

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

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SENATE BILL 542
Judiciary I Committee Substitute Adopted 4/11/05

Short Title: Blakely Decision/Amend Aggravating Factors.

(Public)

Sponsors:

Referred to:

March 15, 2005

A BILL TO BE ENTITLED

AN ACT TO AMEND STATE LAW REGARDING THE DETERMINATION OF
AGGRAVATING FACTORS IN A CRIMINAL CASE TO CONFORM WITH
THE UNITED STATES SUPREME COURT DECISION IN BLAKELY V.
WASHINGTON.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 15A-1340.16 reads as rewritten:

"§ 15A-1340.16. Aggravated and mitigated sentences.

(a) Generally, Burden of Proof. – The court shall consider evidence of
aggravating or mitigating factors present in the offense that make an aggravated or
mitigated sentence appropriate, but the decision to depart from the presumptive range is
in the discretion of the court. The State bears the burden of proving ~~by a preponderance
of the evidence beyond a reasonable doubt~~ that an aggravating factor exists, and the
offender bears the burden of proving by a preponderance of the evidence that a
mitigating factor exists.

(a1) Jury to Determine Aggravating Factors; Jury Procedure if Trial Bifurcated. –
The defendant may admit to the existence of an aggravating factor, and the factor so
admitted shall be treated as though it were found by a jury pursuant to the procedures in
this subsection. Admissions of the existence of an aggravating factor must be consistent
with the provisions of G.S. 15A-1022.1. If the defendant does not so admit, only a jury
may determine if an aggravating factor is present in an offense. The jury impaneled for
the trial of the felony may, in the same trial, also determine if one or more aggravating
factors is present, unless the court determines that the interests of justice require that a
separate sentencing proceeding be used to make that determination. If the court
determines that a separate proceeding is required, the proceeding shall be conducted by
the trial judge before the trial jury as soon as practicable after the guilty verdict is
returned. If prior to the time that the trial jury begins its deliberations on the issue of
whether one or more aggravating factors exist, any juror dies, becomes incapacitated or
disqualified, or is discharged for any reason, an alternate juror shall become a part of the

1 jury and serve in all respects as those selected on the regular trial panel. An alternate
2 juror shall become a part of the jury in the order in which the juror was selected. If the
3 trial jury is unable to reconvene for a hearing on the issue of whether one or more
4 aggravating factors exist after having determined the guilt of the accused, the trial judge
5 shall impanel a new jury to determine the issue. A jury selected to determine whether
6 one or more aggravating factors exist shall be selected in the same manner as juries are
7 selected for the trial of criminal cases.

8 (a2) Procedure if Defendant Admits Aggravating Factor Only. – If the defendant
9 admits that an aggravating factor exists, but pleads not guilty to the underlying felony, a
10 jury shall be impaneled to dispose of the felony charge. In that case, evidence that
11 relates solely to the establishment of an aggravating factor shall not be admitted in the
12 felony trial.

13 (a3) Procedure if Defendant Pleads Guilty to the Felony Only. – If the defendant
14 pleads guilty to the felony, but contests the existence of one or more aggravating
15 factors, a jury shall be impaneled to determine if the aggravating factor or factors exist.

16 (a4) Pleading of Aggravating Factors. – Aggravating factors set forth in
17 subsection (d) of this section need not be included in an indictment or other charging
18 instrument. Any aggravating factor alleged under subdivision (d)(20) of this section
19 shall be included in an indictment or other charging instrument, as specified in
20 G.S. 15A-924.

21 (a5) Procedure to Determine Prior Record Level Points Not Involving Prior
22 Convictions. – If the State seeks to establish the existence of a prior record level point
23 under G.S. 15A-1340.14(b)(7), the jury shall determine whether the point should be
24 assessed using the procedures specified in subsections (a1) through (a3) of this section.
25 The State need not allege in an indictment or other pleading that it intends to establish
26 the point.

27 (a6) Notice of Intent to Use Aggravating Factors or Prior Record Level Points. –
28 The State must provide a defendant with written notice of its intent to prove the
29 existence of one or more aggravating factors under subsection (d) of this section or a
30 prior record level point under G.S. 15A-1340.14(b)(7). A defendant may waive the right
31 to receive such notice. The notice must list all the aggravating factors the State seeks to
32 establish.

33 (1) If the defendant requests discovery, and the State is in possession of
34 the underlying facts that it intends to use to prove the existence of an
35 aggravating factor or a prior record level point under
36 G.S. 15A-1340.14(b)(7), it shall provide the notice no later than 10
37 days after receiving possession of the underlying facts. Any notice
38 required by this section shall be provided no later than 20 days before
39 trial.

