

SENTENCING AND JAIL CREDIT ISSUES

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SENTENCING QUESTIONS

1. Your client has the following prior record.
 - a. 1-1-01 DWLR PJC
 - b. 11-5-04 Speeding 51/35 Cost
 - c. 1-16-01 Felony Larceny Prob
 - d. 1-19-01 R/O (sup ct) Prob
 - e. 1-29-01 City Code Viol. Fine
 - f. 1-15-02 PV (fel. Lar) Revoked

What is the record level?

Misdemeanor Punishment Chart

CLASS	PRIOR CONVICTION LEVELS		
	I	II	III
	No Prior Convictions	One to Four Prior Convictions	Five or More Prior Convictions
A1	1-60 days C/I/A	1-75 days C/I/A	1-150 days C/I/A
1	1-45 days C	1-45 days C/I/A	1-120 days C/I/A
2	1-30 days C	1-45 days C/I	1-60 days C/I/A
3	1-10 days C	1-15 days C/I	1-20 days C/I/A

Prior conviction

§15A-1340.11(7) Prior conviction. -- A person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime:

- a. In the district court, and the person **has not given notice of appeal and the time for appeal has expired.**

Multiple prior convictions

§15A-1340.21(d) Multiple Prior Convictions Obtained in One Court Week. -- For purposes of this section, if an offender is convicted of more than one offense in a **single session of district court, or in a single week of superior court** or of a court in another jurisdiction, only one of the convictions may be used to determine the prior conviction level.

City code violations

§14-4 (a) Except as provided in subsection (b), if any person shall violate an ordinance of a county, city, town, or metropolitan sewerage district created under Article 5 of Chapter 162A, he shall be guilty of a Class 3 misdemeanor

(b) If any person shall violate an ordinance of a county, city, or town regulating the operation or parking of vehicles, he shall be responsible for an infraction.

ANSWER: Level II.

2. Your client is charged with Second-Degree Trespassing and is a Level I. He has been in jail for 8 days.

Does the Judge have to give him a suspended sentence?

Active punishment for time served

§15A-1340.20(c1) Active Punishment Exception. -- The court may impose an active punishment for a class of offense and prior conviction level that does not otherwise authorize the imposition of an active punishment if the term of imprisonment is equal to or less than the total amount of time the offender has already spent committed to or in confinement in any State or local correctional, mental, or other institution as a result of the charge that culminated in the sentence.

ANSWER: No, he can give 8 days active, credit for 8 days.

3. The Judge hates your client. He is charged with 10 counts of Assault on a Government Officer. Your client is a Level III.

What is the maximum sentence your client could receive?

What would it be if it were 10 counts of second-degree trespass?

Multiple convictions

§15A-1340.22(a) Limits on Consecutive Sentences. -- If the court elects to impose consecutive sentences for two or more misdemeanors and the most serious misdemeanor is classified in Class A1, Class 1, or Class 2, the **cumulative length of the sentences of imprisonment shall not exceed twice the maximum** sentence authorized for the class and prior conviction level of the most serious offense. **Consecutive sentences shall not be imposed if all convictions are for Class 3 misdemeanors.**

ANSWER: 300 days/20 days.

4. The Judge sentences your client to the maximum active sentence of 150 days on each offense. Nothing else is said.

What is the sentence?

Concurrent and consecutive terms of imprisonment

§15A-1354(a) Concurrent and consecutive terms of imprisonment. -- When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. **If not specified or not required by statute to run consecutively, sentences shall run concurrently.**

Consolidation of Sentences

§15A-1340.22(b) Consolidation of Sentences. -- If an offender is convicted of more than one offense at the same session of court, the court may consolidate the offenses for judgment and impose a single judgment for the consolidated offenses. Any sentence imposed shall be consistent with the appropriate prior conviction level of the most serious offense.

ANSWER: Concurrent.

5. Your client has a pending murder charge. He is convicted of DWLR and R/O.

Do you need to appeal to prevent a point?

Prior Record Level for Felony Sentencing

§15A-1340.14(b)(5) Prior Record Level for Felony Sentencing. --For each prior misdemeanor conviction as defined in this subsection, 1 point. For purposes of this subsection, misdemeanor is defined as **any Class A1 and Class 1 nontraffic misdemeanor offense, impaired driving** (G.S. 20-138.1), impaired driving in a commercial vehicle (G.S. 20-138.2), and misdemeanor death by vehicle (G.S. 20-141.4(a2)), **but not any other misdemeanor traffic offense under Chapter 20 of the General Statutes.**

ANSWER: No.

