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Deeper Thoughts on the Constitutionality of Quick Dips

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Under the Justice Reinvestment Act, a probation officer may, through delegated authority, impose a short period of jail confinement in response to a violation of a court-imposed probation condition. The officer may impose up to six days of confinement per month during any three separate months of a period of probation. The time must be served in the local jail in 2-day or 3-day increments. G.S. 15A-1343.2(e) and (f).

As of the end of September, three quick dips had been imposed statewide. That's surprisingly low, but I think several factors conspire to keep the numbers down. First, probation officers only have authority to impose quick dips for offenders on probation for offenses committed on or after December 1, 2011. S.L. 2011-192, sec. 1(*l*). Those offenders are just now starting to come onto probation in large numbers. Second, even for statutorily eligible offenders, the Division of Adult Correction delayed use of quick dips until July 2, 2012, to allow for policy development and training. Third, quick dip authority applies only in Structured Sentencing cases; it is not an option for DWI probationers. G.S. 15A-1343.2(a) ("This section applies only to persons sentenced under Article 81B [Structured Sentencing] of this Chapter.") And fourth, Community Corrections has chosen as a matter of policy to use quick dip authority only in cases involving relatively serious violations by Supervision Level 1 and 2 offenders—the highest risk, highest need probationers, as described in this prior post.

Another reason quick dip usage may be limited is that judges are increasingly withholding delegated authority in judgments suspending sentence. Some judges are checking the box finding that delegated authority is not appropriate in the case out of concern about the constitutionality of a probation officer imposing jail time without review by a judicial official or hearing officer.

That may be a legitimate concern. There obviously are not any North Carolina cases yet, but case law from around the country indicates that a judge generally may not delegate to a probation officer a core judicial function, such as deciding whether a probationer will be required to abide by a condition at all. *See* United States v. Esparza, 552 F.3d 1088 (9th Cir. 2009) (vacating a condition that allowed a probation officer to choose whether a defendant would participate in inpatient or outpatient treatment); United States v. Heath, 419 F.3d 1312 (11th Cir. 2005) (striking a condition stating that a defendant was required to participate in mental health programs "*if* and as directed by the probation officer"). Appellate courts in other jurisdictions have stricken conditions purporting to allow a probation officer to decide whether or not a probationer will serve additional jail time. *See* State v. Fearing, 619 N.W.2d 115 (Wis. 2000) (holding that a trial court exceeded its authority in authorizing a probation officer to determine whether a probationer would be required to serve three additional months in jail); State v. Hatfield, 846 P.2d 1025 (Mont. 1993) (holding that a trial court erred in sentencing a defendant to 180 days of jail time to be served—or not served—in the discretion of the probation officer); State v. Lee, 467 N.W.2d 661 (Neb. 1991) (invalidating a condition purporting to allow a probation officer to "waive" some of the defendant's jail days, noting that "[j]ail time is to be imposed by judges" and that a "court may not delegate the authority to impose a jail sentence, or to eliminate a jail sentence, to a nonjudge"); State v. Paxton, 742 N.E.2d 1171 (Ohio Ct. App. 2000) (reversing a 60-day period of imprisonment imposed by a probation officer on due process and separation of powers grounds); People v. Thomas, 217 Ill. App. 3d 416 (1991) (vacating a condition allowing a probation officer to remit a 30-day jail sentence if a probationer completed a treatment program because that was "not a function that could properly be delegated when the question of further incarceration is at stake").

The North Carolina Attorney General issued similar guidance in response to a question about whether a judge could impose a 30-day split sentence to be used in the discretion of the probation officer "if deemed necessary for minor infractions or technical violations." In a formal opinion letter, the attorney general advised against the practice, concluding that it would violate constitutional due process and the statutory probation violation framework set out in G.S. 15A-1345. 60 N.C. Op. Atty. Gen. 110 (1992).

It is possible, of course, that the courts cited above and the attorney general might evaluate the delegation differently in light of the new enabling statute. But even with the statute in place, several issues may arise.

