

SERVING AN ACTIVE SENTENCE

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A. Proper place of confinement

The Justice Reinvestment Act (JRA) made several changes to the proper place of confinement for a defendant.¹ For sentences imposed on or after January 1, 2012:

Felons. Felons must be committed to the Department of Public Safety, Division of Adult Correction (DAC, formerly the Department of Correction). The law removes the provision in G.S. 15A-1352(b) allowing a felon to serve a sentence in the local jail upon request of the sheriff or the board of commissioners. G.S. 15A-1352(b).

Misdemeanants. Under prior law, misdemeanants with a sentence of 90 days or less were required to be sentenced to the local jail, except as provided in G.S. 148-32.1. Misdemeanants with a sentence in excess of 90 days could be sentenced to prison or to the jail in the court's discretion. G.S. 15A-1352(a).

Under the new law, misdemeanants:

- *With a sentence imposed of 90 days or less* must be committed to a facility other than one maintained by DAC—generally, the local jail—except as provided in G.S. 148-32.1 (described below). Inmates are housed at county expense. G.S. 15A-1352(a).
- *With a sentence imposed that requires confinement for a period of 91 to 180 days, except for impaired driving (DWI)* shall be committed to confinement pursuant to the new Statewide Misdemeanant Confinement Program (MCP), described below. Counties are reimbursed for these inmates from the new Statewide Misdemeanant Confinement Fund, also discussed below. G.S. 15A-1352(e).
- *With a sentence or sentences imposed that require confinement for more than 180 days* must be committed to DAC. Inmates are housed at State expense. G.S. 15A-1352(a).

It is unclear whether the court should determine the proper place of confinement for each judgment individually, or whether it should consider the effect of any consecutive sentences when deciding whether the defendant falls within the 91–180 day range.² Given the laws' reference to the "imposed" sentence, the court probably should not consider the effect of jail credit or the potential for sentence reduction credits when determining the proper place of confinement for a defendant.

¹ The changes apply to "sentences imposed" on or after January 1, 2012. S.L. 2011-192, sec. 7.(q). It is unclear whether that change applies only to initial sentences imposed on or after that date or whether it also applies to probation revocation judgments entered on or after that date.

² The language of G.S. 15A-1352(e) refers to "a misdemeanor" and "a sentence" in the singular, in contrast to subsection (a) of the same statutory section, which says that a defendant should be committed to DAC if the "sentence or sentences" imposed exceed 180 days. On the other hand, the choice of 180 days as the upper limit of the MCP range suggests that consecutive sentences should be aggregated; the longest sentence for a single misdemeanor under Structured Sentencing is 150 days.

Impaired drivers. The JRA did not change the baseline rule for where a DWI sentence can be served, set out in G.S. 20-176(c1). Taking amended G.S. 15A-1352 into account the complete rule for DWI sentences is:

- DWI defendants who have no prior DWI convictions under G.S. 20-138.1 or who have never been previously imprisoned in a local confinement facility for a violation of Chapter 20 *must* be sentenced to the local jail. G.S. 20-176(c1).
- DWI defendants with a prior DWI conviction or who have previously been imprisoned in a local confinement facility for a violation of Chapter 20:
 - *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). G.S. 15A-1352(a).
 - *May* be sentenced to the local jail or to DAC, in the court's discretion, if the sentence or sentences imposed require confinement of 91 to 180 days. G.S. 15A-1352(a).
 - *Must* be sentenced to DAC if the sentence or sentences imposed require confinement for more than 180 days. G.S. 15A-1352(a).

Exceptions to the 90-day-or-less misdemeanor confinement rules for overcrowded jails. If a jail certifies in writing to the clerk of superior court that it is filled to capacity, or that it cannot meet segregation requirements for particular prisoners, or that it anticipates an influx of temporary prisoners, or if the jail does not meet minimum standards published pursuant to G.S. 153A-221, a judge may order that a non-MCP prisoner be transferred to another jail with available space. If no other jail has space and the reason for the requested transfer is that the jail cannot accommodate the prisoner due to segregation requirements or that the jail does not meet minimum standards, the judge may order a non-MCP inmate transferred to DAC. In no event, however, shall a prisoner whose term of imprisonment is less than 30 days be transferred to DAC. G.S. 148-32.1(b).

Special probation (split sentences). The JRA did not change the place-of-confinement rule for split sentences. The judge can, in his or her discretion, order a split sentence to be served in DAC or a designated local confinement facility or treatment facility. Noncontinuous periods of confinement (e.g., weekends) must be served in a local confinement facility or treatment facility. G.S. 15A-1351(a).

"Quick dips." Short-term confinement ordered by a probation officer pursuant to delegated authority under G.S. 15A-1343.2(e)-(f) or by a judge under new G.S. 15A-1343(a1)(3) is served in the local jail.