40 (2) If the defendant does not request discovery, then the notice shall be
41 provided no later than 20 days before trial.

42 (b) When Aggravated or Mitigated Sentence Allowed. – If the ~~court~~ jury, or with
43 respect to an aggravating factor under G.S. 15A-1340.16(d)(18a), the court, finds that
44 aggravating factors exist or the court finds that mitigating factors exist, ~~it~~ the court may

1 depart from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2). If
2 ~~the court finds that~~ aggravating factors are present and the court determines they are
3 sufficient to outweigh any mitigating factors that are present, it may impose a sentence
4 that is permitted by the aggravated range described in G.S. 15A-1340.17(c)(4). If the
5 court finds that mitigating factors are present and are sufficient to outweigh any
6 aggravating factors that are present, it may impose a sentence that is permitted by the
7 mitigated range described in G.S. 15A-1340.17(c)(3).

8 (c) Written Findings; When Required. – The court shall make findings of the
9 aggravating and mitigating factors present in the offense only if, in its discretion, it
10 departs from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2). If
11 the jury finds factors in aggravation, the court shall ensure that those findings are
12 entered in the court's determination of sentencing factors form or any comparable
13 document used to record the findings of sentencing factors. Findings shall be in writing.
14 The requirement to make findings in order to depart from the presumptive range applies
15 regardless of whether the sentence of imprisonment is activated or suspended.

16 (d) Aggravating Factors. – The following are aggravating factors:

- 17 (1) The defendant induced others to participate in the commission of the
18 offense or occupied a position of leadership or dominance of other
19 participants.
- 20 (2) The defendant joined with more than one other person in committing
21 the offense and was not charged with committing a conspiracy.
- 22 (2a) The offense was committed for the benefit of, or at the direction of,
23 any criminal street gang, with the specific intent to promote, further, or
24 assist in any criminal conduct by gang members, and the defendant
25 was not charged with committing a conspiracy. A "criminal street
26 gang" means any ongoing organization, association, or group of three
27 or more persons, whether formal or informal, having as one of its
28 primary activities the commission of felony or violent misdemeanor
29 offenses, or delinquent acts that would be felonies or violent
30 misdemeanors if committed by an adult, and having a common name
31 or common identifying sign, colors, or symbols.
- 32 (3) The offense was committed for the purpose of avoiding or preventing a
33 lawful arrest or effecting an escape from custody.
- 34 (4) The defendant was hired or paid to commit the offense.
- 35 (5) The offense was committed to disrupt or hinder the lawful exercise of
36 any governmental function or the enforcement of laws.
- 37 (6) The offense was committed against or proximately caused serious
38 injury to a present or former law enforcement officer, employee of the
39 Department of Correction, jailer, fireman, emergency medical
40 technician, ambulance attendant, justice or judge, clerk or assistant or
41 deputy clerk of court, magistrate, prosecutor, juror, or witness against
42 the defendant, while engaged in the performance of that person's
43 official duties or because of the exercise of that person's official duties.
- 44 (7) The offense was especially heinous, atrocious, or cruel.

- 1 (8) The defendant knowingly created a great risk of death to more than
2 one person by means of a weapon or device which would normally be
3 hazardous to the lives of more than one person.
- 4 (9) The defendant held public office at the time of the offense and the
5 offense related to the conduct of the office.
- 6 (10) The defendant was armed with or used a deadly weapon at the time of
7 the crime.
- 8 (11) The victim was very young, or very old, or mentally or physically
9 infirm, or handicapped.
- 10 (12) The defendant committed the offense while on pretrial release on
11 another charge.
- 12 (13) The defendant involved a person under the age of 16 in the
13 commission of the crime.
- 14 (14) The offense involved an attempted or actual taking of property of great
15 monetary value or damage causing great monetary loss, or the offense
16 involved an unusually large quantity of contraband.
- 17 (15) The defendant took advantage of a position of trust or confidence,
18 including a domestic relationship, to commit the offense.
- 19 (16) The offense involved the sale or delivery of a controlled substance to a
20 minor.
- 21 (16a) The offense is the manufacture of methamphetamine and was
22 committed where a person under the age of 18 lives, was present, or
23 was otherwise endangered by exposure to the drug, its ingredients, its
24 by-products, or its waste.
- 25 (17) The offense for which the defendant stands convicted was committed
26 against a victim because of the victim's race, color, religion,
27 nationality, or country of origin.
- 28 (18) The defendant does not support the defendant's family.
- 29 (18a) The defendant has previously been adjudicated delinquent for an
30 offense that would be a Class A, B1, B2, C, D, or E felony if
31 committed by an adult.
- 32 (19) The serious injury inflicted upon the victim is permanent and
33 debilitating.
- 34 (20) Any other aggravating factor reasonably related to the purposes of
35 sentencing.