First, unlike other delegated authority conditions, an offender cannot seek court review of an officer-imposed quick dip. Instead, the statute explicitly states that the probationer has no such right of review if he or she has signed a written waiver of rights. Quick dips were probably excluded from the judicial review process on the rationale that the probation officer could not have imposed the confinement in the first place without the offender waiving his or her right to a hearing before a judge. But the lack of a judicial review process may bear on the separation of powers and due process analyses. *See* United States v. Kerr, 472 F.3d 517, 523 (8th Cir. 2006) ("A sentencing judge may delegate limited authority to non-judicial officials as long as the judge retains and exercises ultimate responsibility.") By way of comparison, a defendant's failure to object when a judge imposes a probation condition does not constitute a waiver of the right to object to it at a later time. G.S. 15A-1342(g).

Second, the JRA appears to place North Carolina in a minority of states that allow a probation officer to respond administratively to a violation with full-blown jail confinement. Delaware allows its corrections department to respond administratively to certain violations with sanctions less restrictive than "Accountability Level V" (incarceration), including up to 5 consecutive days of supervision at "Accountability Level IV" (house arrest, a half-way house, or residential treatment). Del. Code. Ann. title 11 § 4334; § 4204. Georgia's system includes similar limitations, allowing probation officers to impose conditions like intensive supervision and electronic monitoring administratively, but reserving to administrative hearing officers and judges the authority to impose more restrictive conditions like confinement in a probation detention center or placement in a residential facility. Ga. Code. Ann. § 42-8-155; § 42-8-153(c). Oregon, on the other hand, allows an officer to impose jail confinement under its law, and there do not appear to be any reported cases challenging the law's constitutionality. Or. Rev. Stat. Ann. § 137.595; Or. Admin. R. 291-058-0045 (2011).

In general, before a probationer may be confined in response to a violation of probation he or she has certain rights as a matter of constitutional due process. Gagnon v. Scarpelli, 411 U.S. 778 (1973) (holding that a probationer is entitled to, among other things, notice of the alleged violations, an opportunity to be heard and to present evidence, a neutral hearing body, and, in some cases, counsel); Morrissey v. Brewer, 408 U.S. 471 (1972) (setting out what process is due in a parole revocation hearing). Instead of involving a judge or an administrative hearing officer in the procedure (as is generally the case in places like Hawaii and Georgia), the JRA's approach to quick dips relies on the probationer's written waiver of rights. The statutorily required elements of the waiver, set out in G.S. 15A-1343.2(e) and (f), appear to track the minimum requirements of due of process for probation violation hearings set out by the Supreme Court. But it is questionable whether an interested party (a probation officer) can properly ensure that a probationer's waiver is knowing, voluntary, and intelligent—especially when a defendant who decides not to waive could nonetheless be arrested and jailed in advance of a probation violation hearing before the court.

Moreover, to the extent that the waiver incorporates a waiver of counsel, it is unclear whether it comports with North Carolina's statutory requirement for a judge to conduct a "thorough inquiry" of defendants who elect to proceed without a lawyer. G.S. 15A-1242; State v. Warren, 82 N.C. App. 84 (1986) (holding that G.S. 15A-1242 applies to waiver of counsel in probation matters). That law is already a common source of errors for waiver inquiries conducted by judges in criminal trials, State v. Seymore, __ N.C. App. __, 714 S.E.2d 499 (Aug. 16, 2011), and probation violation hearings, State v. Sorrow, __ N.C. App. __, 713 S.E.2d 180 (July 19, 2011). The current version of the form that probation officers use to order a quick dip, a DCC-10B, may also be problematic in that it only requires the probationer to acknowledge explicitly the waiver of his or her right to a hearing, not counsel, before the dip is imposed.

I'm not a criminologist, but I know there's research showing that "swift and certain" probation sanctions like quick dips are effective (a brief example is available here). North Carolina judges who have run drug treatment courts know that from experience, as they have been using a version of quick dips through their contempt power for years. (Can I add that it also makes some intuitive sense to me as the father of four little boys?) It seems that most of the concerns about the law are more to do with the procedure than the substance. Judges, are you un-delegating delegated authority? If so, why? Defense lawyers and prosecutors, are you asking judges to do that? Probation officers, what has your experience been? As always, I welcome and value your thoughts.

Tags: CRV, delegated authority, justice reinvestment, probation, quick dips

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