

Appendix C

SURVEY OF STRUCTURED SENTENCING CASE LAW

The following is a survey of cases from the North Carolina Supreme Court and the Court of Appeals which includes rulings pertaining to offenses committed under the Structured Sentencing Act. This survey includes published opinions dating from the enactment of structured sentencing in 1994 to the time of publication of this manual in January 2000. The cases should be read in their entirety before being cited as authority.

SECTION I: IMPOSING SENTENCES FOR FELONIES

Step 1: Determine the offense class for each felony conviction.

No case law.

Step 2: Determine the prior record level for the offender.

A. Counting prior record points

State v. Gentry, ___ N.C. App. ___ (September 21, 1999)(No. COA98-1225): In calculating defendant's prior record level, the trial court counted three prior driving while impaired convictions which were relied upon to establish defendant's habitual driving while impaired status. Relying on the laws concerning habitual felons and calculation of their prior record level, the Court held that the driving while impaired convictions used to establish the habitual driving while impaired offense could not also be used to calculate defendant's prior record level for sentencing purposes.

State v. Vaughn, 130 N.C. App. 456, 503 S.E.2d 110 (1998), *aff'd*, 350 N.C. 88, 511 S.E.2d 638 (1999)(per curiam): The trial court counted a prior breaking and entering conviction for which defendant was found to be an habitual felon as a Class C felony instead of a Class H felony in determining defendant's prior record level. The Court of Appeals reversed holding that "habitual felon" is a status, not a felony, and that the prior Class H felony conviction for breaking and entering must be used to calculate his prior record level.

State v. Rich, 130 N.C. App. 113, 502 S.E.2d 49 (1998): The trial court rejected defendant's argument that prior convictions which occurred ten years before the current offense should not be counted in determining prior record level. The Court of Appeals upheld the trial court stating that there is no statute of limitation on the use of prior convictions to determine prior record level.

State v. Rice, 129 N.C. App. 715, 501 S.E.2d 665 (1998): In calculating defendant's prior record level, the trial court treated a 1972 common law kidnaping conviction as second degree kidnaping. Defendant appealed, arguing that common law kidnaping had been abolished and

that, when it was in effect, it was classified as a misdemeanor. The Court of Appeals upheld, basing its decision on both the legislative intent behind the Structured Sentencing Act and the plain language of the Act itself. Noting that the intent of the Act was to provide more severe punishment for recidivists, the Court held it would be contrary to legislative intent not to include the prior conviction. In determining how to count the prior offense, the Court relied on N.C.G.S. 15A-1340.14 which requires that a prior offense be classified based on the current classification of the offense at the time of sentencing. If no such offense exists, then the Court must find a substantially similar crime for which classification may be assigned. Using this principle, the Court found that the trial court properly reviewed the common law kidnaping conviction and determined that it most closely resembled the current offense of second degree kidnaping.

State v. Leopard, 126 N.C. App. 82, 483 S.E.2d 469 (1997): In determining his prior record level, the trial court assessed defendant one point for being on probation for a driving while impaired conviction at the time the current offense was committed. The Court of Appeals, relying on the plain language of N.C.G.S. 15A-1340.14(7), affirmed holding that if the current offense is committed while the defendant is on probation, a point is added to the prior record calculation; it is irrelevant that the prior conviction which resulted in probation is for an offense which does not count in the calculation of prior record level.

State v. McCrae, 124 N.C. App. 664, 478 S.E.2d 210 (1996): In determining defendant's prior record level, the trial court assigned points for a prior conviction that was consolidated for judgment with another prior conviction which was used to establish defendant's habitual felon status. The Court of Appeals upheld the trial court stating that where prior offenses have been consolidated for judgment, each prior conviction still stands; one can be used to establish habitual felon status while the other can be used in the calculation of defendant's prior record level.

State v. Bethea, 122 N.C. App. 623, 471 S.E.2d 430 (1996): In determining defendant's prior record level, the trial court assigned defendant two additional points. One point was added because all the elements of the present offense were included in a prior conviction. A second point was assessed based on defendant's current probation status. Each of these underlying prior offenses was also used to establish defendant's habitual felon status. The Court of Appeals affirmed the trial court. Relying on N.C.G.S. 15A-1340.14(b)(6) and (b)(7), the Court held that the assigning of additional points addresses the timing and nature of the offense for which the defendant is now being sentenced, rather than the mere existence of a prior offense. Therefore, the prohibition against double counting a prior conviction to determine habitual felon status and prior record level has not been violated.

