

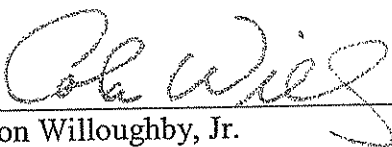
10. That on information and belief, Crouch, through some unknown means caused the official court file to be brought to Judge Gregory's courtroom and he gave the file to Flythe.
11. That Crouch represented to Flythe on two occasions that her supervisor, assistant district attorney Steven Saad (Saad) had agreed to calendar the defendant's case for hearing on that date. Flythe told Judge Gregory that Crouch had told her that he had approval from Saad to hear the case on that date. Crouch also represented to Judge Gregory that Saad had agreed to hear the case.
12. That on the morning of January 20, 2012 Saad was in a program of continuing legal education and on that afternoon he was on vacation and was not in the Wake County Courthouse and had not agreed to calendar the defendant's case for hearing or trial.
13. That there is no documentation of a request, commonly referred to as a "gold sheet", signed by an assistant district attorney in the official court file of this case.
14. That Crouch gave Flythe 2 pages of the 10 page police report and represented to her that the 2 pages were the police report.
15. That Flythe went to her laptop computer in the courtroom and accessed the report of defendant's arrest and discovered that it was 10 pages long and included relevant information that was not provided to her by Crouch.
16. That the report included additional information, including the fact that a 17 year old passenger was in the vehicle the defendant was operating at the time of his arrest.
17. That under North Carolina law, effective December 1, 2011, if there is a passenger under the age of 18 present in the vehicle operated by an impaired driver, that circumstance is a grossly aggravating factor and the defendant is to be sentenced as a Level 1 offender to a minimum of 30 days active imprisonment.
18. That the defendant was present in Court on January 20, 2012, and appeared with Crouch and entered a plea of guilty to impaired driving.
19. That during the sentencing hearing Flythe informed Judge Gregory that a grossly aggravating factor existed, to wit: that a passenger under 18 was in the vehicle at the time it was being operated by the defendant.
20. That Judge Gregory summoned Crouch and Flythe into his chambers.
21. That in chambers Crouch told Judge Gregory that the defendant was the son of a lawyer.
22. That in chambers Crouch told Judge Gregory that the State did not have witnesses present to prove the grossly aggravating factor that there was a passenger under the age of 18 in the vehicle.
23. That in chambers Crouch told Judge Gregory that he would stipulate that the defendant be sentenced as a Level 3 offender.
24. That Flythe did not stipulate that the defendant be sentenced as a Level 3 offender.

25. That the in chambers meeting was concluded and Crouch, Flythe and Judge Gregory returned to the courtroom. Flythe offered the grossly aggravating factor that there was a passenger under 18 in the car. Judge Gregory proceeded to sentence the defendant as a Level 3 offender and found as a fact that it was stipulated that the offender was a Level 3 and that the State could not prove the aggravating factor. A copy of portions of the judgment is attached as Exhibit 1.
26. That the case was not properly set for trial or hearing by the district attorney.
27. That North Carolina General Statutes Chapter 7A-61 authorizes the district attorney to set the trial calendar and in this case the district attorney had not set the case for trial or hearing.
28. That the representations by Crouch to Judge Gregory and Flythe that her supervisor Saad had agreed to add the case to the docket on January 20, 2012 were false and were misleading.
29. That Flythe would not have added the case to the docket and presented it to Judge Gregory in that courtroom on January 20, 2012 if she had known that the representation was false.
30. That as a result of the false representation this case was not properly calendared for trial or hearing on January 20, 2012.
31. That the judgment entered by Judge Gregory was not a proper judgment in keeping with the law of North Carolina and should be set aside.

WHEREFORE, the State prays that:

1. That the judgment in this case be set aside and the defendant's plea be stricken and this case be returned to pending status.
2. That in the alternative, that an evidentiary hearing be held to determine whether the State is entitled to the relief sought.
3. That in the alternative, this be considered notice of appeal of a judgment entered in error.

This the 30th day of January, 2012.



Colon Willoughby, Jr.
District Attorney

Service on: James Crouch
Duncan McMillan
Thomas Manning

STATE OF NORTH CAROLINA

File No.

