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1979 LEGISLATION AFFECTING ADULT CORRECTION, PROBATION, AND PAROLE

by

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The major corrections legislation for which the 1979 General Assembly will be remembered is the Governor's presumptive-sentencing bill. The new law does not take effect until July 1, 1980, however, and will be discussed in another memorandum. None of the other laws passed in 1979 relating to corrections will have such serious and far-ranging consequences. Instead, the emphasis was on a clean-up of existing law and the passage of a few pieces of legislation designed to remedy recurring problems. Nonetheless, the legislature enacted some noteworthy laws in the correction field during this session.

PROBATION

Court Costs and Attorney Fees

Several bills enacted in the 1979 session reflect the heightened feeling among criminal justice officials that restitution and costs should be collected from defendants placed on probation. At the same time, however, one of the most troublesome problems facing probation/parole officers is the overwhelming difficulty and frustration encountered in attempting to collect money from probationers. Typically, a person placed on probation is poor and the inability to hold a steady job may have contributed to the defendant's initial trouble with the law. Nevertheless, judges, in their discretion, often require convicted defendants to pay court costs and attorney fees as a condition of supervised probation [G.S. 15A-1343(b)(14)].

Ch. 662 (H 1255), effective October 1, 1979, adds new G.S. 15A-1343(e) to require any person placed on supervised or unsupervised probation on or after that date to pay all court costs and the costs of his appointed counsel

or public defender as a mandatory condition of probation, unless the court finds extenuating circumstances. The judge is required to determine the costs due and the method of payment. Present law authorizing but not requiring a judge to mandate such a condition of probation is repealed. Whether the new law fulfills its intended purpose and requires the payment of costs in more cases will depend on how judges define "extenuating circumstances."

Judges have been authorized, under repealed G.S. 15A-1343(b)(14), to require payment of costs as a condition of probation. Before imposing that condition, however, a judge was required to consider the financial resources of a defendant and his ability to pay. If the defendant could not pay the costs after making a good-faith effort, they were not to be imposed. Presumably, a defendant's inability to pay must also be considered as an extenuating circumstance that will permit a trial judge to place a person on probation without requiring the payment of costs.

Supervision Fee

In a closely related matter, Ch. 801 (S 904) further amends G.S. 15A-1343 to provide that any person placed on supervised probation on or after January 1, 1980, may be required to pay a ten dollar monthly supervision fee as a condition of probation. The clerk of superior court, not the probation officer, is responsible for collecting the supervision fee. Further, a probationer may not be required to pay more than one monthly supervision fee. A court has absolute discretion in deciding whether to impose the monthly supervision fee. Certainly, however, the factors considered in determining a defendant's future ability to pay fines or costs must also be examined to determine his ability to pay a monthly supervision fee over the course of his probationary period. Before adding a monthly supervision fee as another condition of probation, a judge should consider the likelihood that a defendant will be able to pay either at that time or in the future.

Special Probation

North Carolina law permits a defendant convicted of an offense for which the maximum penalty does not exceed ten years or who violates a condition of probation to be placed on special probation. Special probation means that a defendant's prison sentence is suspended and that he is placed on probation, but he is also imprisoned for a specified continuous period or for several discontinuous periods at determined intervals, such as weekends.

Effective June 4, 1979, Ch. (H 159) amends G.S. 15A-1344(e) and 15A-1351(a) to provide that a court imposing a period of imprisonment as a condition of special probation must impose, in addition to any other ordinary conditions of probation, a further condition that the defendant obey the Department of Correction's rules and regulations governing inmate conduct. A defendant placed on special probation is made subject to this condition even if the court does not include it in the written probation judgment. This automatic imposition of a probation condition conflicts with the requirement of G.S. 15A-1343(c) that "[a] defendant released on supervised probation must be given a written statement explicitly setting forth the conditions on which he is being released." The better practice is to include the condition that a defendant obey the Department's rules and regulations in the written probation judgment. Basic fairness and constitutional notice requirements demand no less.

Under present law the Department of Correction is authorized to adopt rules and regulations governing the award of good behavior credit toward a prisoner's term of imprisonment. Confusion has arisen in the past over whether a prisoner is entitled to good time credit toward a term of imprisonment served as a condition of special probation. Ch. 749 (S 159) answers that question by amending G.S. 15A-1355(c) to provide that a person imprisoned as a condition of special probation must serve his term day for day without receiving credits toward service based on Department of Correction regulations.