B. Definition of prior conviction

State v. Hasty, ___ N.C. App. ___, 516 S.E.2d 428 (1999): In calculating defendant's prior record level, the trial court counted a prior conviction for which defendant was on probation at the time of the current offense under the provisions of N.C.G.S. 90-96(a)(1997). N.C.G.S. 90-96 (a) allows for the dismissal of a conviction if a defendant completes all the conditions of probation. Defendant argued that his prior Chapter 90 conviction should not count. The Court

of Appeals ruled that defendant's prior conviction did count for sentencing purposes because defendant had pled guilty to the prior offense and that conviction had not been dismissed because defendant had not completed probation prior to the new offense.

C. Considering multiple prior convictions

State v. Wilkins, 128 N.C. App. 315, 494 S.E.2d 611 (1998): The trial court assessed two separate prior record points for Class 1 misdemeanors of which defendant had been convicted in District Court on separate days but which defendant argued had been remanded following withdrawal of appeal to District Court and judgment entered on the same day during the same session of court. In affirming the trial court's action, the Court of Appeals held that for purposes of calculating prior record level where a conviction in District Court is appealed and then subsequently the appeal is withdrawn, the conviction occurs on the date that the defendant was originally convicted in District Court.

State v. Truesdale, 123 N.C. App. 639, 473 S.E.2d 670 (1996): In calculating defendant's prior record level, the trial court counted convictions which were from the same session of court and which were consolidated with prior convictions used to establish defendant's habitual felon status. The Court of Appeals held that even though N.C.G.S. 14-7.6 prohibits using the same conviction to establish both habitual felon status and prior record level and N.C.G.S. 15A-1340.14(d) prohibits the use of more than one conviction obtained in a single calendar week to increase the defendant's prior record level, nothing in the statutes prohibits the trial court from using one conviction obtained in a single calendar week of court to establish habitual felon status and using another separate conviction obtained during that same week to determine the prior record level.

D. Proof of prior convictions

State v. Rich, 130 N.C. App. 113, 502 S.E.2d 49 (1998): The Court of Appeals upheld the trial court's finding that a computer printout from the Division of Criminal Information had sufficient identifying information, such as defendant's fingerprint identifier number and FBI number, to give it the indicia of reliability so that it could be used to establish defendant's prior record.

E. Prior record from other jurisdictions

State v. Rich, 130 N.C. App. 113, 502 S.E.2d 49 (1998): The trial court compared statutes from other jurisdictions to North Carolina statutes to determine how to count defendant's prior convictions from outside North Carolina. In upholding the trial court, the Court of Appeals found that the trial court could establish by comparison that defendant's prior convictions from other states were for offenses substantially similar to offenses classified as felonies in North Carolina. Therefore, the convictions from other jurisdictions could be assigned the same number of prior record points as the similar North Carolina offenses pursuant to N.C.G.S. 15A-1340.14(e)(1997).

Step 3: Consider Aggravating and Mitigating factors.

A. Burden of proof

State v. Hughes, ___ N.C. App. ___, (December 21, 1999)(No. COA98-1514): The trial court did not find any mitigating factors despite evidence presented by the defendant. The Court of Appeals held that the trial court is required to find a mitigating factor only where the evidence presented in support of the factor is “substantial, uncontradicted, and manifestly credible”; the defendant failed to meet this burden; therefore, the trial court did not err in not finding any factors in mitigation.

B. Aggravating and Mitigating factors

State v. Ballard, 127 N.C. App. 316, 489 S.E.2d 454 (1997), rev’d per curiam in part and disc. rev. improvidently allowed in part, 349 N.C. 286, 507 S.E.2d 38 (1998): The trial court found as an aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense. In affirming per curiam the dissenting opinion of the Court of Appeals, the Supreme Court held that the mere existence of a relationship of trust between the defendant and the victim is not sufficient to support this aggravating factor; the evidence must show that defendant relied upon the relationship to facilitate commission of the crime.

State v. Hughes, ___ N.C. App. ___, (December 21, 1999)(No. COA98-1514): In sentencing the defendant for the conviction of felony accessing computers, the trial court found the great monetary loss to the victim to be an aggravating factor. The Court of Appeals held that this evidence is not necessary to prove an element of the offense, and therefore, such evidence may be used to aggravate the sentence.