6. Your client is on probation and is convicted of the Second-Degree Trespass only.

What effect will this have on his probation?

Response to violations

§15A-1344(d) . . . provided that probation may not be revoked **solely for conviction of a Class 3 misdemeanor.**

ANSWER: None.

7. Can a Judge hold an inmate in Contempt for failure to complete inpatient drug treatment when only an active sentence has been ordered?

In *State v. Hughes, 136 N.C. App. 92 (1999)*, the defendant raised the issue of whether “the trial court erred in both requiring defendant to make restitution and imposing an active sentence in its judgment .”

In the present case, defendant was not placed on probation in the judgment imposed on Count III of the indictment. He received an active sentence of imprisonment of not less than sixteen nor more than twenty months. The trial court was authorized only to "recommend" that defendant make restitution as a condition of work release or post-release supervision. Therefore, the trial court did not have the authority to order defendant to make restitution in the amount of \$ 550,283.75 in the judgment on Count III.

The authority to allow for inpatient drug treatment comes from §15A-1351 (h). In a paragraph entitled Substance Abuse Recommendation, it says that “[t]he sentencing court may recommend that the sentenced offender be assigned to the Substance Abuse Treatment Unit for treatment of alcoholism or substance abuse during his imprisonment.” Interpreting this language the same way the Court did in *Hughes*, it seems clear that the court can only “recommend” drug treatment.

BUT, Judges can always order that treatment or restitution be a condition of work release, if recommended.

ANSWER: No, if treatment can only be recommended by the court, then contempt is not an appropriate remedy for the refusal to complete it.

JAIL CREDIT QUESTIONS

1. Your client was arrested on 1-1-01 and released 1-2-01. How many days of jail credit can you certify?
 - a. 1.
 - b. 2.
 - c. 0.
 - d. Do not have enough information.

Credits allowed §15-196.1

The minimum and maximum term of a sentence shall be credited with and diminished by the total amount of time a defendant has spent, committed to or in confinement in any State or local correctional, mental or other institution as a result of the charge that culminated in the sentence. The credit provided shall be **calculated from the date custody under the charge commenced and shall include credit for all time spent** in custody pending trial, trial de novo, appeal, retrial, or pending parole, probation, or post-release supervision revocation hearing: Provided, however, the credit available herein **shall not include any time that is credited on the term of a previously imposed sentence** to which a defendant is subject.

2. Your client was arrested at 11:59 p.m. on 1-1-01 and released at 12:03 a.m. on 1-2-01. How many days of jail credit can you certify?
 - a. 1.
 - b. 2.
 - c. 0.
 - d. Do not have enough information.
3. Your client was arrested at 11:59 p.m. on 1-1-01 and released at 11:59 p.m. on 1-2-01. How many days of jail credit can you certify?
 - a. 1.
 - b. 2.
 - c. 0.
 - d. Do not have enough information.
4. Your client is charged with DWI and was arrested at 11:59 p.m. on 1-1-01 and released at 11:59 p.m. on 1-2-01. How many days of jail credit can you certify?
 - a. 1.
 - b. 2.
 - c. 0.
 - d. Do not have enough information.

DWI Sentencing §20-179

(p) Limit on Amelioration of Punishment. -- For active terms of imprisonment imposed under this section:
(1) The judge may not give credit to the defendant for the first 24 hours of time spent in incarceration pending trial.

5. Your client is charged with DWI, you expect him to be a level 1. What recommendations do you have to minimize the active portion?
 - a. Use any pre-trial credit available.
 - b. Request weekend sentence.
 - c. Recommend your client go into inpatient treatment.
 - d. All the above.

DWI Sentencing §20-179

(k1) Credit for Inpatient Treatment. -- Pursuant to G.S. 15A-1351(a), the judge may order that a term of imprisonment imposed as a condition of special probation under any level of punishment be served as an inpatient in a facility operated or licensed by the State for the treatment of alcoholism or substance abuse where the defendant has been accepted for admission or commitment as an inpatient. . . . The judge may credit against the active sentence imposed on a defendant the time the defendant was an inpatient at the

treatment facility, provided such treatment occurred after the commission of the offense for which the defendant is being sentenced

This language is not present in the Habitual DWI statute. Therefore, no way around mandatory 12-month sentence. Other bad news, no provision for credit against the active sentence imposed on a defendant for time the defendant was an inpatient at a treatment facility.

