Weighing Aggravating and Mitigating Factors

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Much has been written—and much of it by the Supreme Court—on the proper way to find aggravating factors for sentencing. After *Apprendi v. New Jersey*, *Blakely v. Washington*, and countless cases at the state level, it is of course clear that a defendant has a Sixth Amendment right to have aggravating factors proved to a jury beyond a reasonable doubt. Once sentencing factors are properly found, however, responsibility shifts back to the judge to decide what to do about them. The rules for *weighing* factors are as loosey-goosey as the rules for finding them are rigid.

Under Structured Sentencing, if aggravating factors are present and the court decides they are sufficient to outweigh any mitigating factors that are present, the court may impose a sentence from the aggravated range. Conversely, if mitigating factors are present and are deemed to outweigh any aggravating factors, the court may sentence from the mitigated range. G.S. 15A-1340.16(b).

Many, many appellate cases reinforce the rule that weighing of aggravating and mitigating factors is squarely within the sound discretion of the trial judge. It is for the judge to assign whatever weight he or she deems appropriate to any given factor. State v. Monserrate, 125 N.C. App. 22 (1997). A trial court's weighing of factors "will not be disturbed on appeal absent a showing that there was an abuse of discretion." State v. Garnett, 209 N.C. App. 537 (2011).

A recurrent theme in the cases on weighing aggravating and mitigating factors is that the process is not a mathematical balance. One factor in aggravation may outweigh more than one factor in mitigation (or vice-versa). State v. Allen, 112 N.C. App. 419 (1993) (decided under the similar rule under Fair Sentencing). An extreme case in that regard is State v. Vaughters, 219 N.C. App. 356 (2012), in which the court of appeals upheld a trial court's decision that one aggravating factor (the defendant was armed with a deadly weapon) outweighed 19 mitigating factors (5 statutory and 14 non-statutory).

An older case, State v. Parker, 315 N.C. 249 (1985), noted the possibility that "a single, relatively minor aggravating circumstance simply will not reasonably outweigh a number of highly significant mitigating factors." Nevertheless, the case affirmed that aspect of the trial judge's decision and concluded with a reminder that appellate courts are loathe to second-guess a trial judge on a question such as this. "It is, after all, the sentencing judge who hears and observes the witnesses and the defendant firsthand. We have before us only the cold record. We are, therefore, reluctant to overturn a sentencing judge's weighing of aggravating and mitigating factors even if, based solely on the record, we might have weighed them differently." *Id.* at 260.

Finally, note that G.S. 15A-1340.16(b) governs when aggravated or mitigated sentence are *permitted*. The court is never *required* to depart from the presumptive range, even if many aggravating factors and no mitigating factors are found (or vice-versa). In that respect, Structured Sentencing is a bit different from sentencing for impaired driving under G.S. 20-179. An impaired driving defendant with a single mitigating factor and no aggravating factors *must* be sentenced at Level Five. State v. Geisslercrain, 233 N.C. App. 186 (2014). In other words, Level Four is *not* the functional equivalent of the presumptive range under Structured Sentencing; the judge has no discretion to remain at Level Four if only one type of factor is found (aggravating or mitigating) and there is no opposite factor present to counterbalance it.