Classifying Prior Convictions for Sentencing Purposes

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When determining a defendant's prior record level for felony sentencing, prior convictions count for points according to their classification as of the offense date of the crime now being sentenced. G.S. 15A-1340.14(c). That law helps modernize a person's record, treating it according to present-day classification standards as opposed to those that existed at the time of the prior offenses themselves. The rule can cut in either direction. If the offense class of the prior conviction has increased between the time of the prior and present offenses, the prior counts for points according to the higher offense class. If the offense class has decreased, the prior counts at its new, reduced level.

The rule is simple enough to apply when an offense classification for a single crime is ratcheted up or down. What do you do, though, when a person has a prior conviction for an offense that has since been split into multiple offenses with different classifications? A recent case gives some guidance.

The case is State v. Arrington, decided by the court of appeals earlier this week. In *Arrington*, the defendant was convicted of two felonies and of being a habitual felon. One of his prior convictions—the most significant one in terms of points—was a July 1994 conviction for second-degree murder.

Back when the defendant committed that second-degree murder, it was a Class C felony under Fair Sentencing. For most of the Structured Sentencing era it was Class B2. Had it remained so, G.S. 15A-1340.14(c) would clearly have required Mr. Arrington's prior offense to be upgraded to Class B2 for the sentencing of his current crime.

But second-degree murder didn't remain Class B2—at least not in its entirety. As Jeff described here, effective for offenses committed on or after December 1, 2012, the legislature increased it to Class B1, except in cases where malice is based on recklessness or where the murder is proximately caused by the unlawful distribution of certain drugs, in which case it is Class B2. The sentencing of Mr. Arrington's current crime, committed in 2013, thus raised the issue Jeff anticipated in the prior post linked above: how to classify a prior conviction that has since been split into two versions, each with a different offense class?

In Mr. Arrington's case, the issue was resolved in the trial court by stipulation. On his prior record level worksheet, Arrington stipulated to the existence of the second-degree murder conviction and to the points assigned to it—9 as a Class B1 felony. The parties apparently agreed (or assumed) that it was not one of the two types of second-degree murder that would today be classified as Class B2. Those 9 points gave him a total of 16, making him prior record level V for sentencing.

On appeal, Arrington argued that the stipulation was improper to the extent that it purported to resolve the *legal* question of whether his prior second-degree murder would be Class B1 or Class B2 under the present-day statute. Legal questions, unlike factual ones, are not something to which he could validly stipulate. That legal/factual distinction has come up many times in cases about improper stipulations to "substantial similarity" of out-of-state prior convictions (discussed at length here). The State argued that the proper classification was a factual question to which the defendant could validly stipulate.

Over a dissent, the court of appeals agreed with the defendant. The defendant could validly stipulate to the *existence*

of the 1994 conviction, but not to how it would be categorized under the current version of G.S. 14-17. That, the court concluded, required a legal analysis that cannot be settled by stipulation. Rather, it must be resolved by the trial judge—in the same way, the appellate court indicated, that he or she determines substantial similarity of an out-of-state offense.

Because the improper stipulation was tied up in the defendant's plea, the court vacated the plea and remanded the case to the trial division for disposition of the charges.

Assuming it is not overturned on appeal (the dissenting judge would have deemed the stipulation proper), *Arrington* highlights yet another trap to avoid when it comes to stipulations to prior record level. Thankfully, there are not a tremendous number of defendants who have prior convictions for second-degree murders committed before December 1, 2012. But for those who do, the trial judge should take care to reject any purported stipulation regarding the classification of that prior conviction, and determine for himself or herself—as a legal matter—whether it should count as a Class B1 (9 points) or Class B2 (6 points).

Exactly what information the court should review to make that determination, and whose burden it is to provide it, is not clear from *Arrington*. In general, the State has the burden of proving a defendant's prior record. If it has shown on the existence of a prior second-degree murder but not provided the court with the information necessary to determine which variety it would be under today's law, then there may be an argument that it should be considered Class B2 by default. It seems to me that it will often be difficult to tell from the records of the prior conviction itself which type of second-degree murder the prior conviction would be under the revised statute.

Finally, even if prior second-degree murders are relatively rare, *Arrington* may impact the treatment of a much more common prior conviction that has also recently been split in two: possession of drug paraphernalia. As discussed here, before 2014 all PDP convictions were Class 1. For offenses committed on or after December 1, 2014, new G.S. 90-113.22A created the Class 3 crime of possession of *marijuana* drug paraphernalia. Since then, defendants with prior PDP convictions have argued that they should, under G.S. 15A-1340.14(c), be treated as Class 3 instead of Class 1—at least in the absence of any showing by the State that the drug paraphernalia possessed by the defendant was *not* related to marijuana. *Arrington* doesn't resolve that issue, but it may call into question any *stipulation* to one classification or the other of a defendant's prior paraphernalia conviction.