

ACTIVE SENTENCES: LEGAL BACKGROUND

Sentencing Law for Superior Court Judges

September 7, 2012

I. Place of Confinement

The following rules apply for sentences imposed on or after January 1, 2012.

a. Felons

- i. Must be sentenced to the Div. of Adult Correction (DAC). G.S. 15A-1352(b).
- ii. The Justice Reinvestment Act removed the court's authority to sentence a felon to the jail with the permission of the sheriff or the board of county commissioners.

b. Misdemeanants

- i. **Sentence imposed of 90 days or less:** Must be committed to the local jail, except as provided in G.S. 148-32.1.¹ G.S. 15A-1352(a).
- ii. **Sentence imposed that requires confinement for a period of 91 to 180 days, except for impaired driving (DWI) under G.S. 20-138.1 or for nonpayment of a fine under Article 84 of G.S. Chapter 15A:** Must be committed to the Statewide Misdemeanant Confinement Program (SMCP).² Counties are reimbursed for these inmates from the Statewide Misdemeanant Confinement Fund at \$40/day. G.S. 15A-1352(e).
- iii. **Sentence or sentences imposed that require confinement for more than 180 days:** Must be committed to DAC. G.S. 15A-1352(a).

¹ Under G.S. 148-32.1, as amended, the custodian of a local jail may certify in writing to the clerk of superior court that the jail: (1) Is filled to capacity; (2) Cannot reasonably accommodate any more prisoners due to segregation requirements; (3) Anticipates, in light of local experiences, an influx of temporary prisoners; or (4) Does not meet minimum standards published pursuant to G.S. 153A-221. If the custodian does so, any district or superior court judge of the district where the facility is located may transfer a non-SMCP prisoner to another jail with available space. If no other jail has space *and* the reason for the requested transfer is item (2) (segregation requirements) or (4) (noncompliance with minimum standards) listed above, the judge may order a non-SMCP inmate transferred to DAC. In no event, however, may a prisoner whose term of imprisonment is less than 30 days be transferred to DAC.

² When a defendant is subject to multiple judgments, it is unclear whether the court should determine the proper place of confinement by considering each sentence in isolation, or whether the court should consider the effect of any consecutive sentences. The statutory subsection describing which defendants should be sentenced to the SMCP, G.S. 15A-1352(e), refers to "a misdemeanor" and "a sentence" in the singular, whereas subsection (a) says that a defendant should be committed to DAC if the "sentence or sentences" imposed requires confinement of more than 180 days. An interpretation that takes both of those provisions in account is that consecutive sentences *should not* be aggregated when determining whether the defendant meets the 91-day *floor* for the SMCP, but *should* be aggregated when determining whether sentences exceed the program's 180-day *ceiling*.

- c. Impaired driving (DWI)
 - i. Place-of-confinement for DWI is governed by G.S. 20-176(c1).
 - ii. DWI defendants who have no prior DWI convictions under G.S. 20-138.1 and who have never been previously imprisoned in a local confinement facility for a violation of Chapter 20 *must* be sentenced to the local jail. The rule, which applies “notwithstanding any other provision of law,” does not turn on the length of the sentence.
 - iii. DWI defendants being sentenced for their second or subsequent conviction under G.S. 20-138.1 or who have previously been imprisoned in a local confinement facility for a violation of Chapter 20:
 - 1. *Must* be sentenced to the jail if the sentence imposed is for a period of 90 days or less, except as provided in G.S. 148-32.1(b).
 - 2. *May* probably be sentenced to the local jail or to DAC, in the court’s discretion, if the sentence imposed requires confinement of 91 to 180 days, although no statute addresses this category of DWI defendant directly.
 - 3. *Must* be sentenced to DAC if the sentence or sentences imposed require confinement for more than 180 days. G.S. 15A-1352(a).
- d. Structured Sentencing sentences must be served continuously.
 - i. A judge may not order that an active sentence be served on weekends or in some other intermittent fashion. *State v. Miller*, 205 N.C. App. 291 (2010).
 - ii. Noncontinuous confinement may be ordered through special probation under G.S. 15A-1351(a).
 - iii. DWI sentences may be served on weekends under G.S. 20-179(s).

