

Succeeding at Sentencing

Presented by

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NCATL

MECHANISMS AFFECTING SENTENCING

- 1. Deferred Prosecution Statute**
- 2. N.C. Gen. Stat. § 90-96**
- 3. N.C. Gen Stat. § 90-98 (Attempt and Conspiracy)**
- 4. Substantial Assistance Statute N.C. Gen. Stat. § 90-95 (h) (5)**
 - a. N.C. v. Saunders 131 N.C. App. 551**
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 - a. Case law regarding prior record**
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Deferred Prosecution Statute N.C. Gen. Stat. § 15A-1341 (a1)

A person who has been charged with a class H or I felony or a misdemeanor may be placed on probation if the court finds each of the following;

1. Prosecution has been deferred by the prosecutor pursuant to a written agreement with defendant and the approval of the court.
2. The victims are notified and given an opportunity to be heard.
3. There have been no felony or misdemeanor convictions involving moral turpitude.
4. There have been no previous probations.
5. The defendant is unlikely to commit another offense.

Prosecution can also be deferred so the defendant may enroll in a drug education class.

N.C. Gen. Stat. § 90-96

This statute applies to first time offenders. The offender must plead or be found guilty of;

1. Misdemeanor- possession (Schedule II-VI)
2. Felony- Possession of less than one gram.

A first time offender must have no prior convictions under N.C. Gen. Stat. 90-95 (a) (1), (2), or (3) and no prior offense occurring within the last seven years.

The court may then defer further proceedings without entering judgment and place the offender on probation. Probation may be imposed where the prescribed punishment includes only a fine. There must be no less than one-year probation and the court may impose a requirement to complete drug education school. (This school requirement can be waived if the school is not within a reasonable distance or if there are specific extenuating circumstances as determined by the court that drug education school will not be necessary.) If at any point there is a violation of probation the court may enter an adjudication of guilt and proceed.

If an offender fails to attend drug education school without a valid excuse, or fails to complete the program within 150 days or has willfully failed to pay the required fee the court has grounds to revoke probation and deny application under this article. A hearing may be obtained prior to probation revocation.

Upon fulfillment of all terms and conditions of the probation the Court shall discharge such person and dismiss the proceedings against him. This will not be deemed a conviction. This can only occur one time.

[B] If offender is not over 21 years of age they can apply for expunction of records with the following

1. Affidavit of good behavior during probation
2. Two affidavits from others in the community regarding the offender's character and reputation.
3. The clerk, Sheriff, Chief of Police must show no convictions since the date of probation.

If all of this is completed the offender will be returned to the status enjoyed prior to the arrest for the current offense.

[C] The clerk files with the Administrative Office of the Courts to determine if this offender was granted conditional discharge previously.

[D] If in the proceedings the offender is found innocent and they are not yet 21 years old, they may apply for expunction from all official records all recordation relating to his arrest, indictment or information, or trial.

[E] If no previous convictions are found the court may; no sooner than 12 months order; cancellation of the judgment, expunction of the records of his arrest, indictment, or information, trial and conviction. The order shall be to restore the petitioner in contemplation of the law to the status occupied before the arrestor indictment or information or conviction.

N.C. Gen. Stat. § 90-98

“Except as otherwise provided in this article any person who attempts or conspires to commit any offense defined in this article is guilty of an offense that is the same class as the offense which was the object of the attempt or conspiracy and is punishable as specified for that class of offense and prior record or conviction level in Article 81B of chapter 15A of the General Statutes.

SUBSTANTIAL ASSISTANCE N.C. Gen. Stat. § 90-95 (h) (5)

Except as provided in this subdivision, a person being sentenced under this subsection may not receive a suspended sentence or be placed on probation. The sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-

conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

In N.C. v. Saunders (131 N.C. App. 551) the question before the court is whether based on a finding of substantial assistance the trial court's discretion in departing from minimum sentencing pursuant to N.C. Gen. Stat. § 90-95 (h) (5) is limited by the structured sentencing minimum in N.C. Gen. Stat. § 15A 1340.17 for an offense of the same class. The appellate court found that the judge is free to depart from the sentencing guidelines in any way they see fit and do not have to be limited by the structured sentencing guidelines.

PROOF OF PRIOR RECORD N.C. Gen. Stat. § 15A-1340.14 (f)

A prior conviction shall be proved by any of the following methods;

- (1) Stipulation of the parties
- (2) An original copy of the court record of the prior conviction
- (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or the Administrative Office of the Courts
- (4) Any other method found to be reliable.

Suppression of prior convictions is pursuant to G.S. 15A-980.