36 Evidence necessary to prove an element of the offense shall not be used to prove any
37 factor in aggravation, and the same item of evidence shall not be used to prove more
38 than one factor in aggravation. Evidence necessary to establish that an enhanced
39 sentence is required under G.S. 15A-1340.16A may not be used to prove any factor in
40 aggravation.

41 The judge shall not consider as an aggravating factor the fact that the defendant
42 exercised the right to a jury trial.

43 Notwithstanding the provisions of subsection (a1) of this section, the determination
44 that an aggravating factor under G.S. 15A-1340.16(d)(18a) is present in a case shall be

1 made by the court and not by the jury. That determination shall be made in the
2 sentencing hearing.

3 (e) Mitigating Factors. – The following are mitigating factors:

- 4 (1) The defendant committed the offense under duress, coercion, threat, or
5 compulsion that was insufficient to constitute a defense but
6 significantly reduced the defendant's culpability.
- 7 (2) The defendant was a passive participant or played a minor role in the
8 commission of the offense.
- 9 (3) The defendant was suffering from a mental or physical condition that
10 was insufficient to constitute a defense but significantly reduced the
11 defendant's culpability for the offense.
- 12 (4) The defendant's age, immaturity, or limited mental capacity at the time
13 of commission of the offense significantly reduced the defendant's
14 culpability for the offense.
- 15 (5) The defendant has made substantial or full restitution to the victim.
- 16 (6) The victim was more than 16 years of age and was a voluntary
17 participant in the defendant's conduct or consented to it.
- 18 (7) The defendant aided in the apprehension of another felon or testified
19 truthfully on behalf of the prosecution in another prosecution of a
20 felony.
- 21 (8) The defendant acted under strong provocation, or the relationship
22 between the defendant and the victim was otherwise extenuating.
- 23 (9) The defendant could not reasonably foresee that the defendant's
24 conduct would cause or threaten serious bodily harm or fear, or the
25 defendant exercised caution to avoid such consequences.
- 26 (10) The defendant reasonably believed that the defendant's conduct was
27 legal.
- 28 (11) Prior to arrest or at an early stage of the criminal process, the
29 defendant voluntarily acknowledged wrongdoing in connection with
30 the offense to a law enforcement officer.
- 31 (12) The defendant has been a person of good character or has had a good
32 reputation in the community in which the defendant lives.
- 33 (13) The defendant is a minor and has reliable supervision available.
- 34 (14) The defendant has been honorably discharged from the United States
35 armed services.
- 36 (15) The defendant has accepted responsibility for the defendant's criminal
37 conduct.
- 38 (16) The defendant has entered and is currently involved in or has
39 successfully completed a drug treatment program or an alcohol
40 treatment program subsequent to arrest and prior to trial.
- 41 (17) The defendant supports the defendant's family.
- 42 (18) The defendant has a support system in the community.
- 43 (19) The defendant has a positive employment history or is gainfully
44 employed.

1 (20) The defendant has a good treatment prognosis, and a workable
2 treatment plan is available.

3 (21) Any other mitigating factor reasonably related to the purposes of
4 sentences."

5 **SECTION 2.** G.S. 15A-1340.14 reads as rewritten:

6 **"§ 15A-1340.14. Prior record level for felony sentencing.**

7 (a) Generally. – The prior record level of a felony offender is determined by
8 calculating the sum of the points assigned to each of the offender's prior convictions that
9 the court or, with respect to subdivision (b)(7) of this section, the jury, finds to have
10 been proved in accordance with this section.

11 (b) Points. – Points are assigned as follows:

12 (1) For each prior felony Class A conviction, 10 points.

13 (1a) For each prior felony Class B1 conviction, 9 points.

14 (2) For each prior felony Class B2, C, or D conviction, 6 points.

15 (3) For each prior felony Class E, F, or G conviction, 4 points.

16 (4) For each prior felony Class H or I conviction, 2 points.

17 (5) For each prior misdemeanor conviction as defined in this subsection, 1
18 point. For purposes of this subsection, misdemeanor is defined as any
19 Class A1 and Class 1 nontraffic misdemeanor offense, impaired
20 driving (G.S. 20-138.1), impaired driving in a commercial vehicle
21 (G.S. 20-138.2), and misdemeanor death by vehicle
22 (G.S. 20-141.4(a2)), but not any other misdemeanor traffic offense
23 under Chapter 20 of the General Statutes.