Confinement in Response to Violation (CRV). CRV is served where the defendant would have served an active sentence. Thus, felony CRV is served in prison. Misdemeanor CRV is served in the local jail, pursuant to the Misdemeanor Confinement Program (described below), or in prison, depending on the length of the defendant's suspended sentence or sentences. G.S. 15A-1344(d2).

Active sentences. Active sentences in Structured Sentencing cases must be served continuously; the judge does not have discretion to order that they be served on weekends. *State v. Miller*, __ N.C. App. __, 695 S.E.2d 149 (2010). Active sentences for impaired driving may, however, be served on weekends, even if the sentence cannot be served in consecutive sequence. G.S. 20-179(s).

B. The Statewide Misdemeanant Confinement Program (MCP)

The JRA established a new program for housing non-DWI misdemeanants who have a sentence imposed that requires confinement for a period of 91 to 180 days. G.S. 148-32.1(b2). The law required the North Carolina

Sheriffs' Association, Inc. (NCSA) to develop the program in consultation with DAC. After a brief pilot program in late 2011, the program began statewide operation on January 1, 2012.

MCP basics. Under the MCP, the NCSA identifies available space and arranges for housing for 91–180 day misdemeanants in jails in counties that have voluntarily agreed to participate in the program. Counties agreeing to house inmates under the program may enter into a written agreement with DAC to do so. No county is required to house inmates under the program.

To date, over 40 counties have agreed to house inmates through the MCP as “receiving counties,” resulting in a total of over 1,000 beds volunteered to the program. Receiving counties are reimbursed \$40 per day for housing inmates under the program, plus additional reimbursement for out-of-jail medical costs and certain transportation and supervision costs.

As the program has been implemented by the NCSA, all counties are participating in the MCP as “sending counties.” That is, a misdemeanant from any county can be sentenced to the MCP, and the county of conviction is expected to transport the inmate to a volunteering receiving county identified by the NCSA. Sending counties are reimbursed for transportation and supervision expenses related to the transfer of MCP inmates.

If the NCSA determines that the jails available for housing misdemeanants under the MCP are filled to capacity, a misdemeanant housed under the program may be transferred to DAC, which is then reimbursed for the inmate through the Misdemeanant Confinement Fund, described below. G.S. 148-32.1(b4).

The MCP also includes a “safekeeper” provision, similar operationally to existing G.S. 162-29, for inmates who pose a security risk, require specialized medical treatment, or who cannot be accommodated due to space constraints. G.S. 148-32.1(b3).

MCP funding issues. The General Assembly established a nonreverting Statewide Misdemeanant Confinement Fund (the Fund) to be used to cover the costs of managing the program. G.S. 148-10.4. The MCP shall only operate as long as sufficient moneys are available in the Fund. G.S. 148-32.1(b2). The Fund is funded by two court costs that were effective August 1, 2011: (1) an \$18 court cost for district court convictions, and (2) a \$50 court cost specific to convictions for an improper equipment offense. G.S. 7A-304(a)(2b) and (4b). As of February 1, 2012, the Fund balance was \$8.5 million. Fiscal Research projected the court costs would generate approximately \$31 million annually. Ten percent of the monthly receipts collected into the Fund are transferred on a monthly basis to the NCSA to support the MCP and for administrative and operating expenses of the NCSA and its staff. G.S. 148-10.4(e). One percent of the monthly receipts collected into the Fund are transferred on a monthly basis into the General Fund to be allocated to DAC for its administrative and operating expenses for the MCP. G.S. 148-10.4(e).

C. Jail fees

G.S. 7A-313 describes two types of jail fees:

Pretrial confinement fees. A person who winds up getting convicted of a crime shall be liable to the county in the sum of \$10 for each 24 hours (or fraction thereof) of pretrial confinement. The pretrial confinement fee used to be \$5 per day but was increased to \$10, effective August 1, 2011. S.L. 2011-145, sec. 31.26.(e), as amended by S.L. 2011-192, sec. 7.(p). No fee is assessed if a person is acquitted or the case against him or her is dismissed.

The \$10 pretrial confinement fee is stated in mandatory terms (“[p]ersons who are lawfully confined . . . shall be liable”), and appears to fall within the new rule that costs in that statutory section may not be waived—even in active-punishment cases—unless the judge makes a written finding of just cause to grant such a waiver. G.S. 7A-304(a), as amended by S.L. 2011-145, sec. 15.10.(a).

Probationary-confinement fees. The second fee, set out in the second paragraph of G.S. 7A-313, is for “persons who are ordered to pay jail fees pursuant to a probationary sentence.” That provision is generally interpreted to authorize a fee for every day served in jail as part of a sentence to special probation (a split sentence).

The amount of the probationary-sentence jail fee is set at the “same per diem rate paid by the Department of Correction to local jails for maintaining a prisoner, as set by the General Assembly in its appropriations acts.” Before 2009 that reference was ambiguous, as there were two DOC-to-jail per diem reimbursement rates set out in the budget. There was an \$18 per day rate, authorized by G.S. 148-32.1(a), for jail inmates serving criminal sentences of 30 days or longer. And then there was a \$40 per day “jail backlog” rate, authorized by G.S. 148-29, for convicted inmates awaiting transfer from a jail to DOC. In 2009, however, the reimbursement for 30-day inmates was repealed (S.L. 2009-451, sec. 19.22A), leaving the \$40 rate as the only one to which the jail fee could be pegged. Since then, the probationary-sentence jail fee has been \$40 per day.

