
35.5 Resentencing after Successful Appellate or Post-Conviction Review

A. In General

Federal constitutional requirements. At a resentencing hearing, due process of law "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969). "[D]ue process also requires that a defendant be freed of apprehension of . . . a retaliatory motivation on the part of the sentencing judge" at resentencing; otherwise, "the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his [or her] first conviction." *Id.*

In *Pearce*, the U.S. Supreme Court held that whenever a harsher sentence is imposed at resentencing, the record must affirmatively show the existence of factors that would justify a more severe sentence. The reasons for the increased sentence "must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id.* at 726. If the reasons do not appear in the record, the harsher sentence will be presumed to be retaliatory and in violation of the Due Process Clause. Additionally, the defendant must be given credit for the time he or she spent in custody before resentencing.

Although a more severe punishment may violate the Due Process Clause, "neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction." *Id.* at 723. A judge at resentencing "is not constitutionally precluded . . . from imposing a new sentence, whether greater or less than the original sentence, in light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.'" *Id.* (citation omitted); *see also Alabama v. Smith*, 490 U.S. 794 (1989) (holding that presumption of vindictiveness does not apply if defendant successfully appeals a guilty plea and then goes to trial and receives harsher sentence because of the additional information the trial judge obtains from a trial; placing burden on defendant in these circumstances to show actual vindictiveness in violation of due process).

Broader protection of state statute. In 1977, the General Assembly codified and expanded the rule established in *Pearce.* G.S. 15A-1335 provides a broad rule that whenever a conviction or sentence imposed after a trial in superior court judgment has been set aside on

direct review or collateral attack, the resentencing judge may not impose a new sentence for the same offense, or for a different offense based on the same conduct, that is more severe than the original sentence less the portion of the original sentence that the defendant has previously served. *See also* G.S. 15A-1335 Official Commentary (stating that "[t]his section embodies generally the rule of *North Carolina v. Pearce* . . . but does not allow a more severe sentence even if intervening factors would argue for a more severe sentence, as the *Pearce* decision permits"). While this statute provides defendants with greater protection against retaliation or vindictiveness for exercising the right to appeal or collaterally attack a judgment, the statute may have some surprising exceptions, discussed in B., below, of which counsel must be aware in advising clients.

B. Applicability of G.S. 15A-1335

Limitations and exceptions. Unlike the rule applicable in federal courts, G.S. 15A-1335, as originally enacted, applied to resentencings held after a successful attack on a superior court judgment regardless of whether the original conviction was the result of a jury trial or a guilty plea. *Compare State v. Wagner*, 356 N.C. 599, 602 (2002) (finding that for the purposes of G.S. 15A-1335, "the fact that defendant's original conviction resulted from a negotiated plea bargain rather than a finding of guilty by a jury is of no consequence"), *with Alabama v. Smith*, 490 U.S. 794 (1989) (holding that no presumption of vindictiveness under the U.S. Constitution arises when a defendant's original sentence was based on a guilty plea and the subsequent sentence follows a trial). Per *Wagner*, the statute, as originally written, precluded a court from imposing a more severe sentence for a conviction that was set aside regardless of whether the original sentence resulted from a negotiated plea or an open plea and regardless of whether the defendant, after vacation of the original sentence, reentered a guilty plea or was found guilty after a jury trial. *See also State v. Dunston*, 193 N.C. App. 247 (2008) (unpublished) (applying rule in case involving jury trial after negotiated guilty plea was set aside); *State v. Burton*, 187 N.C. App. 510 (2007) (unpublished) (applying rule in case involving negotiated guilty plea after earlier negotiated guilty plea was set aside).

However, G.S. 15A-1335 was amended in 2013 to provide that "[t]his section shall not apply when a defendant, on direct review or collateral attack, succeeds in having a plea of guilty vacated." This amendment became effective December 1, 2013 and applies to offenses and probation violations occurring on or after that date, motions filed on or after that date, and resentencing hearings held on or after that date. 2013 N.C. Sess. Laws Ch. 385; *see also State v. Kawelo*, 263 N.C. App. 594 (2019) (unpublished) (granting defendant's 2018 motion for appropriate relief that sought to set aside his plea agreement; court vacated one of his three consolidated convictions as violative of the First Amendment, remanded the two remaining charges for disposition, and noted that "[t]he provisions of Section 15A-1335 are not applicable on remand"). The amendment took away the extra protection that had been afforded to defendants who pled guilty and brought it more in line with the holdings in *Pearce* and *Smith*. The practice note following this subsection addresses consequences that may result from the vacation of a guilty plea on appeal or by collateral attack.

