

Noncontinuous Active Sentences

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The court of appeals issued its decision yesterday in a case called [State v. Miller](#). It answers a question I get asked a lot: Can an active sentence be served in noncontinuous periods? The answer: No, it can't—at least not as a true active sentence.

In Miller, the defendant received a 30-day suspended sentence in district court. The defendant violated his probation, prompting the district court to enter a [modification order](#) requiring 30 days of special probation confinement (a 30-day split) to be served on 15 consecutive weekends as an intermediate sanction. (I'll address the propriety of this condition in a minute.) The modification order said probation would be terminated “upon completion of the active sentence.”

Mr. Miller apparently served those weekends for two or three months but then violated his probation again. This time, the district court entered a [judgment and commitment upon revocation of probation](#), activating Miller's 30-day sentence (with credit for 16 days—time that had presumably been served over eight weekends as part of his 30-day “split”).

Miller appealed the revocation to the superior court, which likewise concluded that he had violated probation and activated his 30-day sentence. At the superior court hearing, Miller asked the court to order that the activated sentence be served in non-continuous periods, from Monday evening to Wednesday evening each week. The trial court refused, saying that it lacked statutory authority to do so—notwithstanding defense counsel's argument that it “happens all the time in district court.”

Miller appealed to the court of appeals, arguing that the trial court was mistaken in its belief that it couldn't order the remainder of his active sentence to be served two days per week for seven weeks. The court of appeals disagreed with the defendant, saying there is no statutory authority to impose an active sentence over noncontinuous periods of time—even if the sheriff has a “policy” allowing sentences to be served that way. The court was unpersuaded by the defendant's argument that the reference in G.S. 15A-1353 to orders of commitment for “term or terms of imprisonment” authorizes an sentence to be served over multiple intervals of time. That provision, the court said, refers to active sentences for defendants convicted of multiple crimes, not noncontinuous periods of imprisonment for a single conviction.

The rule from Miller is clear: a trial judge lacks authority to allow a defendant to serve an active sentence on nonconsecutive days. If a court wants an active term of imprisonment to be served in noncontinuous periods, the best it could do is something sort of like what the district court did when it modified Mr. Miller's probation in the first place: add special probation as an intermediate sanction and then terminate probation when the days of confinement have been served. The catch, however, is that the court may not order special probation confinement for a duration equal to the underlying suspended sentence (an issue not addressed in the Miller case itself). Special probation added in response to a probation violation under [G.S. 15A-1344\(e\)](#) is bound by the same maximum as special probation ordered at sentencing under [G.S. 15A-1351\(a\)](#): periods of confinement may not exceed one-fourth the maximum sentence of imprisonment imposed for the offense. So, the most the district court could have ordered as special probation in Miller's case was 7 days, not 30.