

Habitual Felon Prosecutions—The Bad, the Ugly and the Maybe

Prepared by Paul James
Assistant Public Defender
Forsyth County Public Defender's Office
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The purpose of this paper is to explore some of the common areas of habitual felon prosecutions where a challenge may be successfully made, a rare event, where a challenge would appear to be successful but isn't, and to address some of the procedural issues arising from habitual felon proceedings.

Areas that ought to be successful but usually are not.

Defects in the habitual felon indictment. Our case law says that the prosecution of a case is controlled by the indictment and proof offered which is different than what is alleged in the indictment is either a fatal variance or subject to exclusion as prejudicial and outside the scope of the indictment. Theoretically this applies to any habitual felon indictment as well. Unfortunately the Court of Appeals regularly finds ways to say it ain't so.

The Court of Appeals has held that the following errors in habitual felon indictments are not fatal:

Erroneous date of prior conviction

Erroneous date of prior offense

Lack of the correct sovereign

The erroneous listing of the actual offense of conviction.

Although most indictments actually do list the named offense, say Burglary, the statute does not actually require it. What is at least theoretically required is sufficient information to apprise the defendant of the State's claim that he was convicted of a felony committed on a date and convicted on a date and committed against a state or other government. This appears a little vague I realize but taking all the cases together this is in reality what we are left with.

The essential approach of the court of appeals decisions in this area is did the defendant have notice that the state contends he is a recidivist subject to additional punishment prior to entering and proceeding upon a plea.

One might also think that the plain English terms of the statute on habitual felon indictments might reasonably guide the practitioner as to what is expected in such a document. There are certain specific things that the statute says are required to be in an habitual felon indictment. The absence of any (and maybe all of them eventually) of these "required" items has been routinely ruled by the Court of Appeals to not be a problem.

According to the statute an indictment charging habitual felon status must contain:

"The date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place." N.C.G.S. §14-7.3

The statute uses the word "must" but the interpretation the court of appeals uses for "must" should not be read as "mandatory" but only required if it is detrimental to the defendant.

The Statute says that the underlying felony indictment must also charge that the defendant is an habitual felon. Case law says not. [State v. Peoples, -- N.C. App. --, 604 S.E.2d 321 \(2004\)](#); [State v. Hodge, 112 N.C. App. 462, 436 S.E.2d 251 \(1993\)](#).

Also, as far as habitual felon indictments go, one ancillary indictment as an habitual felon can be used in conjunction with any number of underlying felony indictments and the same indictment can be used to habitualize each new felony conviction from the underlying felony charges. [State v. Patton, 342 N.C. 633, 466 S.E.2d 708 \(1996\)](#).

Although the Statute says: "The indictment charging the defendant as an habitual felon shall be separate from the indictment charging him with the principal felony." The Court of Appeals says: "The statute does not require that the indictment charging a defendant with habitual felon status be contained in a separate bill of indictment." [State v. Young, 120 N.C. App. 456, 462 S.E.2d 683 \(1995\)](#).

The indictment must contain a statement as to each prior felony's date of conviction and the name of the court in which it was obtained. However, if this information is wrong that's ok. [State v. Lewis, 162 N.C. App. 277, 590 S.E.2d 318 \(2004\).](#)

N.C.G.S. 14-7.4 allows the establishment of prima facie evidence that a conviction being offered in support of an habitual felon charge belongs to the defendant if it bears the same name as the charge now lodged against the defendant. The apparent burden shifting authorized by 14-7.4 is not burden shifting according to the COA. It merely raises a presumption that allows the jury to infer guilt.

However, the COA has interpreted the plain English "bearing the same name" to actually mean "bears some resemblance to". For example "Michael Hodge" is apparently the "same name" as "William Michael Hodge". [State v. Hodge, 112 N.C. App. 462, 436 S.E.2d 251 \(1993\).](#) See also [State v. Petty, 100 N.C. App. 465, 397 S.E.2d 337 \(1990\).](#) (*Martin Bernard Perry is the same as Martin Perry*).