State v. Burgess, ___ N.C. App. ___, 518 S.E.2d 209 (1999): The trial court found the victim’s young age to be an aggravating factor in sentencing (*see* N.C.G.S. 15A-1340.16(d)(11)) despite the fact that this factor was also an element of felony child abuse, the crime for which defendant was convicted. Relying on State v. Ahearn, 307 N.C. 584, 300 S.E.2d 689 (1983), the Court of Appeals affirmed holding that the fact that the victim was very young was not an element necessary to prove felony child abuse. To sustain a charge of felony child abuse, it must only be proved that the victim is less than 16 years old. This aggravating factor took into account the child’s vulnerability due to its especially young age.

State v. Rollins, 131 N.C. App. 601, 508 S.E.2d 554 (1998): On its own motion, the trial court found as a nonstatutory aggravating factor that defendant attempted to dispose of evidence by transferring the gun to another individual immediately after the crime. Defendant argued that a finding of this factor under the circumstances of this case violated his Fifth Amendment right against self-incrimination. The Court of Appeals reversed, holding that defendant’s actions did not rise to the level of misconduct sufficient to outweigh the constitutional protection against self-incrimination. The Court based its decision on the absence of evidence that the defendant was actively trying to elude law enforcement. The Court further held that a trial court may find

non-statutory aggravating factors not requested by the State whether evidence supporting such factors is presented at trial or at the sentencing hearing, but that the trial court should exercise restraint when considering such factors.

State v. Mullaney, 129 N.C. App. 506, 500 S.E.2d 112 (1998): The trial court found as an aggravating factor that defendant violated a position of trust in committing the offense. The Court of Appeals reversed, holding that because a violation of a position of trust was an element of the offense of embezzlement, the trial court could not also find this to be an aggravating factor.

State v. Taylor, 128 N.C. App. 394, 496 S.E.2d 811 (1998): The trial court found as an aggravating factor that defendant had a prior delinquency adjudication for second degree rape. Defendant argued that N.C.G.S. 15A-1340.16(d)(18a), which permits the consideration of this factor, was unconstitutionally applied to him because it was not in existence at the time of defendant's delinquency adjudication. Affirming the trial court, the Court of Appeals held that consideration of the prior juvenile adjudication did not violate defendant's constitutional rights. The Court held that N.C.G.S. 15A-1340.16(d)(18a) does not violate the ex post facto clauses of the Constitution because it does not retroactively punish conduct that previously was not criminalized nor does it aggravate the prior delinquency adjudication or inflict a greater punishment for that conduct than allowed at the time the delinquent act was committed. The Court held that there was no denial of due process because defendant had adequate notice at the time of the current offense that his prior adjudication could be used to aggravate his sentence and defendant had a full hearing as to his delinquency at the time of the adjudication.

State v. Deese, 127 N.C. App. 536, 491 S.E.2d 682 (1997): The trial court did not find as a mitigating factor that defendant had acted under extreme provocation where evidence supporting such a finding was presented at trial but not at the sentencing hearing. The Court of Appeals held that only if the defendant proves by uncontradicted evidence that he acted under circumstances constituting strong provocation must the trial court consider this factor in mitigation of his sentence. Further, where the evidence shows that the defendant has time or opportunity to "cool his blood" (as in this case) the trial court is not required to find provocation. The trial court did find the victim's old age to be an aggravating factor. The Court of Appeals reversed holding that the aggravating factor focuses on whether as a result of his or her age the victim was especially vulnerable to the crime. The age of the victim alone, with no proof that his age made him more vulnerable to victimization, was not sufficient to find this aggravating factor.

State v. Applewhite, 127 N.C. App. 677, 493 S.E.2d 297 (1997): The trial court found the nonstatutory aggravating factor that defendant left the victim without making any effort to save his life. Defendant argued that evidence used to support this factor was necessary to prove an element of the crimes for which he was convicted and that it should not have been used to enhance his sentence. The Court of Appeals held that evidence used to prove this factor was not necessary to prove either of the offenses of which defendant was convicted, and therefore, the trial court did not err in finding this nonstatutory aggravating factor. Defendant also contended that the trial court should have found as a mitigating factor that he has a support system in the community despite the fact that defendant did not request this factor be found at the sentencing

hearing. The Court of Appeals held that the evidence in support of this mitigating factor was not sufficient to mandate the trial court's finding.

