23.5 Felony Sentencing

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Structured sentencing is not considered in this manual, but a few issues specific to guilty pleas are discussed below.

A. Aggravated Sentences

G.S. 15A-1022.1 provides that before accepting a guilty or no contest plea to a felony, the judge must determine whether the State intends to seek a sentence in the aggravated range and, if so, which factors the State seeks to establish. The judge also must determine whether the State seeks a finding that an "under supervision" point should be found under G.S. 15A-1340.14(b)(7) (whether the defendant committed the new offense while on probation, parole, or post-release supervision, while serving a sentence of imprisonment, or while on escape from a correctional facility).

If the State is seeking to aggravate a sentence based on aggravating factors or the "under supervision" point, the judge must determine whether the State has given written notice to the defendant at least thirty days before the entry of the guilty or no contest plea as required by G.S. 15A-1340.16(a6) or whether the defendant has waived his or her right to such notice. G.S. 15A-1022.1(a); *see also State v. Snelling*, 231 N.C. App. 676 (2014). The trial judge cannot impose an aggravated sentence if the State failed to give proper notice unless the defendant waives the right to notice. *See Snelling*, 231 N.C. App. 676; *State v. Mackey*, 209 N.C. App. 116 (2011); *see also State v. Crook*, ___ N.C. App. ___, 785 S.E.2d 771 (2016) (holding that trial judge erred in including the "under supervision" point in sentencing defendant where trial judge did not determine that State gave proper notice and no evidence showed that defendant waived notice; inclusion by State of that point in the prior record level worksheet provided in discovery was not sufficient notice under G.S. 15A-1340.16(a6) and defendant's stipulation to the point at sentencing was not clear evidence of notice).

If the State has properly alleged one or more aggravating factors or the "under supervision" point, a defendant has several options. If he or she contests the existence of the factors or the "under supervision" point, a defendant can request that a jury be impaneled to determine whether the factors or point exist (unless the alleged factors are ones that a judge is permitted to find under G.S. 15A-1340.16(d)(12a) or (18a)). *See* G.S. 15A-1340.16(a3), (a5). Alternatively, it appears that a defendant can now request a bench

trial on the sentencing issues after pleading guilty to the underlying offense. *See* G.S. 15A-1201(b) (allowing waiver of jury trial and referencing G.S. 15A-1340.16(a3), which otherwise provides for a jury determination of aggravating factors when a defendant pleads guilty to a felony but contests the existence of aggravating factors).

If the defendant chooses to admit the existence of the alleged aggravating factors or the "under supervision" point, a jury or bench trial is unnecessary. *See* G.S. 15A-1340.16(a1). In accepting the defendant's admission to aggravating factors or points, the judge generally must engage in the colloquy for accepting a guilty plea under G.S. 15A-1022(a) and must follow the procedures in G.S. 15A-1022.1, including advising the defendant of his or her rights, determining that there is a factual basis for the factors and points admitted by the defendant, and determining that the decision to admit is the informed choice of the defendant. *See* G.S. 15A-1022.1(b); G.S. 15A-1340.16(a1). The procedures specified in G.S. 15A-1022(a) and G.S. 15A-1022.1 for the handling of guilty pleas must be followed in the handling of admissions to aggravating factors and prior record points "unless the context clearly indicates that they are inappropriate." G.S. 15A-1022.1(e); *see also State v. Marlow*, 229 N.C. App. 593 (2013).

Although the sentencing statutes discussed above expressly provide for only three ways for an aggravating factor or an "under supervision" point to be found (admission by the defendant followed by a "guilty plea colloquy" or submission to the judge or to a jury for determination beyond a reasonable doubt), the appellate courts appear to have approved another option—stipulation by the defendant. *See, e.g., State v. Khan*, 366 N.C. 448 (2013) (ruling that where defendant stipulated to the existence of an aggravating factor in the Transcript of Plea and orally at the plea hearing, trial judge's procedure satisfied the requirements of G.S. 15A-1022.1); *Marlow*, 229 N.C. App. 593 (citing G.S. 15A-1022.1(e) and holding that where defense counsel stipulated to defendant's record that included an "under supervision" point, trial judge was not required to follow guilty plea procedures and conduct questioning of defendant because the context revealed that it was inappropriate and unnecessary in that case); *see also State v. Deese*, 238 N.C. App. 363 (2014) (unpublished) (following *Marlow* and holding that where defense counsel acknowledged that he had reviewed the prior record level worksheet with defendant and then orally stipulated to the *prior convictions* shown on the worksheet without further objection, trial judge was not required to follow guilty plea procedures and conduct questioning of defendant regarding the *"under supervision" point* listed on the worksheet).

For further discussion of the statutory procedures applicable when a prior record point for being on probation, parole, or post-release supervision is alleged, see Jamie Markham, *The Right Way to Find the "Under Supervision" Prior Record Level Bonus Point*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Oct. 27, 2016). For further discussion of the waiver of the right to a jury trial, see *infra* § 24.2B, Waiver of Right.