In other words, the first names don't have to match and the middle names don't have to match. Fairly soon now I am quite confident the last names won't have to match. (God help a defendant whose name is Smith or Jones).

The bottom line is that although we should still raise such technical objections in the hopes that this sort of treatment may change eventually, at the moment almost any technical challenge will be dismissed by the COA.

This can be summed up in one phrase---any technical defense is a loser. The Court of Appeals will seemingly find any excuse to relieve the State of the burden of State created errors.

Areas that can be successful

Attacks on the underlying felonies for lack of jurisdiction, which can be raised at any time, can be successful.

Although case law says that you cannot attack the underlying habitual felon convictions collaterally, [State v. Creason, 123 N.C. App. 495, 473 S.E.2d](#)

[771 \(1996\)](#), aff'd, [346 N.C. 165, 484 S.E.2d 525 \(1997\)](#), lack of jurisdiction is never a collateral attack and by statute may be raised "at any time".

For obtaining dismissals of habitual felon charges this is probably the most fruitful area, particularly at the trial level. One should be sure to obtain the complete court file of each underlying felony that is being used to support the habitual charge. Do not assume that such felonies were handled properly at the outset. These files should particularly be reviewed for the presence of an appropriate and valid indictment or a bill of information. Just because there is an indictment present in the file does not stop further review. One should check the indictment to see that it is appropriately signed, that there were witnesses listed as being called, and that the charge listed is the one for which the defendant was convicted or that conviction is for a lesser included offense. If the plea or conviction is to some charge that is not a lesser included offense then the court had no jurisdiction to accept the plea or enter a conviction and that conviction can be struck by raising the claim of lack of jurisdiction.

For those counties that do a lot of felony pleas on the Class H and I level in district court it is also very important to check and be sure that the file contains a proper bill of information; particularly check to see that such document was signed by the DA, the defense counsel, and the defendant. If the document is not in the file then it can be presumed not to be in existence since all felony files must be microfilmed prior to being destroyed. Without a bill of information there was no jurisdiction for the court to take the plea. Since all of the above signatures are required for a valid bill of information, lack of one or more deprives the Court of jurisdiction.

A DA who is scrambling to preserve such a conviction will, if artful, try to argue that a signed plea transcript is an acceptable substitute for a missing bill of information since it lists the charges, is signed by the DA, defense counsel, and the defendant. However, it is not adequate because a bill of information must also contain all of the elements of the charge (unless it is in an approved short form indictment which is not applicable to H & I felonies, only A felonies—so far). N.C.G.S. §15A-644 & §15A-642(c).

Another area of potentially successful attack is the lack of counsel on any of the underlying felonies. This situation does not often arise when dealing with any relatively recent felony conviction as counsel is almost always provided for felony charges and if not the judges are usually careful to insure

that the record reflects the defendant was advised of his rights and knowingly waived them. However, if the record does not show this a motion under 15A-980 to suppress the use of that felony conviction should be made and proof offered up if possible. Under 15A-980 the defendant bears the burden of proving by a preponderance of the evidence that he was either denied counsel or not advised of his right to counsel. If he can do this the conviction may not be used to enhance his sentence, which an habitual felon charge certainly does.

The requirement in the statute that only one felony committed before the age of 18 may be counted for purposes of maintaining an habitual felon indictment can also be a fruitful area to look at if your DA's office is sloppy.

Also due to statutory amendment a charge of habitual misdemeanor assault can no longer be bootstrapped into a predicate felony supporting an ancillary habitual felon charge. An old felony conviction for habitual misdemeanor assault can however be used as one of the three supporting felonies to make the habitual felon indictment. If you have a charge of being an habitual felon based on any misdemeanor which is enhanced such as habitual DWI or any drug misdemeanor enhanced to a felony based on a prior drug conviction you should probably challenge the enhancement as beyond the legislative intent as indicated by the amendment to the habitual misdemeanor statute. (Don't expect it to be successful since that was entirely statutory but raise it anyway).

