

Sentencing (Blakely error)

Sentencing Court Modifies Ruling of Court of Appeals on Statutory Aggravating Factor, G.S. 15A-1340.16(d)(8) (Knowingly Creating Great Risk of Death to More Than One Person By Weapon Normally Hazardous to Lives of More Than One Person)

State v. Sellars, 363 N.C. 112, ___ S.E.2d ___ (20 March 2009), modifying and affirming, ___ N.C. App. ___, 664 S.E.2d 45 (5 August 2008).

The court affirmed the ruling of the North Carolina Court of Appeals that found no error in the defendant's trial and sentence. However, it rejected the implication in the court of appeals' opinion that a jury's determination that a defendant is not insane resolves the presence or absence of the statutory aggravating factor, G.S. 15A-1340.16(d)(8) (knowingly creating great risk of death to more than one person by weapon normally hazardous to lives of more than one person). Nor does a jury's finding that a defendant is not insane automatically render any Blakely error concerning this aggravating factor harmless beyond a reasonable doubt. However, the court examined the evidence and determined that the trial judge's finding of the aggravating factor was harmless beyond a reasonable doubt.

Defendant Appealing Revocation of Probation May Not Collaterally Attack on Blakely Grounds Suspended Sentence in Aggravated Range Imposed When Defendant Was Convicted and Placed on Probation

State v. Holmes, 361 N.C. 410, 646 S.E.2d 353 (28 June 2007), reversing, 177 N.C. App. 565, 629 S.E.2d 520 (2006).

The defendant was convicted and placed on probation with suspended sentences in the aggravated range. He did not appeal his sentences. His probationary sentences were later revoked. He argued on appeal that the suspended sentences in the aggravated range violated the ruling in *Blakely v. Washington*, 542 U.S. 296 (2004). The court ruled, relying on the reasoning in *State v. Noles*, 12 N.C. App. 676 (1971), and *State v. Rush*, 158 N.C. App. 738 (2003), that a defendant appealing a revocation of probation may not collaterally attack on Blakely grounds an aggravated suspended sentence imposed when the defendant was convicted and placed on probation. The court stated that a direct appeal from an original judgment lies only when the sentence is originally entered.

No Blakely Error Because Defendant Admitted Existence of Factor That Provides One Additional Point in Sentencing

State v. Cupid, 361 N.C. 417, 646 S.E.2d 348 (28 June 2007), affirming in part and reversing in part, 173 N.C. App. 448, 618 S.E.2d 874 (2005).

The defendant during his sentencing hearing stated to the trial judge that he “was . . . on probation” when the offenses were committed. The court ruled, relying on *State v. Hurt*, 361 N.C. 325 (2007), that the defendant’s statement was an admission of the factor (committing offense while on probation) found by the trial judge that provides one additional point for sentencing. Thus, there was no *Blakely v. Washington*, 542 U.S. 296 (2004), error.

Blakely v. Washington Error in Judge’s Finding of Aggravating Factors in DWI Sentencing Hearing Was Harmless Beyond Reasonable Doubt

State v. McQueen, 181 N.C. App. 417, 639 S.E.2d 131 (16 January 2007).

The court ruled, relying on *Washington v. Recuenco*, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), and *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (15 December 2006), that *Blakely v. Washington*, 542 U.S. 296 (2004), error in the judge’s finding of two aggravating factors in a DWI sentencing hearing was harmless beyond a reasonable doubt. The court ruled that there was overwhelming evidence to support the two aggravating factors (accident caused personal injury and property damage in excess of \$500.00).

Trial Judge Had Authority to Submit Aggravating Factors to Jury as Required by Blakely v. Washington Even Though There Was No Statutory Authority to Do So

State v. Johnson, 181 N.C. App. 287, 639 S.E.2d 78 (2 January 2007).

The court ruled, relying on *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (15 December 2006), that the trial judge had the authority to submit aggravating factors to the jury as required by *Blakely v. Washington*, 542 U.S. 296 (2004), even though there was no statutory authority to do so. (Author’s note: The trial occurred when statutory law required a judge to make findings of the existence of aggravating factors.)

Blakely v. Washington Ruling Was Not Retroactively Applicable to Judgment Entered on 1998 Guilty Plea Because Defendant Did Not Take a Direct Appeal from That Judgment, and Appellate Court Issued Writ of Certiorari in 2002 Limited to Issues That Could Be Raised on Direct Appeal; Case Was Not Pending on Direct Review When Blakely Was Decided

State v. Hasty, 181 N.C. App. 144, 639 S.E.2d 94 (2 January 2007).

