

## Deferred Prosecutions and Guilty Pleas

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Local procedures vary when it comes to deferred prosecutions. In general, there's nothing wrong with that; the district attorney has broad discretion in the deferred prosecution realm. Lately, though, several people have asked me a particular question related to deferred prosecution procedure: Does the defendant actually plead guilty when the deferral is entered?

At the risk of oversimplifying the issue, I think the answer is no. If the defendant pleads guilty—as in, actually goes through the full transcript of plea with a judge—it seems to me that it wouldn't be a deferred prosecution any longer. It would be a conviction. And once you cross that Rubicon, you'd be on shaky legal footing if you required the defendant to do anything that amounted to punishment. See *State v. Popp*, 197 N.C. App. 226 (2009) (discussed [here](#)). Moreover, neither the prosecutor nor the court would have clear authority to dismiss it, even if the defendant did everything he or she was supposed to do under the agreement. *Id.* There's a risk that everyone winds up unhappy.

The statutes setting out the endgame possibilities of a deferred prosecution corroborate the view that a plea should not be entered as a deferral begins. When a defendant violates a deferred prosecution agreement the court may “order that charges as to which prosecution has been deferred be *brought to trial*.” [G.S. 15A-1344\(d\)](#) (emphasis added). When a defendant's deferred prosecution probation expires or terminates without violation, the defendant “shall be immune *from prosecution*.” [G.S. 15A-1342\(i\)](#) (emphasis added). Neither statute would make much sense if a plea had already been entered.

The formal deferred prosecution statute references a “written agreement” between the State and the defendant. [G.S. 15A-1341\(a1\)](#). And the boilerplate language of [Form AOC-CR-610](#) suggests that those agreements typically include an “admission of responsibility” that is binding on the defendant in any subsequent prosecution. But that admission does not have the effect of a guilty plea.

The lone case addressing this issue is *State v. Ross*, 173 N.C. App. 569 (2005). In *Ross*, the defendant entered into a deferred prosecution agreement related to his failure to pay taxes. (Like, a lot of taxes. Over a quarter-million dollars of taxes.) As part of the agreement, the defendant “acknowledged his guilt in fact” to five counts of misdemeanor failing to pay withholding taxes and agreed to pay restitution to the Department of Revenue in the amount of \$285,000. He failed to pay the money, prompting the State to drop the charges referenced in the deferral agreement and pursue the more serious charge of aiding and abetting the embezzlement of State property worth \$100,000 or more. The defendant was convicted and sentenced to about 5 years in prison.

On appeal, the defendant argued that his deferred prosecution agreement was actually a plea of guilty to the five misdemeanor counts, and that the State was thus locked into those charges on double jeopardy grounds. Specifically, the defendant noted the agreement's focus on his acknowledgement of guilt and the fact that a breach of the agreement was to be brought to court for *sentencing*, not for trial or plea. No trial was necessary, he argued, because the plea had already been entered.

The court of appeals didn't see it that way. To the contrary, the court held that “a plea of guilty was neither tendered by the defendant nor accepted by the court.” *Id.* at 573. The court never found a factual basis for the plea, and the

“acknowledgment of guilt contained in the transcript of the agreement, without more, [wa]s insufficient to raise the legal inference that a guilty plea was entered and accepted.” *Id.* at 574.

The rule is different, of course, when you’re talking about conditional discharges like [G.S. 90-96](#) or G.S. 15A-1341(a4). Those statutes clearly require the defendant to either plead guilty or be found guilty first. The defendant is then placed on probation without formal entry of judgment, and the court is granted authority to dismiss the proceedings if the defendant succeeds. G.S. 15A-1341(a6). If you prefer the plead-first approach, a conditional discharge, not a deferred prosecution, is probably the better way to go.