Geisslercrain Sends Green Packing

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This is not a sports story – despite what the title may suggest. Besides, I am so over March Madness. There was a little too much madness and not enough March for this double Tarheel.

State v. Geisslercrain is among of yesterday's batch of court of appeals opinions. (The court issued ***twenty-four*** published opinions yesterday—leading me to conclude that our intermediate appellate experienced its own version of March Madness). *Geisslercrain* limits the application of State v. Green, 209 N.C. App. 669 (2011), an earlier opinion in which the court characterized Level Four DWI sentences as "presumptive." Yesterday's *Geisslercrain* replaces an earlier opinion, discussed here, which was withdrawn shortly after it was released.

The facts. The defendant in *Geisslercrain* appealed her district court conviction of impaired driving to superior court. The State did not notify the defendant in advance of trial that it intended to use any aggravating factors to enhance the defendant's sentence. Thus, though the jury found the defendant guilty of impaired driving, it did not find any aggravating factors. The judge at sentencing nevertheless applied the aggravating factor in G.S. 20-179(d)(3) for negligent driving that leads to a reportable accident. The judge also found the mitigating factor in G.S. 20-179(e)(4) based on the defendant's record of safe driving. The judge determined that the factors counterbalanced one another and therefore sentenced the defendant to Level Four punishment. *See* G.S. 20-179(f)(2) (requiring Level Four punishment when aggravating factors are substantially counterbalanced by mitigating factors). Matters went further awry from there as the judge sentenced the defendant to 12 months imprisonment, which he suspended on condition that the defendant perform 48 hours of community service. A Level Four sentence carries a maximum punishment of 120 days imprisonment. G.S. 20-179(j).

The issues. The defendant argued on appeal that the trial court erred by enhancing the defendant's maximum sentence based on its own finding of an aggravating factor not found by the jury. *See* Blakely v. Washington, 542 U.S. 296 (2004) (requiring that any fact that increases the defendant's sentence beyond the maximum sentence that could be imposed based solely on the facts reflected in the jury verdict or admitted by the defendant must be submitted to a jury and found beyond a reasonable doubt). The State contended that no *Blakely* error occurred since the defendant was sentenced at Level Four, and the court of appeals in *Green* had characterized sentencing at Level Four as "tantamount to a sentence within the presumptive range." Green, 209 N.C. App. at 681.

The defendant further argued that her sentence could not be enhanced by an aggravating factor for which the State failed to provide notice pursuant to G.S. 20-179(a1)(1). The State contended that its failure to provide the statutorily required notice was harmless, again relying on the notion that the Level Four sentence was in the presumptive range.

The analysis. The court of appeals began by reviewing the scheme set forth in G.S. 20-179 for sentencing defendants convicted of DWI. G.S. 20-179 establishes six sentencing ranges, ranging from Level A1 (most serious) to Level Five (least serious). The range applicable to a particular defendant is determined based on the existence and balancing of aggravating and mitigating factors, and trial courts have little room to exercise discretion in imposing such sentences. The three most severe punishment levels are imposed only when a grossly aggravating factor is found to exist. When there are no grossly aggravating factors, a defendant must be sentenced to Level Three, Four, or Five punishment.

There were no grossly aggravating factors in *Geisslercrain*, so the trial court was required to determine which of the three lower levels of punishment was appropriate. Level Three punishment is required if aggravating factors substantially outweigh mitigating factors. G.S. 20-179(f)(1). The court of appeals explained that Level Three punishment also is required if only aggravating factors—and no mitigating factors—are present.

Level Five punishment is required if mitigating factors substantially outweigh any aggravating factors. G.S. 20-179(f)(3). And, *Geisslercrain* explained, if *only* mitigating factors are present, the trial court must impose a Level Five punishment.

If there are no aggravating or mitigating factors or if the factors counterbalance one another, the trial court must impose Level Four punishment. G.S. 20-179(f)(2).

The trial court in Geisslercrain sentenced the defendant to Level Four punishment, concluding that the single aggravating factor (which was erroneously found by the judge and not the jury) was substantially counterbalanced by the single mitigating factor. Had the trial court not considered the erroneously found aggravating factor, there would have been only the single mitigating factor. The presence of a single mitigating factor and no aggravating factors would have required the trial court to sentence the defendant to Level Five punishment. Thus, the court of appeals reasoned, the trial court's finding of the aggravating factor increased the penalty for the crime beyond the prescribed maximum, thereby violating *Blakely*.

Why Level Four sentences are not presumptive. The court rejected the notion that Level Four punishment under G.S. 20-179 is similar to a presumptive range sentence under Structured Sentencing. Under the latter scheme, a trial court has the discretion to sentence a defendant within the presumptive range even when only mitigating factors are found. Trial courts have no such discretion under G.S. 20-179 to impose a Level Four sentence based upon a finding of only mitigating factors.

The court further held that it was not bound by *State v. Green*, a case in which the defendant was sentenced to Level Four punishment based on the trial court's finding of two aggravating factors and two mitigating factors. In *Green*, the trial court, rather than the jury, inappropriately determined one of the two aggravating factors, which was based on the defendant's alcohol concentration. The other aggravating factor was based on the trial court's finding of a prior conviction, a sentencing factor that was within its province to determine. *Geisslercrain* reasoned that even with the error in *Green*, "there remained one valid aggravating factor to counterbalance the two mitigating factors;" thus, the trial court could have imposed Level Four punishment based on its determination that the one aggravating factor substantially counterbalanced the two mitigating factors. Accordingly, the court held that *Green* did not apply.

The outcome. *Geisslercrain* determined that the Level Four punishment was inappropriate given the trial court's finding of the aggravating factor and the State's failure to provide proper notice. The court of appeals remanded the case to the trial court, directing it to impose Level Five punishment.

Geisslercrain provides a clear roadmap for sentencing defendants convicted of driving while impaired and for determining when *Blakely* errors occur. If only the Tarheels' road to North Texas or Nashville could have been similarly clear . . . .