The probationary-confinement fee would appear to apply to short-term jail confinement ordered by a judge under new G.S. 15A-1343(a1)(3).

Confinement in Response to Violation (CRV) for technical violations of probation is arguably a type of confinement for which the fee could be ordered, although that type of confinement is less clearly “pursuant to a probationary sentence” than special probation or a “quick dip.”

The probationary-confinement jail fee applies to “[p]ersons who are ordered to pay”—suggesting judges have discretion not to order it. As such, probationary-sentence jail fees are listed separately as an optional check-box item on the judgment forms for any confinement ordered as part of a probationary sentence.

D. Jail credit

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. 15-196.1. The judge presiding shall determine the credits to which the defendant is entitled and shall cause the clerk to transmit to the custodian of the defendant a statement of allowable credits. G.S. 15-196.4.

A defendant must receive credit for the following:

- Presentence commitment for study. *State v. Powell*, 11 N.C. App. 194 (1971);
- Hospitalization to determine capacity to stand trial. *State v. Lewis*, 18 N.C. App. 681 (1973);
- 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);
- The active portion of a split sentence. *State v. Farris*, 336 N.C. 553 (1994);
- Time spent at DART–Cherry as a condition of probation. *State v. Lutz*, 177 N.C. App. 140 (2006);
- Time spent imprisoned for contempt in response to a violation of probation under G.S. 15A-1344(e1). *State v. Belcher*, 173 N.C. App. 620 (2005).
- Time spent in jail or prison as confinement in response to a violation under G.S. 15A-1344(d2);

- Time spent in jail pursuant to a probation officer’s exercise of delegated authority under G.S. 15A-1343.2(e) or (f), or as a “community and intermediate” probation condition imposed by a judge under G.S. 15A-1343(a1).

A defendant should not receive credit for:

- Time spent under electronic house arrest. *State v. Jarman*, 140 N.C. App. 198 (2000);
- 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. __ (July 19, 2011). Note that under G.S. 20-197(k1), a judge may, in a DWI case, credit time spent as an inpatient in a facility operated or licensed by the State for the treatment of alcoholism or substance abuse, provided that such treatment occurred after the commission of the offense for which the defendant is being sentenced.

If time is creditable time is spent in custody as the result of more than one pending charge, how the credit is ultimately applied depends on whether the defendant receives consecutive or concurrent sentences. Consecutive sentences are considered as one sentence and the creditable time shall not be multiplied by the number of consecutive offenses for which the defendant will be imprisoned. When sentences are run concurrently, however, creditable time must be applied to each of them (to the extent that the defendant was actually held on both charges at the same time). G.S. 15-196.2.

- For example, a defendant is held in pretrial confinement for 10 days, charged with Crime A and Crime B. If he receives consecutive 30-day sentences, they are treated as one 60-day sentence with 10 days of credit applied to only one of the judgments and the defendant serves 50 days. If he receives concurrent 30-day sentences, 10 days of credit apply to each judgment and the defendant serves 20 days.

A sentence should not be reduced by any time that is credited on the term of a previously imposed sentence to which a defendant is subject. G.S. 15-196.1.

E. Sentence reduction credit

Structured Sentencing. Pursuant to DAC regulations enacted under authority of G.S. 148-13, Structured Sentencing sentences may be reduced by *earned time*.

The maximum term of a felony sentence may be reduced to, but not below, the minimum term by earned time credit. G.S. 15A-1340.13(d). DAC awards earned time at three different rates—3 days per month, 6 days per month, or 9 days per month—depending on the nature of the work performed or program completed. On average, felons serve 110 percent of their minimum sentence.

A misdemeanor sentence may be reduced by earned time credit and by credit for work or educational programs under G.S. 162-60, provided that the combined award of credit may not exceed more than four days per month of incarceration. G.S. 15A-1340.20(d). On average, misdemeanants serve 96 percent of their sentence.

Inmates eligible for earned time are also eligible for credit called *meritorious time* for exemplary acts, overtime, work performed during inclement weather, and certain educational and vocational milestones.

Impaired driving. Impaired driving sentences are eligible for *good time*. Good time is awarded at the rate of one day deducted for each day served without a violation of inmate conduct rules. Thus, good time effectively cuts an impaired driving sentence in half.

Special probation. Inmates do not receive sentence reduction credit while serving the active portion of a split sentence. G.S. 148-13(f). As a matter of DAC policy inmates likewise do not receive any sentence reduction credit while serving a period of confinement in response to violation.

The Division of Adult Correction's policy on *Sentence Credits* is included as an appendix.