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Substantial Similarity of Prior Convictions from Other Jurisdictions

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By Jamie Markham

Under G.S. 15A-1340.14(e), a defendant's prior out-of-state convictions count by default as Class I felonies if the other jurisdiction classifies them as a felony, or as Class 3 misdemeanors if the other jurisdiction classifies them as a misdemeanor. The State or the defendant may, however, attempt to depart from those default classifications through a preponderance-of-the-evidence showing that the offense is "substantially similar" to a North Carolina offense with a different classification. For example, the State might try to show that a prior rape conviction from another State is substantially similar to first-degree rape in North Carolina, and should thus count as a Class B1 conviction (9 points) instead of the default Class I (2 points). Conversely, the defendant might attempt to show that a felony conviction from another state is similar to a misdemeanor in North Carolina. For defendants with significant out-of-state records, those substantial similarity determinations can have a big impact on prior record level.

A common sentencing error is a defendant's improper stipulation to the substantial similarity of prior convictions from other jurisdictions. The court of appeals has held many times that substantial similarity is a question of law that may not be validly stipulated to by the defendant. *See, e.g.*, State v. Hanton, 175 N.C. App. 250 (2006); State v. Palmateer, 179 N.C. App. 579 (2006); State v. Lee, 193 N.C. App. 748 (2008). Instead, the court must make a legal determination that the out-of-state conviction is indeed substantially similar to a North Carolina crime with a particular offense classification. There is a check-box near the bottom of the front page of the prior record level worksheet (AOC-CR-600) for the court to indicate that it has made the requisite finding. No findings are required if the parties are content to count the out-of-state crimes at the default levels described in the first paragraph above. A defendant may stipulate to the existence of the prior conviction and even to its classification in the other jurisdiction as a felony or misdemeanor, State v. Bohler, 198 N.C. App. 631 (2009), but not to substantial similarity. I discussed the issue in this prior post.

How should the court go about making its legal determination of substantial similarity? The General Statutes do not say, but cases from the appellate courts offer pretty clear guidance: the court should review copies of the out-of-state criminal law and compare the elements of the out-of-state offense to those of the purportedly similar North Carolina offense. State v. Hanton, 175 N.C. App. 250 (2006); *see also* State v. Rich, 130 N.C. App. 113 (1998) (holding that photocopies of statutes from New York and New Jersey were sufficient proof that the defendant's crimes in those states were substantially similar to crimes in North Carolina); State v. Hadden, 175 N.C. App. 492 (2006) (photocopies of statutes from New York and Illinois, along with testimony by a detective, sufficient to prove substantial similarity). *Cf.* State v. Burgess, __ N.C. App. __ (Sept. 20, 2011) (remanding for resentencing when the defendant's South Carolina crimes were identified only by "brief and non-specific descriptions" and the State failed to show that the 2008 copies of the law were unchanged from the 1993 and 1994 versions under which the defendant had been convicted); State v. Cao, 175 N.C. App. 434 (2006) (computerized printout of defendant's criminal history record from Texas, showing only the names of offenses committed there, sufficient to prove existence of the convictions but insufficient evidence of substantial similarity to North Carolina crimes); State v. Morgan, 164 N.C. App. 298 (2004) (remanding for resentencing when the State presented a copy of the 2002 New Jersey homicide statute but offered no evidence that the statute was unchanged from the 1987 version of the law under which the defendant was convicted).

Even with copies of another state's laws in hand the comparison will not always be easy. In State v. Rollins, __ N.C. App. __ (July 17, 2012), the trial court found that the defendant's Florida burglary conviction was substantially similar to a Class G second-degree burglary in North Carolina and should thus count for 4 points instead of the default 2 points for a Class I. The court of appeals disagreed, holding that the Florida crime was not sufficiently similar to the crime we call "burglary" here. Unlike North Carolina burglary, the Florida crime need not occur at night and does not require both a breaking and an entering. The appellate court concluded that the

Florida crime is, at most, substantially similar to North Carolina's Class H felonious breaking or entering and should thus count for no more than 2 prior record points. If an out-of-state crime has elements that are substantially similar to multiple North Carolina offenses, the rule of lenity requires that the court assign record points corresponding to the less serious North Carolina offense. *Hanton*, 175 N.C. App. at 259 (holding that New York second-degree assault was more similar to North Carolina simple assault than to assault inflicting serious injury).

With these cases in mind, the party arguing for substantial similarity should be prepared to offer a copy of the relevant out-of-state law and, to be safe, probably also any lesser offenses that might be even more similar. Stipulations obviously should be avoided. The court should review those statutes and announce its determination accordingly.

Wouldn't it be nice if every state had a resource substantially similar to *North Carolina Crimes*?

Tags: out of state convictions, prior record level, prior record points, Sentencing, substantial similarity

This entry was posted on Wednesday, August 29th, 2012 at 1:15 PM and is filed under Sentencing, Uncategorized. You can follow any responses to this entry through the RSS 2.0 feed. You can leave a response, or trackback from your own site.

2 Responses to "Substantial Similarity of Prior Convictions from Other Jurisdictions"

1. *wilbunch* says:

   August 29, 2012 at 5:55 PM

   In Michigan csc3 is the term used for statutory rape. Until recently there was no consideration given for age gaps. So there are people in prison and on the sex registry for cpnsensual sex as a teen with a person one, two, three years younger. North Carolina's statutory rape laws begin at 4-6years or at least 6years older as I read it. Now, with that in mind, can Michigan's statutory rape law be considered substantially similar to North Carolina's? Also, recently Mi finally enacted Romeo & Juliet exemptions from the sex registry. As of july 1st 2011 persons that were convicted of these crimes were no longer required to register. So if a person moves to NC, would they have to register in NC with those two prongs being addresed?

   Reply

2. *Bryan Gates* says:

   August 30, 2012 at 3:01 PM

   I think it is odd how the statute requires the judge to apply the "preponderance of the evidence" standard to the resolution of a question of law.

   Reply

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