Habitualized Sex Crimes

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Suppose a defendant is convicted of a Class F–I felony that requires registration as a sex offender. He is also convicted as a habitual felon. When sentencing the defendant as a habitual felon, the court obviously will select a minimum sentence appropriate for an offense that is four classes higher than the underlying felony. But what maximum sentence should the court impose? Should it use the regular maximum sentence from G.S. 15A-1340.17(e), or the elevated sex offender maximum from subsection (f)?

Under G.S. 15A-1340.17(f), "for offenders sentenced for a Class B1 through E felony that is a reportable conviction subject to the registration requirement of Article 27A," the maximum sentence includes an extra 60 months instead of the typical 12. Today's issue is whether a Class F–I sex crime elevated to Class E, D, or C under the habitual felon law in G.S. 14-7.6 *is* a "Class B1 through E felony that is a reportable conviction" covered by G.S. 15A-1340.17(f), or whether it is merely a lesser crime *sentenced* at Class E, D, or C under the habitual felon law, such that the regular maximum sentence rule should apply.

No North Carolina appellate case addresses this issue directly, but it seems to me that the elevated maximum probably applies. We know from many, many appellate cases that being a habitual felon is a status, not a crime, State v. Allen, 292 N.C. 431 (1977), and that "[t]he status itself, standing alone, will not support a criminal sentence." *Id.* at 435. To give a defendant convicted of a reportable offense a non-reportable maximum because of the generic (non-sex-crime) character of the habitual felon overlay would seem to disregard that longstanding principle by treating the habitual status as the crime. Once the offense class is elevated, I think the defendant probably has to take the bitter with the—even more bitter.

It is an open enough question, however, that the Division of Adult Correction will accept either maximum sentence (regular or elevated) as correct without writing to the court for clarification. They will administer either sentence as written. Note, however, that regardless of the imposed maximum, the defendant will be on post-release supervision for five years instead of 12 months, because that is the length of post-release supervision for any sex offender felon. G.S. 15A-1368.2(c). And of course the defendant will have to register as a sex offender upon release.

For whatever it may be worth, I programmed the Structured Sentencing mobile application to use the elevated maximum sentence for a reportable offenses when a Class F–I sex crime is sentenced under the habitual felon law. For example, when Class F indecent liberties is habitualized to Class C, the maximum sentence that corresponds to a 100-month minimum is 180 months, not 120. In recognition of the fact that this is an open question, however, when you try to try to habitualize a Class F–I sex crime, the app will alert you to my assumption, and remind you that other interpretations are possible.

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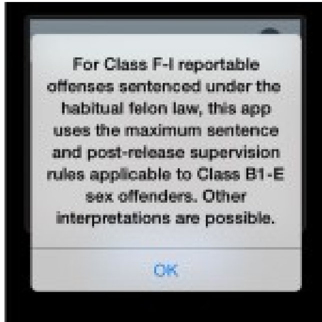

Speaking of the app, I am aware that it is not working on certain devices, especially those running iOS9. I hope to have the issue fixed soon.

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