II. Understanding the Minimum and Maximum Sentence

- a. Felons are released from prison upon serving their maximum sentence.
- b. The maximum sentence is derived from the minimum. It is typically 120% of the minimum sentence, plus additional time built in for post-release supervision.
- c. No inmate may be released before serving his or her minimum sentence, G.S. 15A-1340.13(c), except an inmate released through the Advanced Supervised Release program, G.S. 15A-1340.18.
- d. The maximum sentence for a felony may be reduced through sentence reduction credits. An inmate may thus work his or her way down from the maximum sentence toward the minimum sentence through sentence reduction credits.

III. Sentence Reduction Credits

- a. Earned Time
 - i. Earned Time is the principal sentence reduction credit for sentences imposed under Structured Sentencing. It is earned at three possible rates:

1. Earned Time Credit Level I: 3 days per month for 4–6 hours of unskilled or low level activity per day.
 2. Earned Time Credit Level II: 6 days of credit per month for 4–8 hours of skilled or moderate level activity per day.
 3. Earned Time Credit Level III: 9 days of credit per month for 6–8 hours of high skilled or high level activity per day.
- ii. As of mid-2011, all inmates receive 3 days of Earned Time credit per month by default.
- b. Meritorious Time
- i. An inmate may receive additional credit called Meritorious Time for exemplary acts, working overtime, working in inclement weather, or for certain programmatic or educational achievements.
 - ii. Meritorious Time can be awarded in sizeable increments—sometimes as much as 30 days per month—but may not reduce an inmate’s sentence below his or her minimum.
- c. Good Time
- i. Good time is sentence reduction credit for felonies committed before October 1, 1994 and for impaired driving sentences, regardless of offense date.
 - ii. Good time reduces a sentence by one day for each day without a violation of inmate conduct rules, effectively cutting a sentence in half.
- d. Structured Sentencing inmates are generally able to reduce their maximum sentences through sentence reduction credit as follows (by default, an inmate’s maximum sentence is 120% of his or her minimum sentence):

<u>Offense Class</u>	<u>Percentage of Minimum Served</u>
Class B1–C:	102%
Class D:	105%
Class E–F:	106%
Class G:	107%
Class H:	111%
Class I:	114%

IV. Post-Release Supervision

- a. Post-release supervision (PRS) is a period of supervised release (similar to probation) that an inmate serves in the community upon his or her release from prison.
- b. Before 2011, only Class B1–E felons received post-release supervision. For offenses committed on or after December 1, 2011, all felons receive PRS. Class B1–E felons receive 12 months of post-release supervision. Class F–I felons receive 9 months of post-release supervision.
- c. Felons who receive PRS are automatically released from prison onto PRS before reaching their maximum sentence, less earned time.
 - i. Class F through I felons are automatically released onto post-release supervision nine months before reaching their maximum term of imprisonment.
 - ii. Class B1-E felons are released 12 months before attaining their maximum, less earned time. G.S. 15A-1368.2(a).

- d. To accommodate PRS, the table of maximum sentences on the back of the sentencing grid includes a number of months equal to the early release. For offenses committed on or after December 1, 2011:
 - i. Maximum sentences for Class F–I felonies are 120 percent of the imposed minimum plus 9 months.
 - ii. Maximum sentences for Class B1–E felonies are 120 percent of the imposed minimum plus 12 months.
- e. The additional time added on to each sentence operates like a suspended sentence during the offender’s period of post-release supervision.
- f. The Post-Release Supervision and Parole Commission, not the court, is the controlling authority during the offender’s period of post-release supervision. Violations of PRS are brought before the Parole Commission in Raleigh, which can return offenders to prison in response to certain violations.
- g. Sex offenders
 - i. Sex offenders who receive post-release supervision are supervised in the community for 5 years. G.S. 15A-1368.2(c).
 - ii. Class B1–E sex offenders with offense dates on or after December 1, 2011, have an additional 60 months built into the maximum sentence. They are released from prison 60 months before attaining that increased maximum.
- h. The table below summarizes the PRS rules for reportable and non-reportable crimes committed before and after December 1, 2011.

