Case Law Summary: North Carolina

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This summary of North Carolina appellate case law addresses five topics: availability of and standards for appellate review, standards and allowable ground for departure, constitutional requirements for proof of facts permitting upward departure or increasing the minimum sentence, and other important appellate sentencing decisions.

1. Availability of and General Standards for Appellate Review

Defendants may request discretionary review on any issue related to their sentence, but may only appeal as a matter of right on the following grounds: 1) that the sentence resulted from an incorrect assessment of the defendant's criminal history, or the sentence disposition or length is not authorized by the guidelines;[1] or 2) that a sentence imposed outside the presumptive range is not supported by the evidence introduced at the trial and sentencing hearing.[2] The state may appeal a sentence resulting from an incorrect assessment of the defendant's criminal history or a sentence disposition or length not authorized by the guidelines, and may also raise on appeal the claim that a finding of "extraordinary mitigating circumstances" required to impose an intermediate punishment in lieu of prison is not supported by the evidence or is insufficient as a matter of law.[3]

Questions of law are reviewed *de novo*.[4] This includes review of questions regarding whether a prior conviction under an out-of-state statute is substantially similar to an offense under North Carolina law;[5] calculation of prior criminal record;[6] and alleged errors applying North Carolina sentencing statutes.[7] Several errors of law are preserved for appeal even when a defendant fails to object at the sentencing hearing.[8]

[1] N.C. Gen. Stat. §15A-1444(a2) (2018). By its terms this provision only applies to "a defendant who has entered a plea of guilty or no contest." *But see* N.C. Gen. Stat. §15A-1444(a) (2018) (a defendant found guilty after pleading not guilty "may appeal as a matter of right when final judgment has been entered").
[2] N.C. Gen. Stat. §15A-1444(a1) (2018). A defendant may appeal the sufficiency of the evidence to support the sentence imposed outside the presumptive range even if that sentence falls in the mitigated range. *State v. Mabry*, 720 S.E.2d 697, 700–702 (N.C. Ct. App. 2011). But a defendant may *not* appeal as a matter of right if the minimum sentence imposed is at the top of the presumptive range, even if the maximum sentence imposed overlaps with the aggravated range. *State v. Daniels*, 691 S.E.2d 78, 81 (N.C. Ct. App. 2010).
[3] N.C. Gen. Stat. §15A-1445(a3) (2018).
[4] *Staton v. Brame*, 523 S.E.2d 424, 427 (N.C. Ct. App. 1999).
[5] *State v. Sanders*, 753 S.E.2d 713, 715 (N.C. Ct. App. 2014).
[6] *State v. Boyd*, 701 S.E.2d 255, 261 (N.C. Ct. App. 2010).
[7] *State v. Mackie*, 708 S.E.2d 719, 721 (N.C. Ct. App. 2011).
[8] N.C. Gen. Stat. § 15A-1446(d) (2018). *See also, e.g., Boyd*, 701 S.E. 2d at 261-62 (evaluating claim of error in calculating defendant's prior record); *State v. Morgan*, 595 S.E.2d 804, 809 (N.C. Ct. App. 2004) (evaluating claim that the state failed to meet its burden of proving defendant's prior record category).

2. Standards and Allowable Grounds for Departure

The sentencing court has discretion to impose a departure sentence (a sentence in the aggravated or mitigated range) provided the court includes written findings of which aggravating or mitigating factors it relied upon.[11] However, the sentencing court is not required to depart, as it has the discretion to enter a presumptive sentence even if it finds mitigating factors and finds that they outweigh any factors in aggravation.[12] Although the sentencing court has discretion to impose a presumptive sentence, it must at least consider any evidence of mitigating or aggravating circumstances offered by the parties.[13] The sentencing court must consider any mitigating factor that is supported by uncontradicted, substantial, and credible evidence.[14]

North Carolina law provides a non-exclusive list of statutorily prescribed aggravating and mitigating factors which a sentencing judge must consider.[15] Mitigating factors must be presented by the defendant and proven by a preponderance of the evidence that '"the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn,' and that the credibility of the evidence 'is manifest as a matter of law.'"[16] Aggravating factors must meet the requirements of *Blakely v. Washington*, discussed in section 3. The fact that a defendant was on probation at the time of his conviction may be used both as a non-statutory aggravating factor and to increase the defendant's criminal history score.[17]

The North Carolina Supreme Court has held that a sentence may be aggravated based on evidence necessary to prove elements of another current conviction, provided that the same evidence is not also needed to prove an element of the offense being sentenced.[18] The court has also determined that although the same fact may not be used as evidentiary support for more than one aggravating factor, a single source or document that establishes multiple aggravating facts may be used as evidentiary support for two or more aggravating circumstances.[19] The Court of Appeals has held that when multiple current offenses ranked at the same offense severity level are consolidated for judgment and final sentencing, the consolidated judgment and sentence can be aggravated by any factor that is an element of one but not all of the offenses.[20]

