Prior Possession of Drug Paraphernalia

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It's December 1. That means a number of new laws come into effect today. WRAL has a good rundown here, while the School's annual summary of legislation of interest to court officials offers a more comprehensive review. For today's post I'd like to focus on a sentencing question related to one of the changes that kicks in today: the reduced punishment for possession of marijuana paraphernalia.

Under prior law, possession of any type of drug paraphernalia was a Class 1 misdemeanor. Effective for *offenses committed* on or after December 1, new G.S. 90-113.22A creates the Class 3 misdemeanor of possession of marijuana paraphernalia. S.L. 2014-119, section 3. Existing G.S. 90-113.22 remains a Class 1 misdemeanor, but now applies only to controlled substances other than marijuana. The change is prospective and offers no relief to defendants convicted for acts that occurred before today.

I have been asked several times how this change impacts defendants with prior convictions for possession of drug paraphernalia (PDP) who are now being sentenced for a new offense. Does the reduction in punishment for marijuana paraphernalia mean that some (or all?) prior PDP convictions should be considered as Class 3 misdemeanors, instead of Class 1, for sentencing purposes? It turns out to be a tricky question, and I don't think there's a clear answer.

First, let's focus on something we know: the change makes no difference for a defendant with a prior PDP conviction who is now being sentenced for a new misdemeanor. All prior convictions count the same for misdemeanor prior conviction level purposes, regardless of offense class. G.S. 15A-1340.21(b).

For a person being sentenced now for a felony, the analysis is harder. If the prior PDP conviction should count at its original Class 1 level, it counts for 1 point. If it should be treated as Class 3, it counts for no points. G.S. 15A-1340.14(b). For such a common crime, the distinction would matter for many defendants.

Again, let's start with something we know. The rule for felony prior record level is that prior offenses get counted for points according to their classification as of the *date of offense* (not the date of sentencing) of the crime now being sentenced. G.S. 15A-1340.14(c). So, if the offense class of a prior offense has gone up or down over the years, it will be treated not according to what it was when the defendant committed it, but rather what it was when the defendant committed his or her present offense. Only for the sentencing new offenses *committed* on or after today would G.S. 15A-1340.14(c) call for any change in treatment of a defendant's prior PDP convictions.

But even for the sentencing of those offenses—that is, those committed on or after December 1, 2014—it is not clear that G.S. 15A-1340.14(c) requires any updating of defendants' prior PDP convictions. The argument that it does is that as of December 1, the offense classification assigned to possession of marijuana paraphernalia is Class 3, and that unless the State can prove that a prior PDP was *not* marijuana related, it should be assumed that it was and treated as Class 3 (0 points).

The counterargument is that the literal language of G.S. 15A-1340.14(c) does not require that sort of conduct-based examination of a prior conviction. Nothing tells the court to survey the General Statutes for newly created offenses that might be a better match for the behavior behind a prior conviction, or what information to consider when conducting

that review. As a practical matter, a model that takes actual conduct into account would be difficult to administer to say the least. Applying the statute literally, one could reasonably conclude that G.S. 90-113.22 was Class 1 when the defendant possessed drug paraphernalia and still is, and so the prior conviction continues to count as Class 1 (1 point).

On the other, other hand, it does seem a bit formalistic to allow a marijuana-based PDP to continue to count as a Class 1 misdemeanor just because the more general statute under which it used to be codified is still Class 1. Had marijuana paraphernalia possession been codified in its own statute all along, its new, reduced classification would clearly apply to the sentencing of offenses committed on and after the date of the reduction. But it wasn't. State v. Rice, 129 N.C. App. 715 (1998), provides some guidance in how to handle a prior common law offense (kidnapping) later superseded by statute, but it doesn't address the creation of a new, more specific statutory offense like the one at issue here.

Trial courts will be called upon resolve the issue, and—understandably—they will not all reach the same conclusion. The best advice I can offer for now is to be aware of the issue and intentional about its resolution. I welcome your thoughts about how things might play out in practice.