Defective Indictments—the good issue

The one area where a defendant can potentially make some headway when fighting a “technical correction “ to an indictment when it is really a prohibited amendment is on prejudicial lack of notice before entering a plea at the trial stage. The good case on this issue is State v. Little, 126 N.C. App. 262, 484 S.E.2d. 835 (1997). In Little the case was called for trial and defendant was found guilty of the underlying felony. Before the habitual felon stage of the case took place the State obtained a superseding habitual felon indictment that replaced one of the three predicate felonies with a different predicate felony. The court ruled that this violated the defendant's rights since he was entitled to know and evaluate the consequences of his habitual felon indictment prior to proceeding on a plea, either not guilty or guilty. By changing an element of the indictment the

State changed the potential likelihood of the defendant prevailing on the habitual felon indictment and this was an improper amendment.

The habitual felon indictment must be filed prior to the defendant's pleading in the substantive felony case. [Allen, 292 N.C. at 435-36, 233 S.E.2d at 588; State v. Oakes, 113 N.C. App. 332, 338, 438 S.E.2d 477, 480 \(1994\)](#). This permits the defendant to enter his plea in the substantive felony case "with full understanding of the consequences" of that plea. [Allen, 292 N.C. at 436, 233 S.E.2d at 588](#). (State v. Little, 126 N.C. App. 262, 269, 484 S.E.2d. 835 (1997)).

[State v. Cogdell](#), 165 N.C. App. 368, 599 S.E. 2d 570 (2004) seems to throw some doubt on the clarity of [Little](#), but it can be easily distinguished. In [Cogdell](#) the defendant was arraigned and entered a plea, having been charged under an habitual felon indictment. Then, before the actual trial the State obtained a superseding habitual felon indictment which changed one of the underlying three felonies. Defendant was then tried on this superseding indictment. The Court distinguished [Cogdell](#) from [Little](#) on the basis that a plea at arraignment was only a preliminary plea and not the actual plea on which the case proceeded.

According to the COA in [Cogdell](#):

Thus, the critical event that forecloses substantive [***10] changes in an habitual felon indictment is the plea entered before the actual trial. Our Supreme Court tends to support this conclusion by holding that an habitual felon adjudication in North Carolina is the functional equivalent of the following:

[HN3](#) "Before the trial and in the absence of the jury, both parts of the indictment are read to the defendant, at which time he [*374] must plead to the charge of the present crime. If he pleads not guilty to the present offense and proceeds to trial, at the trial there can be no mention to the jury of the prior convictions. If and when the jury returns a verdict of guilty, the second part of the indictment is again read to the defendant, at which time he must plead to the recidivist allegation. If he admits the prior convictions, he is sentenced in accordance with the

recidivist statute. If he denies them, he is entitled to a jury trial on the issue of prior convictions."

[State v. Allen, 292 N.C. 431, 434, 233 S.E.2d 585, 587-88 \(1977\)](#)
(citation omitted).

Finally, assuming *arguendo* that a plea entered at an arraignment is intended to foreclose substantive changes to an habitual felon indictment, the most important [***11] distinction between this case and *Little* involves notice. In *Little*, this Court determined that the trial court erred because "the defendant did not have *notice*, prior to his plea on the substantive felonies, that the State was seeking to have him declared an habitual felon on the basis of the three felonies listed in the [superseding] indictment" [Little, 126 N.C. App. at 270, 484 S.E.2d at 840](#) (emphasis added).

[HN4](#) One basic purpose behind our [Habitual Felons Act](#) is to provide notice to defendant that he is being prosecuted for some substantive felony *as a recidivist*. Failure to provide such notice where the state accepts a guilty plea on the substantive felony charge may well vitiate the plea itself as not being knowingly entered with full understanding of the consequences.