Probation Revocation Procedures

Ch. 749 (S 159), effective June 4, 1979, also enacted several miscellaneous amendments concerning specific aspects of probation revocation procedure.

The United States Supreme Court requires that a probationer taken into custody for allegedly violating a probation condition be given a preliminary hearing, unless certain requirements have been satisfied, to determine if there is probable cause to believe that he violated the condition. Before, the preliminary hearing in North Carolina had to be held within five working days after a probationer was taken into custody. Another provision caused confusion by requiring that a probationer be released from custody no later than four days after his arrest, but in practice it was interpreted to mean that a preliminary hearing was not required if the actual probation revocation hearing was held within four days after a probationer's arrest.

Ch. 749 (H 159) amends G.S. 15A-1345(c) to increase the time within which a preliminary hearing must be held after a probationer's arrest to seven days. However, the provision requiring a probationer's release from custody within four working days after his arrest was not changed. An irreconcilable conflict is the result of this apparent drafting oversight. The conflict should be resolved in a defendant's favor, so that if the preliminary hearing is not held within four working days after the arrest of a probationer remaining in custody, he must be released.

Ch. 749 also clarifies the procedure for retaining jurisdiction to revoke the probation of a defendant charged with another crime that may not be disposed of until after the probationary period has expired. Traditional practice has been to retain jurisdiction to revoke probation by extending the period of probation, if possible, or by following the procedure under G.S. 15A-1344(f) and filing a written motion with the clerk before expiration of the probation period expressing an intent to conduct a revocation hearing and obtaining a court order for the defendant's arrest for the alleged probation violation. The probation hearing may then be continued if the charge is not disposed of before the date of the scheduled hearing.

This procedure has apparently been made unnecessary by an amendment to G.S. 15A-1344(d) providing that the probation period is automatically "tolled" (apparently means that it stops running) if a probationer has criminal charges pending against him which, upon conviction, could result in a revocation of probation. Jurisdiction is retained without further action by the probation officer and the probationary period begins to run and revocation proceedings may be commenced after the criminal charge is resolved. Because it is unclear whether this provision may be applied to defendants placed on probation before its effective date of June 4, 1979, the old procedure should be used for those defendants. This new provision does not affect the current practice with regard to retaining jurisdiction to revoke probationers who abscond and cannot be found after violating a condition of probation, but who are not charged with a new crime.

Ch. 749 also contains a provision to govern recordkeeping in cases where a defendant's probation is revoked in a county other than the county of original conviction. An amendment to G.S. 15A-1344(c) requires the clerk of court in the county revoking probation to file a copy of the revocation order in that county and send another copy to the Department of Correction to serve as a temporary commitment order. The original probation revocation order and related papers are to be sent to the county where the defendant was convicted and filed with his original court records. Then, the clerk of the county of original conviction is required to issue a formal commitment order to the Department of Correction. Since a probationer may violate his conditions of probation and have probation revoked in a county other than that of original conviction, it is logical to provide a central location for compiling the original court records affecting his probationary status. For some reason, however, the present provision of G.S. 15A-1344(c) that requires a copy of an order issued in another county modifying the terms of probation to be sent to the court of original conviction was not changed. As a result, some of the original records concerning the terms of a defendant's probation will be filed in the county of original conviction and others will be in whatever other counties have modified, but not revoked, the defendant's original conditions of probation.

"90-96 Probation"

G.S. 90-96 provides that if a defendant has not previously been convicted of an offense relating to controlled substances and is found guilty of a misdemeanor by possessing certain controlled substances, a court, with the defendant's consent, may defer the proceedings without entering a judgment of guilt and place him on probation. If the probationer violates

a condition of probation, the court may enter a formal adjudication of guilt. On the other hand, if a probationer fulfills the terms of probation, the proceedings are dismissed and the discharge is not considered a conviction. A couple of bills enacted last session affect the administration of this unique form of probation.

A defendant placed on G.S. 90-96 probation, in addition to a discharge and dismissal of proceedings, may apply for a court order to expunge all information from official records relating to the criminal proceedings if he was not over age 21 at the time of the offense. Ch. 431 (H 325), effective April 20, 1979, changes the affidavits that must be submitted with an expungement application. The amendment to G.S. 90-96(b)(3) deletes the requirement that an application to expunge include official FBI and SBI records showing that the defendant was not convicted of any felony or misdemeanor before the present misdemeanor charge or during the period of "90-96" probation; however, it requires an affidavit from the sheriff of the county of the petitioner's residence and the sheriff of the county of conviction if the counties are different.