The court ruled, relying on *State v. Pender*, 176 N.C. App. 688, 627 S.E.2d 343 (21 March 2006), that the *Blakely v. Washington*, 542 U.S. 296 (2004), ruling was not retroactively applicable to a judgment entered on a 1998 guilty plea because the defendant did not take a direct appeal from the judgment, and the North Carolina Court of Appeals had issued a writ of certiorari in 2002 limited to issues that could be raised on direct appeal. The case was not pending on direct review when *Blakely* was decided.

(2) Court Rules Trial Judge's Finding of Aggravating Factor in Violation of *Blakely v. Washington* Was Harmless Error Beyond Reasonable Doubt

(3) Trial Judge's Finding of Aggravating Factor Did Not Violate Constitution of North Carolina

State v. Blackwell, 361 N.C. 41, 638 S.E.2d 452 (15 December 2006).

The defendant was convicted of second-degree murder and other offenses when he drove his vehicle while impaired and crashed into another vehicle, killing one of the occupants. In a sentencing hearing held before the ruling in *Blakely v. Washington*, 542 U.S. 296 (2004), the trial judge found the statutory aggravating factor that the defendant was on pretrial release for another charge and imposed a sentence in the aggravated range for the second-degree murder conviction and two other felony convictions. (2) The court reviewed the state's evidence at trial, the defendant's failure to object to the prosecutor's statement at sentencing about the defendant being on pretrial release, and the defendant's failure at sentencing to present any arguments or evidence contesting the aggravating factor. It then ruled that the trial judge's finding of aggravating factor in violation of *Blakely v. Washington*, 542 U.S. 296 (2004), was harmless error beyond reasonable doubt. (3) The court ruled that the trial judge's finding of the aggravating factor did not violate Article I, Section 24 of the Constitution of North Carolina. See also *State v. Speight*, 361 N.C. 106, 637 S.E.2d 539 (15 December 2006) (court set aside North Carolina Court of Appeals ruling that sentence was erroneously imposed under *Blakely* and remanded case to that court for harmless error analysis not inconsistent with ruling in *State v. Blackwell*, discussed above).

1) Sentencing--Aggravating factors--*Blakely* error

State v. Pender 176 N. C. APP. 688 (2006).

The trial court did not err in a double armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury case by increasing defendant's sentences beyond the prescribed statutory maximum based upon its own finding of aggravating factors that were not alleged in the indictments or found by the jury beyond a reasonable doubt, because: 1) in North Carolina there is no requirement that aggravating factors be alleged in an indictment; 2) the situations contemplated by *State v. Allen*, 359 N.C. 425 (2005), are not present in the instant case since defendant was indicted as of the certification date of the *Allen* opinion, his appeal is not now pending direct review, and his case was final; and 3) defendant did not appeal the trial court's acceptance of his Alford plea agreement, the finding of aggravating and mitigating factors by the trial court, nor his sentence of twenty-five years for each armed robbery case and five years for assault.

2) Sentencing Blakely error--Case final before effective date of rule

State v. Simpson 176 N. C. APP. 719 (2006).

The trial court's imposition of an aggravated sentence upon defendant based upon an aggravating factor found by the trial court and not submitted to the jury did not entitle defendant to appropriate relief where his case was final as of 23 December 2003; Blakely errors are limited to cases that were not final as of 21 July 2005.

State v. Upshur, 176 N. C. APP. 174 (2006).

3) Sentencing--Aggravated range--Crimes especially heinous, Atrocious, or cruel--Blakely error

The trial court erred by sentencing defendant in the aggravated range for the assault with a deadly weapon inflicting serious injury charge based upon a finding that the crime was especially heinous, atrocious, or cruel, and defendant is entitled to a new sentencing hearing on this charge, because defendant did not stipulate to the factor nor was it found by a jury beyond a reasonable doubt.

1) Sentencing--Habitual felon—Indictment--Order of convictions--Waiver of argument by guilty plea

State v. McGee, 175 N. C. APP. 586 (2006)

An habitual felon indictment was facially valid and defendant's guilty plea

waived his right to challenge the correctness of the information in the indictment. His guilty plea also waived his argument concerning a prior prayer for judgment continued and impermissible overlapping convictions under N.C.G.S. § 14-7.1 Even so, “conviction” refers to the factfinder's guilty verdict; defendant was “convicted” when he received the prayer for judgment continued. See Farb p21

2) Sentencing--Aggravating factors--Found by judge--Not alleged in indictment

State v Matthews, 175 N. C. APP. 550 (2006)

The trial court erred when sentencing defendant by imposing aggravated sentences based upon factors found by the judge rather than the jury. However, the argument that aggravating factors should have been alleged in the indictment has been rejected.