[11] N.C. Gen. Stat. §15A-1340.16(c) (2018). *See also State v. Bright*, 520 S.E.2d 138, 139 (N.C. Ct. App. 1999) (holding that written findings must accompany a sentence in the aggravated range, even if the plea agreement provided for sentencing "in the trial court's discretion").
[12] N.C. Gen. Stat. §§15A-1340.16(a), (b) (2018); *State v. Bivens*, 573 S.E.2d 259, 261–62 (N.C. Ct. App. 2002).
[13] *State v. Knott*, 595 S.E.2d 172, 176 (N.C. Ct. App. 2004).
[14] *State v. Hilbert*, 549 S.E.2d 882, 885 (N.C. Ct. App. 2001).
[15] N.C. Gen. Stat. §§15A-1340.16(d), (e) (2018).
[16] *State v. Davis*, 696 S.E.2d 917, 920 (N.C. Ct. App. 2010) (quoting *State v. Jones*, 306 S.E.2d 451, 455 (N.C. Ct. App. 1983)).
[17] *State v. Moore*, 656 S.E.2d 287, 294 (N.C. Ct. App. 2008).
[18] *See State v. Ruff,* 505 S.E.2d 579, 581 (N.C. 1998).
[19] *State v. Beck*, 614 S.E.2d 274, 275 (N.C. 2005) (discussing N.C. Gen. Stat. §15A-1340.16(d) (2003)).
[20] *State v. Harrison*, 596 S.E.2d 834, 837 (N.C. Ct. App. 2004).

3. Constitutional Requirements for Proof of Facts Permitting Upward Departure

The North Carolina Supreme Court has ruled that the North Carolina Structured Sentencing Act is similar to the Washington guidelines at issue in *Blakely v. Washington.* Thus, findings of facts needed to impose a sentence in the aggravated range are subject to the requirements of *Blakely*, meaning that any fact, other than the fact of a prior conviction, that is used to prove an aggravating factor must be submitted to a jury and proven beyond a reasonable doubt.[21] However, North Carolina courts have not applied *Blakely* retroactively to sentences based on convictions that had already become final when *Blakely* was decided.[22]

North Carolina courts have held that a defendant's probationary status at the time he committed the current offense does not fall within the *Blakely* exception for "the fact of a prior conviction"; thus, unless admitted by the defendant, probationary status resulting in an increased recommended sentence must be submitted to a jury and proven beyond a reasonable doubt.[23] The admission of an aggravating factor may be made by either the defendant or defendant's counsel.[24]

4. Constitutional Requirements for Proof of Facts Increasing the Minimum Sentence

There are currently no North Carolina state court cases which cite or reference *Alleyne v. United States*. This issue is likely subsumed by the *Blakely* litigation mentioned in Section 3, requiring a jury to find any fact necessary to impose a sentence in the aggravated range. Because the Structured Sentencing System uses grids that provide the minimum sentence, and the maximum sentence is statutorily determined to be 120% of the minimum sentence (plus a period of post-prison supervision), any fact that aggravates the sentence would necessarily increase both the minimum and maximum sentence. Thus, there is no difference between a *Blakely* issue (fact that raises the maximum allowable sentence) and an *Alleyne* issue (fact that raises the minimum allowable sentence) in North Carolina.

5. Other Important Sentencing Decisions

<u>Proof of Prior Convictions</u>

North Carolina courts have established detailed rules regarding the introduction of a defendant's prior convictions for the purposes of computing the defendant's prior criminal history. A written stipulation signed by the prosecutor and defense counsel on a sentencing worksheet is sufficient to prove the existence of prior convictions.[25] Where the prosecutor proffers a sentencing worksheet listing the defendant's prior convictions, defense counsel's statement that they have no objections may be reasonably construed as a stipulation.[26] However, even if uncontested, the prosecutor's unsupported statement about a defendant's prior conviction level is insufficient to meet the state's burden of proof at sentencing.[27]

[21] *See State v. Norris*, 630 S.E.2d 915, 919 (N.C. 2006). However, no *Blakely* issue is raised if the sentencing court finds an aggravating fact but nevertheless imposes a sentence within the presumptive range or the mitigated range. *Id.* at 921.
[22] *State v. Holmes*, 646 S.E.2d 353, 355 (N.C. 2007); *State v. Hasty*, 639 S.E.2d 94, 95–6 (N.C. Ct. App. 2007) (referencing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final")).
[23] *State v. Wissink,* 617 S.E.2d 319, 324–25 (N.C. Ct. App. 2005). The Court of Appeals' decision was reversed on other grounds, but the Supreme Court upheld the lower court's ruling that probationary status does not fall within the prior record exception to *Blakely*. *State v. Wissink*, 361 N.C. 418 (N.C. 2007).
[24] *State v. Everette,* 652 S.E.2d 241, 247 (N.C. 2007); *State v. Hurt*, 643 S.E.2d 915, 918 (N.C. 2007).
[25] N.C. Gen. Stat. § 15A-1340.14(f)(1); *State v. Hussey*, 669 S.E.2d 864, 868 (N.C. Ct. App. 2008).
[26] *State v. Eubanks*, 565 S.E.2d 738, 742–44 (N.C. Ct. App. 2002).
[27] *State v. Bartley*, 577 S.E.2d 319, 326 (N.C. Ct. App. 2003). *But see State v. Threadgill*, 741 S.E.2d 677, 679–81 (N.C. Ct. App. 2013) (holding that defense counsel effectively stipulated to the felony classification of an out-of-state conviction, where that classification was indicated on the prior record level worksheet and was asserted by the prosecutor in court, without objection by counsel).