10228533

WAKE

County

In The General Court Of Justice

District Superior Court Division

STATE VERSUS

Name Of Defendant

Henry Horne

IMPAIRED DRIVING
DETERMINATION OF SENTENCING FACTORS
(For Offenses Committed On Or After Dec. 1, 2011)

G.S. 20-179

- District Court:** Based upon the evidence presented at the trial and sentencing hearing in District Court, the Court determines that (1) the State has proved the grossly aggravating factors and aggravating factors marked below beyond a reasonable doubt and (2) the defendant has proved the mitigating factors marked below by a preponderance of the evidence.
- Superior Court:** Based upon the evidence presented at the trial and sentencing hearing in Superior Court, (1) the jury has determined that the State has proved the grossly aggravating factors and aggravating factors marked below beyond a reasonable doubt, or the defendant has admitted to these grossly aggravating factors and aggravating factors, and (2) the Court determines that the defendant has proved the mitigating factors marked below by a preponderance of the evidence. If grossly aggravating factor No. 1.a., 1.b., 1.c., 1.d., 1.e., or 1.f. is marked below, the Court determines that the State has proved that grossly aggravating factor beyond a reasonable doubt. If aggravating factor No. 8 or 9 is marked below, the Court determines that the State has proved that aggravating factor beyond a reasonable doubt.

I. GROSSLY AGGRAVATING FACTORS - G.S. 20-179(c)

(NOTE: Either Nos. 1 and 2 or No. 3 apply in each case except aiders and abettors. If No. 1 is checked, No. 2.a., 2.b., or 2.c. must also be checked.)

- 1. The defendant
 - a. has been convicted of a prior offense involving impaired driving which conviction occurred within seven (7) years before the date of this offense.
 - b. has two three or more convictions as described in No. 1.a.
 - c. has been convicted of an offense involving impaired driving which conviction occurred after the date of the offense for which the defendant is being sentenced but before or contemporaneously with the sentencing in this case.
 - d. has two three or more convictions as described in No. 1.c.
 - e. has a prior conviction in District Court for an offense involving impaired driving, the conviction was appealed to Superior Court, the appeal has been withdrawn or the case has been remanded back to District Court, and a new sentencing hearing for the case has not been held pursuant to G.S. 20-38.7.
 - f. has two three or more convictions as described in No. 1.e.
 - g. drove, at the time of the current offense, while the defendant's drivers license was revoked under G.S. 20-28 and the revocation was an impaired driving revocation under G.S. 20-28.2(a).
 - h. caused, by the defendant's impaired driving at the time of the current offense, serious injury to another person.
 - i. drove, at the time of the current offense, while a child under the age of 18 years was in the vehicle.
 - j. drove, at the time of the current offense, while a person with the mental development of a child under the age of 18 years was in the vehicle.
 - k. drove, at the time of the current offense, while a person with a physical disability preventing unaided exit from the vehicle was in the vehicle.
- 2. Therefore, the following level of punishment shall be imposed:
 - a. **Aggravated Level One** punishment, because three or more grossly aggravating factors in No. 1 apply to this defendant. (NOTE: Each prior conviction is a separate grossly aggravating factor.)
 - b. **Level One** punishment, because
 - grossly aggravating factor No. 1.i., 1.j., or 1.k. applies to this defendant.
 - two and only two grossly aggravating factors in No. 1 (other than grossly aggravating factor No. 1.i., 1.j., or 1.k.) apply to this defendant.
 (NOTE: Each prior conviction is a separate grossly aggravating factor.)
 - c. **Level Two** punishment, because only one grossly aggravating factor in No. 1 (other than grossly aggravating factor No. 1.i., 1.j., or 1.k.) applies to this defendant.

- 3. There are no grossly aggravating factors.

II. AGGRAVATING AND MITIGATING FACTORS - G.S. 20-179(d) AND (e)

AGGRAVATING FACTORS - G.S. 20-179(d):

(NOTE: Except for the factors in subdivisions 8 and 9 below, the conduct constituting the aggravating factor must occur during the same transaction or occurrence as this impaired driving offense.)

- 1. The defendant's faculties were grossly impaired at the time the defendant was driving.
- 2. The defendant had an alcohol concentration of at least 0.15 within a relevant time after the driving.
- 3. The driving of the defendant was especially reckless.
- 4. The driving of the defendant was especially dangerous.
- 5. The negligent driving of the defendant led to an accident causing property damage of \$1,000.00 or more, or property damage of any amount to a vehicle seized pursuant to G.S. 20-28.3.
- 6. The negligent driving of the defendant led to an accident causing personal injury.
- 7. The defendant was driving while the defendant's drivers license was revoked.

Original - File

Material opposite unmarked squares is to be disregarded as surplusage.