24 (6) If all the elements of the present offense are included in any prior
25 offense for which the offender was convicted, whether or not the prior
26 offense or offenses were used in determining prior record level, 1
27 point.

28 (7) If the offense was committed while the offender was on supervised or
29 unsupervised probation, parole, or post-release supervision, or while
30 the offender was serving a sentence of imprisonment, or while the
31 offender was on escape from a correctional institution while serving a
32 sentence of imprisonment, 1 point.

33 For purposes of determining prior record points under this subsection, a conviction
34 for a first degree rape or a first degree sexual offense committed prior to the effective
35 date of this subsection shall be treated as a felony Class B1 conviction, and a conviction
36 for any other felony Class B offense committed prior to the effective date of this
37 subsection shall be treated as a felony Class B2 conviction. G.S. 15A-1340.16(a5)
38 specifies the procedure to be used to determine if a point exists under subdivision (7) of
39 this subsection. The State must provide a defendant with written notice of its intent to
40 prove the existence of the prior record point under subdivision (7) of this subsection as
41 required by G.S. 15A-1340.16(a6).

42 (c) Prior Record Levels for Felony Sentencing. – The prior record levels for
43 felony sentencing are:

44 (1) Level I – 0 points.

- 1 (2) Level II – At least 1, but not more than 4 points.
- 2 (3) Level III – At least 5, but not more than 8 points.
- 3 (4) Level IV – At least 9, but not more than 14 points.
- 4 (5) Level V – At least 15, but not more than 18 points.
- 5 (6) Level VI – At least 19 points.

6 In determining the prior record level, the classification of a prior offense is the
7 classification assigned to that offense at the time the offense for which the offender is
8 being sentenced is committed.

9 (d) Multiple Prior Convictions Obtained in One Court Week. – For purposes of
10 determining the prior record level, if an offender is convicted of more than one offense
11 in a single superior court during one calendar week, only the conviction for the offense
12 with the highest point total is used. If an offender is convicted of more than one offense
13 in a single session of district court, only one of the convictions is used.

14 (e) Classification of Prior Convictions From Other Jurisdictions. – Except as
15 otherwise provided in this subsection, a conviction occurring in a jurisdiction other than
16 North Carolina is classified as a Class I felony if the jurisdiction in which the offense
17 occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if
18 the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. If
19 the offender proves by the preponderance of the evidence that an offense classified as a
20 felony in the other jurisdiction is substantially similar to an offense that is a
21 misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor
22 for assigning prior record level points. If the State proves by the preponderance of the
23 evidence that an offense classified as either a misdemeanor or a felony in the other
24 jurisdiction is substantially similar to an offense in North Carolina that is classified as a
25 Class I felony or higher, the conviction is treated as that class of felony for assigning
26 prior record level points. If the State proves by the preponderance of the evidence that
27 an offense classified as a misdemeanor in the other jurisdiction is substantially similar
28 to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the
29 conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record
30 level points.

31 (f) Proof of Prior Convictions. – A prior conviction shall be proved by any of the
32 following methods:

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

39 The State bears the burden of proving, by a preponderance of the evidence, that a
40 prior conviction exists and that the offender before the court is the same person as the
41 offender named in the prior conviction. The original or a copy of the court records or a
42 copy of the records maintained by the Division of Criminal Information, the Division of
43 Motor Vehicles, or of the Administrative Office of the Courts, bearing the same name as
44 that by which the offender is charged, is prima facie evidence that the offender named is

1 the same person as the offender before the court, and that the facts set out in the record
2 are true. For purposes of this subsection, "a copy" includes a paper writing containing a
3 reproduction of a record maintained electronically on a computer or other data
4 processing equipment, and a document produced by a facsimile machine. The
5 prosecutor shall make all feasible efforts to obtain and present to the court the offender's
6 full record. Evidence presented by either party at trial may be utilized to prove prior
7 convictions. Suppression of prior convictions is pursuant to G.S. 15A-980. If a motion
8 is made pursuant to that section during the sentencing stage of the criminal action, the
9 court may grant a continuance of the sentencing hearing. If asked by the defendant in
10 compliance with G.S. 15A-903, the prosecutor shall furnish the defendant's prior
11 criminal record to the defendant within a reasonable time sufficient to allow the
12 defendant to determine if the record available to the prosecutor is accurate. Upon
13 request of a sentencing services program established pursuant to Article 61 of Chapter
14 7A of the General Statutes, the district attorney shall provide any information the
15 district attorney has about the criminal record of a person for whom the program has
16 been requested to provide a sentencing plan pursuant to G.S. 7A-773.1."