CASE LAW REGARDING PRIOR RECORD

1. State v. Ellis 504 S.E. 2d 787 (1998); Certified computer printout from AOC was properly used to establish one of defendant's DWI convictions in prosecution for habitual impaired driving.
2. State v. Rich 502 S.E.2d 49 (1998); Un-verified computerized printout not under seal was admissible as a copy of records maintained by DCI. Considered to fall into "other reliable methods", and contained enough information to identify defendant.
3. State v. Hayes 580 S.E. 2d 431 (2003) Defendant's admission on cross-examination of prior crimes was enough to support the determination of defendant's prior record level.
4. State v. Goodman 356 N.C. 17 (2002) State bears the burden of proving prior convictions by a preponderance of the evidence. Only

evidence offered was prosecutor's prior record level worksheet, the criminal information printout where the conviction information was received was never offered into evidence. The State did not uphold the burden of proof.

5. State v. Hanton 2003 N.C. App. LEXIS 2066 Held that defense counsel's statement that he did not disagree with the worksheet constituted an admission by defendant that he had been convicted of the other charges appearing on the worksheet.
6. State v. Eubanks; 151 N.C. App 499 (2002) "There is no question that a worksheet, prepared and submitted by the State purporting to list a defendant's prior convictions is without more, insufficient to satisfy the State's burden in establishing proof of prior convictions." However, statements made by the attorney representing the defendant may reasonably be construed as a stipulation by defendant that he had been convicted of the charges listed on the worksheet.
7. State v. Bidgood 144 N.C. App. 267 (2001) The defendant was convicted of first-degree rape. At sentencing the defendant's prior record level was determined to be a Level 5 based in part on a conviction for uttering a forged instrument. This conviction for uttering a forged instrument was overturned on appeal after the defendant's current sentence. The Court held that his current sentence must also be adjusted.

CASE LAW REGARDING GUILTY PLEAS AND PJC

1. State v. Hasty; 133 N.C. App. 453 (1999) The Court of Appeals held that the defendant's probationary status under § 90-96, which was based on a plea of guilty constituted a conviction for the purposes of determining defendant's prior record level on his present charges. Finding the language to be clear and unambiguous under § 15A-1331 (b) that a person has been convicted when he has been "adjudged guilty or has entered a plea of guilty or no contest" the court found further support for its conclusion in State v. Watkins, 283 N.C. 17 (1973) (where it was stated that a plea of guilty is equivalent to a conviction) and in State v. Sidberry 337 N.C. 779 (1994) (which this court analyzed as saying that a "prayer for judgment continued" following a plea of guilty may amount to a conviction.)

2. State v. Hatcher; 136 N.C. App. 524 (2000) Defendant was found guilty of two counts of robbery with a dangerous weapon. He was sentenced in the aggravated range to a minimum term of 108 months and the corresponding maximum of 139 months for each offense, to run consecutively. Defendant contends the court erred in computing his prior record level points by assessing points for an offense to which he pled no contest and for which prayer for judgment was continued. The appellate court found the following. “A person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime...” N.C. Gen. Stat. § 15A-1340.11(7) (1997). “For the purpose of imposing sentence, a person has been convicted when he has been adjudged guilty or has entered a plea of guilty or no contest” N.C. Gen. Stat. § 15A-1331 (b). “We have interpreted N.C. Gen. Stat. § 15A-1331 (b) to mean that formal entry of judgment is not required in order to have a conviction. State v. Fuller 48 N.C. App. 418. The court found based on this that the defendant was convicted of the prior offense when he entered the plea of no contest even though no final judgment had been entered.

HABITUAL FELON

N.C. v. Norman Jones, No. COA02-1404 ***

In this case the court determined whether possession of cocaine is a misdemeanor or felony. The court found that possession of cocaine is a misdemeanor punishable as a felony. When an offense is defined as one class and punished as another the definitional classification controls. The specific definition in the statute is controlling calling cocaine possession a misdemeanor even though the punishment is considered felony status.

****This case was given a temporary stay by the North Carolina Supreme Court pending further review of the decision. (As of 11/25/03)*

SENTENCING COMMISSION PROPOSALS.

CHART I; current guidelines

CHART II; proposals

- More balance in new proposals
- Drug trafficking is brought into the structured punishments
- Reduce first offender punishments
- Higher punishments for repeat offenders
- Attempt will be treated the same as the offense
- No “mandatory minimums”
- Does away with consecutive sentencing
- Very conservative proposal
- DA opposition to the bill
- House bill #241
- In 1993 26 members of the sentencing commission voted against even discussing changes to the trafficking laws. In 2003, 19 members voted that drug trafficking sentences be included into structured sentencing.

COPY OF CURRENT HOUSE BILL #241

- Changes also include changing the amounts of marijuana. The changes appear on the new chart.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

H

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HOUSE BILL 241

Short Title: Amend Drug Trafficking Laws.-AB (Public)

Sponsors: Representative Haire.

Referred to: Judiciary IV.

March 6, 2003

A BILL TO BE ENTITLED
AN ACT TO AMEND THE DRUG TRAFFICKING LAWS, AS RECOMMENDED BY THE
NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION.
The General Assembly of North Carolina enacts:

SECTION 1. G.S. 90-95(h) reads as rewritten:

"(h)Notwithstanding any other provision of law, the following provisions apply except as otherwise provided in this Article.
Sentences imposed pursuant to this subsection may not be suspended and must include a minimum and maximum term of

imprisonment that is consistent with the class of offense for which the sentence is being imposed and with the prior record level for the offender, as specified in G.S. 15A-1340.17.

- (1) Any person who sells, manufactures, delivers, transports, or possesses in excess of ~~105~~ pounds (avoirdupois) of marijuana shall be guilty of a felony which shall be known as "trafficking in marijuana" and if the quantity of such substance involved:
 - a. Is in excess of ~~105~~ pounds, but less than 50 pounds, such person shall be punished as a Class ~~F~~ H felon and shall be sentenced to a minimum term of 25 months and a maximum term of 30 months and, in addition to an active punishment in the State's ~~prison and prison,~~ shall be fined not less than five thousand dollars (\$5,000);
 - b. Is 50 pounds or more, but less than ~~2,000~~ 500 pounds, such person shall be punished as a Class ~~E~~ G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months and, in addition to an active punishment in the State's ~~prison and prison,~~ shall be fined not less than twenty-five thousand dollars (\$25,000);
 - c. Is ~~2,000~~ 500 pounds or more, but less than ~~10,000~~ 5,000 pounds, such person shall be punished as a Class ~~F-D~~ D felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months and, in addition to an active punishment in the State's ~~prison and prison,~~ shall be fined not less than fifty thousand dollars (\$50,000);
 - d. Is ~~10,000~~ 5,000 pounds or more, such person shall be punished as a Class ~~D-B2~~ B2 felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months and, in addition to an active punishment in the State's ~~prison and prison,~~ shall be fined not less than two hundred thousand dollars (\$200,000).
- (2) Any person who sells, manufactures, delivers, transports, or possesses 1,000 tablets, capsules or other dosage units, or the equivalent quantity, or more of methaqualone, or any mixture containing such substance, shall be guilty of a felony which shall be known as "trafficking in methaqualone" and if the quantity of such substance

or mixture involved:

- a. Is 1,000 or more dosage units, or equivalent quantity, but less than 5,000 dosage units, or equivalent quantity, such person shall be punished as a Class ~~G-E~~ felon and shall be sentenced to a ~~minimum term of 35 months and a maximum term of 42 months and, in addition to an active punishment in the State's prison and prison,~~ shall be fined not less than twenty-five thousand dollars (\$25,000);
- b. Is 5,000 or more dosage units, or equivalent quantity, but less than 10,000 dosage units, or equivalent quantity, such person shall be punished as a Class ~~F-D~~ felon and shall be sentenced to a ~~minimum term of 70 months and a maximum term of 84 months and, in addition to an active punishment in the State's prison and prison,~~ shall be fined not less than fifty thousand dollars (\$50,000);
- c. Is 10,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class ~~D-B2~~ felon and shall be sentenced to a ~~minimum term of 175 months and a maximum term of 219 months and, in addition to an active punishment in the State's prison and prison,~~ shall be fined not less than two hundred thousand dollars (\$200,000).

(3) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or any coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, and any salt, isomer, salts of isomers, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocainized coca leaves or any extraction of coca leaves which does not contain cocaine) or any mixture containing such substances, shall be guilty of a felony, which felony shall be known as "trafficking in cocaine" and if the quantity of such substance or mixture involved:

- a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class ~~G-E~~ felon and shall be sentenced to a ~~minimum term of 35 months and a maximum term of 42 months and, in addition to an active punishment in the State's prison and prison,~~ shall be fined not

- less than fifty thousand dollars (\$50,000);
- b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class ~~F-D~~ felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months and, in addition to an active punishment in the State's ~~prison and prison,~~ shall be fined not less than one hundred thousand dollars (\$100,000);
- c. Is 400 grams or more, such person shall be punished as a Class ~~D-B2~~ felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months and, in addition to an active punishment in the State's ~~prison and prison,~~ shall be fined at least two hundred fifty thousand dollars (\$250,000).
- (3a) Repealed by Session Laws 1999-370, s. 1.
- (3b) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine or amphetamine shall be guilty of a felony which felony shall be known as "trafficking in methamphetamine or amphetamine" and if the quantity of such substance or mixture involved:
- a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class ~~F-D~~ felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months and, in addition to an active punishment in the State's ~~prison and prison,~~ shall be fined not less than fifty thousand dollars (\$50,000);
- b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class ~~E-C~~ felon and shall be sentenced to a minimum term of 90 months and a maximum term of 117 months and, in addition to an active punishment in the State's ~~prison and prison,~~ shall be fined not less than one hundred thousand dollars (\$100,000);
- c. Is 400 grams or more, such person shall be punished as a Class ~~E-B1~~ felon and shall be sentenced to a minimum term of 225 months and a maximum term of 279 months and, in addition to an active punishment in the State's ~~prison and prison,~~ shall be fined at least two hundred fifty thousand dollars (\$250,000).
- (4) Any person who sells, manufactures, delivers, transports, or possesses four grams or more of

opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in opium or heroin" and if the quantity of such controlled substance or mixture involved:

a. Is four grams or more, but less than 14 grams, such person shall be punished as a Class ~~F-D~~ F felon and

