Jail Credit Applied to Split Sentences

Author : Jamie Markham

Categories : Sentencing, Uncategorized

Tagged as : jail credit, jail fees, special probation, split sentence

Date : April 20, 2017

When imposing a split sentence, the court has a choice to make about what to do with whatever pretrial jail credit the defendant might have in the case. Apply it to the split? Or apply it to the defendant's suspended sentence? Today's post discusses a few issues associated with that choice.

The statutory basis for the court's choice is in G.S. 15A-1351(a). That law give the court authority to apply jail credit to "either the suspended sentence or to the imprisonment required for special probation." If the court chooses the latter option and applies the credit to the split sentence, the defendant gets the benefit of the jail credit immediately—the imprisonment portion of split is shortened or possibly zeroed out entirely by the credit. If the court chooses to apply the credit to the suspended sentence, the credit is set aside, with the defendant only receiving the benefit of it if and when he or she is revoked. Obviously it is generally to a defendant's advantage to have the credit applied to the split sentence now—most probationers don't ever get revoked, and those who don't never get a chance to cash in their banked credit.

Before 2011, one of the more common uses of the court's authority to apply jail credit to a split sentence was to order a split sentence to time already served. Back then, an Intermediate punishment *had* to include at least one of the six Intermediate sanctions (special probation, intensive probation, electronic house arrest, day reporting center, drug treatment court, or a residential program). In cases where no Intermediate sanction seemed necessary or appropriate, a go-to move was to order a short split sentence less than or equal to the defendant's jail credit, with that jail credit applied immediately such that the defendant went right onto probation without having to serve any additional time behind bars.

Nowadays it is not necessary to do that in a Structured Sentencing case. The Justice Reinvestment Act removed the *requirement* for an Intermediate punishment to include any particular sanctions. With that in mind you might think a judge would forego a split entirely rather than going to the trouble of imposing one and then zeroing it out immediately with jail credit. But the practice persists—and not just in impaired driving cases where a split to time already served can be used to satisfy the mandatory term of imprisonment required for a particular level of DWI.

How does the court memorialize its choice about whether and how pretrial jail credit gets applied to a split? It turns out there is some variation in practice around the state.

The suspended sentence judgment forms include a place for the decision on page one, side one. For example, the AOC-CR-603D includes the following line:

The defendant shall be given credit for _____ days spent in confinement prior to the date of this Judgment as a result of this charge(s) to be applied toward the ☐ sentence imposed above. ☐ imprisonment required for special probation set forth on AOC-CR-603D, Page Two.

Not every district completes the form in the same way. In some places, the court uses the jail credit blank on page one to memorialize only the jail credit that will be applied to the suspended sentence, noting separately any jail credit that will apply to the split in the free text area of the Intermediate Punishment block on page two (box H., Other, on the AOC-CR-603D). In other places, the court will record all the jail credit on page one, check the box that the credit is to be

applied to the split, but then clarify on page two in the free text exactly how much of the credit from page one is to be applied to the split. I'm sure there are other variations I'm not aware of.

The trouble arises when a defendant for whom one of these different approaches has been applied is later before the court for a probation violation hearing—possibly in a district other than the county of conviction, where yet another approach may be customary. It may not be clear at that point exactly how much total time the defendant has served in the case through pretrial confinement and special probation. For example, if the form shows 50 days of credit on page one, but then references 10 days of credit in the free text on page two, it may not be clear to the revocation court whether the defendant has 60 total days of credit, or whether the 10 referenced on page two were really just a clarifying subset of the total of 50 days recorded on page one. It matters, because the defendant clearly should get credit upon revocation for every day actually served in the case up to that point, whether it was served pretrial or as part of a split. State v. Farris, 336 N.C. 552 (1994).

To use the form as designed, the court would fill in the blank on page one with the defendant's total pretrial jail credit. The court would then check the first box if it wanted that credit to be applied to the suspended sentence—which is to say, banked, and applied only in the event of revocation. The court would check the second box if it wanted the credit applied to the split. This is designed to be the only reference to jail credit in the judgment; it is up to the custodian (the sheriff or DAC, as the case may be) to look at page one to see what time, if any, remains to be served on whatever split is ordered in the Intermediate Punishments block on page two.

Another wrinkle related to the application and memorialization of the credit applied to a split is what jail fees should apply. Under G.S. 7A-313, a convicted defendant is mandatorily assessed a $10 court cost for every day spent in pretrial confinement unless the court waives that cost. Meanwhile, a defendant ordered to serve a split sentence as part of a probationary sentence may be assessed a $40 fee for every day of the split. Which fee applies when pretrial confinement gets applied to a split?

It seems clear to me that the $10 cost would apply to any portion of the split served through the application of pretrial credit, and the $40 fee would apply (if ordered at all) only to post-conviction split days remaining to be served after any pretrial credit is applied. Given the variations in practice on how the credit is recorded, however, I could imagine the clerk might sometimes have trouble determining which fee to assess for which days. At a minimum, those districts that record the credit on both page one and page two should take care to identify any overlap so that both fees don't get assessed for the same days of confinement.