17 **SECTION 3.** G.S. 15A-924(a) is amended by adding a new subdivision to
18 read:

19 "(a) A criminal pleading must contain:

- 20 (1) The name or other identification of the defendant but the name of the
21 defendant need not be repeated in each count unless required for
22 clarity.
- 23 (2) A separate count addressed to each offense charged, but allegations in
24 one count may be incorporated by reference in another count.
- 25 (3) A statement or cross reference in each count indicating that the offense
26 charged therein was committed in a designated county.
- 27 (4) A statement or cross reference in each count indicating that the offense
28 charged was committed on, or on or about, a designated date, or during
29 a designated period of time. Error as to a date or its omission is not
30 ground for dismissal of the charges or for reversal of a conviction if
31 time was not of the essence with respect to the charge and the error or
32 omission did not mislead the defendant to his prejudice.
- 33 (5) A plain and concise factual statement in each count which, without
34 allegations of an evidentiary nature, asserts facts supporting every
35 element of a criminal offense and the defendant's commission thereof
36 with sufficient precision clearly to apprise the defendant or defendants
37 of the conduct which is the subject of the accusation. When the
38 pleading is a criminal summons, warrant for arrest, or magistrate's
39 order, or statement of charges based thereon, both the statement of the
40 crime and any information showing probable cause which was
41 considered by the judicial official and which has been furnished to the
42 defendant must be used in determining whether the pleading is
43 sufficient to meet the foregoing requirement.

1 (6) For each count a citation of any applicable statute, rule, regulation,
2 ordinance, or other provision of law alleged therein to have been
3 violated. Error in the citation or its omission is not ground for
4 dismissal of the charges or for reversal of a conviction.

5 (7) A statement that the state intends to use one or more aggravating
6 factors under G.S. 15A-1340.16(d)(20), with a plain and concise
7 factual statement indicating the factor or factors it intends to use under
8 the authority of that subdivision."

9 **SECTION 4.** Article 58 of Chapter 15A of the General Statutes is amended
10 by adding a new section to read:

11 **"§ 15A-1022.1. Procedure in accepting admissions of the existence of aggravating**
12 **factors in felonies.**

13 (a) Before accepting a plea of guilty or no contest to a felony, the court shall
14 determine whether the State intends to seek a sentence in the aggravated range. If the
15 State does intend to seek an aggravated sentence, the court shall determine which
16 factors the State seeks to establish. The court shall determine whether the State seeks a
17 finding that a prior record level point should be found under G.S. 15A-1340.14(b)(7).
18 The court shall also determine whether the State has provided the notice to the
19 defendant required by G.S. 15A-1340.16(a6) or whether the defendant has waived his or
20 her right to such notice.

21 (b) In all cases in which a defendant admits to the existence of an aggravating
22 factor or to a finding that a prior record level point should be found under
23 G.S. 15A-1340.14(b)(7), the court shall comply with the provisions of
24 G.S. 15A-1022(a). In addition, the court shall address the defendant personally and
25 advise the defendant that:

- 26 (1) He or she is entitled to have a jury determine the existence of any
27 aggravating factors or points under G.S. 15A-1340.14(b)(7); and
28 (2) He or she has the right to prove the existence of any mitigating factors
29 at a sentencing hearing before the sentencing judge.

30 (c) Before accepting an admission to the existence of an aggravating factor or a
31 prior record level point under G.S. 15A-1340.14(b)(7), the court shall determine that
32 there is a factual basis for the admission and that the admission is the result of an
33 informed choice by the defendant. The court may base its determination on the factors
34 specified in G.S. 15A-1022(c), as well as any other appropriate information.

35 (d) A defendant may admit to the existence of an aggravating factor or to the
36 existence of a prior record level point under G.S. 15A-1340.14(b)(7) before or after the
37 trial of the underlying felony.

38 (e) The procedures specified in this Article for the handling of pleas of guilty are
39 applicable to the handling of admissions to aggravating factors and prior record points
40 under G.S. 15A-1340.14(b)(7), unless the context clearly indicates that they are
41 inappropriate."

42 **SECTION 5.** This act is effective when it becomes law. Prosecutions for
43 offenses committed before the effective date of this act are not abated or affected by this

1 act, and the statutes that would be applicable but for this act remain applicable to those
2 prosecutions.