3) Sentencing--Concessions or stipulations--Waiver of constitutional right--Not sufficiently considered

State v Harris, 175 N. C. APP. 360 (2006)

A sentence was remanded where there was no discussion in the record that concessions or stipulations by defendant would be tantamount to a waiver of defendant's right to a jury trial under *Blakely v. Washington*, 542 U.S. 296, which was decided only six working days prior to defendant's resentencing hearing. The relevant inquiry is not whether defendant stipulated to the factual basis for an aggravating factor, but rather whether she effectively waived her constitutional right to a jury determination.

4) Sentencing--Aggravating factor--Failure to submit to jury--Blakely error

State v Pittman, 174 N. C. APP. 745 (2005)

The trial court erred in a first-degree kidnapping of a child, conspiracy to commit kidnapping, and attempted first-degree murder case by sentencing defendant on an aggravating factor that it found without submitting the factor to the jury, and the case is remanded for resentencing in accordance with *Blakely*, 542 U.S. 296 (2004), and *Allen*, 359 N.C. 425 (2005). However, defendant's argument that the aggravating factor should have been alleged in the indictment has already been rejected by *Allen*.

5) Sentencing--Aggravating factor--Blakely error

State v Oglesby, 174 N. C. APP. 658 (2005)

The trial court erred when sentencing defendant in the aggravated range for armed robbery by finding an aggravating factor where the facts on which the factor was based were neither presented to the jury, proved beyond a reasonable doubt, nor stipulated by defendant.

Sentencing--Aggravating factors--Failure to submit to jury--Blakely error - - Prob. Revocation

State v McMahan, 174 N. C. APP. 586 (2005)

The trial court erred by activating defendant's suspended sentences arising from embezzlement convictions when those sentences were unconstitutionally aggravated in violation of *Blakely v. Washington*, U.S. (2004), without defendant's stipulation or submission to and finding by the jury beyond a reasonable doubt, and the case is remanded for a new sentencing hearing. N.C. Gen. Stat. §15A-1446(d)(18) permits a review of sentencing errors even though the defendant failed to object at trial.

Sentencing--Aggravated range--Blakely error

State v Garcia, 174 N. C. APP. 498 (2005)

The trial court in a felonious breaking and entering case did not sentence defendant in the aggravated range in violation of his Sixth Amendment right to a jury trial because, contrary to defendant's assertion, his sentence falls within the presumptive range. Thus, the trial court's findings of aggravating factors not admitted by defendant or submitted to the jury did not violate *Blakely v. Washington*, 542 U.S. 296 (2004).

Sentencing--Aggravating factors--Failure to submit to jury--Blakely error

State v Massey, 174 N. C. APP. 216 (2005)

The trial court erred by imposing aggravated sentences on defendant for multiple counts of first-degree sexual offense with a child under thirteen, multiple counts of felonious sexual acts with a minor over whom he assumed the position of parent residing in the home, and multiple counts of indecent liberties by finding as an aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense without submitting this finding to the jury, and defendant is entitled to a new sentencing hearing.

Sentencing--Aggravating factor--Failure to submit to jury--Blakely error

State v Cruz, 173 N. C. APP. 689 (2005)

The trial court committed Blakely error in a driving while impaired case by sentencing defendant as a Level II offender on the basis of its finding of the grossly aggravating factor that defendant drove impaired with a child under the age of sixteen in the car, and the case is remanded for resentencing, because the aggravating factor was not submitted to a jury to be determined beyond a reasonable doubt.

Sentencing—Resentencing--Aggravated sentence--Blakely

State v. Harris, 360 NC 145 (2005)

The Court of Appeals holding that a second-degree rape and common law robbery case must be remanded to the trial court for resentencing on the basis of *Blakely v. Washington*, 542 U.S. 296 (2004) is affirmed. *Washington v. Recuenco*, (26 June 2006). US Sup Ct. The Court ruled that sentencing error under *Blakely v. Washington*, 542 U.S. 296 (2004), is not structural error and thus is subject to review by the standard of harmless error beyond a reasonable doubt.. [Author's note: The ruling in *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005) (Blakely error is structural error not subject to harmless error review) appears to be in direct conflict with this ruling.]