(Over)

- 8. The defendant had at least two prior convictions of a motor vehicle offense not involving impaired driving, which occurred within five (5) years of this offense, and
 - a. all were offenses for which at least three (3) points were assigned under G.S. 20-16.
 - b. all were offenses for which the defendant's drivers license was subject to revocation.
 - c. at least one was an offense for which at least three (3) points were assigned under G.S. 20-16 and at least one was an offense for which the defendant's drivers license was subject to revocation.
- 9. The defendant had at least one prior conviction of an offense involving impaired driving that occurred more than seven (7) years before the date of this offense.
- 10. The defendant has been convicted under G.S. 20-141.5 of speeding while fleeing or attempting to elude apprehension.
- 11. The defendant has been convicted under G.S. 20-141 of speeding by at least 30 m.p.h. over the legal limit.
- 12. The defendant passed a stopped school bus in violation of G.S. 20-217.
- 13. Additional factors that aggravate the seriousness of this offense:

14. There are no aggravating factors.

MITIGATING FACTORS - G.S. 20-179(e):

NOTE: Except for the factors in subdivisions 4, 6, and 7 below, the conduct constituting the mitigating factor must occur during the same transaction or occurrence as this impaired driving offense.

- 1. There was a slight impairment of the defendant's faculties resulting solely from alcohol; and, the defendant's alcohol concentration did not exceed 0.09 at any relevant time after the driving.
- 2. There was a slight impairment of the defendant's faculties resulting solely from alcohol; and, no chemical test was made available to the defendant.
- 3. The driving of the defendant was safe and lawful except for the impairment of the defendant's faculties.
- 4. The defendant has a safe driving record, having no convictions of any motor vehicle offense for which at least four points are assigned under G.S. 20-16 or for which the defendant's license is subject to revocation within five (5) years of the date of this offense.
- 5. The impairment of the defendant's faculties was caused primarily by a lawfully prescribed drug for an existing medical condition, and the amount of the medical drug taken was within the prescribed dosage.
- 6. After being charged in this case with impaired driving, the defendant voluntarily submitted himself/herself to a mental health facility for assessment and has voluntarily participated in any treatment recommended by such facility, if such treatment was recommended.
- 6a. The defendant completed a substance abuse assessment, complied with its recommendations, and simultaneously maintained 60 days of continuous abstinence from alcohol consumption, as proven by a continuous alcohol monitoring system of a type approved by the Department of Correction.
- 7. Additional factors that mitigate the seriousness of this offense:

polite/cooperative

stipulated level 3 the state cannot prove beyond a reasonable doubt

8. There are no mitigating factors.

DETERMINATION - G.S. 20-179(f): *the aggravating fact (letter c)*
 (NOTE: Check only one.)

- 1. The aggravating factors marked above substantially outweigh any mitigating factors marked above. Therefore, Level Three punishment shall be imposed.
- 2. There are no aggravating or mitigating factors. Therefore, Level Four punishment shall be imposed.
- 3. The aggravating factors marked above are substantially counterbalanced by the mitigating factors marked above. Therefore, Level Four punishment shall be imposed.
- 4. The mitigating factors marked above substantially outweigh any aggravating factors marked above. Therefore, Level Five punishment shall be imposed.
- 5. No findings of mitigating or aggravating factors were made because the defendant is an aider and abettor. Therefore, Level Five punishment shall be imposed.

Date <i>1/20/12</i>	Name Of Presiding Judge (Type Or Print) <i>Rjm</i>	Signature Of Presiding Judge <i>[Signature]</i>
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STATE OF NORTH CAROLINA

File No. 11CR 228 533

WAKE County RALEIGH Seat of Court

(NOTE: Except in cases involving a violation of both G.S. 20-138.1 and 138.2, this form should be used for only one DWI conviction, and no other offense should be consolidated for judgment with the DWI offense.)

In The General Court Of Justice
[X] District [] Superior Court Division

STATE VERSUS

Name Of Defendant: Henry S. Horne
Race: W Sex: M Drivers License Nn. State: NC Date Of Birth: 4/14/95

IMPAIRED DRIVING - JUDGMENT SUSPENDING SENTENCE

(For Offenses Committed On Or After Dec. 1, 2011)

Date Of Offense: 12/10/11 Attorney For State: Flythe Attorney For Defendant: Croach
[] Def. Found Not Indigent [] Def. Waived Attorney [] Appointed [] Retained

Offense: [X] Impaired Driving (G.S. 20-138.1) [] Impaired Driving in a commercial vehicle (G.S. 20-138.2) [] Operating a commercial vehicle after consuming alcohol...