State v. Crisp, 126 N.C. App. 30, 483 S.E.2d 462 (1997): The trial court found the following to be aggravating factors: the victims suffered permanent and debilitating serious injuries; and the defendant used a weapon which normally would be hazardous to the lives of more than one person. On appeal, defendant argued that these factors had been necessary to prove an element of the offense for which he was convicted and as such could not be used in sentencing him in the aggravated range. The Court of Appeals held that a distinction exists between the elements of the offense (that defendant inflicted serious injury and that he used a deadly weapon) and the specific circumstance of the offense which the aggravating factors seek to punish (that the injury inflicted is permanent and debilitating and that the deadly weapon used, in this case a semi-automatic weapon, is by design hazardous to more than one person). Defendant further argued that the trial court erred in failing to find three statutory mitigating factors presented by the defendant. The Court held that the trial court properly determined that defendant had failed to prove by the preponderance of the evidence that any of the three statutory mitigating factors existed.

C. Requirement to provide written reasons

State v. Brooks, ___ N.C. App. ___, (December 21, 1999)(No. COA98-1576): The trial court sentenced defendant within the presumptive range. Defendant argued that the trial court should have found that certain mitigating factors existed. Relying on State v. Rich, ___ N.C. App. ___, ___, 512 S.E.2d 441, 450 (1999), the Court of Appeals held that because the trial court sentenced defendant within the presumptive guidelines for his offense, it did not have to make any findings of mitigating or aggravating factors.

State v. Bright, ___ N.C. App. ___, 520 S.E.2d 138 (1999): The trial court imposed a sentence from the aggravated range without making written findings of factors in aggravation. The Court of Appeals held that, unlike under the Fair Sentencing Act, the trial court is bound by the requirement that written findings be made as to why a defendant is sentenced outside of the presumptive range even in cases in which there has been a plea agreement.

State v. Campbell, ___ N.C. App. ___, 515 S.E.2d 732 (1999): Presented with several mitigating and no aggravating factors, the trial court sentenced the defendant within the presumptive range. Upholding the trial court, the Court of Appeals held that the trial judge is not required to justify a sentencing decision within the presumptive range, and need not make findings of mitigating or aggravating factors.

State v. Rich, 132 N.C. App. 440, 512 S.E.2d 441 (1999): The trial court made no findings in mitigation despite what defendant on appeal described as conclusive evidence in support of mitigating factors. The Court of Appeals held that because the trial court sentenced within the presumptive range, there was no requirement that the judge make findings of mitigating or aggravating factors.

State v. Caldwell, 125 N.C. App. 161, 479 S.E.2d 282 (1997): The trial court sentenced defendant within the presumptive range. Defendant argued that even when sentencing within the presumptive range the trial court should be required to consider evidence of aggravating and mitigating factors when imposing sentences and that not to consider such evidence is an abuse of discretion. Relying on the plain language of the statute, the Court of Appeals held that the trial court has absolute discretion to sentence within the presumptive range and must take into account factors in aggravation and mitigation only when deviating from the presumptive range in sentencing.

Step 4: Select a Minimum Sentence from the Sentence Range.

A. Firearm Enhancement

State v. Ruff, 349 N.C. 213, 505 S.E.2d 579 (1998): The trial court enhanced defendant's sentence for second-degree kidnaping based on evidence that he used a gun during the commission of the offense. Defendant appealed, arguing that the use of the gun was an essential element in the contemporaneous conviction for first-degree rape. The Court of Appeals reversed. In reversing the Court of Appeals, the Supreme Court held that the underlying felony which was enhanced was the second-degree kidnaping offense and that because the use of a firearm is not an essential element of second-degree kidnaping, the trial court was not precluded from enhancing defendant's sentence pursuant to N.C.G.S. 15A-1340.16A. The Supreme Court found it was irrelevant that the first-degree rape required proof of use of a firearm because it was not the underlying felony which was enhanced.

