Confinement as Part of a Deferral or Conditional Discharge

Author : Jamie Markham

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May probation pursuant to a deferred prosecution or conditional discharge include incarceration?

The question has come up a lot lately, both on the front end when a person is placed on probation and on the back end if he or she violates. What sort of confinement, if any, is allowed at any point in the life of such a case?

First, let's back up and make sure we're on the same page about what sort of deferrals and conditional discharges we're talking about. Under G.S. 15A-1341(a1), a person may be "placed on probation as provided in this Article [82]" as part of a statutory deferred prosecution. Under G.S. 15A-1341(a2), a person may be "placed on probation" to participate in Drug Treatment Court as part of a deferred prosecution. Under G.S. 15A-1341(a3), (a4), and (a5), a person may be "placed on probation as provided in this Article" as part of a conditional discharge for prostitution, misdemeanors and Class H and I felonies, and Drug Treatment Court, respectively. There is also "probation" as part of the conditional discharges described in G.S. 90-96(a) and (a1) for drug possession and G.S. 90-113.14(a) and (a1) for certain toxic vapor offenses.

So clearly the person must be placed on *probation*; it obviously would be wrong, for example, to style something as a conditional discharge but then order a straight active sentence to a jail or prison. The harder question, though, is whether the *probation* referred to throughout those statutes may include the various forms of incarceration that are allowed under regular post-conviction probation—things like special probation, quick dips, or confinement in response to violation.

I don't think the statutes are clear, and there's not much appellate case law on point. The most instructive case is probably State v. Burns, 171 N.C. App. 759 (2005). *Burns* involved a G.S. 90-96(a) conditional discharge probationer. This issue in the appeal was whether the jurisdictional rules and timelines applicable in ordinary probation cases applied to him. The court of appeals concluded that they did, reasoning that "[i]n the absence of a provision to the contrary, and except where specifically excluded, the general probation provisions found in Article 82 of Chapter 15A apply to probation imposed under [G.S.] 90-96." *Id.* at 761. As discussed here, it seems to me that the court would probably apply the same sort of logic to probation imposed as part of a deferred prosecution, too.

Taking the *Burns* rule literally, there's a plausible argument that splits, dips, and dunks may (and should) be used in conditional discharge and deferral cases just like they are in regular probation. There are some problems with that, though.

The clearest problem, I think, is with special probation. By definition, conditional discharge and deferred prosecution probationers have not been sentenced. Therefore, unlike regular probationers, they have no suspended sentence. Under G.S. 15A-1351(a), the maximum term of imprisonment allowed as part of a sentence to special probation is one-fourth of the maximum term of imprisonment imposed for the offense. For a deferral or conditional discharge probationer with no suspended sentence, you'd be left asking "one-fourth of what?" when trying to figure out how long the split could be.

Beyond that technical wrinkle, I think there's an even more important conceptual difficulty with ordering any sort of

probationary confinement for a defendant who doesn't yet have a suspended sentence. There is simply no credit in the suspended sentence bank from which to borrow the probationary confinement days. Even for short-term confinement like a quick dip (2 or 3 days, as provided in G.S. 15A-1343(a1)(3)), which would eventually be covered by all but the very shortest of suspended misdemeanor sentences if the defendant were to fail on probation, it seems like you ought not put the probationary confinement cart before the suspended sentence horse. For what it's worth, Community Corrections assumes by policy that its delegated authority in deferral and conditional discharge cases does not include the authority to impose a quick dip in the jail.

A confinement-less approach to deferral probation also strikes me as a better fit with the ostensible purpose of deferral supervision. That supervision arguably should be less focused on *punishing* and more focused on verifying compliance with the deferred prosecution agreement or fulfillment of the terms and conditions of the conditional discharge. You can see that in the statutes governing probation failures in those cases. Under G.S. 15A-1341(a6), "upon violation of a term or condition of a conditional discharge . . . the court may enter an adjudication of guilt and proceed as otherwise provided." Under G.S. 15A-1344(d), in response to a violation of deferred prosecution probation, the court may "order that charges as to which prosecution has been deferred be brought to trial." I read those provisions as exempting these cases from the technical violation/revocation-eligible violation distinction applicable in ordinary cases. In other words, the court may revoke them for any violation, including a technical violation (something other than a new crime or absconding) without first imposing quick dips or CRV, as the case may be. The punishment in the case, if any, will be meted out in the eventual post-revocation sentence.

Sometimes people will note that the various probationary confinement options are on some of the AOC forms applicable in each type of case (e.g., AOC-CR-619D for conditional discharges under G.S. 90-96(a), or AOC-CR-622, for disposition or modification of a deferred prosecution or conditional discharge) include space for probationary confinement like splits, quick dips, and CRV.

Sort of. Look carefully and you'll see that the pages on which those sanctions appear are really borrowed from the AOC-CR-603D and AOC-CR-609—the suspended sentence and modification orders designed for regular probation cases, respectively. Under *Burns*, most of what appears on the regular probation forms probably applies in deferral and conditional discharge cases, so allowing those forms to do double-duty for deferrals is a sensible shortcut. But as always, users should bear and mind that not every check-box on the boilerplate forms is vetted and approved for every type of case in which the form may be used.

The type of probationary confinement that may make the most sense in deferral and conditional discharge cases is contempt. Criminal contempt may, under G.S. 5A-11(9a), be imposed in response to a probation violation, and that seemingly could include a violation of probation in a deferred prosecution or conditional discharge case. On the other hand, State v. Belcher, 173 N.C. App. 620 (2005) (discussed here), says that probation contempt counts for credit against a later-activated sentence. So even contempt imprisonment may bump up against the "no-time-in-the-bank" concern I have about splits, dips, and CRV.

Finally, I am sometimes asked the related question of whether a probation officer may arrest a person alleged to have violated probation in a conditional discharge or deferral case. I wrote about that here, concluding that officers probably do have arrest authority in those cases.