

SENTENCING AND JAIL CREDIT ISSUES

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JAIL CREDIT STATUTES

§ 15-196.1 Credits allowed

“The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be calculated from the date custody under the charge commenced and shall include credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole, probation or post-release supervision revocation hearing: Provided, however, the credit available herein shall not include any time that is credited on the term of a previously imposed sentence to which the defendant is subject.”

Comment: A defendant is entitled to jail credit for periods of confinement prior to his conviction (or probation revocation) as long as the defendant was not serving another sentence during the same time period. A defendant stops earning credit when he begins serving his active sentence.

§ 15-196.2 Allowances in cases of multiple sentences

“In the event time creditable under this section shall have been spent in custody as the result of more than one pending charge, resulting in imprisonment of more than one offense, credit shall be allowed as herein provided. Consecutive sentences shall be considered as one sentence for the purpose of providing credit, and the creditable time shall not be multiplied by the number of consecutive offenses for which a defendant is imprisoned. Each concurrent sentence shall be credited with so much of the time as was spent in custody due to the offense resulting in the sentence. When both concurrent and consecutive sentences are imposed, both of the above rules shall obtain to the applicable extent.”

Comment: If the defendant receives concurrent sentences, each sentence is to be reduced for periods of confinement on charges that brought about the sentence. If a defendant receives consecutive sentences, any period the defendant was confined for more than one of the consecutive sentences is to be counted only once as credit toward the entire string of sentences.

Calculating Jail Credit

Jail credit is computed by excluding the first day and including the last. See *State v. Richardson*, 245 S.E.2d 754 (1978). The day of conviction date is not counted as jail credit because sentences begin on the date of conviction. N.C. Gen. Stat. § 15A-1353.

To determine the amount of jail credit a defendant will receive on his/her sentence or sentences you must answer two questions:

1. Is the defendant entitled to jail credit?
 - Was the defendant confined?
 - In a state or local facility?
 - On the charge he was convicted of?
 - Was the credit applied to a previously imposed sentence?

2. How will the jail credit be applied to his/her sentences?
 - Concurrent sentences
 - Consecutive
 - Concurrent and consecutive

1. IS THE DEFENDANT ENTITLED TO JAIL CREDIT?

- Was the defendant confined?

YES –

DART-Cherry – *State v. Lutz*, 177 N.C. App. 140, 628 S.E.2d 34 (2006).

IMPACT – *State v. Hearst*, 356 N.C. 552, 444 S.E.2d 124 (2002).

Split sentence/special probation – *State v. Farris*, 336 N.C. 552, 444 S.E.2d 182 (1994).

NO –

House arrest – *State v. Jarman*, 140 N.C. App. 198, 535 S.E. 2d 875 (2000).

Ex. 1. Defendant was held for 30 days prior to conviction. Upon conviction, he is given a 30 day split sentence and then 3 years of supervised probation. His probation is revoked. He was not held in jail prior to his probation revocation. How much jail credit is he entitled to upon revocation if

- a) The judge used his pre-trial confinement to satisfy the split sentence?

30 days – the jail credit was used to satisfy the split sentence and defendant gets credit for the split sentence.

- b) The judge did not give him the credit and he had to serve the 30 days?

60 days – credit for the split sentence and pretrial confinement.

- In a state or local facility?

YES –

County jail

Jail in another State – Defendants are entitled to credit for time spent in an out-of-state jail only if he was held solely on the North Carolina charge of which he is to be sentenced. The

defendant is not entitled to the credit if he was held under a NC charge and out-of state charge unless the out-of-state charge was dismissed. *Childers v. Laws*, 558 F. Supp. 1284 (W.D.N.C. 1983).

- Mental Hospital for pre-trial evaluation
- DART-Cherry
- Juvenile facility – IMPORTANT to take care of this at time of sentencing because records may be destroyed or transferred to Raleigh once defendant turns 18.

NO –

TROSA or Private rehabilitation facilities – Statute §15-196.1 includes only time spent in custody in “State” institutions. See *Childers v. Laws*, 558 F. Supp. 1284 (W.D.N.C. 1983).

Civil commitment to a mental hospital after defendant is found incompetent. – NCPLS litigated this issue. MAR was denied and Court of Appeals did not grant cert. petition. The State argued that defendant was civilly committed and therefore, not being held because of the charge. However, some attorneys have had trial judges grant this credit.

- On the charge he was convicted of?

Ex. 2. Defendant was arrested on January 1 for Attempted First-degree Murder and Assault With a Deadly Weapon Intent to Kill Inflicting Serious Injury. On January 2, defendant makes bond on assault charge, but remains in jail because he has not made bond on attempted murder charge. On June 1, he makes bond on the attempted murder charge. On August 1, he is convicted on assault charge. How much jail credit is he entitled to?