State v. Williams, 127 N.C. App. 464, 490 S.E.2d 583 (1997): The trial court applied the firearm enhancement to defendant's sentence pursuant to N.C.G.S. 15A-1340.16A even though the victim's testimony was that the object displayed by defendant was only a cigarette lighter shaped like a gun. The Court of Appeals held that the trial court may not enhance a defendant's sentence by sixty months where the evidence at trial conclusively established that no gun was actually displayed, even where it appeared to the victim at the time of the offense that a gun was displayed.

State v. Brice, 126 N.C. App. 788, 486 S.E.2d 719 (1997): The trial court enhanced defendant's second degree kidnaping sentence for use of a firearm where defendant was convicted of two counts of armed robbery and one count of second degree kidnaping. In finding that the trial court had erred, the Court of Appeals held that evidence of the use of a firearm which was relied upon to prove a necessary element of the kidnaping charge could not subsequently be used to enhance defendant's sentence.

State v. Evans, 125 N.C. App. 301, 480 S.E.2d 435 (1997): The trial court sentenced defendant within the aggravated range for assault and armed robbery convictions and enhanced the sentence for defendant's kidnaping conviction by sixty months pursuant to N.C.G.S. 15A-1340.16A for use of a firearm. Defendant argued that the trial court violated the constitutional prohibition on double jeopardy by enhancing his kidnaping conviction sentence for use of a firearm and by

imposing a consecutive sentence for armed robbery because the evidence establishing use of a firearm for purposes of the enhancement was relied upon in establishing the armed robbery conviction. The Court of Appeals held that the firearm enhancement applies unless the underlying felony requires proof of use of a firearm and that the use of the firearm by defendant was not used to establish the first degree kidnaping conviction. The Court held that because kidnaping and armed robbery were two distinct criminal offenses requiring proof of different elements, punishment for these offenses by consecutive sentences did not violate the constitutional prohibition against double jeopardy.

State v. Smith, 125 N.C. App. 562, 481 S.E.2d 425 (1997): The trial court enhanced defendant's sentence for use of a firearm where evidence of the use of a firearm was necessary in proving the offense of voluntary manslaughter. The Court of Appeals held that if evidence of the use of a firearm is relied upon in proving an element of the offense, regardless of whether the use of a firearm is an actual element of the offense or not, then the firearm enhancement may not be applied.

Step 5: Determine the Maximum Sentence.

No case law.

Step 6: Determine the Sentence Disposition.

A. Extraordinary mitigation

State v. Ray, 125 N.C. App. 721, 482 S.E.2d 755 (1997): The trial court did not find extraordinary mitigation pursuant to N.C.G.S. 15A-1340.13(g) despite its finding no aggravating factors and four mitigating factors. The Court of Appeals held that the decision to impose an intermediate punishment by finding extraordinary mitigation is within the discretion of the trial court and that there was no abuse of discretion in this case.

B. Substantial assistance

State v. Saunders, 131 N.C. App. 551, 507 S.E.2d 911 (1998): The trial court limited itself to imposing a sentence from the felony punishment grid after it had found substantial assistance on behalf of defendant. The Court of Appeals held that once the trial court has made a finding of substantial assistance, it is not limited to the authorized punishments under the grid, but may impose any sentence in its discretion.

C. Consecutive sentences

State v. Crumbley, ___ N.C. App. ___, (September 21, 1999)(No. COA98-1078): At the time of sentencing defendant in open court, the trial court did not indicate whether the sentences imposed were to run consecutively or concurrently. The trial court subsequently ordered in the written judgment, without defendant being present, that the sentences were to run consecutively.

The Court of Appeals vacated. While holding that the actual sentence is that which appears in the written judgment and not that which is spoken in open court, the Court ruled that because the trial judge failed to indicate in open court that the sentences would run consecutively, the presumption was that the sentences would run concurrently. The trial court erred in entering a written order different than that orally ordered in open court without providing the defendant with an opportunity to be heard.

State v. Love, 131 N.C. App. 350, 507 S.E.2d 577 (1998): The trial court sentenced defendant to consecutive terms of imprisonment. Defendant argued that the imposition of consecutive sentences in this case was cruel and unusual punishment and that the lack of statutory guidance as to when concurrent and consecutive sentences are appropriate creates unguided judgments which lead to an abuse of discretion by the trial court. The Court of Appeals held that the trial court has the statutory authority to impose consecutive sentences and that the lack of guidelines as to the appropriateness of imposing consecutive sentences is a question for the legislature.