Practice note: If your client enters into a plea agreement in which the negotiated sentence is in the aggravated range of the sentencing chart, the State still must offer a factual basis for the aggravating factors and the procedures set out above must be followed. Likewise,

if your client enters into a plea agreement in which the negotiated sentence is in the mitigated range of the sentencing chart, you must present evidence in support of a mitigating factor or factors because the trial judge is required to make sentencing findings that support the mitigated sentence. *See* G.S. 15A-1340.16(b), (c). The judge is not required to make findings if he or she accepts a negotiated sentence in the presumptive range. *See, e.g., State v. Caldwell*, 125 N.C. App. 161 (1997).

B. Aggravating Factors Based on Elements of a Dismissed Offense

Before the U.S. Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), and the enactment of North Carolina's "*Blakely* bill," (S.L. 2005-145), North Carolina appellate courts held that the trial judge could find, as an aggravating factor, an element of an offense that is dismissed as part of a plea bargain. For example, in *State v. Melton*, 307 N.C. 370 (1983), the defendant had been charged with first-degree murder and pled guilty to second degree murder. The trial judge was permitted to find premeditation and deliberation as an aggravating factor. *Melton* held that, "[a]s long as they are not elements essential to the establishment of the offense to which the defendant pled guilty, all circumstances which are transactionally related to the admitted offense and which are reasonably related to the purposes of sentencing must be considered during sentencing." *Id.* at 378.

After the passage of North Carolina's *Blakely* bill, it appears that if the State seeks to establish as an aggravating factor an element of a dismissed offense, the State must, as with other aggravating factors not specifically listed in G.S. 15A-1340.16(d), include the allegation in an indictment or other charging instrument as specified in G.S. 15A-924 and, unless admitted by the defendant, prove its existence to the jury (or to the judge if the defendant waives a jury determination) beyond a reasonable doubt. G.S. 15A-1340.16(a), (a4).

C. Use of Testimony from Prior Trial

Defendant's prior testimony. If the defendant testifies against a co-defendant at a trial held before the defendant's sentencing hearing, that testimony may be used as evidence against the defendant at his or her sentencing hearing. *See State v. O'Neal*, 116 N.C. App. 390 (1994) (sentencing judge could incorporate by reference, and consider as evidence of premeditation and deliberation, defendant O'Neal's own testimony from a co-defendant's trial).

Other witness's testimony at co-defendant's trial. Evidence other than the defendant's testimony that was developed from the trials of co-defendants connected with the same offense may not be used to support a finding of an aggravating factor. *See State v. Thompson*, 314 N.C. 618 (1985); *State v. Benbow*, 309 N.C. 538 (1983). The parties may avoid this limitation by stipulating to evidentiary facts developed at related trials as long as the stipulations are not too extensive. "Even with . . . a stipulation[,] reliance exclusively on . . . record evidence from other trials (in which the defendant being sentenced had no opportunity to examine the witness) as a basis for a finding of an

aggravating circumstance may constitute prejudicial error." *Benbow*, 309 N.C. 538, 549. "The policy behind this ruling is that the focus at the previous trial is on the culpability of others and not the defendant being [presently] sentenced . . . ." *O'Neal*, 116 N.C. App. 390, 394.

D. Restitution Orders and Recommendations

Restitution or reparation may be made part of a plea arrangement. *See* G.S. 15A-1021(d). Any order or recommendation for restitution must be supported by evidence presented at the sentencing hearing. *See, e.g., State v. Burkhead*, 85 N.C. App. 535 (1987) (vacating restitution order for $5,000 when evidence showed unpaid medical expenses of about $450). A prosecutor's unsworn statement is not sufficient to support a restitution award. *State v. Smith*, 210 N.C. App. 439 (2011); *State v. Buchanan*, 108 N.C. App. 338 (1992). A restitution worksheet, unsupported by testimony or documentation, is likewise insufficient to support an order of restitution. *Smith*, 210 N.C. App. 439; *State v. Mauer*, 202 N.C. App. 546 (2010). A defendant's silence or lack of objection does not constitute a stipulation as to the amount of restitution. *State v. Mumford*, 364 N.C. 394 (2010); *Mauer*, 202 N.C. App. 546.

There is no explicit burden of proof established in the restitution statutes. However, the N.C. Court of Appeals has analogized the North Carolina restitution statutes to the federal restitution provision, 18 U.S.C. § 3664(e), which requires the attorney for the government to establish the amount of loss suffered by the victim, and the defendant to show lack of financial resources and the existence of financial needs of any dependents. *See State v. Tate*, 187 N.C. App. 593, 596 (2007) (agreeing with the analogous federal provision that states that "[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence"); *see also State v. Riley*, 167 N.C. App. 346, 349 (2004) (allocating burden of showing that she would not be able to make the required restitution payments to the defendant).

For further discussion of the requirements of the restitution statutes, see Jamie Markham, *Restitution*, UNC SCH. OF GOV'T (Feb. 2012).