Although G.S. 15A-1335 is still rather broadly written, other exceptions exist. The statute does not:

- Apply to de novo appeals from district court to superior court. *State v. Burbank*, 59 N.C. App. 543, 547 (1982) ("the possibility of a more severe sentence being imposed is a risk inherent to this type of review"); *see also Colten v. Kentucky*, 407 U.S. 104 (1972) (Due Process Clause not violated because no presumption of vindictiveness arises when a defendant receives a harsher sentence in superior court after an appeal de novo from district court). *But cf.* 1 NORTH CAROLINA DEFENDER MANUAL § 10.7B, Misdemeanor Appeals from District Court (Jan. 2020) (discussing limits on filing of more serious charges on appeal for a trial de novo).
- Bar a more severe sentence when that sentence is statutorily mandated by the General Assembly. *See State v. Cook*, 225 N.C. App. 745 (2013) (defendant's sentence was properly increased at resentencing where he had not been sentenced in the correct presumptive range at the original sentencing hearing); *State v. Kirkpatrick*, 89 N.C. App. 353 (1988) (judge was required to increase defendant's sentence from three to fifteen years on resentencing because the habitual felon statute required it); *State v. Williams*, 74 N.C. App. 728 (1985) (imposition of fourteen-year sentence for armed robbery was proper even though it was two years more than defendant had originally received because the judge imposed the statutory mandatory sentence and had no discretion to impose a lesser sentence).
- Prohibit a resentencing judge from consolidating the convictions in a manner different from the original judge so long as the total sentence is not greater than the original sentence. *State v. Moffitt*, 185 N.C. App. 308 (2007); *State v. Ransom*, 80 N.C. App. 711 (1986).
- Apply to sentences imposed after the State properly prays judgment on previously arrested convictions. *State v. Pakulski*, 106 N.C. App. 444, 452 (1992) (where first-degree felony murder conviction was overturned on appeal, trial judge could impose life sentence for armed robbery conviction that was predicate felony for murder and originally had been arrested; sentence did "not constitute a resentencing within the meaning of G.S. 15A-1335"); *cf. State v. Van Trusell*, 170 N.C. App. 33 (2005) (declining to recognize a presumption of vindictiveness when the State prays judgment on a previously arrested offense following a defendant's successful appeal on a separate conviction).
- Prohibit a resentencing judge from changing concurrent sentences to consecutive sentences "provided neither the individual sentences, nor the aggregate sentence, exceeds that imposed at the original sentencing hearing." *State v. Oliver*, 155 N.C. App. 209, 211 (2002); *see also State v. Gates*, 248 N.C. App. 732 (2016) (citing *Oliver*).
- Prevent a resentencing judge from finding new or different aggravating or mitigating factors so long as the sentence is not more severe than the original sentence. *State v. Hemby*, 333 N.C. 331 (1993).

Practice note: Great care must be taken when advising a client who is considering an attack on a guilty plea since G.S. 15A-1335 no longer prohibits a more severe sentence to be imposed on resentencing when a guilty plea is vacated on direct appeal or by collateral attack. Additionally, as a matter of federal constitutional law, if a defendant undoes the

guilty plea, no presumption of vindictiveness applies to protect against a harsher sentence. *See Alabama v. Smith*, 490 U.S. 794 (1989).

Even before G.S. 15A-1335 was amended, a defendant who had charges dismissed as part of a plea agreement was subject to having those previously dismissed charges reinstated if he or she was successful in attacking a guilty plea. *See, e.g., State v. Williams*, 180 N.C. App. 477 (2006) (unpublished) (defendant improperly given a more severe sentence on a charge he had originally pled to but properly given a consecutive sentence on a charge that had been dismissed under the original plea agreement for which he was subsequently convicted; the charge that had been originally dismissed pursuant to the plea arrangement had not "been set aside on direct review or collateral attack" so G.S. 15A-1335 was not applicable). Also, a defendant who pleads guilty to a lesser included offense and then seeks to have it vacated may be subjecting himself or herself to re-prosecution on the greater offense and imposition of a more severe sentence. *See State v. Fox*, 34 N.C. App. 576, 579 (1977) ("Where a defendant elects not to stand by his portion of the plea agreement, the State is not bound by its agreement to forego the greater charge."); *see also State v. Rico*, 366 N.C. 327 (2012) (reversing per curiam for the reasons stated in the dissenting opinion of the N.C. Court of Appeals; dissenting judge would have found that when defendant repudiated his part of the plea agreement to voluntary manslaughter, the State was free to bring back the original charge of first-degree murder). For an annotation collecting and analyzing state and federal cases discussing whether a defendant may properly be tried on a greater charge after a successful attack on his or her guilty plea to a lesser charge, see Michael A. DiSabatino, Annotation, *Retrial on Greater Offense Following Reversal of Plea-based Conviction of Lesser Offense*, 14 A.L.R. 4th 970 (2008). In light of the above, counsel should carefully analyze the consequences of seeking to undo a guilty plea and very explicitly explain the risks to the client.

C. Additional Resources

For further discussion of the topic covered in this section, see Jessica Smith, *Sentencing: Limitations on a Judge's Authority to Impose a More Severe Sentence after a Defendant's Successful Appeal or Collateral Attack* (Apr. 2014), NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK.