

STATE OF NORTH CAROLINA  
COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO. .

STATE OF NORTH CAROLINA, )  
)  
)  
v. )  
)  
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)  
)  
Defendant. )

**MOTION FOR  
APPROPRIATE RELIEF**

NOW COMES the Defendant, by and through undersigned counsel, who respectfully moves this Court, pursuant to N. C. Gen. Stat. § 15A-1415(b)(8), for appropriate relief to vacate his current sentence and to order a resentencing hearing. Three prior convictions used to indict Mr. for Habitual Impaired Driving were also used to determine his prior record level. Additionally, a prior out-of-state conviction was incorrectly classified as a Class I felony, resulting in two additional prior record points. In support of this Motion, the Defendant shows the Court the following:

FACTS

1. On February 4, 2013, Defendant was charged by superseding indictment for Habitual Impaired Driving in . The State alleged three prior convictions for driving while impaired (DWI) or habitual impaired driving in support of the Habitual Impaired Driving indictment. (Exhibit 1– Superseding Indictment)
2. On March 4, 2013, Defendant entered a guilty plea to Habitual Impaired Driving and two counts of Driving While License Revoked (DWLR). (Exhibit 2 – Transcript of Plea)
3. Pursuant to the plea, the State dismissed all remaining charges that were pending in County. The plea agreement specified that Mr. would be sentenced in the

presumptive range. (Exhibit 2)

4. Mr. [REDACTED]'s prior record level was determined using DWI or habitual impaired driving convictions with conviction dates of September 29, 2004, October 5, 2006, and September 25, 2008, which were also used to indict Mr. [REDACTED] for Habitual Impaired Driving. (Exhibit 1, Exhibit 3 – Prior Record Level Worksheet)

5. Mr. [REDACTED]'s prior out-of-state conviction for “assault PO while resisting” on 10/19/06 was classified as a Class I felony and assigned two points. Defendant contends it should not have been assigned any prior record points because he was charged under the local city ordinance in [REDACTED] South Carolina and was sentenced to thirty (30) days. (Exhibit 4 – Emails with Captain [REDACTED])

6. Mr. [REDACTED]'s prior record points were calculated as twenty (20) points, which made him a Prior Record Level VI for sentencing, including the prior convictions used to indict him for Habitual Impaired Driving and the out-of-state conviction as a felony.

7. Mr. [REDACTED]'s prior record points would be twelve (12) points, making him a Prior Record Level IV, excluding the prior convictions that were used in both the Habitual Impaired Driving indictment and to determine Defendant's prior record level and if the out-of-state felony was excluded.

8. The Honorable [REDACTED] sentenced Mr. [REDACTED] in the presumptive range to an active sentence of 33 months minimum, 49 months maximum as a Prior Record Level VI. (Exhibit 5 – Judgment and Commitment)

9. A sentence of 33 months minimum, 49 months maximum would be in the aggravated range as a prior record level V and is an illegal sentence for a prior record level IV under the Structured Sentencing Act for offenses on or after December 1, 2011.

10. Defendant is presently incarcerated in the North Carolina Department of Public Safety Division of Adult Correction at \_\_\_\_\_ Correctional Institution and is indigent.  
(Exhibit 6 – DPS Offender Public Information)

ARGUMENT

**DEFENDANT IS ENTLITED TO A RESENTENCING HEARING BECAUSE HIS PRIOR RECORD LEVEL WAS CALCULATED INCORRECTLY WITH CONVICTIONS USED TO INDICT HIM FOR HABITUAL IMPAIRED DRIVING AND ONE OUT-OF-STATE CONVICTION WAS INCORRECTLY CLASSIFIED**

The prior convictions used to indict a defendant for Habitual Impaired Driving may not be used to determine the defendant's prior record level pursuant to N.C. Gen. Stat. § 15A-1340.14. *State v. Gentry*, 135 N.C. App. 107, 519 S.E.2d 68 (1999).

Three of Defendant's prior convictions, two for DWI and one for Habitual Impaired Driving were used to indict him for Habitual Impaired Driving:

- 1) DWI, \_\_\_\_\_ County, \_\_\_\_\_, conviction date September 29, 2004;
- 2) DWI, \_\_\_\_\_ County, \_\_\_\_\_ conviction date October 5, 2006 (incorrectly listed on indictment as November 28, 2007, which was the date probation was revoked);  
and
- 3) habitual impaired driving, \_\_\_\_\_ County, \_\_\_\_\_ conviction date December 4, 2009.

Examination of Defendant's Prior Record Level Worksheet shows that there are seven prior DWI convictions listed on side two, including two that supported the Habitual Impaired Driving indictment. There are also two prior convictions for Habitual Impaired Driving listed on side two, one of which supported the Habitual Impaired Driving indictment. A review of the front side shows that both Class F convictions were assigned four points each and that all seven

DWI convictions were assigned one point each. In other words, none of the convictions used to indict Defendant for habitual impaired driving were excluded when calculating his prior record level. Under *Gentry*, this was in error and entitles Defendant to a resentencing hearing.

Additionally, Defendant had a prior conviction for "Assault PO while resisting" that was classified as a Class I felony. This conviction was an out-of-state conviction from South Carolina. N.C. Gen. Stat. § 15A-1340.14(e) specifies how prior convictions from other jurisdictions shall be classified:

(e) Classification of Prior Convictions From Other Jurisdictions. -- Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. If the offender proves by the preponderance of the evidence that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points.

N.C. Gen. Stat. § 15A-1340.14 (2009)

Undersigned counsel investigated this prior conviction and attempted to get court documents from the South Carolina, which is where the conviction occurred. Although the city no longer had court documents, undersigned counsel learned that Defendant was charged under the local city ordinances for resisting arrest rather than a state statute. Exhibit 4. Additionally, the matter was disposed of in Municipal Court, rather than the County Circuit Court, and Defendant was sentenced to thirty days. *Id.*, Exhibit 7. Resisting an officer is a Class 2 misdemeanor in North Carolina. N.C. Gen. Stat. § 14-223. Accordingly, this conviction should not have been assigned any prior record points.

Defendant's prior record level should have been calculated as IV, since he would only

have twelve (12) prior record points after excluding the convictions used to indict him for habitual impaired driving and excluding his prior conviction South Carolina conviction for resisting arrest that was incorrectly compared to the South Carolina felony of assaulting an officer while resisting. Defendant can show prejudice because a sentence of 33 months minimum, 49 months maximum would be in the aggravated range for a Class F felony as a prior record level V and is an illegal sentence for a prior record level IV under the Structured Sentencing Act for offenses on or after December 1, 2011.

Therefore, Defendant is entitled to have his Motion for Appropriate Relief granted and a resentencing hearing ordered.

#### CONCLUSION

Defendant was sentenced illegally by including prior convictions that were used to indict him for Habitual Impaired Driving and by incorrectly classifying a prior out-of-state conviction. Since Defendant can show that his prior record level was calculated incorrectly and his sentence would not be in the presumptive range for either a level V or level IV sentence he is entitled to a resentencing hearing for his conviction of habitual impaired driving.

PRAYER FOR RELIEF

WHEREFORE, the Defendant prays the Court for the following relief:

1. That this Court vacate Defendant's sentence and order a resentencing hearing;
2. For such other and further relief as the Court may deem just and proper.

Respectfully submitted this 10th day of March, 2014.

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Attorney for Defendant

EXHIBITS

1. Superseding Indictment –
2. Transcript of Plea –
3. Prior Record Level Worksheet –
4. Emails exchanged with Captain
5. Judgment and Commitment –
6. Department of Public Safety Offender Public Information
7. Case History from

**CERTIFICATE OF SERVICE AND CERTIFICATION OF  
COMPLIANCE WITH N.C. GEN. STAT. § 15A-1420(a)(1)(c1)**

The undersigned hereby certifies that the original of the foregoing was filed by first class mail with the \_\_\_\_\_ County Clerk of Court, and a copy of the foregoing Motion for Appropriate Relief, together with any exhibits and a copy of this certification was served by first class mail upon the counsel listed below on the date indicated:

Assistant District Attorney

I also certify that there is a sound legal basis for the motion for appropriate relief, that it is being made in good faith, that I have notified trial counsel of its filing, and that the nature of the relief sought does not require that the hearing transcript be read in its entirety.

This the 10th day of March, 2014.

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Attorney for Defendant