed on or after December 1, 2009.

Rules for what counts for prior record points:

- Count a prior conviction for points based on the offense class assigned to it on the date of the offense for which the defendant is now being sentenced. G.S. 15A-1340.14(c).
- Multiple convictions
  - Count only a single conviction from each calendar week of superior court, or session (generally, one day) of district court. 15A-1340.21(d).
- Convictions on appeal:
  - District court convictions count when the defendant has not given notice of appeal and the time for appeal has expired.
  - Superior court convictions count regardless of whether the conviction is on appeal to the appellate division. G.S. 15A-1340.11(7).
- COUNT:
  - All felony convictions.
  - Class A1 and Class 1 non-traffic misdemeanors.
  - Impaired driving, commercial impaired driving, and misdemeanor death by vehicle.
  - Prayer for judgment continued (PJC). *State v. Canellas*, 164 N.C. App. 775 (2004).
- DO NOT COUNT:
  - Class 2 and Class 3 misdemeanors.
  - Misdemeanor traffic offenses other than impaired driving, commercial impaired driving, and misdemeanor death by vehicle.
  - Infractions.
  - Contempt. *State v. Reaves*, 142 N.C. App. 629 (2001).
  - Probation revocations.
  - Juvenile adjudications.
- Crimes from other jurisdictions:
  - Felonies: Count as Class I by default. G.S. 15A-1340.14(e).
  - Misdemeanors: Count as Class 3 misdemeanor by default.
  - If State/defendant proves substantial similarity (preponderance of the evidence) to a NC offense, count for points like the NC offense.
    - Substantial similarity is a question of law which must be found by the judge— stipulations are ineffective. *State v. Bohler*, 681 S.E.2d 801 (2009).
- Prior record “bonus points”
  - +1 prior record point if all the elements of the present offense are included in any prior offense for which the offender was convicted, regardless of whether the prior offense was used in determining the defendant’s prior record level. G.S. 15A-1340.14(b)(6).
    - This factor is a question of law to which the defendant may not validly stipulate. *State v. Prush*, 185 N.C. App. 472 (2007).
  - +1 prior record point if the offense was committed while the offender was on probation, parole, or post-release supervision, or while the offender was serving a sentence of imprisonment, or while the offender was on escape from a sentence of imprisonment. G.S. 15A-1340.14(b)(7).
    - The State need not allege in the charging document that it intends to establish this point, but it must give 30 days’ notice of its intent to do so. G.S. 15A-1340.16(a6).
- Prior record rules related to sentencing of particular crimes:
  - Habitual felon:

- Prior convictions used to habitualize a defendant under the habitual felon law do not count toward the defendant's prior record level when sentencing the habitualized crime. G.S. 14-7.6.
- The State is free to use a defendant's least serious prior felonies in a habitual felon indictment, leaving more serious felonies to count for prior record level purposes. *State v. Cates*, 154 N.C. App. 737 (2002).
- When a previous felony conviction listed in a habitual felon indictment was consolidated with a lesser conviction, the lesser conviction may count toward the defendant's prior record level when sentencing for the habitualized crime. *State v. Truesdale*, 123 N.C. App. 104 (1999).
- Habitual breaking and entering status offense: Any conviction used to establish a person's status as a habitual breaking and entering status offender does not count for prior record points when sentencing the habitualized offense. G.S. 14-7.31.
- Habitual DWI: The prior misdemeanor DWI offenses used to qualify a person as a habitual impaired driver do not count for prior record points when sentencing the habitual DWI. *State v. Gentry*, 135 N.C. App. 107 (1999).
  - However, when a person with prior misdemeanor DWI convictions and a prior habitual DWI conviction is later sentenced for another felony, the misdemeanor DWIs and the habitual DWI all count for prior record points. *State v. Hyden*, 175 N.C. App. 576 (2006).
- Failure to register as a sex offender: The prior sex crime that caused the offender to be placed on the registry counts for prior record points when sentencing a conviction for failure to register as a sex offender. *State v. Harrison*, 165 N.C. App. 332 (2004).
- Possession of firearm by a felon: The prior felony that cost the defendant his or her guns in the first place counts for prior record points when sentencing a conviction for possession of a firearm by a felon. *State v. Best*, \_\_ N.C. App. \_\_, 713 S.E.2d 556 (2011).

