Proper Procedure for Aggravating Factors

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Not many sentences come from the aggravated range—four percent in Fiscal Year 2013/14, according to the North Carolina Sentencing and Policy Advisory Commission. But when you use the aggravated range, you want to make sure to do it correctly. Some recent cases offer a reminder about the proper procedure for alleging and proving aggravating factors.

Notice. The State must provide a defendant with written notice of any aggravating factors it intends to prove at least 30 days before trial or the entry of a guilty or no contest plea, unless the defendant waives that right. G.S. 15A-1340.16(a6). The notice must list all the specific aggravating factors the State intends to establish. It would not suffice for the notice to say, for example, that the State intends to pursue aggravating factors generally, or solely that it will seek a sentence from the aggravated range. In *State v. Mackey*, discussed here, the court of appeals endorsed form AOC-CR-614 as a template for proper notice. 209 N.C. App. 116, 121 (2011) ("The State had at its disposal a form routinely used by prosecutors to comply with this minimal requirement. Therefore, it had the ability to comply with the statute using regular forms promulgated for this specific purpose by the Administrative Office of the Courts.").

Pleading. Statutory aggravating factors (the ones set out in G.S. 15A-1340.16(d)) need not be included in an indictment or other charging instrument. Nonstatutory aggravating factors, on the other hand, must be included in the charging instrument. G.S. 15A-1340.16(a4). The pleading should, as provided in G.S. 15A-924(a)(7), include "[a] statement that the State intends to use one or more aggravating factors under G.S. 15A-1340.16(d)(20), with a plain and concise factual statement indicating the factor or factors it intends to use under the authority of that subdivision."

In State v. Ortiz, __ N.C. App. __, 768 S.E.2d 322 (2014), the State sought to prove as an non-statutory aggravating factor that the defendant committed a sexual assault "knowing that he was HIV positive and could transmit the AIDS virus . . . causing serious bodily injury or death." At a pretrial hearing, the State sought to have its notice of intent to prove the factor sealed, out of concern for G.S. 130A-143, which prohibits the disclosure of the identity of persons with certain communicable diseases. The trial judge allowed the notice to be filed under seal.

The court of appeals concluded that any issue regarding the sealed notice was largely beside the point, as the State failed to allege the non-statutory aggravating factor in the indictment. Any conflict between the public nature of the indictment and the confidentiality law could have been resolved by sealing the indictment—like the State did with the 30-day notice. *Id.* at 326 ("It is perplexing to this Court that the State obtained permission from the trial court to file notice of its intent to pursue an aggravating factor under seal but did not attempt to do so for the indictment.").

Charge conference. When there is to be a trial on an aggravating factor, the trial court must conduct a charge conference on the jury instructions related to the factor. G.S. 15A-1231. That requirement applies to aggravating factors just as it applies to the instructions on the substantive criminal charge. State v. Hill, __ N.C. App. __, 760 S.E.2d 85 (2015). If aggravating factors are not addressed at the charge conference held before the guilt-innocence phase of the trial, the trial court must hold a separate charge conference before instructing the jury during the sentencing phase. *Id.* at 89–90.

To comply fully with G.S. 15A-1231, the trial court must, at the charge conference, inform counsel of the instructions

that it will provide the jury on the alleged aggravating factors. In *State v. Houser*, __ N.C. App. __, 768 S.E.2d 626 (2015), the trial judge had a colloquy with counsel that she referred to as a "charge conference," during which she reviewed the specific factors alleged and gave counsel a general opportunity to be heard. Nevertheless, the court of appeals concluded that the conference was not up to snuff, because it "failed to inform counsel of the instructions that it would provide the jury." *Id.* at 636. Ultimately the error was deemed non-prejudicial, but the opinion provides a helpful summary of the proper procedure for future cases.