More Thoughts on Improper Delegation of Authority and Intermittent Confinement

Author : LaToya Powell

Categories : Juvenile Justice

Tagged as : delegation of authority, dispositional alternatives, due process, intermittent confinementjuvenile disposition

Date : October 28, 2015

Over the past four months, I've had the opportunity to discuss the new juvenile delinquency legislation, S.L. 2015-58, with juvenile court officials from every part of the system – prosecutors, defenders, judges, and most recently, juvenile court counselors. While each group had distinct questions and concerns, one particular issue universally generated the most discussion. That issue was intermittent confinement (short periods of confinement in juvenile detention) or "IC days" and how the amendments to G.S. 7B-2506(12) and (20) change the way it is "imposed." The amended statutes mandate that only judges may determine the *imposition* of IC days, whereas previously, judges were only required to determine the *timing* of the confinement. In a recent post, I explained that this change was designed to prevent judges from improperly delegating their authority to court counselors by suspending IC days and ordering court counselors to impose them immediately upon the juvenile's noncompliance with certain conditions. This practice will soon be prohibited (as of December 1, 2015), since the new law clarifies that only the court may impose the confinement. However, the lack of specific guidelines has left judges and court counselors wondering what they must do to comply with the statute. Here are some additional thoughts about how I think this legislation will impact the court.

- **Only a judge may impose confinement.**

The new legislation was not designed to prohibit judges from suspending IC days. It was created to stop judges from suspending the confinement and ordering a court counselor to immediately impose it when the triggering event (*i.e.*, noncompliance with the court's order) occurs. Such orders give court counselors, not the judge, the power to determine (1) that the juvenile violated a condition of the court's order and (2) that confinement is an appropriate consequence for the violation – decisions normally reserved for the court. *See, e.g.*, G.S. 7B-2510(e). Our appellate courts have long held that judges may not delegate this type of judicial authority to court counselors. *See, e.g., In re Hartsock*, 158 N.C. App. 287, 292 (2003). S.L. 2015-58 simply codifies this rule in G.S. 7B-2506(12) and (20).

Not only is this an improper delegation of authority, but it probably also violates a juvenile's due process rights. By way of comparison, consider this blog post, written by my colleague, Jamie Markham, addressing the constitutionality of "quick dips" imposed by adult probation officers pursuant to delegated authority under Chapter 15A. Quick dips are short periods of jail confinement that probation officers may impose in response to a violation of a court-imposed probation condition, unless the court undelegated this authority. G.S. 15A-1343.2(e) and (f). However, a probation officer's quick dip authority is contingent upon a probationer's waiver of several due process rights, including the right "to a hearing before the court on the alleged violation[.]" G.S. 15A-1343.2.

Before quick dips were created, the North Carolina Attorney General concluded that an order allowing a probation officer to impose a 30-day split sentence "if deemed necessary for minor infractions or technical violations" would violate constitutional due process and the statutory framework for probation violations. *See* 60 N.C. Op. Atty. Gen. 110 (1992). The fact that a probationer must now waive her due process rights before a probation officer may impose quick dips implies the legislature agrees with the attorney general that, absent a waiver, confinement imposed by a probation officer violates due process.

Admittedly, the confinement of delinquent juveniles differs, at least theoretically, from the confinement of adult criminals in a jail. *See In re D.L.H.*, 364 N.C. 214, 218 (2010) (stating that "[i]n confining delinquent juveniles, the State acts more as a caregiver than a jailer."). IC days also differ from quick dips because it is the court that orders the confinement, not the court counselor. Although, in both circumstances, a non-judge is ultimately the one who imposes the confinement. Thus, in the absence of North Carolina cases addressing the constitutionality of confinement imposed by court counselors, the discussion of probation officer quick dips provides a useful comparison.

- **Although not explicitly required by G.S. 7B-2506, the court should hold a hearing before imposing suspended IC days.**

I've received mixed reviews regarding my view that the court must hold a hearing to impose suspended confinement. In some districts, for example, judges instruct the court counselors to approach them with evidence of the juvenile's noncompliance, so the court can determine whether a violation occurred and issue an order imposing the confinement. In this scenario, it is the judge who imposes the confinement, but without any notice to the juvenile or an opportunity for the juvenile to be heard regarding the allegations to provide a valid excuse. It's hard to reconcile this no hearing procedure with precedent establishing that juveniles, like adult offenders, are entitled to constitutional due process when facing the possibility of confinement. *In re Wade*, 67 N.C. App. 708, 709 (1984).

At least one jurisdiction has explicitly held that notice and a hearing are required to impose detention for a juvenile's noncompliance with a condition of the court's order. *In re Marie G.*, 189 Ariz. 632 (Ct. App. 1997). In *Marie G.*, the Arizona court upheld a probation term imposing ten weekends of detention but promising a waiver of the detention each week the juvenile tested negative for drugs, as reported by the juvenile's probation officer. The court held that this "no-hearing procedure" was valid only if it resulted in a waiver of detention. *Id.* at 634. However, before detention could be *imposed* for a positive drug screen, the juvenile "must be given notice of the 'charge' and a pre-detention opportunity to contest it and present evidence." *Id.* Addressing the *ex parte* communication between the judge and probation officer, the court also noted that it "appreciate[d] counsels' arguments that something is wrong when detention turns on 'evidence' received by the court without a hearing." *Id.* at 633. I think the same reasoning probably applies here, although North Carolina courts have not yet addressed this question.

As the mother of an 8-year-old boy, I fully understand the importance of providing swift accountability for a child's actions, which is one of the statutory goals of the Juvenile Code. *See* G.S. 7B-1500. I also understand that having to conduct a hearing to impose suspended IC days may frustrate the court's efforts to quickly respond to wayward juveniles. However, the need to hold juveniles accountable for their actions cannot result in a denial of the juvenile's right to due process. *In re Gault*, 387 U.S. 1 (1967).

- **To initiate a hearing to impose suspended IC days, file a motion for review.**

My suggestion to court counselors for initiating a hearing for the court to impose suspended confinement is to file a motion for review and provide notice to the juvenile, the juvenile's parent or guardian, and the juvenile's attorney. Generally, a juvenile must receive at least five days written notice of all scheduled hearings, unless notified in open court. G.S. 7B-1807. Also, if the statutory criteria are present, the court counselor could request the court to issue a secure custody order under G.S. 7B-1903 for an immediate response.

I'm interested to see how this legislation is implemented, as courts throughout the state vary widely in how they impose intermittent confinement. If you have additional questions or concerns not addressed in this post, please let me know. I'm keeping a running list!