Presumptive Sentences in DWI Cases

Author : Shea Denning

Categories : Crimes and Elements, Motor Vehicles, Sentencing, Uncategorized

Tagged as : aggravating factors, blakely, DWI, presumptive, Sentencing

Date : February 5, 2014

Author's Note: The opinion discussed below was withdrawn on February 4, 2014 and replaced by an opinion discussed here*.*

How can a sentencing factor found by a judge that doubles a defendant's maximum sentence not implicate *Blakely*? I pondered this question a few years ago after the court of appeals in State v. Green, 209 N.C. App. 669 (2011), characterized a Level Four DWI sentence as "tantamount to a sentence within the presumptive range." Yesterday's court of appeals' decision in State v. Geisslercrain caused me to resume my puzzling.

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 sentence was erroneous because it exceeded the statutory maximum for Level Four. The court of appeals agreed and remanded for resentencing at Level Four.

The defendant also argued 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 court of appeals, following *Green*, rejected the defendant's argument on the basis that *Blakely* was not implicated since the defendant was sentenced at Level Four, which is the "presumptive range" for DWI.

Finally, the defendant 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 court found this error harmless, again because the defendant was sentenced in the "presumptive range."

The puzzle. Level Four DWI sentences apply when there are no aggravating and mitigating factors or the aggravating factors are substantially counterbalanced by mitigating factors. Thus, in a blank-slate DWI sentencing in which no factors—mitigating or aggravating—are ~~introduced~~ found, the sentence is Level Four.

While sentencing at this range does not require findings other than those in the jury verdict, a Level Four sentence is

not presumptive in the same manner as a presumptive structured sentencing sentence. In a structured sentencing case, a sentence within the presumptive range is always permissible, regardless of whether aggravating or mitigating factors exist. *See* G.S. 15A-1340.16(b). A judge may, in appropriate circumstances, depart from this range, but is never required to do so.

A Level Four DWI sentence, in contrast, is ***not*** authorized when only mitigating factors are present. The appropriate sentence in that case is Level Five, which carries a maximum punishment of 60 days imprisonment. *See* G.S. 20-179(f)(3) (requiring Level Five sentence when "mitigating factors substantially outweigh any aggravating factors"). Thus, a judge's consideration of an aggravating factor in connection with a DWI offense involving one or more mitigating factors—like the sentencing in *Geisslercrain* and in *Green* before it—does, in fact, expose a defendant to enhanced punishment under G.S. 20-179.

In addition to depriving the defendant of the benefit of a mitigating factor when the jury finds no aggravating factors, *Geisslercrain* dilutes the requirement that the State notify the defendant of its intent to use any aggravating factor. Relying again on the notion that a Level Four sentence is presumptive, the court concluded that the State's failure to provide notice was harmless as the defendant's punishment was not enhanced by the error.

So there you have it. That's how the doubling of the maximum penalty based on a judge-found factor falls outside of *Blakely*'s purview. To paraphrase a great poet, I've puzzled 'til my puzzler is sore. Now it's your turn.