Keeping a Person Under Supervision When There's No Sentence Left to Suspend

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When a person has so much jail credit that he has served his entire sentence of imprisonment, may he nonetheless be sentenced to probation? In other words, may a court sentence someone to probation when there is no sentence left to suspend?

For example, suppose a Class A1, Prior Conviction Level II misdemeanant has 100 days of jail credit. The maximum permissible sentence in that grid cell is 75 days. Obviously if the court gave an active sentence—which is authorized in this C/I/A grid cell, or in any misdemeanor grid cell through the "active punishment exception" of G.S. 15A-1340.20(c1)—the jail credit would exceed the sentence and the defendant would be immediately released to time already served.

But could the court put the person on probation? In my opinion, no. The sentencing judge is required to apply creditable jail time to the term of imprisonment regardless of the sentence disposition (active or probationary). G.S. 15-196.1; -196.4. And G.S. 15A-1342(c) provides that when a court places someone on probation, it "must impose a suspended sentence of imprisonment . . . that may be activated upon violation of conditions or probation." If the all the imprisonment that could be served has already been served, there would be no suspended sentence to impose, and probation would appear to be impermissible. That makes sense as a practical matter, too—Community Corrections would have little leverage over an offender who has no time left hanging over his head.

My answer would be the same for a felon. If the defendant has served the maximum sentence, he or she must be released—even in grid cells that do not allow for an active disposition. Service of the maximum term pulls the suspended sentence rug out from under any possible probation. A trickier variation on the issue, though, is the felon who doesn't quite have enough jail credit to cover the maximum sentence, but does have enough to be due for release onto post-release supervision. May those defendants be sentenced to probation (assuming the grid allows for it)? I think so—although judges and defendants alike should note that revocation would actually result in an immediate release to PRS, which may not be the outcome anybody had in mind.

A final version of this question comes up for offenders already on post-release supervision. Can PRS supervision continue once a person has served all the time remaining on his maximum sentence? No—and in the PRS context that is clear by statute. Under G.S. 15A-1368.3(c)(1), a "supervisee shall not be rereleased on post-release supervision if the supervisee has served all the time remaining on the supervisee's maximum imposed term."

The issue is mostly likely to arise for sex offenders—particularly Class F–I sex offenders—who have a long supervision period (5 years) but only 9 months of possible reimprisonment built into their maximum sentence. If those offenders are reimprisoned for the full time remaining on their maximum sentence (as they may be for any violation under G.S. 15A-1368.3(c)(1)), their sentence could conclude long before their supervision period would have ended.

With that in mind, it is not uncommon for the Post-Release Supervision and Parole Commission to re-release a sex offender from imprisonment back to supervision before the full maximum sentence is served. Re-release is authorized under G.S. 15A-1368.3(d). I have heard of sex offenders being re-released with only a day or two remaining on their

maximum sentence, so that they may be kept under supervision for the full five years.

That raises the leverage issue I mentioned before—what power does a probation-parole officer really have over an offender who could face not more than a day of reimprisonment in response to a violation? Remember, though, that the Parole Commission has the authority to hold sex offenders in a special form of contempt under G.S. 15A-1368.2(b) (discussed here). That law says that punishment for contempt "is not eligible for credit for time served against the sentence for which the prisoner is subject to post-release supervision." In other words, the statutory rule for PRS contempt is exactly the opposite of the rule for probation contempt under State v. Belcher, 173 N.C. App. 620 (2005) (discussed here). Assuming that is permissible, sex offenders can be kept on post-release supervision for the full 5-year term even when they have very little time remaining on their maximum imposed sentence of imprisonment.