Sentencing Legislation Review Part I: New Credit Rules for CRV

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My next few posts will discuss this session's legislative changes related to sentencing and corrections. Today's post covers some pending changes related to confinement in response to violation (CRV, sometimes referred to as a "dunk").

CRV is incarceration ordered in response to a technical violation of probation—meaning a violation other than a new crime or absconding. The CRV concept was created in 2011 as a centerpiece of the Justice Reinvestment Act. Drafters of that legislation noted that revoked probationers made up a big portion—over half—of North Carolina's prison population. How to reduce that population? Change the law so that technical violators can be locked up for no more than 90 days. G.S. 15A-1344(d2).

There are many technical details associated with CRV—where it is served, how it works when a person is on probation for multiple convictions, and how jail credit gets applied to it, among others. I tried to address some of those issues in the FAQ post here. The CRV law has been amended multiple times since 2011 to clarify various things about it. In 2012: to remove the apparent requirement of a "terminal dunk" in short misdemeanor cases. In 2013: to make clear that CRV confinement must be served in one big chunk, not on weekends or other noncontinuous intervals.

That brings us to the changes for 2014, which relate to the rules for applying jail credit to a CRV. Under existing G.S. 15A-1344(d2), the rule for felonies and misdemeanors alike is that credit for any time spent awaiting a violation hearing at which a CRV is ordered *must* first be applied to the CRV. For example, if a person was held in jail for 20 days in advance of a violation hearing at which a 90-day felony CRV is ordered, the judge is required under existing law to credit the 20 days to the CRV, and the person will serve only 70 additional days. That prehearing credit cannot be "banked" to be applied only in the event of a later revocation. The law never said anything about whether other jail credit, such as pre*trial* confinement or time spent at DART-Cherry, could be applied to a later-imposed term of CRV, but that frequently happens in practice.

That crediting of time—especially the gathering up of credits beyond the mandatorily-credited prehearing confinement—was frustrating the Division of Adult Correction's plan for CRV periods by making them too short. With credits applied, the average length of a felony CRV is around 75 days. And that is apparently not enough time for CRV to be the program-based behavior modification that DAC envisioned. They were hoping for a full three months to allow the offender to complete a tailored curriculum involving cognitive behavioral intervention, substance abuse treatment, and other programming as appropriate.

And so DAC sought and obtained a change to the law. A provision in the budget bill (section 16C.8.(a) of S.L. 2014-100) amends G.S. 15A-1344(d2) to provide that the 90-day period of CRV ordered for a felony "shall not be reduced by credit for time already served in the case." Instead, "[a]ny such credit shall . . . be applied to the suspended sentence"—which means it will only be applied if the offender ever gets revoked. There's nothing inherently wrong with that; it happens to every probationer with pretrial jail credit who completes probation without getting revoked. But it is a 180-degree turn from the original CRV rule, which was designed to cap the total incarceration (pre- and post-hearing) for a technical violation at 90 days.

For misdemeanors, the revised rule is different. In fact, the revised rule for misdemeanor CRV is that there is no rule. Amended G.S. 15A-1344(d2) neither requires nor forbids the crediting of any sort of confinement (pretrial or prehearing), giving the judge apparent flexibility to do what he or she would like. The change was made in recognition of the fact that for most misdemeanor probationers, the first CRV usually winds up being a "terminal" one, either because it uses up the entire suspended sentence or because the judge orders probation terminated upon its completion.

This change to G.S. 15A-1344(d2) is **effective October 1, 2014, and applicable to probation violations occurring on or after that date.** I read that applicability clause to refer to the date of the defendant's *offending behavior*, not to the date of the violation hearing. If an offender is before the court for a string of technical violations that cross that effective-date threshold, the court should take care to note the particular violation(s) to which it is responding, and apply the appropriate credit rule accordingly.

To the extent that the change disadvantages a probationer by limiting the judge's authority to apply credit, there may be some argument that it violates the Ex Post Facto Clause. On the other hand, if one views the suspended sentence as setting the total punishment in a given case, a change to the manner in which the time is served may not register as an increase in the defendant's exposure. After all, regardless of the technicalities of the credit rules, the judge must always see to it that the defendant's total time behind bars does not exceed his or her suspended sentence.

Finally, these changes to the credit rules should be viewed in the context of DAC's broader plan with respect to CRV. For example, the Division has legislative approval to create two prison facilities devoted exclusively to CRV inmates—the "treatment and behavior modification facilities" mentioned in section 16C.10 of the budget. For men, a western facility in Burke County is on track to open in November, while an eastern facility in Robeson County should come online early next year. The plan for women is still under development. These facilities will apparently have a unique approach to staffing and security designed to facilitate the programmatic interventions described above—which CRV offenders will, after October 1, have a full 90 days to complete.