1 day. He was only held on the charge he was convicted of – assault – for one day.

- Was the credit applied on a previously imposed sentence?

*If a defendant serves a misdemeanor sentence in the county jail while awaiting conviction on another charge, upon conviction the days that he served the misdemeanor sentence cannot be credited to his sentence.

Ex. 3 Defendant was arrested on March 1 for Possessing Stolen Goods and Possession of Cocaine. He was convicted of both charges on May 11, 70 days later, and received 10 – 12 months in the DOC under the Possession of Cocaine charge. The judge ordered the defendant to serve 70 days in jail under the Possessing Stolen Goods charge, and the 70 days was counted as time-served. How much jail credit should he receive on the Possession of Cocaine charge?

None. The credit was used on a prior sentence of which he has already served.
N.C. Gen. Stat. §15-196.1.

*If a defendant is held on two charges, convicted on two separate dates, and he received jail credit on the first sentence, the Judge may refuse to give him credit on the second even if the charges are running concurrently because the credit was granted on a previously imposed sentence. NCPLS litigated this issue in Guilford County. We lost on the MAR and the Court of Appeals denied our cert. petition.

Ex. 4. On July 1, Defendant was arrested on Possession of Stolen Goods and an old DWI charge. On September 1, defendant was convicted of Possession of Stolen Goods and given 61 days of jail credit. On September 15, he was convicted of DWI and the Judge ordered the sentence to run concurrently to the sentence for Possession of Stolen Goods. How much jail credit is defendant entitled to on the DWI conviction?

Depends on the county. Some counties will give the defendant 61 days jail credit because the defendant was held on the DWI and it's running concurrently with the Possession of Stolen Goods. N.C. Gen. Stat. §15-196.2 Some counties may not want to grant the credit because the time was given on a previously imposed sentence. Where the subsequent concurrent sentence is imposed within a relatively short period of time after the initial sentence, we do ask for the credit to be applied to the subsequent sentence. We base our request on fundamental fairness. See *Williams v. Hayes*, 846 F.2d 6 (4th Cir.1988) (fundamental fairness requires that jail credit which relates to two sentences be applied against sentence from which prisoner would derive some benefit).

Defendant is not entitled to jail credit from September 1 to 15, because at that point he was serving his sentence for Possession of Stolen Goods.
N.C. Gen. Stat. §15-196.1

HOW WILL THE CREDIT BE APPLIED TO HIS/HER SENTENCES?

- Concurrent sentences

If defendant receives concurrent sentences each sentence is credited for the amount of time he was held on that charge. If the defendant was held longer on one charge than another, it is better to consolidate the convictions into one judgment than to run them concurrently.

Ex. 5. Defendant is arrested for a Breaking and Entering charge on July 1. On September 1, she is served with a Larceny charge. On November 1, she is convicted of both. How much jail credit does she receive if

a) she receives two concurrent sentences?

122 days on Breaking and Entering
60 days on Larceny

b) the two convictions are consolidated into one judgment?

122 days.

- Consecutive sentences

If defendant receives consecutive sentences, the sentences are considered one sentence for the purpose of providing jail credit. All *shared* confinement is counted once toward all consecutive sentences.

Ex. 6. Defendant is held for 55 days on Breaking and Entering and Larceny before being convicted. How much jail credit does the defendant entitled to if she

a) receives two concurrent sentences?

55 days on Larceny
55 days on Breaking and Entering

b) receives two consecutive sentences?

55 days on **either** the Larceny **or** the Breaking and Entering.

Ex. 7. Defendant is arrested for Breaking and Entering on January 1. On February 1, while in jail for Breaking and Entering, he is served with an arrest warrant for Larceny. He is convicted on March 1. How much jail credit is he entitled to if he

a) receives concurrent sentences?

Breaking and Entering: January 1 to February 28 = 58 days
Larceny: February 1 to February 28 = 27 days

b) receives consecutive sentences?

58 days on either the B & E or Larceny

Ex. 8. The defendant was arrested on January 1, 2002 for manslaughter and reckless driving. On December 31, 2002, he received an active prison sentence for manslaughter. The judge ordered the defendant to serve probation for reckless driving immediately after his active prison sentence. The judge orders the 363 days of jail credit to be applied to the probation sentence. Is this a legal sentence?

Yes. The probation sentence is consecutive to the active sentence. Therefore, the jail credit can be applied to either. If the probation sentence is revoked he will get 363 days of credit. However, defense counsel should actively and strongly request for the 363 days to be applied to the active portion of the sentence based on fundamental fairness, *Williams v. Hayes*, 846 F.2d 6 (4th Cir.1988) (fundamental fairness requires that jail credit which relates to two sentences be applied against sentence from which prisoner would derive some benefit).