6. If your client is charged with Habitual DWI and a separate/unrelated DWLR, which case would you want to dispose of first?

Habitual Impaired Driving §20-138.5

(b) A person convicted of violating this section shall be punished as a Class F felon and shall be sentenced to a minimum active term of not less than 12 months of imprisonment, which shall not be suspended. Sentences imposed under this subsection **shall run consecutively with and shall commence at the expiration of any sentence being served.**

7. Your client is in jail for offense A only, for 10 days. He is re-arrested for offense A and for offense B. After 10 days of incarceration, the following occurs:

- a. Offense A is dismissed. How many days credit for offense B?

10, you don't get to use credit from another charge.

- b. Offense B is dismissed. How many days credit for offense A?

20, since he was in custody "as a result of the charge."

- c. Offense A is dismissed, a new warrant is taken out for the same acts, but a new case number is assigned. Is he still entitled to 20 days credit?

Yes, same charge. May have to get copies of all warrants to establish same offense.

- d. He is sentenced to 1 day, credit 1 day for offense B. How many days credit are left for offense A?

19. "[C]redit available herein shall not include any time that is credited on the term of a previously imposed sentence to which a defendant is subject."

- e. Is there an incentive to bring him in early for a plea if he received a 30-day active sentence for offense B?

Allowance in cases of multiple sentences §15-196.2

. . . Consecutive sentences shall be considered as one sentence for the purpose of providing credit, and the creditable time shall not be multiplied by the number of consecutive offenses for which a defendant is imprisoned. Each concurrent sentence shall be credited with so much of the time as was spent in custody due to the offense resulting in the sentence.

Concurrent and Consecutive terms §15A-1354

(a) Authority of Court. -- When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. **If not specified or not required by statute to run consecutively, sentences shall run concurrently.**

8. Your client receives a 120-day sentence with a split of 30 days. He has credit for 25 days.
- a. How many more days does your client have to serve?

Sentences of Imprisonment §15A-1351(a)

“. . . Except for probationary sentences of impaired driving under G.S. 20-138.1, the total of all periods of confinement imposed as an incident of special probation, but not including an activated suspended sentence, **may not exceed six months or one fourth the maximum sentence of imprisonment imposed for the offense, whichever is less.** . . . In imposing a sentence of special probation, the judge may credit any time spent committed or confined, as a result of the charge, to **either the suspended sentence or to the imprisonment required for special probation.**”

This changes for offenses committed on or after December 1, 2003. The six-month cap has been removed. This will not affect any misdemeanor case, but can allow for a longer split for felony cases.

- b. Ultimately, your client’s probation is revoked. Is he entitled to credit for the 30 day split sentence?

Yes, *State v. Farris, 111 N.C. App. 254 (1994)*, states that a defendant who has served, pursuant to special probation, an active sentence is entitled to credit for that time on any sentence imposed upon revocation of probation.

9. Is **IMPACT** a “State or local correctional, mental or other institution” for purposes of jail credit?

Yes. Per §15A-1343.1, “[t]he Intensive Motivational Program of Alternative Correctional Treatment (IMPACT) shall be a residential program within the meaning of G.S. 15A-1340.11(8), operated by the Department of Correction.

§ 15A-1340.11(8) Residential program. -- A program in which the offender, as a condition of probation, is required to reside in a facility for a specified period and to participate in activities such as counseling, treatment, social skills training, or employment training, conducted at the residential facility or at other specified locations.

§ 15A-1340.11(6) Intermediate punishment. -- A sentence in a criminal case that places an offender on supervised probation and includes at least one of the following conditions:

- a. Special probation as defined in G.S. 15A-1351(a) [split sentence].
b. Assignment to a residential program.

See *State v. Hearst, 356 N.C. 132 (2002)*.

Defendant was entitled to credit for time spent in treatment program because his decision to attend it or be sentenced to longer incarceration was not voluntary, and he was in custody, as he had no control over his daily activities.

10. Why is a person not entitled to credit for the first 24 hours of time spent in jail for a straight active DWI sentence?

- (p) Limit on Amelioration of Punishment. -- For active terms of imprisonment imposed under this section:
(1) The judge may not give credit to the defendant for the first 24 hours of time spent in incarceration pending trial.

Are they entitled to it upon revocation of probation?