Sentencing--Aggravating factors--Blakely error--Jury finding required

State v Caudle, 172 N. C. APP. 261 (2005)

Any fact that increases the penalty beyond the presumptive range (other than the fact of a prior conviction) must be submitted to the jury and proven beyond a reasonable doubt. An assault defendant received a new sentencing hearing because the court itself found the aggravating factor that defendant had committed the offense while on pretrial release.

1) Sentencing--Aggravating factors--Blakely error--Jury finding required

State v Everette, 172 N. C. APP. 237 (2005)

Defendant's Sixth Amendment right to a jury trial was violated where the court unilaterally found aggravating factors without submitting them to the jury.

2) Sentencing--Aggravating factors--Right to jury determination--Harmless error rule not applicable

State v. Everette, 172 N. C. APP. 237 (2005)

The harmless error rule does not apply to sentencing errors which violate a defendant's Sixth Amendment right to a jury trial under Blakely.

3) Sentencing--Blakely error--Remand for resentencing

State v Everette, 172 N. C. APP. 237 (2005)

Although defendant argued that he could be resentenced after a Blakely error at no greater than the mitigated range since a mitigating factor was properly found, the proper procedure when appellate review reveals a Blakely error is simply to remand for resentencing.

Sentencing--Aggravating factors--Blakely error

State v Yarnell, 172 N. C. APP. 135 (2005)

The trial court erred by finding aggravating factors and sentencing defendant in the aggravating range for two counts of assault with a deadly weapon inflicting serious injury, because: 1) the aggravating factors that defendant committed the offense while on pretrial release on another charge and that defendant joined with more than one other person in committing the offense and was not charged with committing conspiracy were not prior convictions, the factors were not admitted by defendant, and the facts for these aggravating factors were not presented to a jury and proved beyond a reasonable doubt; and 2) the aggravating factor that defendant had previously been adjudicated delinquent does not constitute a prior conviction pursuant to N.C.G.S. § 7B-2412 and was neither presented to a jury and proved beyond a reasonable doubt nor admitted by defendant.

Sentencing--Prior record level enhancement--Factor not submitted to jury - No knowing stipulation or waiver--Blakely error

State v. Wissink, 172 N. C. APP. 829 (2005)

The trial court erred in enhancing defendant's sentence by adding a point to defendant's prior record level based upon a finding that defendant was on probation at the time he committed the crime without submitting the issue of defendant's probationary status to the jury for a finding beyond a reasonable doubt. Defendant did not knowingly stipulate his probationary status or waive his right to a jury trial on the issue when his attorney stated at the sentencing hearing that defendant was on probation and thus had a prior record level IV because the decisions of *Blakely v. Washington*, 542 U.S. 296, and *State v. Allen*, 359 N.C. 425, had not been issued at the time of defendant's trial and defendant was thus not aware of his right to have a jury determine the existence of a sentence enhancement.

1) Sentencing--Aggravating factor not submitted to jury--Blakely error

State v. Poore, 172 N. C. APP. 839 (2005)

The trial court erred in a felony breaking and entering case by sentencing defendant in the aggravated range without submitting to the jury the aggravating factor that the trial court found that defendant was armed with a deadly weapon at the time of the crime, and the case is remanded for resentencing.

2) Sentencing--Prior record level--Elements of present offense included in prior offense--Finding by trial court--No Blakely error

State v. Poore, 172 N. C. APP. 839 (2005)

Defendant is not entitled to resentencing in a felony breaking and entering case even though the trial court itself found pursuant to N.C.G.S. § 15A-1340.14(b)(6) that all the elements of the present offense are included in a prior offense, because: 1) neither *Blakely v. Washington*, 542 U.S. 296 (2004), nor *State v. Allen*, 359 N.C. 425 (2005), preclude the trial court from assigning a point in the calculation of one's prior record level where all the elements of the present offense are included in a prior offense; and 2) the exercise of assigning a point for the reason set forth in N.C.G.S. § 15A-1340.14(b)(6) is akin to the trial court's determination that defendant had in fact been convicted of certain prior offenses and is not something that increases the statutory maximum within the meaning of *Blakely* or *Allen*.