- Concurrent and consecutive sentences

“When both concurrent and consecutive sentences are imposed, both of the above rules shall obtain to the applicable extent.”
N.C.G.S. § 15-196.2

Ex. 9 On March 1, 2003 and March 20, 2003, Defendant committed the offenses of Larceny and Possession of Schedule II. He was arrested on March 20, 2003 and released on bond on May 9, 2003. He was arrested again on July 24, 2003 for Breaking and Entering and on the previous Larceny charge. He was released on July 31, 2003. On October 6, 2003, he received a 60 day split-sentence in the County jail and 36-48 months on probation under the Larceny and Breaking and

Entering. His sentence was modified on February 1, 2004. He was ordered to the DART-Cherry program. He remained in the County jail until he was transferred to DART-Cherry. On December 13, 2005, he was arrested for assault and the previous Larceny and B & E charges. He received an active sentence on all three convictions on January 9, 2006.

<u>Offense</u>	<u>Arrested</u>	<u>Released</u>	<u># of days</u>
1. Larceny	03/20/03	05/09/03	50
2. B & E + 1	07/24/03	07/31/03	07
3. 1 + 2	10/06/03	12/05/03	60
4. 1 + 2	02/01/04	03/01/04	28
5. 1 + 2	03/01/04	05/30/04	90 (DART-Cherry)
6. Assault + 1 + 2	12/13/05	01/13/06	
	<i>Convicted 01/09/06</i>		26

A. The Larceny and B & E convictions are concurrent. The Assault conviction is consecutive to the Larceny. How much credit should he receive on each sentence?

Larceny	261 days
B & E	211 days
Assault	none

B. The Larceny and B & E convictions are concurrent. The Assault conviction is consolidated with the B & E conviction.

Larceny	261
B & E	211

C. All three convictions are concurrent.

Larceny	261
B & E	211
Assault	026

D. All three are consecutive.

Larceny	261
B & E	none
Assault	none

Working with Combined Records

- Any language written on the back of the judgment after “The Court further recommends:” Combined Records will consider a recommendation and if it is contrary to statute, they will not follow it. For example, if part of the plea agreement is that a Habitual Felon conviction runs concurrently with a previous conviction, this must be expressly written on the front of the judgment. If it is on the back, Combined Records will consider it only a recommendation and run the two sentences consecutively.

Hamilton v. Freeman, 147 N.C. App. 195, 554 S.E.2d 856 (2001). Before *Hamilton v. Freeman*, when the Department of Correction received a Judgment and Commitment from the Court which ordered a concurrent sentence for a crime that under NC statutes required a consecutive sentence, DOC simply entered the sentence as consecutive, without notifying anyone. Under *Hamilton*, when the DOC receives a judgment ordering a concurrent sentence for a crime that under NC statutes requires a consecutive sentence, they must notify the inmate and the sentencing judge that the sentence is wrong and needs to be corrected. The DOC cannot simply enter the sentence as a consecutive sentence, but must wait for the judge to resentence the inmate and enter a corrected judgment.

- Combined Records will enter *nunc pro tunc* (now for then) judgments if it is written on the front of the judgment. If a defendant is being resentenced, date of judgment can effect the projected release date.

Defendant was convicted as a Habitual Felon and received a 7 year sentence on April 5, 2001. Eight felonies were consolidated under the Habitual Felon conviction. Defendant had served four years of his sentence when he wrote to NCPLS because his Habitual Felon indictment was defective. The Assistant District Attorney agreed to vacate the Habitual Felon indictment and sentence defendant to 4 consecutive 12-to-15-month sentences.

Defendant has four years of jail credit so we thought he would be released immediately because he had worked down to his minimum. When the Habitual Felon conviction was vacated, the date on his new judgment was October 12, 2005, the date he was resentenced, not April 5, 2001, when he was originally convicted. Combined Records calculated his sentence as beginning in 2005. Under structured sentencing, defendants enter at their maximum sentence and work down to their minimum. Instead of using 12 months worth of jail credit to complete the first three sentences, it took 15 months. Only three months of jail credit remained to be applied to his final 12-month sentence, which began on October 12, 2005. The defendant had to serve 12-month minimum minus jail credit. As a result, the client lost at least three months of earned time, if not more. If the judge “*nunc pro tunc*ed” the

judgments to the original conviction date, the defendant would have worked down to his minimum and would not lose the benefit of his earned time.