#### Step 4: CONSIDER AGGRAVATING AND MITIGATING FACTORS

- The State must prove aggravating factors to the jury beyond a reasonable doubt (unless they are admitted to).
- The Defendant must prove mitigating factors by a preponderance of the evidence.
- Procedure:
  - Statutory aggravating factors need not be alleged in a charging instrument, but non-statutory aggravators must be pled.
  - The State must provide 30 days notice of its intent to prove aggravating factors.
- The weighing of aggravating and mitigating factors is not a mathematical balance (e.g., one aggravating factor can outweigh multiple mitigating factors, *State v. Gillespie*, \_\_ N.C. App. \_\_, 707 S.E.2d 712 (2011)).
- The decision to depart from the presumptive range is in the discretion of the court. G.S. 15A-1340.16.
- Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation. G.S. 15A-1340.16.

#### Step 5: SELECT A MINIMUM SENTENCE

- Choose a minimum sentence from the appropriate cell on the front of the sentencing grid, and in the appropriate range (presumptive, aggravated, or mitigated) based on weighing of aggravating/mitigating factors.

#### Step 6: DETERMINE THE MAXIMUM SENTENCE

- Find the maximum sentence that corresponds to the selected minimum sentence on the back of the appropriate sentencing grid.
- Offenses before December 1, 2011:
  - Class F-I: Maximum is 120% of the minimum
  - Class B1-E: Maximum is 120% of the minimum, plus 9 (9-month PRS; 60-month PRS for sex offenders)
- Offenses on or after December 1, 2011:
  - Class F-I: Maximum is 120% of the minimum, plus 9 (9-month PRS; 60-month PRS for sex offenders)
  - Class B1-E: Maximum is 120% of the minimum, plus 12 (12-month PRS)
  - Class B1-E sex crimes: Maximum is 120% of the minimum, plus 60 (60-month PRS)

#### Step 7: CHOOSE A SENTENCE DISPOSITION

“A” = Active

“I” = Intermediate

- *For offenses committed before December 1, 2011:* An intermediate sentence requires that the court suspend the sentence of imprisonment and impose supervised probation that *must* include one of the six conditions set out in G.S. 15A-1340.11(6):
  - Special probation (a “split sentence”)
    - Active portion of split sentence capped at  $\frac{1}{4}$  of the imposed max. G.S. 15A-1351(a).
  - Residential program
  - Electronic house arrest
  - Intensive supervision
  - Day reporting center
  - Drug treatment court
- *For offenses committed on or after December 1, 2011:* An intermediate sentence requires that the court suspend the sentence of imprisonment and impose supervised probation that *may* include drug treatment court, special probation, or one or more of the “community and intermediate probation conditions” set out in G.S. 15A-1343(a1). Intensive supervision, residential programs, and day reporting center are repealed as intermediate conditions of probation.

“C” = Community

- *For offenses committed before December 1, 2011:* A community punishment is a non-active punishment that does not include any of the six intermediate probation conditions. It may consist of unsupervised or supervised probation, or a fine only without probation. G.S. 15A-1340.11(2).
- *For offenses committed on or after December 1, 2011:* A community punishment is a non-active punishment that does not include drug treatment court or special probation. It may include any of any one or more of the “community and intermediate probation conditions” set out in G.S. 15A-1343(a1). It may consist of unsupervised or supervised probation, or a fine only without probation.

“Community and Intermediate probation conditions” under G.S. 15A-1343(a1) [only for offenses committed on or after December 1, 2011]

- Electronic house arrest
- Community service

- “Quick dip confinement” of up to 18 days, served in 2-3 day increments, no more than 6 days per month, in three separate months
- Obtain a substance abuse assessment, monitoring or treatment
- Participation in an educational or vocational skills development program
- Submit to satellite-based monitoring if described by G.S. 14-208.40(a)(2) (sex offenders)

#### LENGTH OF PROBATION

- Unless the court makes specific findings that a longer or shorter period of probation is necessary:
  - Felons:
    - Community punishment: Not less than 12 nor more than 30 months;
    - Intermediate punishment: Not less than 18 nor more than 36 months.
  - Misdemeanants:
    - Community punishment: Not less than 6 nor more than 18 months;
    - Intermediate punishment: Not less than 12 nor more than 24 months.
- If the court finds at the time of sentencing that a longer period of probation is necessary, that period may not exceed a maximum of five years. G.S. 15A-1343.2(d).