State v. Rich, 130 N.C. App. 113, 502 S.E.2d 49 (1998): The trial court ordered that defendant's sentences for first-degree burglary and common law robbery run consecutively. In affirming the trial court, the Court of Appeals held that where the offenses for which defendant is sentenced are two distinct criminal offenses which require proof of different elements, there is no requirement that the trial court merge the sentences; the imposition of consecutive sentences does not violate the constitutional prohibition against double jeopardy.

D. Consolidated offenses

State v. Branch, ___ N.C. App. ___, 518 S.E.2d 213 (1999): Defendant was convicted of two separate counts of breaking and entering and of larceny with offense dates of September 19, 1994 and October 4, 1994. The offenses were consolidated and defendant was sentenced under Structured Sentencing to a minimum of twelve months and a maximum of fifteen months imprisonment. The Department of Correction sent the judgment back indicating that offenses that fall under the Fair Sentencing Act could not be combined for sentencing with offenses that fall under the Structured Sentencing Act. At resentencing defendant received twelve to fifteen months for the offense on October 4, 1994 and ten years for the offense that occurred on September 19, 1994. On appeal, defendant argued that there was no prohibition in consolidating the offenses and that the new sentencing hearing was unlawful. The Court of Appeals upheld the trial court's action stating that the two offenses could not be consolidated because they were subject to different sentencing practices as a matter of law. The trial court had the authority to resentence pursuant to N.C.G.S. 15A-1415(b)(8) because the original sentence was unauthorized at the time it was imposed.

E. Intermediate punishments

For cases which pertain to probation, see *F. Community Punishments* below.

F. Community punishments

State v. Hughes, ___ N.C. App. ___, (December 21, 1999)(No. COA98-1514): The Court of Appeals held that the trial court could not place defendant on probation for longer than the statutorily presumed period of probation without making findings that a longer period of probation was necessary.

State v. Cardwell, ___ N.C. App. ___, 516 S.E.2d 388 (1999): On a reckless driving conviction, the trial judge sentenced defendant to twelve months of supervised and forty-eight months of unsupervised probation. N.C.G.S. 15A-1343.2(d) sets out by statute the presumed period of probation for defendants depending on whether they have committed a misdemeanor or felony and whether they are being sentenced to a community or intermediate punishment. The Court of Appeals held that the trial court erred by not making specific findings, as required by statute, that a longer than statutorily presumed period of probation was required before sentencing defendant to five years of probation.

State v. Hill, 132 N.C. App. 209, 510 S.E.2d 413 (1999): The trial court revoked defendant's probation for failure to complete his community service hours and failure to comply with the payment of restitution. Defendant argued that the trial court erred in not considering evidence of defendant's disability and his inability to do community service or make payments. The Court of Appeals reversed holding that the trial court must consider and evaluate evidence brought forth by a probationer that shows a lawful excuse for his violation and must make findings of fact which clearly indicate that this has been done.

SECTION II: ADDITIONAL SENTENCING PROVISIONS RELATING TO FELONIES

A. Violent Habitual Felon

State v. Mason, 126 N.C. App. 318, 484 S.E.2d 818 (1997): The trial court sentenced defendant to life without parole based on his status as a violent habitual felon. Defendant contends that the violent habitual felon law is unconstitutional in that it denies a defendant due process and equal protection, denies freedom from ex post facto laws, denies freedom from cruel and unusual punishment, and denies a defendant freedom from double jeopardy. Relying on State v. Todd, 313 N.C. 110, 118, 326 S.E.2d 249,253 (1985), the Court held that the violent habitual felon law is constitutional. Defendant also argued that his previous conviction of assault with a deadly weapon inflicting serious injury was a Class H felony and the prior conviction for voluntary manslaughter was a Class F felony at the time he committed those offenses and that to subsequently treat these offenses as Class E felonies to establish the violent habitual felon status violates his protection against ex post facto laws. The Court of Appeals held that with the enactment of Structured Sentencing the statutes covering the prior offenses were superceded and that because the status of violent habitual felon serves only to enhance defendant's punishment for the current predicate substantive felony, and not to increase the punishment of defendant for the prior felonies, there is no violation of defendant's rights against ex post facto laws.

