

## 15A-1335: When Is a Sentence "More Severe"?

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G.S. 15A-1335 provides that when a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court 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 prior sentence less the portion of the prior sentence previously served. In most cases, determining whether the new sentence is more severe than the original sentence is a simple matter. In *State v. Holt*, 144 N.C. App. 112, 116 (2001), for example, the court of appeals easily concluded that imposition of a life sentence was more severe than the original sentence of 196,245 months in prison. However, I get questions about this issue every now and then. Here is a quick summary of the most common things people ask about.

**Life Sentences.** Any number of life sentences, even if imposed consecutively, cannot be considered more severe than a single death sentence. *State v. Goode*, 211 N.C. App. 637 (2011) (no violation of G.S. 15A-1335 when after the defendant's two death sentences for murder were vacated the trial judge imposed two consecutive life sentences); *State v. Oliver*, 155 N.C. App. 209, 212 (2002) (same).

**Multiple Sentences.** Even when multiple sentences are involved, the application of the rule is generally straightforward: The statute bars imposing an increased sentence for any of the convictions, even if the total term of imprisonment does not exceed that of the original sentence. *State v. Daniels*, 203 N.C. App. 350 (2010) (the defendant was sentenced to consecutive terms of 307,378 months for first-degree rape and 133,169 months for first-degree kidnapping; after a successful appeal, the trial court resentenced the defendant to 370,453 months for first-degree rape and to a consecutive term of 46,65 months for second-degree kidnapping; the resentencing violated G.S. 15A-1335 because the trial court imposed a more severe sentence for the rape conviction; the court rejected the State's argument that when applying G.S. 15A-1335, the court should consider whether the new aggregated sentences are greater than the aggregated original sentences); *see also* *State v. Oliver*, 155 N.C. App. 209 (2002) ("When multiple sentences are involved [G.S.] 15A-1335 bars the trial court from imposing an increased sentence for any of the convictions, even if the total term of imprisonment does not exceed that of the original sentence.").

Note that the mere fact that the resentencing judge replaces concurrent sentences with consecutive sentences does not automatically make the new sentence more severe, provided neither the individual sentences nor the aggregate sentence exceeds that originally imposed. *Oliver*, 155 N.C. App. at 211 (no violation occurred when the original sentence included concurrent death sentences and the new sentence consisted of consecutive life sentences); *State v. Ransom*, 80 N.C. App. 711, 714 (1986) (the defendant initially received a consolidated sentence of twenty years for multiple offenses; after that sentence was overturned, the court sentenced him to six consecutive three-year sentences, for a total of eighteen years; the new sentence did not violate G.S. 15A-1335).

Also, nothing prevents the resentencing court from changing the way the convictions originally were consolidated, provided that the defendant is not sentenced more severely. *See Ransom*, 80 N.C. App. at 713 ("While G.S. 15A-1335 prohibits trial courts from imposing stiffer sentences upon remand than originally imposed, nothing prohibits the trial court from changing the way in which it consolidated convictions during a sentencing hearing prior to remand.").

**Finding New Sentencing Factors.** The fact that a resentencing judge found new aggravating factors does not make the new sentence more severe, so long as those findings are not used to impose a longer sentence. *See State v.*

Hemby, 333 N.C. 331, 334 (1993) (“Although a trial judge may find altogether new aggravating and mitigating circumstances at a resentencing hearing ..., such findings cannot justify a sentence which is more severe than the original sentence imposed on the same offense.”); *see also* State v. Swimm, 316 N.C. 24, 32-33 (1986) (the defendant’s good behavior while in prison during the interval between initial incarceration and resentencing may constitute a mitigating factor; the defendant’s bad conduct during this period may not be used as a basis to increase his or her sentence, but may be found as an aggravating factor to be used in determining whether to impose a sentence not greater than the one originally imposed); State v. Smith, 73 N.C. App. 637, 639 (1985) (“the restriction on resentencing is not against finding new factors in aggravation, but on imposing a more severe sentence than before”).

**Imposing Same Sentence When Fewer Aggravating Factors Found.** The fact that the resentencing judge imposed the same sentence after finding fewer aggravating factors than were found at the original sentencing hearing does not run afoul of the statute. *See* State v. Mitchell, 67 N.C. App. 549 (1984) (rejecting the defendant’s argument that it was error for the trial judge to impose an identical sentence on resentencing when six aggravating factors were originally found and only two were found at resentencing).

**Non-Binding Recommendations.** The fact that the resentencing judge added a non-binding recommendation to the Department of Correction does not violate G.S. 15A-1335. *See* State v. Hanes, 77 N.C. App. 222, 225 (1985) (trial judge did not violate G.A. 15A-1335 by adding a condition, as a recommendation, that the defendant’s fine and restitution be paid before any early release; the recommendation had no legal effect and was not binding on the Department of Corrections).