Most Serious Offense for Consolidation Purposes

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When a defendant is convicted of more than one offense at the same time, the court may consolidate the offenses for judgment. The sentence for that judgment is driven by the "most serious offense" among the consolidated convictions. G.S. 15A-1340.15(b). Today's post considers some issues related to the determination of which offense in a consolidated judgment is the most serious.

The general rule is this: "[W]hen separate offenses of different class levels are consolidated for judgment, the trial judge is required to enter judgment containing a sentence for the conviction at the highest class." State v. Tucker, 357 N.C. 633 (2003). Most of the time, that's a pretty easy rule to apply. Entering a consolidated judgment for a Class G felony and two Class H felonies? Just enter one sentence appropriate for the Class G. And that entire sentence must be dictated by the lead offense alone. For example, the "same elements" prior record bonus point applies only if all the elements of the most serious offense are included in a prior offense. State v. Mack, 188 N.C. App. 365 (2008). Likewise, aggravating factors apply only if they are connected to the lead offense, State v. Jacobs, 202 N.C. App. 71, 75 (2010) (improper to aggravate the lead burglary offense based on aggravating factors related to lesser consolidated charges), and are barred only if they require evidence necessary to prove an element of the lead offense. *Tucker*, 357 N.C. at 639 (proper to aggravate the most serious offense—Class B1 statutory sexual offense of a person aged 13, 14, or 15—by the "abuse of a position of trust" aggravating factor, even though that aggravating factor would have been barred as to the consolidated offense of Class E sexual offense by a person in a parental role).

Sometimes it is not clear which offense in a consolidated judgment is the most serious offense. Here are some examples, and thoughts on what to do when you encounter them.

Two or more convictions of the same offense class. When all of the convictions in a consolidated judgment are the same offense class, you can generally use whichever one you like as the lead offense. Sometimes, however, convictions of the same offense class will be subject to different punishments. Suppose, for example, that a defendant has two Class H convictions, one for an offense that occurred before December 1, 2011, and one for an offense that occurred on or after that date. The maximum sentence for the post-12/1/11 offense will include an additional 9 months for post-release supervision, which probably makes it the more serious offense for purposes of G.S. 15A-1340.15(b). The same logic might apply if one of the offenses were a reportable sex crime subject to the increased term of post-release supervision described in G.S. 15A-1368.2(c).

Habitual felon sentences. Habitualized felonies sentenced at the same time may be consolidated for judgment. State v. Haymond, 203 N.C. App. 151 (2010). To evaluate which of the consolidated offenses is the most serious for purposes of consolidation, use the original offense class of each crime, not their punishment classification under the habitual felon law. For example, even though a Class E and Class G felony would both be elevated to Class C for sentencing under the habitual felon law, the Class E is still the most serious offense and must be the lead offense in a consolidated judgment. State v. Gardner, __ N.C. App. __, 736 S.E.2d 826 (2013) (discussed here).

Higher maximum sentence for a lower offense class. Sometimes an offense with a lower offense class will have a longer maximum sentence than an offense of a higher offense class. For example, a Class H felony committed on or after December 1, 2011 subject to a 6–17 month sentence has a longer maximum than a pre-2011 Class G felony

subject to a 13–16 month sentence. Which is more serious for consolidation purposes? The language quoted above from *Tucker* suggests offense class controls, and that you'd go with the Class G, but no appellate case has considered the question directly.

Drug trafficking. A situation that would test the limits of the offense class–driven rule is when one of a defendant's convictions is for drug trafficking. Is Class F trafficking, with its 70–93 month sentence, really less *serious* than, say, a regular Class E felony, which would max out at 88 months? If offense class controls, the trafficking could be consolidated into the Class E—which would result in a lower prison term and no mandatory fine. Again, no appellate case resolves the issue.

DWI. What to do with a crime like impaired driving, which is not sentenced under Structured Sentencing and therefore has no offense class at all? We know from G.S. 20-179(f2) that DWI judgments may not be consolidated with one another. But that same statute expressly allows a DWI to be consolidated "with a charge carrying a greater punishment." Shea tackled what that means in this prior post, and on page 191 of her new book.

This is my last post of the year. Happy holidays and safe travels to all readers! I am grateful for all you do to promote justice and uphold the rule of law. Thank you!