Electing to Serve a Sentence

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Suppose a defendant is convicted of a crime and the judge wants to (or, in a "C" or "C/I" cell in the sentencing grid, *has* to) suspend the sentence. Can the defendant refuse probation and elect to serve the sentence? Unless the defendant's crime was committed prior to January 1, 1997, the answer is no.

The law that used to allow a probationer to elect to serve a sentence, G.S. 15A-1341(c), was repealed in 1995. S.L. 1995-429. The repeal was motivated in part by the fact that many pre-Structured Sentencing probationers were refusing or purposely violating their probation, knowing they would serve only ten to twenty percent of their active sentences under the emergency prison population control measures in effect at the time. Better, the thinking went, to knock out a shortened active sentence than to put up with years of probation supervision.

There were some who worried that the repeal of the elect-to-serve provision would cast doubt on the constitutionality of suspended sentences. At that time, probation was not included in the list of authorized punishments set out in Article XI, Section 1 of the state constitution, and so its validity arguably hinged on the defendant's consent. With the elect-to-serve provision repealed, a defendant could no longer be said to have consented to his or her probation. To be safe, then, the repeal was accompanied by a state constitutional amendment, adding probation to the list of authorized punishments. Consent no longer required, problem solved. (This change in the law becomes important when you think about things like warrantless searches of probationers. No longer can you just say the searches are okay because the probationer has implicitly agreed to be on probation. Instead, the searches need to be analyzed under a more traditional Fourth Amendment framework.)

Generally speaking, there are two times when a defendant might try to elect to serve a sentence, at the time of sentencing or at a violation hearing. At sentencing, a defendant who falls within a cell on the sentencing grid that includes an "A" may certainly ask the judge for an active sentence. In many cases I suspect that request will resonate with the judge, who may not want to burden an already-overworked community corrections staff with an offender who isn't motivated to succeed on probation in the first place. But what if the defendant falls in a grid cell without an "A"? Aside from the active-time exception for certain misdemeanors under G.S. 15A-1340.20(c1), an active sentence is simply not an option. The General Assembly has determined that those defendants don't merit a prison bed-at least not at the outset. In those cases, if the court is inclined to let the defendant bypass probation and go directly to prison, I'm told that some judges will use a three-step process in which they (1) sentence the defendant to probation, (2) get the defendant to admit noncompliance (presumably by refusing to report to an officer), and (3) revoke the probation. If you go that route, at a minimum I think you should use a separate form for the original sentence and the revocation, and you should be sure the defendant affirmatively waives the requisite notice and hearing on the probation violation.

At a violation hearing, a defendant can certainly admit to a violation and ask the court to revoke. I imagine the court generally will grant that request, but not in every case. The court may, for example, be inclined to keep a defendant on probation when he or she owes a large amount of restitution. In any event, even if the defendant is purportedly electing to serve, the court should be sure to check the first box in the "Conclusion and Order" section on page one of AOC-CR-607 or -608, saying that the suspended sentences were activated because of the violations, not the second box referring to elections to serve.

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Am I elevating form over substance? Maybe. But in addition to the underlying rule-of-law issue, there's a risk in both situations (at sentencing or at a violation hearing) that invocation of the non-existent elect-to-serve provision will result in the judgment getting kicked back, either by DOC or by the court of appeals, as happened in *State v. Davis*, 186 N.C. App. 305 (2007) (unpublished), and *State v. Adams*, 166 N.C. App. 517 (2004) (unpublished).

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