The defendant [] pled guilty [] pursuant to Alford to [] was found guilty by the Court of [] was found guilty by a jury of [] pled no contest to the offense specified above.

[] Aggravated Level One. [] Level One. [] Level Two. [X] Level Three. [] Level Four. [] Level Five.
The Court, having considered evidence, arguments of counsel and statement of defendant, ORDERS that defendant be imprisoned for a minimum term of 120 days for a maximum term of 120 days in the custody of the N.C. Department of Correction.

[] This sentence shall run at the expiration of sentence imposed in file number
The defendant shall be given credit for [] days spent in confinement prior to the date of this Judgment as a result of this charge [] and as an inpatient at a facility operated or licensed by the State for the treatment of alcoholism or substance abuse after the commission of the above offense.

SUSPENSION OF SENTENCE

Subject to the conditions set out below, the execution of this sentence is suspended and the defendant is placed on [X] unsupervised probation for 12 months. [] supervised probation for [] months, the Court having received evidence and having found as a fact that supervision is necessary.

SPECIAL PROBATION - G.S. 15A-1351

[] As a condition of special probation, the defendant shall [] serve an active term of [] days [] months in the custody of the [] N.C. DOC. [] Sheriff of this County. [] pay jail fees.
The defendant shall report in a sober condition to begin serving this term on: [] Day [] Date [] Hour [] AM and shall remain in custody until: [] Day [] Date [] Hour [] AM [] PM
[] The defendant shall again report in a sober condition to continue serving this term on the same day of the week for the next [] consecutive weeks, and shall remain in custody during the same hours each week.
[] The defendant shall serve the active term above as an inpatient in (Name treatment facility) [] and shall follow the rules of that facility until discharged and not leave its premises except as authorized under those rules.

MONETARY CONDITIONS

The defendant shall pay to the Clerk of Superior Court the "Total Amount Due" shown below, plus the probation supervision fee, pursuant to a schedule [] determined by the probation officer. [] set out by the court as follows:

Table with columns: Costs (\$190), Fine (\$100), Restitution (\$100), Attorney's Fees (\$), Community Service Fee (\$250.00), EHA Fee/CAM Fee (\$), Miscellaneous (\$), Total Amount Due (\$640)

NOTE: In addition to all other costs, G.S. 7A-304(a)(10) requires a fee of \$100.00 for a conviction of any of the four offenses sentenced on this form.
*See attached "Restitution Worksheet, Notice And Order (Initial Sentencing)" AOC-CR-611, which is incorporated by reference.
[] The Court finds just cause to waive costs.
[] Upon payment of the "Total Amount Due," the probation officer may transfer the defendant to unsupervised probation.

REGULAR CONDITIONS OF PROBATION - G.S. 15A-1343(b)

NOTE: Any probationary judgment may be extended pursuant to G.S. 15A-1342. The defendant shall: (1) Commit no criminal offense in any jurisdiction. (2) Possess no firearm, explosive device or other deadly weapon listed in G.S. 14-269. (3) Remain gainfully and suitably employed or faithfully pursue a course of study or vocational training, that will equip the defendant for suitable employment, and abide by all rules of the institution. (4) Satisfy child support and family obligations, as required by the Court. (5) Not abscond, if the defendant is on supervised probation, the defendant shall also: (6) Remain within the jurisdiction of the Court unless granted written permission to leave by the Court or the probation officer. (7) Report as directed by the Court or the probation officer to the officer at reasonable times and places and in a reasonable manner, permit the officer to visit at reasonable times, answer all reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment. (8) Notify the probation officer if the defendant fails to obtain or retain satisfactory employment. (9) Submit at reasonable times to warrantless searches by a probation officer of the defendant's person and of the defendant's vehicle and premises while the defendant is present, for purposes directly related to the probation supervision, but the defendant may not be required to submit to any other search that would otherwise be unlawful. (10) Submit to warrantless searches by a law enforcement

