"Pay to Play" Deferred Prosecutions

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A district attorney generally has discretion in structuring his or her approach to deferred prosecutions. The DA could have a broad program, allowing deferrals for all defendants who might be eligible as a matter of law. Or there could be no program at all (aside from the handful of diversions that are mandatory in certain circumstances). Regardless, whatever program the State has must not discriminate against defendants based on an improper classification. Characteristics like religion and race obviously are not permissible bases on which to condition access to a deferral program. A more difficult question, though, is what role a defendant's financial situation may play in the State's decision to defer prosecution.

The issue recently made headlines in North Carolina, described here as a "pay to play" deferral program. In short, a DA's office had a policy of limiting access to its deferred prosecution program for property crimes to those defendants who could pay their restitution down to $1,000 or less. A particular defendant, charged with embezzlement, owed about $1,800 in restitution. When he was unable to pay the amount down below the $1,000 threshold, the State declined to let him participate in the program.

That denial prompted the defendant to make a motion to dismiss based on selective prosecution. The particular case was eventually resolved in other ways—a group of local residents helped the defendant pay the money back, and the newly appointed district attorney changed the policy. But the situation raised issues that will surely arise again, and so are worth thinking about. I have a few preliminary thoughts.

The main argument against the former requirement to pay restitution as a prerequisite to deferral is that it had the potential to discriminate between defendants based on nothing but their relative wealth. The precise role of indigency as a constitutional classification is evolving (consider the Texas bail case that John discussed here and Jessie discussed here, or the recent federal court order striking Tennessee's driver license revocation law for defendants who fail to pay their costs), but the baseline issue isn't complicated. If two similar defendants are charged with similar crimes, but only the one with the means to pay a certain amount of money is given the opportunity to participate in the deferral program and avoid a criminal record, then the law unfairly favors the wealthier defendant.

The counterargument is that the distinction is not based on the person's wealth, but rather on his or her ability to mitigate some portion of the harm that he or she allegedly caused. We seem to sense that distinction differently when the stolen property is a tangible object and not money. Conditioning access to a deferral program or a better plea deal on making a victim whole by returning a stolen necklace doesn't invite the same discussion of the defendant's overall financial situation as when the property is converted to dollars. But in either case, the restitution in question is tied to property that the defendant had at some point—and so it might be better described as "pay *back* to play."

There aren't many cases—either in North Carolina or nationally—that help us sort through the analysis. The closest case in North Carolina is probably *In re Register*, 84 N.C. App. 336 (1987), a juvenile case. In *Register*, seventeen juveniles allegedly broke into and vandalized a house, causing thousands of dollars' worth of damage. Some of the juveniles agreed to contribute $1,000 each to the victim as restitution, but some did not. The prosecutor dismissed the charges against those who paid, but proceeded against those who didn't. A subset of the latter group appealed, arguing that the decision to prosecute only the juveniles who didn't pay was improper selective prosecution. The court

of appeals agreed—although principally on the rationale that the "purposes of the juvenile code are not served by making the willingness or ability of a juvenile pay compensation the determinative factor in the decision of whether to file a complaint as a juvenile petition." *Id.* at 346.

Looking beyond North Carolina, in Mueller v. State, the Court of Appeals of Indiana held that a prosecutor's decision to exclude defendants from a pretrial diversion program solely based on their inability to pay the $230 in fees required to attend the requisite behavior modification classes violated the defendants' right to due process and equal protection. 837 N.E.2d 198, 204 (Ind. Ct. App. 2005) ("Completely foreclosing a benefit that the State offers to defendants in the criminal justice system, based solely on an inability to pay a fee or fine, violates the Fourteenth Amendment."). In Moody v. State, the Supreme Court of Mississippi similarly concluded that a bad check program that required the defendant to pay a $500 fine in addition to restitution was unconstitutional in that the person "who is unable to pay will always be in a position of facing a felony conviction and jail time, while those with adequate resources will not." 716 So. 2d 562, 565 (Miss. 1998).

Both cases are helpful to a defendant arguing for broad access to a deferral program, but neither is perfectly analogous to the North Carolina situation described earlier, as both involved an additional fine or fee beyond the actual proceeds of the defendant's alleged crime.