~~shall be sentenced to a minimum term of 70 months and a maximum term of 84 months and, in addition to an active punishment in the State's prison and prison, shall be fined not less than fifty thousand dollars (\$50,000);~~

b. Is 14 grams or more, but less than 28 grams, such person shall be punished as a Class ~~E-C~~ E felon and

~~shall be sentenced to a minimum term of 90 months and a maximum term of 117 months and, in addition to an active punishment in the State's prison and prison, shall be fined not less than one hundred thousand dollars (\$100,000);~~

c. Is 28 grams or more, such person shall be punished as a Class ~~G-B1~~ G

~~felon and shall be sentenced to a minimum term of 225 months and a maximum term of 279 months and, in addition to an active punishment in the State's prison and prison, shall be fined not less than five hundred thousand dollars (\$500,000).~~

(4a) Any person who sells, manufactures, delivers, transports, or possesses 100 tablets, capsules, or other dosage units, or the equivalent quantity, or more, of Lysergic Acid Diethylamide, or any mixture containing such substance, shall be guilty of a felony, which felony shall be known as "trafficking in Lysergic Acid Diethylamide". If the quantity of such substance or mixture involved:

a. Is 100 or more dosage units, or equivalent quantity, but less than 500 dosage units, or equivalent quantity, such person shall be punished as a Class ~~G-E~~ G

~~felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months and, in addition to an active punishment in the State's prison and prison,~~

~~shall be fined not less than twenty-five thousand dollars (\$25,000);~~

b. Is 500 or more dosage units, or equivalent

quantity, but less than 1,000 dosage units, or equivalent quantity, such person shall be punished as a Class ~~F~~D

~~felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months and, in addition to an active punishment in the State's prison and prison,~~
shall be fined not less than fifty thousand dollars (\$50,000);

c. Is 1,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class ~~D~~B2 felon

~~and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months and, in addition to an active punishment in the State's prison and prison,~~
shall be fined not less than two hundred thousand dollars (\$200,000).

(4b) Any person who sells, manufactures, delivers, transports, or possesses 100 or more tablets, capsules, or other dosage units, or 28 grams or more of 3,4-methylenedioxyamphetamine (MDA), including its salts, isomers, and salts of isomers, or 3,4-methylenedioxymethamphetamine (MDMA), including its salts, isomers, and salts of isomers, or any mixture containing such substances, shall be guilty of a felony, which felony shall be known as "trafficking in MDA/MDMA." If the quantity of the substance or mixture involved:

a. Is 100 or more tablets, capsules, or other dosage units, but less than 500 tablets, capsules, or other dosage units, or 28 grams or more, but less than 200 grams, the person shall be punished as a Class ~~E~~G

~~E felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months and, in addition to an active punishment in the State's prison and prison,~~
shall be fined not less than twenty-five thousand dollars (\$25,000);

b. Is 500 or more tablets, capsules, or other dosage units, but less than 1,000 tablets, capsules, or other dosage units, or 200 grams or more, but less than 400 grams, the person shall be punished as a Class ~~F~~D felon and shall be

~~sentenced to a minimum term of 70 months and a maximum term of 84 months and, in addition to an active punishment in the State's prison and prison,~~
shall be fined not less than fifty thousand dollars (\$50,000);

c. Is 1,000 or more tablets, capsules, or other dosage units, or 400 grams or more, the person

shall be punished as a Class ~~D~~
~~B2~~ felon and shall be
sentenced to a minimum term of 175 months and
a maximum term of 219 months and,
in addition to an active punishment in the
State's ~~prison and prison,~~
shall be fined not less than two hundred
fifty thousand dollars (\$250,000).

- (5) Except as provided in this subdivision, a person being sentenced under this subsection may not receive a suspended sentence or be placed on probation. The sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.
- (6) Sentences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder.

SECTION 2. G.S. 90-95(i) reads as rewritten:

(i) The penalties provided in subsection (h) of this section shall also apply to any person who is convicted of conspiracy or attempt to commit any of the offenses described in subsection (h) of this section.

SECTION 3. This act becomes effective December 1, 2003, and applies to offenses committed on or after that date.

SAMPLE PROFFER AND CHARTS