#### ACTIVE SENTENCES FOR FELONS

- Felony sentences are served in the Department of Public Safety, Division of Adult Correction (DAC). G.S. 15A-1352(b).
- Felons enter DOC with a presumption that they will serve their maximum sentence. They may reduce their maximum sentence through a sentence reduction credit called Earned Time at rates established by DOC (3, 6, or 9 days per month, depending on the inmate’s participation in work and program activities). Structured Sentencing inmates may also receive credit called Meritorious Time for overtime, working in harsh conditions, or exemplary acts. Structured Sentencing inmates are not eligible for Good Time or Gain Time (those are credits for DWIs and older cases). In no case may credit reduce the time an inmate actually serves below the minimum sentence, unless the Advanced Supervised Release (described below) applies. G.S. 15A-1340.13(d).
- Average percentage of minimum sentence served, by offense class:

|             |      |
|-------------|------|
| Class B1–C: | 102% |
| Class D:    | 105% |
| Class E–F:  | 106% |
| Class G:    | 107% |
| Class H:    | 111% |
| Class I:    | 114% |

- When consecutive sentences are imposed, DOC must treat the defendant as though he or she has been committed for a single term of imprisonment. The minimum of that term is the sum of all the minimum sentences in the consecutive series; the maximum is the sum of all the maximums, less 60, 12, or 9 months for each of the second or subsequent sentences imposed for felonies subject to post-release supervision. G.S. 15A-1354(b). The defendant will serve a single term of post-release supervision whose length is determined by the most serious crime of conviction.

#### RESTITUTION

- The sentencing judge shall determine whether the defendant will be required to pay restitution. G.S. 15A-1340.34. Restitution can be ordered “in addition to any penalty authorized by law”—including an active sentence. G.S. 15A-1340.34(c).

- A prosecutor's unsworn statement, standing alone, is insufficient to support an award of restitution. 340 N.C. 720 (1995). There must either be a stipulation to the amount or evidence introduced at the sentencing hearing to support the calculation of the amount recommended.
- The court must take into consideration the resources of the defendant, including all real and personal property, ability to earn, and obligation to support dependants. The burden is on the defendant to show that he lacks the financial resources to comply with a restitution order. *State v. Tate*, 187 N.C. App. 593 (2007).
- For offenses covered under the Crime Victims' Rights Act (CVRA) (G.S. 15A-830), restitution is mandatory.

## HABITUAL OFFENDER LAWS

- Habitual felon
  - A defendant can attain the status of being a habitual felon when he or she has three prior felony convictions. G.S. 14-7.1. Once a person attains habitual felon status, subsequent felonies may be sentenced as a habitual felon. G.S. 14-7.6.
    - For principal (i.e., fourth or subsequent) felonies occurring before December 1, 2011, the habitual felon law requires any habitualized felony, regardless of offense class, to be sentenced as a Class C felony.
    - For principal felonies occurring on or after December 1, 2011, the habitual felon law is a four-class enhancement, capped at Class C.
  - A sentence imposed under the habitual felon law "shall run consecutively with and shall commence at the expiration of any sentence being served" by the defendant. However, when a habitualized felony is sentenced at the same time as another conviction (including another habitualized conviction) the court may run them concurrently or consolidate them into a single judgment, as none of the sentences are yet "being served" at the time the habitual felon sentence is entered. *State v. Haymond*, 203 N.C. App. 151 (2010).
- Habitual breaking and entering (G.S. 14-7.25 through -7.31)
  - A defendant charged with felony "breaking and entering" who has 1 or more prior felony breaking and entering convictions can, in the prosecutor's discretion, be charged as a habitual breaking and entering status offender.
  - If convicted, the second or subsequent felony breaking and entering crime is sentenced as a Class E felony. Felony breaking and entering is defined to include the following crimes:
    - First- and second-degree burglary (G.S. 14-51);
    - Breaking out of a dwelling house burglary (G.S. 14-53);
    - Breaking or entering buildings generally, felony (G.S. 14-54(a));
    - Breaking or entering a place of religious worship (G.S. 14-54.1);
    - Any repealed or superseded offense substantially similar to the offenses above;
    - Any offense from another jurisdiction substantially similar to the offenses above.
  - A second B/E offense only qualifies if committed after conviction of the first offense.
  - The principal offense must occur after the defendant turns 18.
  - Habitual B/E sentences must run consecutively to any sentence being served.
- Habitual DWI
  - A person who drives while impaired who has 3 or more prior DWI convictions in the past 10 years can be charged with habitual DWI. G.S. 20-138.5.
  - A person convicted of habitual impaired driving shall be punished as a Class F felon and shall be sentenced to a minimum active term of not less than 12 months of imprisonment, which shall not be suspended. Sentences imposed under this subsection shall run consecutively with and shall commence at the expiration of any sentence being served.
  - It is unclear whether G.S. 20-138.5(b) means that habitual DWI sentences cannot be suspended at all, or whether the law allows a split sentence if at least 12 months of the sentence are served as active time. The clearer reading of the law is that habitual DWI sentences may not be suspended at all. That reading avoids a conflict with G.S. 15A-1351(a), which caps the active

