Qualifying Convictions for Purposes of Habitual DWI

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G.S. 20-138.5(a) provides that "[a] person commits the offense of habitual impaired driving if he or she drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 20-4.01(24a) within 10 years of the date of this offense." Unlike the habitual felon statute (G.S. 14-7.1), the violent habitual felon statute (G.S. 14-7.7) and the habitual misdemeanor assault statute (G.S. 14-33.2), G.S. 20-138.5 does not explicitly state that the underlying impaired driving offense must occur ***after*** the convictions for other qualifying impaired driving convictions, though it strikes me as the most straightforward reading of the statute to interpret it as requiring that the instant offense be committed after the predicate convictions. The court of appeals' characterization of the legislature's intent in cases challenging the constitutionality and scope of G.S. 20-138.5 supports this view. *See, e.g.*, State v. Bradley, 181 N.C. App. 557, 559 (2007) (stating that "[th]e habitual impaired driving statute is intended to provide an increased sentence for someone convicted of a fourth impaired driving offense, with the previous three offenses occurring within seven years of the fourth offense"); State v. Vardiman, 146 N.C. App. 381, 385 (2001) (stating that "[p]rior convictions of driving while impaired are the elements of the offense of habitual impaired driving, but the statute 'does not impose punishment for [these] previous crimes, [it] imposes an enhanced punishment' for the latest offense"); *see also* State v. Smith, 139 N.C. App. 209, 213 (2000) (stating that "[b]oth the habitual misdemeanor assault statute and the habitual impaired driving statute declare that a person 'commits the offense' if that person currently commits specified acts and has been convicted of a specified number of similar offenses in the past").

The language defining predicate offenses for purposes of G.S. 20-138.5 also is noteworthy for its inclusion of certain foreign convictions. The habitual felon and violent habitual felon statutes limit qualifying priors to convictions, respectively, "in any federal court or state court in the United States" and "in a court of this or any other state of the United States," thereby avoiding avoid the thorny constitutional issues raised by reliance upon convictions entered in foreign countries. *Compare* Alex Glashausser, The Treatment of Foreign Country Convictions as Predicates for Sentence Enhancement Under Recidivist Statutes, 44 Duke L.J. 134, 136-37 (1994) (asserting that "courts should recognize that even convictions under systems without procedural protections mirroring those in the United States often are based on underlying substantive crimes that should be included in the calculus of sentencing repeat offenders") *with* Martha Kimes, Note, The Effect of Foreign Criminal Convictions under American Repeat Offender Statutes: A Case Against the Use of Foreign Crimes in Determining Habitual Criminal Status, 35 Colum. J. Transnat'l L. 503 (1997) (arguing that foreign criminal convictions should not be considered as predicate offenses under repeat offender statutes based on due process and practical concerns). The habitual misdemeanor assault statute, in contrast, does not specify the court in which the prior conviction must occur. *Cf. Small v. United States*, 544 U.S. 385 (2005) (interpreting 18 U.S.C. Section 922(g)(1), the federal statute criminalizing firearm possession by a person "convicted in any court" of a felony as applying only to domestic convictions). G.S. 20-138.5 differs even more significantly because it to expressly ***includes*** Canadian convictions for offenses involving impaired driving, though a fair bit of foraging through Chapter 20 is required to make this determination. Those interested in joining the expedition can read on.

G.S. 20-138.5 requires that the defendant previously have been convicted of at least three offenses involving impaired driving. Those offenses are:

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- Impaired driving under G.S. 20-138.1,
- Habitual impaired driving under G.S. 20-138.5,
- Impaired driving in a commercial vehicle under G.S. 20-138.2,
- Death or serious injury by vehicle under G.S. 20-141.4 based on impaired driving,
- Murder under G.S. 14-17 based on impaired driving,
- Involuntary manslaughter under G.S. 14-18 based on impaired driving, and
- Substantially similar offenses committed in another jurisdiction

The term *conviction* is defined in G.S. 20-4.01(4a) as "[a] conviction for an offense committed in North Carolina or another state." So far, there is no mention of convictions from other countries. Surprisingly, however, the term *state* is defined in G.S. 20-4.01(45) to include "a province of Canada." Thus, it appears that conviction in Canadian court of an offense substantially similar to any of the North Carolina offenses deemed to involve impaired driving within 10 years of the instant offense meets the statutory requirements for a qualifying prior conviction. These statutory provisions may not, however, end the inquiry in all cases. Though no North Carolina court has considered the issue, case law from other states indicates that reliance at sentencing upon a Canadian conviction obtained without affording the defendant certain rights guaranteed by the U.S. Constitution may be impermissible. *See, e.g.,* State v. Payne, 69 P.3d 889, 893 (Wash. App. 2003) (concluding that trial court properly refused to consider at sentencing a Canadian conviction for which the defendant had no right to trial by jury); State v. Roberts, 14 P.3d 713, 745 (Wash. 2001) (holding that Canadian convictions were properly admitted at defendant's capital sentencing proceeding as the convictions "appear, from the well developed record, to be reliable, to have afforded [defendant] counsel, and to be free of any facial constitutional defects" and because defendant "offered no specific reasons why the Canadian convictions were constitutionally defective or unreliable"); State v. Williams, 706 A.2d 795, 798 (N.J. Super. 1998) (holding that "absent a showing of fundamental unfairness surrounding the prior foreign conviction, its use [in sentencing] is presumed to be appropriate where the conviction occurs in a jurisdiction that has a judicial system that affords protections similar to our own," and noting that the trial judge "found that the Canadian system offers the accused a trial where he is represented by counsel, and if convicted, has the opportunity to appeal").

As a practical matter, I'm not sure how often this issue arises since prosecutors frequently may not know of foreign convictions. *See* Glashausser, *supra*, at 136-37 ("The infrequent use prosecutors make of foreign convictions as predicate offenses for recidivist statutes is probably due more to a lack of easy access to foreign criminal records than to prosecutorial discretion.") However, Canadian convictions may be different. I'd be curious to know whether prosecutors and officers routinely see such convictions on NCIC printouts. The FBI's website indicates that Canada has access to NCIC in the same manner as U.S. states and territories.

Readers, if you have thoughts about anything I've written above, including prosecutors' access to and reliance upon foreign, particularly Canadian, convictions, please share them.

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