[Allen, 292 N.C. at 436, 233 S.E.2d at 588](#). Although the superseding habitual felon indictment was filed after defendant's first arraignment, it was filed approximately three months before defendant's trial. [N.C. Gen. Stat. § 14-7.3 \[**574\]](#) (2003) provides that [HN5](#) "no defendant charged with being an habitual felon in a bill of [***12] indictment shall be required to go to trial on said charge within 20 days of the finding of a true bill by the grand jury" Three months far exceeds the prohibition against trying a defendant as an habitual felon within this twenty day time period. Thus, defendant received sufficient notice that he was being prosecuted as an habitual felon.

Effect of pleas versus trials

If counsel enters a guilty plea to the habitual felon stage you waive any right to appeal any issue from that except erroneous criminal history and other sentencing related issues. Any constitutional argument you raised at the trial

level is not preserved (unless by some weird twist of fate you managed to raise a suppression issue with regard to the habitual felon stage AND you put the trial court on notice that you were preserving this issue for appeal BEFORE entering the plea.)

Areas of attack in habitual felon second stage proceedings

Jury arguments on lack of identification of the defendant, exploiting any areas of the judgments on the three underlying felonies that are different from each other and/or different from the charge on which the defendant has just been convicted. I.e. differences in race, birth date, middle or first names. When fingerprint cards are not introduced you can also raise the specter of no scientific proof, although the State should have been able to get that proof. If fingerprint cards are used or you know they are planning on using them, you can challenge such evidence just as in the guilt/innocence phase of the trial through cross-examination and the use of your own expert to show the inaccuracy of fingerprint identification. This is becoming a much more fruitful area in light of such botched high profile cases as the Oregon lawyer wrongfully identified by three top FBI fingerprint examiners as having his fingerprints on the bomb materials used in the Spain bombing.

In the case of State v. Starkey, COA Opinion NO. COA05-1013 decided April 18, 2006, Judge Fuller, the trial judge, after the defendant was tried and convicted and sentenced as an habitual felon for possession of less than .1 grams of cocaine, sua sponte entered an order granting a motion for appropriate relief and sentenced the defendant at the Class I level. The State appealed and petitioned for cert. But the COA denied it on the grounds the State had no right to appeal and could meet no ground for granting cert. As Judge Hunter indicated in his concurrence, Judge Fuller's action is actually not supported by case law as a violation of the 8th Amendment. *See, e.g., State v. Todd*, 313 N.C. 110, 117-19, 326 S.E.2d 249, 253-55 (1985); *State v. McDonald*, 165 N.C. App. 237, 241-42, 599 S.E.2d 50, 52-53, *disc. review denied*, 359 N.C. 195, 608 S.E.2d 60 (2004), *cert. denied*, ___ U.S. ___, 161 L. Ed. 2d 748 (2005); *State v. Clifton*, 158 N.C. App. 88, 95-96, 580 S.E.2d 40, 45-46, *cert. denied*, 357 N.C. 463, 586 S.E.2d 266 (2003); *State v. Hensley*, 156 N.C. App. 634, 638-39, 577 S.E.2d 417, 421, *disc. review denied*, 357 N.C. 167, 581 S.E.2d 64 (2003). However, stranger things happen and perhaps in cases of egregious prosecutorial overreaching we should start raising such claims.

Conclusion

In reality, if the State has a solid case on an underlying felony and you can avoid trying the case as an habitual felon, clients should be encouraged to plead. It is not a wise idea at this stage to counsel a client that any technical defense to an habitual felon charge is likely to go well. However, if you are stuck trying a case as an habitual felon case then by all means preserve every issue for appeal and do not plead to the habitual felon stage. Raise and argue all technical defenses and then see if you can cast enough doubt for the jury. This is usually tough in light of the alleged record of your client that the jury has now heard. Try to deflect the animus of a superior court judge who is required to try all these habitual felon stage proceedings by blaming it on the COA requirements that one cannot plead and still preserve any underlying appellate issue.

Bottom line is that Habitual Felon prosecutions are bad news and give the State a devastating bargaining weapon and they should be avoided if at all possible.