Felony Speeding to Elude and Lesser Included Offenses (with some ACC Rivalry sprinkled on top)

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More than a decade ago, the General Assembly enacted G.S. 20-141.5, making it a Class 1 misdemeanor to operate a motor vehicle on street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his public duties. If two or more aggravating factors are present at the time of the offense, or the violation causes the death of another person, the offense is elevated to a Class H felony. If there are two aggravating factors and a death, the offense is a Class E felony.

The aggravating factors are:

1. Speeding in excess of 15 miles per hour over the legal speed limit.
2. Gross impairment of the person's faculties while driving due to:
   a. Consumption of an impairing substance; or
   b. A blood alcohol concentration of 0.14 or more within a relevant time after the driving
3. Reckless driving as proscribed by G.S. 20-140
4. Negligent driving leading to an accident causing:
   a. Property damage in excess of $1,000; or
   b. Personal injury
5. Driving when the person's driver's license is revoked.
6. Driving in excess of the posted speed limit, during the days and hours when the posted limit is in effect, on school property or in an area designated as a school zone pursuant to G.S. 20-141.1, or in a highway work zone as defined in G.S. 20-141(j2).
7. Passing a stopped school bus as proscribed by G.S. 20-217.
8. Driving with a child under 12 years of age in the vehicle.

Given that several of these aggravating factors also constitute separate criminal offenses, questions arise regarding whether a defendant may be punished for felony speeding to elude along with a lesser-included misdemeanor that also is an aggravating factor.

For example, suppose Donald Driver is convicted of feloniously speeding to elude based on the aggravating factors of...
gross impairment and reckless driving and that he is, in the same proceeding, convicted of driving while impaired and reckless driving based upon the same driving event. May the judge sentence Donald for each offense? Or must the judge arrest judgment on the convictions for impaired driving and reckless driving, both of which are lesser included offenses of the aggravated speeding to elude?

I think the judge must arrest judgment on the lesser included offenses. Here's why.

The Double Jeopardy Clause does not prohibit multiple punishments for offenses when one is included within the other under the Blockburger test if both are tried at the same time and if the legislature specifically authorizes cumulative punishment for both offenses. See Missouri v. Hunter, 459 U.S. 359 (1983). Thus, even if the elements of two crimes are the same, a defendant may in a single trial be convicted of and punished for both crimes if the legislature intended for multiple punishments to apply. In State v. Gardner, 315 N.C. 444 (1986), for example, the state supreme court concluded that the legislature intended to allow defendants to be punished for both felony larceny and breaking or entering. Among the court's considerations were that courts had uniformly and frequently held that the offenses were separate and distinct crimes and the legislature had not amended the statutes to alter this interpretation. Furthermore, the court noted that the offenses regulated separate and distinct social norms, were codified in different subchapters of Chapter 14, and carried the same penalties.

So what did the General Assembly intend with respect to punishment for felony speeding to elude when an aggravating factor constitutes a separate criminal offense for which the defendant also is convicted? North Carolina's appellate courts haven't said whether judgment for the lesser included offense must be arrested, though a couple of unpublished opinions have noted the trial court's arresting of judgment for lesser included offenses, without considering the propriety of the action. See, e.g., State v. Torres, No. COA04-1578, 2006 WL 91317 (N.C. App. January 17, 2006) (unpublished op.) (noting that trial court sentenced defendant for felony speeding to elude arrest and driving while license suspended and arrested judgment on excessive speeding and reckless driving convictions.)

[Since basketball season is in full swing, I make the following digression. Inquiring minds may discover upon reading Torres that the defendant was identified in part based upon his Tar Heels baseball cap. A cautionary note is in order for any such reader who may also be a fan-of-the-team-that-wears-dark-blue. Before citing this case to disparage Tar Heels supporters, read this recent case involving a proud Duke alum.]

In State v. Becoats, No. COA04-235, 2004 WL 2940900 (N.C. App. December 21, 2004) (unpublished op.), the court likewise noted, without further analysis of the issue, that the trial court "arrested judgment on the two reckless driving charges because this was an aggravating factor in elevating the two fleeing to elude arrest charges to felonies." And, in State v. Ackerman, No. COA03-662, 2004 WL 743799 (N.C. App. April 6, 2004) (unpublished op.), the court rejected, in dicta, the defendant's argument that the trial court was required to arrest judgment for failure to stop for a blue light and siren in violation of G.S. 20-157(a) when evidence of failure to stop was used to prove the aggravating factor of reckless driving for felony speeding to elude. The court noted that the "two offenses require different elements" and therefore punishment for both would not constitute double jeopardy. Ackerman might be interpreted to support the notion that had the elements been the same, arrest of judgment would be required. However, in State v. Wilson, No. COA 06-470, 2007 WL 656264 (N.C. App. March 06, 2007) (unpublished op.), the appellate court noted, without approval or criticism, that the trial court sentenced defendant for felonious fleeing to elude arrest based on the aggravating factors of gross impairment and driving while license revoked and imposed a consecutive sentence for impaired driving.

The scant legislative history likewise does not indicate the legislature's intent to impose cumulative punishment. Section 19.26 of S.L. 1997-443 enacted G.S. 20-141.5 to, according to the section heading, "LIMIT, MODIFY, AND ENHANCE ATTEMPTING TO ELUDE ARREST STATUTES." G.S. 20-141.5 replaced G.S. 20-141(j), which set forth the misdemeanor offense of operating a vehicle on a street or highway in excess of 55 miles per hour and at least 15 miles per hour over the legal limit while fleeing or attempting to elude arrest or apprehension by a law-enforcement officer. Section 19.26 of S.L. 1997-443 also amended G.S. 20-179, which governs sentencing in impaired driving
cases, to include as an aggravating factor "[c]onviction under G.S. 20-141.5 of speeding by the defendant while fleeing or attempting to elude apprehension," based on the same transaction or occurrence as the impaired driving offense. Before the amendment, conviction of GS 20-141(j) was listed as an aggravating factor.

Yet the inclusion of a conviction of G.S. 20-141.5 doesn't necessarily evince a legislative intent to allow a person to be punished both for impaired driving and for felony speeding to elude based on impaired driving. This is so because a person could be convicted of impaired driving and of speeding to elude without the latter offense having been aggravated by the impaired driving. This could occur when the defendant was appreciably-but not grossly-impaired at the time of the driving.

Moreover, a review of the Gardner factors weighs in favor of a conclusion that the legislature did not intend to impose cumulative punishment for impaired driving and felony speeding to elude based on gross impairment. Both offenses arguably regulate similar social norms, namely, safe driving. Both are codified in Part 10 of the Article 3 of Chapter 20. The offenses aren't co-equal, and there is no history of sanctioned punishment for both offenses.

The same can be said of reckless driving in violation of G.S. 20-140 and felony speeding to elude based upon reckless driving.

So, in Donald's case, I believe the proper course of action would be to sentence Donald for felony speeding to elude and to arrest judgment on the impaired driving and reckless driving convictions.

Finally, I'd like to send a shout out to one of my favorite Duke (Law) alums, Jeff Welty, for his help on this post.