Clerks of superior court in each county have been required by G.S. 90-96(c) to file the names of persons convicted under the Controlled Substances Act and the offense for which they were convicted with the Department of Human Resources. Effective June 10, 1979, Ch. 550 (H 471) rewrites G.S. 90-96(c) to delete that requirement and limit the places where that sensitive information may be located. The clerks of superior court, however, must continue to file the names of persons granted a conditional discharge under G.S. 90-96 with the Administrative Office of the Courts.

PAROLE

Parole Commission

Ch. 2 (H 13), effective January 26, 1979, amends G.S. 143B-267 to change the requirement that a majority of the Parole Commission's five full-time members is required to conduct official business. Instead, the Commission is required to take action on matters concerning parole and work release by meeting in two-member panels. However, a majority vote of the full commission (three out of five) is still necessary to grant parole or work release privileges to a person serving a sentence of life imprisonment.

Imprisonment Following Parole Revocation

The 1979 General Assembly significantly changed the law controlling the amount of time a person must serve upon reimprisonment following a revocation of parole. Under former G.S. 15A-1373(d)(1), a recommitted parolee was required to serve six months or the unserved portion of his maximum sentence, whichever was greater. Ch. 927 (H 1230), effective April 27, 1979, requires in all cases that a parolee who violates a condition of parole and has parole revoked be recommitted only for the unserved portion of his maxiumum term.

Parole Eligibility

Ch. 749 (H 159), effective June 4, 1979, makes several important changes in the law governing parole eligibility. One change deletes the provision in G.S. 15A-1371(a) making a prisoner eligible for release on parole after completing one-fourth of his minimum sentence if the minimum sentence was imposed only because it was required by law. As a consequence of the new law, all defendants convicted on or after the ratification date whose sentence includes a minimum term of imprisonment, whether required by law or given in the judge's discretion, will be eligible for release on parole only after serving the entire minimum term or one-fifth of the maximum penalty allowed for the offense, whichever is less, minus time for good behavior. Defendants placed on probation before June 4, however, are still eligible for parole under the one-fourth rule.

Important changes were also made in the so-called "automatic parole" provisions of G.S. 15A-1371(g). If a defendant was serving a maximum sentence of six months or more for a misdemeanor or a sentence of between six months and 18 months for a felony, then, under prior law the defendant was automatically to be released on parole after serving one-third of his maximum sentence if (a) he was also eligible for parole under the provisions of G.S. 15A-1371 (a); and (b) the Parole Commission did not make certain findings indicating that the defendant was a poor risk for parole. The rule did not simply make the defendant eligible for parole after one-third, it required his release on parole. The parole is no longer automatic.

As amended by Ch. 749, G.S. 15A-1371(g) provides that a defendant serving a sentence between 30 days and 18 months, whether for a felony or a misdemeanor, may be released on parole after serving one-third of his maximum sentence unless the Commission finds that the defendant is a poor parole risk. While it is no longer necessary that the defendant also be eligible for parole under G.S. 15A-1371(a), he is now only eligible for release instead of automatically released on parole. Since the decision to release the defendant after one-third has been made discretionary rather than mandatory, if the Commission decides not to grant release after one-third, the findings are surplusage and need not even be considered. Again, however, defendants convicted before June 4 are governed by the former rule of automatic parole. Also, no defendant eligible for parole under the new rule may be released from confinement before the fifth full working day after being placed in custody.

Sentencing

A defendant's sentence of imprisonment must always impose a maximum term and may, in the court's discretion, impose a minimum term. Effective June 4, 1979, Ch. 749 (H 159) amends G.S. 15A-1351(b) to give a judge the discretion to impose only a maximum sentence even in cases where the statute requires a minimum and maximum term of imprisonment for an active sentence. The imposition of a minimum term of imprisonment, of course, affects a defendant's eligibility for parole.

Ch. 749 repeals G.S. 15A-1351(c), permitting a superior or district court judge in the district where an offender was sentenced to remove or reduce an imposed minimum term of imprisonment upon motion of the Department of Correction and the Parole Commission. That procedure is no longer available to reduce or remove a defendant's minimum term for advancing parole eligibility or any other reason.

JAILS / CONFINEMENT

Confinement Pending Trial De Novo

Another bill enacted in 1979 attempts to clarify the circumstances under which a defendant appealing a district court judgment for a trial de novo in superior court may be confined in a local jail. Ch. 758 (H 1231), effective June 4, 1979, amends G.S. 15A-1353(c) to provide that if a convicted defendant is appealing to superior court, the sheriff is not required to place the defendant in custody on the date service of the sentence is to begin. An amendment to G.S. 15A-1431(f), though, permits a judge to order confinement in a local jail pending trial de novo if a defendant is unable to comply with the condition of pretrial release. Of course, if a defendant complies with the conditions of pretrial release while appealing the judgment, he may not be confined.