	Maximum Sentence	Mandatory release to PRS	PRS period
NONREPORTABLE			
Class B1–E felonies Committed before 12/1/11	120% of minimum plus 9 months	Maximum less 9 months, less earned time	9 months
Class B1–E felonies Committed on/after 12/1/11	120% of minimum plus 12 months	Maximum less 12 months, less earned time	12 months
Class F–I felonies Committed before 12/1/11	120% of minimum	N/A (no PRS)	None
Class F–I felonies Committed on/after 12/1/11	120% of minimum plus 9 months	Maximum less 9 months, less earned time	9 months
REPORTABLE			
Class B1–E felonies Committed before 12/1/11	120% of minimum plus 9 months	Maximum less 9 months, less earned time	5 years
Class B1–E felonies Committed on/after 12/1/11	120% of minimum plus 60 months	Maximum less 60 months, less earned time	5 years
Class F–I felonies Committed before 12/1/11	120% of minimum	N/A (no PRS)	None
Class F–I felonies Committed on/after 12/1/11	120% of minimum plus 9 months	Maximum less 9 months, less earned time	5 years

V. Consecutive Sentences

- a. Consecutive active sentences:
 - i. When consecutive sentences are imposed, DAC must treat the defendant as though he or she has been committed for a single term of imprisonment. DAC refers to this aggregation as the “single sentence rule.” G.S. 15A-1354(b).
 - ii. The minimum of that single term is the sum of all the minimum sentences in the consecutive series.
 - iii. The maximum of that single term is the sum of all the maximums, less 60, 12, or 9 months for each of the second or subsequent sentences imposed for felonies subject to post-release supervision.
 - iv. The upshot of the rule is that the defendant will be released from prison upon serving the aggregate maximum, less earned time, to serve a single term of post-release supervision whose length is determined by the most serious conviction.
- b. Probation consecutive to an active sentence:
 - i. A judge has authority under G.S. 15A-1346(b) to run a period of probation consecutive to an undischarged term of imprisonment.
 - ii. There are two “consecutive/concurrent” decisions to be made when imposing a probationary judgment:
 1. When does the period of probation begin: (a) immediately (default); or (b) when the defendant is released from a prior period of imprisonment?
 2. Will the sentence of imprisonment run (a) concurrently with (default); or (b) at the expiration of another sentence of imprisonment in the event of the activation?

VI. Jail Credit

- a. A defendant must receive credit for the total amount of time he or she has spent in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence, including credit for all time spent in custody pending trial, trial de novo, appeal, retrial, or pending parole, probation, or post-release supervision revocation hearing. G.S. 15A-196.1.
- b. A defendant must receive credit for:
 - i. Presentence commitment for study. *State v. Powell*, 11 N.C. App. 194 (1971);
 - ii. Hospitalization to determine competency to stand trial. *State v. Lewis*, 18 N.C. App. 681 (1973);
 - iii. Confinement in another state awaiting extradition to North Carolina, when that confinement is solely at the request and direction of North Carolina. *Childers v. Laws*, 558 F. Supp. 1284 (W.D.N.C. 1983);
 - iv. The active portion of a split sentence. *State v. Farris*, 336 N.C. 553 (1994);
 - v. Time spent at DART–Cherry as a condition of probation. *State v. Lutz*, 177 N.C. App. 140 (2006);
 - vi. Time spent imprisoned for contempt under G.S. 15A-1344(e1). *State v. Belcher*, 173 N.C. App. 620 (2005).
 - vii. Confinement in Response to Violation under G.S. 15A-1344(d2).