Sentencing--Presumptive range--Failure to submit aggravating factor to jury--Blakely error

State v Norris, 172 N. C. APP. 722 (2005) Rev'd 360 NC 507 (June 30, 2006)

The trial court erred in a first-degree arson case by failing to submit the aggravating factor to the jury that the offense created a great risk of death to more than one person even though it sentenced defendant in the presumptive range after balancing the aggravating and mitigating factors, and the case is remanded for resentencing, because: 1) the Court of Appeals is unable to speculate whether the jury would have found the aggravating factor found by the trial court; 2) assuming arguendo that the jury did not find the aggravating factor, the trial court would then be left to balance only the three mitigating factors it found; and 3) although the trial court would retain the discretion to sentence defendant in the presumptive range despite the presence of the mitigating factors, there is the possibility

that defendant might be sentenced in the mitigated range due to the absence of aggravating factors. Rev'd by Sup. Ct. 6-30-06

Sentencing – Aggravating factor – Victim suffered a serious injury that is permanent and debilitating--Blakely error--Aggravated sentence--right to a jury trial

State v. Bullock, 171 NC App 763 (2005)

The United States Supreme Court has held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be **submitted to a jury and proved beyond a reasonable doubt.**

Sentencing--Aggravated sentence based upon judicial findings of fact--Blakely error

State v. Hurt, 359 NC 840 (2005)

Defendant's motion for appropriate relief in a second-degree murder case is allowed because the trial court violated defendant's Sixth Amendment right to a jury trial in a second-degree murder case by imposing an aggravated sentence based upon judicial findings of aggravating factors, and the case is remanded to superior court for resentencing consistent with *State v. Allen, 359 N.C. 425 (2005)*.

1) Sentencing--Aggravating factors--Two prior DWI convictions

State v. Tedder, 169 N. C. APP. 446 (2005)

The trial court did not err by sentencing defendant for driving while impaired based upon its finding of two grossly aggravating factors which were not submitted to the jury because: 1) the case of *Blakely v. Washington, ___ U.S. ___ (2004)* specifically exempts aggravated sentences based upon prior convictions from its requirements; 2) the court found as grossly aggravating factors that defendant had two previous convictions for DWI committed within the preceding seven years of the date of the current offense and that at the time of the current offense she drove with a child under the age of sixteen years in the vehicle; 3) N.C.G.S. § 20-179(c) mandates that the trial court must impose the Level One punishment under subsection (g) if the judge determines that two or more grossly aggravating factors apply or if defendant has two prior impaired driving convictions within the 7 years preceding the offense; and 4) the finding of two prior convictions triggered the mandatory Level One sentence and the finding of another grossly aggravating factor had no impact on defendant's sentence.

2) Sentencing–Blakely error–Driving while impaired and manslaughter

State v. Speight, 359 NC 602 (2005)

Defendant received a new sentencing hearing for involuntary manslaughter and driving while impaired where the judge found an aggravating factor without a jury determination. The rationale of *State v. Allen, 359 N.C. ____ (1 July 2005)* (applying *Blakley v. Washington, ____ U.S. ____,* to North Carolina) applies to all cases in which a defendant is constitutionally entitled to a jury trial and a trial court has increased a defendant’s sentence beyond the presumptive range without submitting the aggravating factors to a jury. However, aggravating factors need not be alleged in the indictment.

3) Sentencing—Structured--Facts increasing punishment--Jury finding beyond a reasonable doubt--Indictment allegation not required

State v. Allen 359 NC 425 (2005)

Applied to North Carolina’s structured sentencing scheme, the rule of *Apprendi v. New Jersey, 530 U.S. 466,* and *Blakely v. Washington, ____ U.S. ____,* is that any fact other than a prior conviction that increases the penalty beyond the presumptive range must be submitted to a jury and proved beyond a reasonable doubt. The language of *State v. Lucas , 353 N.C. 568,* which defines “statutory maximum” in a manner inconsistent with this opinion is overruled, along with language requiring sentencing factors which might lead to a sentencing enhancement to be alleged in an indictment.

4) Sentencing--Blakely errors—Structural--Reversible per se

Blakely v. Washington errors arising under North Carolina’s Structured Sentencing Act are structural and therefore reversible per se. The harmless error rule does not apply because the jury’s findings have been vitiated in total. This holding applies to cases in which the defendants have not been indicted as of the certification date of this opinion and to cases that are now pending on direct review or are not yet final. [Author's note: The ruling in *State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (2005)* (Blakely error is structural error not subject to harmless error review) appears to be in direct conflict with this ruling.] ***See *Washington v. Recuenco, (26 June 2006). US Sup Ct.****