Stipulations to Questions of Law for Sentencing Purposes

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Defendants often stipulate to prior convictions for the purpose of establishing their prior record level. Form AOC-CR-600, the prior record level/prior conviction level worksheet, includes a section (Section III, at the top of Side Two) to note that that stipulation. The court of appeals said in State v. Hussey, __ N.C. App. __ (2008), that a signed stipulation in Section III is adequate to satisfy the State's burden of proving a defendant's prior record level, distinguishing prior cases (State v. Jeffery, 167 N.C. App. 575 (2004), for example) decided at a time when the form did not include Section III.

The frequency and ease of stipulations gives rise to two potential traps for the unwary.

The first involves prior record points for out-of-state convictions. Under G.S. 15A-1340.14(e), felony convictions from other jurisdictions are, by default, considered Class I felonies for prior record level purposes. Misdemeanors from other states are considered as Class 3 misdemeanors, and thus do not count at all for felony sentencing purposes. The State or the defendant may, however, attempt to depart from these default classifications through a preponderance-of-the-evidence showing that the offense is "substantially similar" to a North Carolina offense with a different classification. For example, the State might try to show that a defendant's prior armed robbery conviction from another jurisdiction is substantially similar to our G.S. 14-87, and thus that it should count as a Class D prior conviction (6 points) instead of a Class I (2 points).

Even if the State and a defendant agree that the defendant's out-of-state crimes should count like their North Carolina analogues — and even if the defendant will so stipulate — the court must still make a finding as to the crimes' substantial similarity to the relevant North Carolina offenses. Substantial similarity is a question of law, not fact, and questions of law generally may not be stipulated to by the parties. State v. Prevette, 39 N.C. App. 470 (1979) (citing Young v. United States, 315 U.S. 257 (1942), for the rule that the "due administration of the criminal law cannot be left to the stipulation of the parties"). The court of appeals has reversed many cases on this point over the past few years. *See e.g.*, State v. Hanton, 175 N.C. App. 250 (2006); State v. Palmateer, 179 N.C. App. 579 (2006); State v. Lee, __ N.C. App. __ (2008). To avoid reversal, the court must make a finding of substantial similarity and check the box near the bottom of Section II on the front of the form saying "For each out-of-state conviction listed in Section IV on the reverse, the Court finds by a preponderance of the evidence that the offense is substantially similar to a North Carolina offense and that the North Carolina classification assigned to this offense in Section IV is correct."

Under another recent case, State v. Bohler, __ N.C. App. __ (2009), a trial court *may* accept a defendant's stipulation that a particular offense is either a felony or a misdemeanor under the law of another jurisdiction, so long as that conviction will count for points under the default provisions of G.S. 15A-1340.14(e). That generally makes sense, but it seems like it could be an oversimplification when the other state has an atypical felony-misdemeanor classification scheme. In New Jersey, for example, misdemeanors are classified into four degrees, three of which are considered "high misdemeanors" that are treated as felonies for some purposes. Thus, when Garden State convictions are involved, the basic question of whether a crime is a felony or misdemeanor may itself involve a question of law.

The second trap involves the additional prior record level point available under G.S. 15A-1340.14(b)(6) when all elements of the present offense are included in any prior offense for which the offender was convicted. In State v.

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Prush, 185 N.C. App. 472 (2007), the court of appeals held that the comparison of the elements of two North Carolina offenses is a matter of law, rendering the defendant's stipulation to the prior record bonus point invalid and ineffective. For cases involving offenses committed before December 1, 2009, the prior record level worksheet does not include a box for the court to check that it has made a finding regarding this point; I recommend that judges make a written note of their finding on the form. The new new worksheet for offenses committed on or after that date includes a check-box for the finding, right above the existing box in Section II for findings on substantial similarity of out-of-state convictions.

So, if stipulations are invalid, what's the proper way to prove substantial similarity or that all elements are included in a prior offense? In State v. Hadden, 175 N.C. App. 492 (2006), the court of appeals upheld a trial judge's substantial-similarity finding for out-of-state convictions when the State introduced a record of the defendant's convictions and copies of the relevant New York and Illinois criminal statutes.

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