B. Habitual Felon

State v. McCrae, 124 N.C. App. 664, 478 S.E.2d 210 (1996): In determining defendant's prior record level, the trial court assigned points for a prior conviction that was consolidated for judgment with another prior conviction which was used to establish defendant's habitual felon status. The Court of Appeals upheld the trial court stating that where prior offenses have been consolidated for judgment, each prior conviction still stands; one can be used to establish habitual felon status while the other can be used in the calculation of defendant's prior record level.

State v. Misenheimer, 123 N.C. App. 156, 472 S.E.2d 191 (1996): The trial court relied on prior convictions of habitual impaired driving to establish defendant's habitual felon status. These prior convictions were also used to support the current conviction of habitual drunk driving. The Court of Appeals found that N.C.G.S. 14-7.6 speaks specifically to prohibiting the use of a prior conviction for both establishing habitual felon status and for enhancing a defendant's prior record level. The Court held that nothing in N.C.G.S. 14-7.6 prohibits using the same offense to establish defendant as both an habitual drunk driver and an habitual felon.

State v. Truesdale, 123 N.C. App. 639, 473 S.E.2d 670 (1996): In determining defendant's prior record level, the trial court counted convictions that were from the same session of court and were consolidated with prior convictions used to establish defendant's habitual felon status. The Court of Appeals held that even though N.C.G.S. 14-7.6 prohibits using the same conviction to establish both habitual felon status and prior record level and N.C.G.S. 15A-1340.14(d) prohibits the use of more than one conviction obtained in a single calendar week to increase the defendant's prior record level, nothing in the statutes prohibits the trial court from using one conviction obtained in a single calendar week of court to establish habitual felon status and using another separate conviction obtained during that same week to determine the prior record level.

State v. Bethea, 122 N.C. App. 623, 471 S.E.2d 430 (1996): In determining the prior record level, the trial court assigned defendant two additional points. One point was added because all the elements of the present offense were included in a prior conviction. A second point was assessed based on defendant's current probation status. Each of these underlying prior offenses was also used to establish defendant's habitual felon status. The Court of Appeals affirmed the trial court. Relying on N.C.G.S. 15A-1340.14(b)(6) and (b)(7), the Court held that the assigning of additional points addresses the timing and nature of the offense for which the defendant is now being sentenced, rather than the mere existence of a prior offense. Therefore, the prohibition against double counting a prior conviction to determine habitual felon status and prior record level has not been violated.

C. Life without Parole

State v. Allen, 346 N.C. 731, 488 S.E.2d 188 (1997): The trial court sentenced defendant to life imprisonment without parole on a conviction for murder. Defendant argued that the sentence of life without parole is unconstitutional in that it violates the state constitution's Separation of Powers Clause, is not recognized by the state constitution, violates due process and the law of

the land clause and violates the state constitution's provision against cruel and unusual punishment. In determining that life imprisonment without parole does not violate the Separation of Powers clause, the Supreme Court held that the Governor constitutionally does not have the power to parole and that the Governor's constitutional power to grant clemency remains unencumbered. In holding that life imprisonment without parole is provided for within the constitution's language, the Court stated that only the General Assembly has the power to prescribe the maximum and minimum punishments which can be imposed and pointed out that imprisonment is a legitimate form of punishment under Article XI, sec 1 (amended 1996) of the state constitution.

D. Other provisions

State v. Linemann, ___ N.C. App. ___ (December 7, 1999)(No. COA 98-1515): Pursuant to a motion for appropriate relief brought by the defendant, the District Court judge corrected several clerical errors which appeared in the judgment and denied all other portions of defendant's motion. In answering the question of whether defendant could appeal to Superior Court for a trial de novo from the date the judgment was corrected in District Court, the Court of Appeals held that the correction of a clerical error in a judgment and commitment form does not constitute a new conviction or judgment, that more than the ten days allotted for the filing of an appeal had elapsed since the original entry of the judgment and, therefore, defendant could not appeal for a trial de novo.

State v. Mullaney, 129 N.C. App. 506, 500 S.E.2d 112 (1998): The trial court sentenced defendant under the Fair Sentencing Act for a conviction of embezzlement. The offense occurred over several dates, spanning a period of time from prior to the enactment of Structured Sentencing to after its effective date. By a concurring opinion, the Court of Appeals held that because the prosecution chose to charge with one offense, instead of separate offenses for each transaction, and the indictment alleged that the offense was not concluded until after October 1, 1994 (when structured sentencing became effective) defendant must be sentenced under the Structured Sentencing Act.