



Level 3, 4 and 5 Punishment in Impaired Driving Cases

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I wrote [here](#) about grossly aggravating factors (GAFs) and Level One and Two punishment in impaired driving cases sentenced under [G.S. 20-179](#), leaving discussion of Level Three, Four, and Five punishment for another day. That day is upon us.

If the judge or jury in the sentencing hearing determine that there are no GAFs, the judge must weigh all aggravating and mitigating factors. Aggravating factors, which must be proved beyond a reasonable doubt, and, in superior court, found by a jury, consist of the following:

1. Gross impairment of the defendant's faculties while driving or an alcohol concentration of 0.15 or more within a relevant time after the driving.
2. Especially reckless or dangerous driving.
3. Negligent driving that led to a reportable accident.
4. Driving by the defendant while his driver's license was revoked.
5. Two or more prior convictions of a motor vehicle offense not involving impaired driving for which at least three points are assigned under [G.S. 20-16](#) or for which the convicted person's license is subject to revocation, if the convictions occurred within five years of the date of the offense for which the defendant is being sentenced, or one or more prior convictions of an [offense involving impaired driving](#) that occurred more than seven years before the date of the offense for which the defendant is being sentenced.
6. Conviction under [G.S. 20-141.5](#) of speeding to elude.
7. Conviction under [G.S. 20-141](#) of speeding by at least 30 miles per hour over the legal limit;
8. Passing a stopped school bus in violation of [G.S. 20-217](#).
9. Any other factor that aggravates the seriousness of the offense.

Except for the prior convictions factor in subdivision (5), the conduct constituting the aggravating factor must occur during the same transaction or occurrence as the impaired driving offense.

Mitigating factors are:

1. Slight impairment of the defendant's faculties resulting solely from alcohol, and an alcohol concentration that did not exceed 0.09 at any relevant time after the driving.
2. Slight impairment of the defendant's faculties, resulting solely from alcohol, with no chemical analysis having been available to the defendant.
3. Driving at the time of the offense that was safe and lawful except for the impairment of the defendant's faculties.
4. A safe driving record, with the defendant's having no conviction for any motor vehicle offense for which at least four points are assigned under G.S. 20-16 or for which the person's license is subject to revocation within five years of the date of the offense for which the defendant is being sentenced.
5. Impairment of the defendant's faculties caused primarily by a lawfully prescribed drug for an existing medical condition, and the amount of the drug taken was within the prescribed dosage
6. The defendant's voluntary submission to a mental health facility for assessment after he was charged with the

impaired driving offense for which he is being sentenced, and, if recommended by the facility, his voluntary participation in the recommended treatment.

6a. Completion of a substance abuse assessment, compliance with its recommendations, and simultaneously maintaining 60 days of continuous abstinence from alcohol consumption, as proven by an approved continuous alcohol monitoring system

7. Any other factor that mitigates the seriousness of the offense.

Except for the factors in 4, 6, 6a, and 7, the conduct constituting the mitigating factor must occur during the same transaction or occurrence as the impaired driving offense. Thus, while the catch-all aggravating factor may involve only conduct that occurred during the impaired driving offense, the catch-all mitigating factor may consist of conduct entirely unrelated to the offense.

The judge must weigh all aggravating and mitigating factors. If the aggravating factors substantially outweigh any mitigating factors, the judge must impose Level Three punishment. If there are no aggravating or mitigating factors, or the aggravating factors are substantially counterbalanced by mitigating factors, the judge must impose Level Four punishment. Finally, if the mitigating factors substantially outweigh the aggravating factors, the judge must impose Level Five punishment.

Level 3 punishment *may* consist of a fine of up to \$1,000 and *must* consist of a term of imprisonment that includes a minimum term of not less than 72 hours and a maximum term of not more than six months. This term of imprisonment may be suspended upon condition that the defendant be imprisoned for a term of at least 72 hours as a condition of special probation, perform community service for a term of at least 72 hours, or any combination of these conditions. The requirement that the defendant not operate a motor vehicle for a specified period no longer satisfies the statutory requirements for a suspended sentence imposed under Level 3, 4, or 5. See [S.L. 2006-253](#). For offenses committed before December 1, 2006, non-operation was the condition of probation chosen by judges in sentencing out-of-state defendants when the judge did not deem it necessary for the defendant to return to North Carolina to serve jail time or perform community service. (The Department of Correction's community service alternative punishment program for Level 3, 4, and 5 offenders established pursuant to [G.S. 20-179.4](#) does not allow the service to be performed in another state.) Nonresidents sentenced to Level 3, 4, or 5 punishment for an impaired driving offense committed December 1, 2006 or later now must return to North Carolina not only for sentencing but also to serve a term of imprisonment or perform community service.

Level 4 punishment may consist of a fine of up to \$500 and must consist of a term of imprisonment that includes a minimum term of not less than 48 hours and a maximum term of not more than 120 days. The term of imprisonment may be suspended upon condition that the defendant be imprisoned for a term of 48 hours as a condition of special probation or perform community service for a term of 48 hours, or any combination of these conditions.

Level 5 punishment may consist of a fine of up to \$200 and must consist of a term of imprisonment that includes a minimum term of not less than 24 hours and a maximum term of not more than 60 days. The term of imprisonment may be suspended on condition that the defendant be imprisoned for a term of 24 hours as a condition of special probation, perform community service for a term of 24 hours, or any combination of these conditions.

A person convicted of aiding and abetting impaired driving is subject to Level 5 punishment, and there is no requirement that the judge make findings of grossly aggravating, aggravating, or mitigating factors in such cases.

Those are the basics. Look for future posts on the bedeviling details.