- Even if you have a signed order from a judge granting a certain number of days of jail credit, if Combined Records disagrees with the calculation they will not enter it.

State v. Ellis, 361 N.C. 200, 639 S.E.2d 425 (2007) – Defendant filed an MAR asking that an Robbery with a Dangerous Weapon run concurrently with a previously imposed sentence, as agreed to in his plea agreement, but contrary to statute. The judge ordered DOC to change their records. DOC refused arguing that they were not a party and the judge could not enforce judgment that was void.

The NC Court of Appeals ruled that DOC had to comply with the order. The judgment was voidable, not void. The NC Supreme Court agreed to hear the case and reversed the Court of Appeals.

Following the case of *State v. Wall*, 348 N.C. 671, 502 S.E. 2d 585 (1998), the Court decided *Ellis* had two choices on how proceed. He could have either withdrawn his guilty plea and gone to trial, or, he could have attempted to negotiate another plea that would not violate the robbery with a dangerous weapon statute. The Court of Appeals should have remanded the case back to the trial court to where he could have been given the opportunity to do either of these things.

- Follow up with Combined Records. If a defendant is resentenced and getting close to his projected release date, call Combined Records and make sure they have a certified copy of the judgment and know that your client will be a holdover.

FREQUENTLY ASKED QUESTIONS FROM INMATES –

1. I was convicted on September 1, but remained in the county jail until September 15. Can I get jail credit for the time between conviction and being transferred to the DOC?

No, your sentence begins once you are convicted no matter where you are housed so you were no longer entitled to jail credit after September 1 because that's when you began serving your sentence.

§ 15A-1353(a)

When a sentence includes a term or terms of imprisonment, the court must issue an order of commitment setting forth the judgment. Unless otherwise specified in the order of commitment, the date of the order is the date service of the sentence is to begin.

2. I was sentenced to 8 to 10 months and given two months of jail credit, but when I got to the DOC they had not changed my sentence to 6 to 8 months.

The DOC does not change your sentence. Your jail credit is subtracted from your minimum and maximum when the DOC calculates your projected release date.

3. I have concurrent sentences, but I did not receive the same amount of jail credit on each sentence.

To receive the same amount of credit on concurrent sentences you have to be held on both of the charges for the same amount of time.

4. I received a four month split sentence. I spent three months in the county jail prior to being convicted. Why didn't the Judge give me my jail credit?

The Judge decides whether to use pre-trial confinement to satisfy a split sentence. You are not entitled to this time unless you are revoked.

5. I want my jail credit applied to my minimum instead of my maximum.

Again, jail credit is applied to the minimum and maximum. Inmates enter into DOC custody under their maximum sentence and have the opportunity to work down towards their minimum sentence.

Ex. 8

The defendant received 6-8 months for Breaking and Entering. He has 30 days of jail credit. Upon entering the DOC, he should have a projected release date that is scheduled at 7 months.

2. If he is able to earn 30 days of gain time, when will he be released?

At 6 months

3. If he is able to earn 60 days of gain time, when will he be released?

At 5 months

*This inmate cannot earn more than 60 days of gain time. An inmate cannot earn credit past the minimum sentence.

6. I was held as a fugitive from justice in another state prior to being expedited to a county jail in North Carolina. Why was I not given credit for time spent in the out-of-state jail?

Defendants are entitled to credit for time spent in an out-of-state jail only if he was held solely on the North Carolina charge of which he is to be sentenced. The defendant is not entitled to the credit if he was held under a NC charge and out-of state charge unless the out-of-state charge was dismissed. If the defendant is entitled to the credit, the credit is calculated from the date on the NC warrant.

7. Can I get DOC earn time for the work I performed in the county jail?

The Department of Correction (DOC) is not legally obligated to award gain time which was earned while the inmate was not under state supervision. *Childers v. Laws*, 558 F. Supp. 1284 (W.D.N.C. 1983). Further, there is no constitutional right to gain time. According to N.C. Gen. Stat. §15A-1355(c), an inmate *may* earn credit against their sentence; however, there is no requirement for the DOC to provide credit.

The DOC Policy and Procedures Manual states:

In a case of inmates assigned to local confinement facilities pursuant to Court Commitment, the Sheriff or Administrator at the local confinement facility shall establish procedures for granting, approving, and documenting sentence reduction

credit awards. In the case of inmates confined to local confinement facilities pursuant to a contractual agreement with the Department of Correction, the Sheriff or Administrator shall forward recommendations for sentence reduction credit awards to the Contractual Housing Section of the Division of Prisons for final review and action as appropriate.

There are no legal grounds for requesting gain time credit for work done while in the county jail. It is up to the DOC whether to provide that credit.