Another Look at the DWI Super-Aggravator in G.S. 20-179(c)(4)

Author : Shea Denning

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Last summer I wrote this post about amendments to the fourth grossly aggravating factor applicable to sentencing for impaired driving, namely the factor in G.S. 20-179(c)(4) that elevates punishment for driving while impaired with a child in the vehicle. Amendments effective for offenses committed on or after December 1, 2011 render this factor applicable if any of the following persons were in the vehicle at the time of the offense: (1) a child under the age of 18; (2) a person with the mental development of a child under 18; or (3) a person with a physical disability that prevents the person from getting out of the vehicle without assistance. S.L. 2011-329. When I summarized the amendments last summer, I wrote: "[I]f more than one of these types of persons is in the car, it appears that only on grossly aggravating factor applies." I want to revisit that issue in this post.

G.S. 20-179(c)(4) does not specify whether more than one grossly aggravating factor exists if more than one qualifying minor or disabled person is in the vehicle at the time of the offense. It did not so specify before it was amended, though then it applied only when one category of persons was present in the vehicle: a child under the age of 16. In light of G.S. 20-179(c)(1)'s specification that each qualifying *prior conviction* counted as a separate grossly aggravating factor, the prevailing interpretation before the statute was amended was that, regardless of the number of children present in the vehicle, only one factor applied. *See* Ben Loeb and James Drennan, Motor Vehicle Law and the Law of Impaired Driving in North Carolina 85 (2000); *see also* Jeff Welty, DWI for the Whole Family. That's the analysis I applied in the August 2011 post. It finds some support in another provision of S.L. 2011-329, which amended G.S. 20-179(c) to require Level One punishment "if it is determined that the grossly aggravating factor in subdivision (4) of this subsection applies" and to permit Level Two punishment "[i]f the judge does not find that the aggravating factor at subdivision (4) of this subsection applies." These references to G.S. 20-179(c)(4) arguably reflect the legislature's view that the factor, while capable of proof in multiple ways, remains singular in its application.

Nevertheless, the contrary view—namely that division of this factor into subparts evinces the legislature's intent to permit the finding of more than one grossly aggravating factor under G.S. 20-179(c)(4)—is bolstered by case law interpreting other, similarly worded aggravating factors. The court of appeals in State v. Mack, 81 N.C. App. 578 (1986), for example, construed the aggravating factor of "especially reckless or dangerous driving" in G.S. 20-179(d)(2) to permit a finding of two separate aggravating factors, one based on *especially reckless* driving and the other based on *especially dangerous* driving. The *Mack* court explained that "there would need to be at least one item of evidence not used to prove either an element of the offense or any other factor in aggravation to support each additional aggravating factor." *Id.* at 585. Similarly, the state supreme court has upheld the division of the aggravating factor set forth in G.S. 15A-1340.16(d)(1), which applies if "[t]he defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants," holding that the provision may support the finding of two aggravating factors (one for inducement and one for position of leadership) if separate evidence supports each. *See* State v. Erlewine, 328 N.C. 626, 638-39 (1991). For that reason, both the impaired driving determination of sentencing factors form (AOC-CR-311) and the felony judgment form, AOC-CR-605, provide check boxes for the finding of one or both factors under each provision.

If the reasoning in *Mack* and *Erlewine* was applied to G.S. 20-179(c)(4), as amended, it would allow for the determination of more than one grossly aggravating factor based on the presence of more than one person in the car, each of whom satisfied a separate category. So, for example, a finding of one grossly aggravating factor under G.S.

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20-179(c)(4) would be appropriate for a defendant who committed a covered offense with more than one child under the age of 18 in the vehicle because the children occupy the same category. If, however, a person with a qualifying disability or a person with the mental development of a child under the age of 18 years also was present in the vehicle, a separate grossly aggravating factor also would apply.

The DWI sentencing factors form (AOC-CR-311) acknowledges this possible interpretation, providing a separate check box for each category of qualifying individual under 20-179(c)(4). The form does not, of course, resolve the legal issue of whether each category gives rise to separate factor.

Given that a finding of one aggravating factor under G.S. 20-179(c)(4) requires Level One punishment, whether multiple aggravating factors can be found under this subsection carries legal significance in the limited number of cases in which there are three or more grossly aggravating factors, thus requiring punishment at Aggravated Level One. If you've litigated this issue or have other insights or perspective on the proper construction of this provision, I'd love to have the benefit of your thoughts.

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