officer of the defendant's person and of the defendant's vehicle, upon a reasonable suspicion that the defendant is engaged in criminal activity or is in possession of a firearm, explosive device, or other deadly weapon listed in G.S. 14-269 without written permission of the court. (11) Not use, possess, or control any illegal drug or controlled substance unless it has been prescribed for the defendant by a licensed physician and is in the original container with the prescription number affixed on it; not knowingly associate with any known or previously convicted users, possessors, or sellers of any such illegal drugs or controlled substances; and not knowingly be present at or frequent any place where such illegal drugs or controlled substances are sold, kept, or used. (12) Supply a breath, urine, or blood specimen for analysis of the possible presence of prohibited drugs or alcohol when instructed by the defendant's probation officer for purposes directly related to the probation supervision. If the results of the analysis are positive, the probationer may be required to reimburse the Department of Correction for the actual costs of drug or alcohol screening and testing. If the defendant is to serve an active sentence as a condition of special probation, the defendant shall also: (13) Obey the rules and regulations of the Department of Correction governing the conduct of inmates while imprisoned. (14) Report to a probation officer in the State of North Carolina within seventy-two (72) hours of the defendant's discharge from the active term of imprisonment.

SPECIAL CONDITIONS OF PROBATION - G.S. 15A-1343(b1); 20-179

- 15. Obtain a substance abuse assessment and all recommended education or treatment. *Completed*
- 16. Surrender the defendant's drivers license to the Clerk of Superior Court for transmittal/notification to the Division of Motor Vehicles; and not operate a motor vehicle until the defendant's driving privilege is restored by that Division, except as may be permitted in a limited privilege.
- 17. Complete 72 hours of community service during the first 180 days of the period of probation, as directed by the judicial service coordinator. The fee prescribed by G.S. 143B-262.4 is
 - not due because it is assessed in a case adjudicated during the same term of court.
 - to be paid pursuant to the schedule set out under Monetary Conditions above within _____ days of this Judgment and before beginning service.
- 18. Abstain from alcohol consumption for _____ days, _____ months, as verified by a continuous alcohol monitoring system of a type approved by the Department of Correction. The defendant shall pay to the Clerk the fees associated with the system.
- 19. Other: Not to drive until properly licensed by DMV
- 20. Comply with the Additional Conditions of Probation which are set forth on AOC-CR-603C, Page Two, attached.

[Check any that apply - G.S. 20-179(r)]

- The probation officer may transfer the defendant to unsupervised probation upon completion of _____ the community service required by Special Condition No. 17 above. payment of all fines, costs and fees required above.

SPECIAL ALCOHOL CONCENTRATION FINDING

- The defendant's alcohol concentration was 0.15 or greater.
- Other: _____

ORDER OF COMMITMENT/APPEAL ENTRIES

- 1. It is ORDERED that the Clerk deliver two certified copies of this Commitment on Special Probation to the sheriff or other qualified officer and that the officer cause the defendant to be delivered with these copies to the custody of the agency named on the reverse to serve the sentence imposed or until the defendant shall have complied with the conditions of release pending appeal.
- 2. The defendant gives notice of appeal from the judgment of the District Court to the Superior Court. The current pretrial release order is modified as follows:
NOTE: Upon notice of appeal, the District Court sentence is vacated. Withdrawal of appeal or remand to District Court requires that a new sentencing hearing be scheduled.
- 3. The defendant gives notice of appeal from the judgment of the Superior Court to the appellate division. Appeal entries and any conditions of post conviction release are set forth on form AOC-CR-350.

SIGNATURE OF JUDGE

Date	Name Of Presiding Judge (Type Or Print)	Signature Of Presiding Judge
1/20/12	<i>Kam</i>	<i>[Signature]</i>

CERTIFICATION

I certify that this Judgment and the attachment(s) marked below are true and complete copies of the originals.

- 1. Determination Of Sentencing Factors (AOC-CR-311, Rev. 12/11)
- 2. Judgment Suspending Sentence (AOC-CR-603C, Page Two) (additional conditions of probation)
- 3. Restitution Worksheet, Notice And Order [Initial Sentencing] (AOC-CR-611)
- 4. Other: _____

Date	Date Certified Copies Delivered To Sheriff	Signature Of Clerk	<input type="checkbox"/> Deputy CSC <input type="checkbox"/> Assistant CSC <input type="checkbox"/> CSC
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NOTE TO CLERK: If the defendant's conviction is based on a violation of an offense involving impaired driving while the defendant's drivers license is revoked as a result of a prior impaired driving license revocation as defined in G.S. 20-28.2, report DWI Defendant Registration Stop to DMV using menu item #9 in STARS. Also report the defendant's conviction to DMV in the usual manner. If there is a non-defendant vehicle owner, report registration stop to DMV using menu item #10 in STARS (unless the owner has been found to be an innocent owner).