portion of a split sentence at  $\frac{1}{4}$  the maximum sentence imposed. *But see* State v. Groce, 187 N.C. App. 510 (2007) (unpublished) (upholding a 12-month split sentence for a habitual DWI).

## DEFERRALS AND MITIGATED SENTENCES

*Deferred prosecution.* Class H and I felonies are eligible for deferred prosecution (if the defendant is otherwise qualified). G.S. 15A-1341(a1).

*“90-96” probation.* When any eligible defendant who pleads guilty to or is found guilty of:

- Misdemeanor possession of a controlled substance (any schedule or amount);
- Possession of drug paraphernalia under G.S. 90-113.22; or
- Felony drug possession under G.S. 90-95(a)(3) (any schedule or amount)

then the court shall (was “may” under prior law), with the consent of the defendant, place the defendant on probation without entering judgment under G.S. 90-96(a). An eligible defendant is any person who has not previously been convicted of any felony, any offense under the Controlled Substances Act, or any state/federal controlled substance/paraphernalia offense. If the defendant succeeds on 90-96 probation, the case gets discharged and dismissed. Successful defendants under age 22 then have an opportunity to get records of the charge expunged. Use AOC-CR-619.

G.S. 90-96(a1) provides for a discretionary discharge and dismissal of the same offenses listed in subsection (a) for first-time offenders. G.S. 90-96(a1) has a 7-year look-back period for purposes of determining whether the conviction is a first conviction or whether a person has already had discharge and dismissal.

*Extraordinary mitigation.* Under G.S. 15A-1340.13(g), a sentencing court may impose an intermediate punishment for a class of offense and prior record level that ordinarily requires an active sentence.

- To apply extraordinary mitigation the court must find in writing (using AOC-CR-606) that:
  - Extraordinary mitigating factors of a kind significantly greater than in the normal case are present;
  - Those factors substantially outweigh any factors in aggravation; and
  - It would be a manifest injustice to impose an active punishment in the case.
- Extraordinary mitigation is unavailable if:
  - The offense is a Class A or Class B1 felony;
  - The offense is a drug trafficking offense or a drug trafficking conspiracy; or
  - The defendant has five or more prior record points. G.S. 15A-1340.13(h).

*Substantial assistance.* In drug trafficking cases only, the court may depart from the mandatory drug trafficking punishment and reduce the fine, impose a prison term less than the ordinarily applicable minimum term, or suspend the prison term and place the defendant on probation if the person has provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals. The court must record a finding that the defendant has rendered substantial assistance. G.S. 90-95(h)(5).

*Advanced Supervised Release (new for persons entering a plea or found guilty on or after January 1, 2012).* If the prosecutor does not object, the sentencing judge may, when imposing an active sentence, order defendants in the following grid cells into to DOC’s ASR program:

- Class D felonies, prior record levels I–III
- Class E felonies, prior record levels I–IV
- Class F felonies, prior record levels I–V
- All Class G and H felonies

Defendants who complete “risk reduction incentives” in prison (or who are unable to do so through no fault of their own) get released onto PRS on their ASR date—the lowest minimum sentence in the mitigated range

for the defendant's offense and prior record level (or 80% of the imposed minimum if a mitigated-range sentence). G.S. 15A-1340.18.