Felons to Department of Correction

Whether a defendant was sentenced to imprisonment for a felony, a misdemeanor, or nonpayment of a fine was not relevant under former law in determining where he was to be committed. Instead, if a sentence was for 180 days or less, a defendant had to be committed to a local confinement facility and if a sentence were for a longer period of time a defendant was committed to a facility maintained by the Department of Correction. There was, in other words, no distinction made between convictions for misdemeanors and felonies.

Ch. 456 (S 166) rewrites G.S. 15A-1352 to require that all defendants imprisoned for conviction of a felony be committed to the custody of the Department of Correction. The same rule applies if a defendant is being imprisoned for failing to pay a fine imposed for conviction of a felony. However, a presiding judge, upon request of the sheriff or the board of county commissioners, may sentence a convicted felon to a local confinement facility in that county. A defendant sentenced to imprisonment for a misdemeanor conviction, however, continues to be committed to a local jail if the sentence is for 180 days or less and, if for a longer period, to a Department of Correction facility. This new provision applies to persons sentenced on or after June 5, 1979.

MISCELLANEOUS

Voluntary Admission of Inmates

Beginning July 1, 1979, Ch. 547 (S 292) permits inmates in the custody of the Department of Correction to seek voluntary admission to regional psychiatric facilities for treatment of mental illness or inebriety. No inmate, however, may be voluntarily admitted unless the Secretary of Human Resources and the Secretary of Correction jointly agree to the request. Also, the Department of Correction is required to take custody of a voluntarily admitted inmate upon discharge from such a facility if the inmate's term of imprisonment has not been completed. The potential hazards to the public associated with such a procedure were a concern of the General Assembly. As a result, the Department is to be responsible for the security and costs of transporting inmates to and from psychiatric facilities for voluntary admission.

Interstate Exchange of Inmates

The 1979 General Assembly enacted the Interstate Corrections Compact, (G.S. Ch. 148, Art. 12) which outlines a comprehensive and technical procedure for transferring inmates to institutions in other states. Effective May 23, 1979, Ch. 632 (H 998) permits North Carolina's Governor to enter into a compact with other states for the purpose of cooperating in the efficient confinement and rehabilitation of offenders. States that are parties to the compact may contract with each other or with the federal government for the exchange and confinement of inmates. A "sending state," where the inmate was initially committed, contracts with a "receiving state," where the inmate is sent for confinement, to confine him in one of its institutions. Under these new procedures, a state may transfer an inmate to an institution in another compact state for participation in a special rehabilitation program or, possibly because of overcrowding in the sending state.

To assure that a program of this complexity operates efficiently, the legislature has required that any contract between compact states carefully outline the responsibilities of each party. Each contract for a prisoner exchange must provide for the following: (1) its duration; (2) payments to the receiving state or the federal government from the sending state for inmate maintenance, extraordinary medical and dental expenses, and the inmate's participation in normal rehabilitative or correctional programs; (3) the inmate's participation in employment programs, disposition of payments received from employment, and crediting of proceeds from products made in program; (4) delivery and return of the inmate; and (5) any other matters necessary to fix the rights and responsibilities of the sending and receiving states. In addition to specific contract provisions, an inmate confined in another state pursuant to this scheme is to be treated equally with similar inmates in the receiving state institution.

Although an inmate from a compact state may be physically located in another state's institution, the receiving state acts only as the sending state's agent and the inmate remains subject to the jurisdiction of the sending state. Because the sending state retains jurisdiction over an inmate, it

may remove or release the inmate for any reason permitted under the laws of the sending state. To guarantee that the sending state has sufficient information with which to make those decisions, the receiving state is required to provide the sending state with regular reports on the inmate, including a conduct record.

An inmate, even if transferred to another state to benefit from a special rehabilitation program, may not be deprived of any rights or benefits that he could have received in the sending state. For example, an inmate transferred to a receiving state is entitled to any hearings (e.g., parole) that he would have had in the sending state. The receiving state may be authorized to conduct the hearing, but any final determination must be by the appropriate officials of the sending state. Moreover, any inmate confined under the compact must be released in the sending state unless the inmate and the two contracting states agree to a release in another place. The sending state must pay for the return of an inmate to its territory.