- viii. Short-term (“quick dip”) confinement as a condition of probation, imposed by a judge under G.S. 15A-1343(a1)(3), or by a probation officer under G.S. 15A-1343.2.
- c. A defendant should not receive credit for:
 - i. Time spent under electronic house arrest. State v. Jarman, 140 N.C. App. 198 (2000);
 - ii. Time spent at a privately run residential treatment program as a condition of probation (in a non-DWI case). State v. Stephenson, __ N.C. App. __, 713 S.E.2d 170 (July 19, 2011).
- d. Jail credit for multiple charges
 - i. When a defendant is held on more than one charge and has creditable time against both:
 - 1. If he or she receives consecutive sentences, they are considered as one sentence and the creditable time shall not be multiplied by the number consecutive offenses for which the defendant is imprisoned.
 - 2. If he or she receives concurrent sentences, each sentence shall be credited by as much of the time as was spent in pretrial custody on each charge. G.S. 15-196.2.
 - ii. An additional rule states that a defendant shall not receive credit for “any time that is credited on the term of a previously imposed sentence to which a defendant is subject.” G.S. 15-196.1.
 - 1. When a defendant has been held in pretrial confinement on two charges and one is sentenced before the other, it is unclear how that rule applies if the second sentence runs concurrently with the first.
 - 2. Under one interpretation, any shared credit applied to the first sentence is “used up” and unavailable for the second sentence.
 - 3. Under another interpretation, the rule for “multiplied credit” for concurrent sentences still applies and the shared credit is also applied against the second sentence. Under that approach, the reference in G.S. 15-196.1 to a “previously imposed sentence” refers to sentenced confinement imposed previously to the accrual of the pretrial confinement at issue. In other words, the rule states that a person does not accrue pretrial credit on any charge if he or she is already serving a previously imposed sentence.
- e. “Time Served”
 - i. If a defendant has already served time in excess of the maximum term for a felony, he or she should be sentenced to time served.
 - ii. Jail credit in excess of the *minimum* imposed sentence is not sufficient to permit a sentence to time served. For instance, a defendant with 9 months of pretrial jail credit who is sentenced to 6–17 months cannot be sentenced to time served; 8 months remain on his maximum sentence. He should, however, be released onto post-release supervision immediately, as he is already within 9 months of his maximum sentence.

- f. Responsibility for determining jail credit
 - i. Upon sentencing or activating a sentence, the presiding judge shall determine the credits to which the defendant is entitled and shall cause the clerk to transmit to the custodian a statement of allowable credits. G.S. 15-196.4.

VII. Additional Sentencing Options

- a. **Delaying the start of a sentence.** “Unless otherwise specified in the order of commitment, the date of the order is the date service of the sentence is to begin.” G.S. 15A-1353(a).
- b. **Pregnant defendants.** G.S. 15A-1353(a): “If a female defendant is convicted of a nonviolent crime and the court is provided medical evidence from a licensed physician that the defendant is pregnant or the court otherwise determines that the defendant is pregnant, the court may specify in the order that the date of service of the sentence is not to begin until at least six weeks after the birth of the child or other termination of the pregnancy unless the defendant requests to serve her term as the court would otherwise order. The court may impose reasonable conditions upon defendant during such waiting period to insure that defendant will return to begin service of the sentence.” *See also* Jamie Markham, *Options for Pregnant Inmates*, North Carolina Criminal Law Blog (June 15, 2011), available at <http://sogweb.sog.unc.edu/blogs/ncclaw/?p=2561>.
- c. **Segregation from specific inmates.** The Section of Prisons will attempt to honor a court’s request for an inmate to be housed separately from persons identified in a judgment.
- d. **Recommendation for housing at a particular facility.** Under G.S. 148-4, the Secretary of Public Safety or his authorized representative determines an inmate’s place of confinement. The Section of Prisons will, however, take a judge’s recommendation for place of confinement into consideration when other factors allow.
- e. **Requests for psychiatric/psychological counseling.** All inmates are screened for mental health issues upon intake. If a judge recommends “psychiatric and/or psychological counseling” (using the check-box on the active judgment form) or includes a reference to mental health treatment on the form, the Section of Prisons will automatically generate an appointment with a qualified mental health professional for a more detailed appraisal.