The Same Elements Bonus Point for Sentencing

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In addition to the regular sentencing points assigned to a defendant based on his or her prior convictions, there are two additional "bonus points" that apply in certain circumstances. One is for defendants being sentenced for crimes committed while they were probation, parole, or post-release supervision; serving a sentence of imprisonment; or on escape. G.S. 15A-1340.14(b)(7). The other applies when all the elements of the offense being sentenced are included in any prior offense for which the offender was convicted. G.S. 15A-1340.14(b)(6). Today's post discusses some of the technicalities of the second point, which I refer to as the "same elements" bonus point.

The idea behind the same elements point is to elevate slightly the prior record level of a defendant being sentenced for a crime that he or she has also committed in the past. *You've done this (or a greater offense that includes this) before. You know it's wrong and we're going to punish you a little more severely this time.*

The full language of the bonus point statute says that the point applies "whether or not the prior offense or offenses were used in determining prior record level." On the one hand, that means a single prior conviction can do double duty, counting for points itself and also qualifying the defendant for the bonus point if it includes the elements of the offense being sentenced. On the other hand, the bonus point also applies when the prior conviction in question does not otherwise factor into the defendant's record level. That means a prior conviction can be used to establish the bonus point even when it is otherwise masked from the defendant's prior record level because it was used to habitualize him, State v. Bethea, 122 N.C. App. 623 (1996), or because it was not the defendant's most serious prior offense from a single week of superior court. So it's a bit of a lose-lose from the defendant's point of view.

If the offense now being sentenced is part of a consolidated judgment, the defendant qualifies for the bonus point only if the most serious conviction in that consolidated judgment is included within all the elements of a prior offense. State v. Mack, 188 N.C. App. 365 (2008); State v. Prush, 185 N.C. App. 472 (2007). That rule came into play in a case decided by the court of appeals last week, albeit with a habitual felon wrinkle. In *State v. Gardner*, the defendant's present convictions for Class F assault with a deadly weapon on a government officer (AWDWOGO), Class H speeding to elude, and several other lesser convictions were consolidated for judgment under the AWDWOGO. The defendant was sentenced at Class C because she was a habitual felon. At sentencing, the court applied the same elements point based on the defendant's prior conviction for felony speeding to elude. On appeal, the defendant argued that she should not qualify for the point because her present speeding to elude conviction was not the most serious offense in her consolidated judgment.

The court of appeals agreed. Under G.S. 15A-1340.15(b), a consolidated judgment contains a single sentence driven by the most serious offense. In this case the most serious offense was Class F AWDWOGO. The court rejected the State's argument that either the AWDWOGO or speeding to elude charge could be considered the most serious offense because both were elevated to Class C by virtue of the defendant's habitual felon status—notwithstanding some contrary language from a recent case. *See* State v. Skipper, __ N.C. App. __, 715 S.E.2d 271 (Aug. 16, 2011) (suggesting that all the felonies in a consolidated habitual felon judgment are categorized as Class C). The court concluded that the habitual felon law does not actually transform underlying offenses into Class C felonies. *See* State v. Vaughn, 130 N.C. App. 456 (1999) (holding that habitualized crimes count for prior record points according to their original offense class, not as Class C felonies). Rather, the Class F AWDWOGO remains the more serious of the two

underlying felonies, which makes it the lead offense for consolidation purposes, which in turn makes it the proper offense against which to gauge the applicability of the same elements point. Because the defendant did not have any priors that included all the elements of AWDWOGO, the court of appeals remanded for resentencing.

Like the finding of "substantial similarity" that allows a prior conviction from another jurisdiction to count for points like the comparable North Carolina crime (discussed here), the same elements finding is a question of law that must be determined by the court. The defendant cannot validly stipulate to it. State v. Prush, 185 N.C. App. 472 (2007). Instead, it must be proved by comparing the elements of the present offense against those of the defendant's prior convictions. The elements of the present offense must be included in a prior offense for the point to apply, but the present and prior offenses need not be factually identical. For instance, a defendant being sentenced for delivery of a Schedule II controlled substance (cocaine) qualifies for the point based on his prior conviction for delivery of a Schedule VI controlled substance (marijuana). State v. Williams, 200 N.C. App. 767 (2009). Likewise, a defendant being sentenced for attempted felony larceny qualifies based on his prior felony larceny conviction, even if the two offenses were elevated from misdemeanors to felonies on different bases under G.S. 14-72. State v. Ford, 195 N.C. App. 321 (2009).