

LETTER OPINION
94-L-86

March 31, 1994

Dr. Warren Allen
Chairman
North Dakota Parole Board
PO Box 5521
Bismarck, ND 58502-5521

Dear Dr. Allen:

Thank you for your letter requesting an opinion on whether probation in conjunction with a suspended portion of a sentence may begin prior to the expiration of any parole period.

The beginning date for probation in cases in which a portion of the sentence of imprisonment has been suspended will be dependent upon the specific language set forth in the criminal judgment and commitment. N.D.C.C. ? 12.1-32-06.1 addresses the length of probation which may be imposed in conjunction with a suspended execution or deferred sentence. The time frames run from the later of one of three occurrences: the order imposing probation, the defendant's release from incarceration, or the termination of the defendant's parole. Nothing in N.D.C.C. ? 12.1-32-06.1 or in any other statute, however, provides that a probationary period may begin only after the defendant has served all of the unsuspended portion of the sentence (including any time spent on parole).

A trial judge is vested with the widest range of discretion in fixing a criminal sentence. State v. Ennis, 464 N.W.2d 378 (N.D. 1990). Considerable sentencing alternatives are granted trial courts in N.D.C.C. ? 12.1-32-02. Each sentence must be individually considered to determine when the court intended the probation to begin for that sentence.

If the criminal judgment and commitment specifically sets forth the time when probation upon a suspended portion of the sentence of imprisonment will begin,

that time will govern. If the time for commencement of the term of probation on a suspended execution of sentence is unclear, the warden or other executive authority should not make the determination of when probation will begin. Such a determination, if not consistent with the intent of the court, would result in a modification of sentencing conditions. Modification, reduction, or commutation of sentences is the primary responsibility of the courts or, in specific instances, the North Dakota Board of Pardons. Assumption of the authority of interpreting an unclear or ambiguous criminal judgment and commitment may be an assumption of judicial authority by the executive branch contrary to the concepts expressed in State v. Saavedra, 406 N.W.2d 667 (N.D. 1987) and State v. Chapin, 429 N.W.2d 16 (N.D. App. 1988).

I recognize that the beginning of probation upon a parole release would cause probation and parole to run concurrently. However, this can be done if such was the intent of the sentencing court. See generally Tarbell v. State, 860 P.2d 1290 (Alaska App. 1993); United States v. King, 990 F.2d 190 (5th Cir. 1993). With a long prison sentence and an early parole release, concurrent probation and parole could result in probation terminating before the parole period ended. Having probation and parole run concurrently also could cause difficulties since only the parole board may revoke parole and only the court may revoke probation. Should a violation of the terms of parole result in a revocation of the parole, an inmate potentially could be on probation while incarcerated on the same sentence. Inconsistencies between the terms of probation and the terms of parole could also create difficulties. However, if the criminal judgment and commitment is clear that the probation will commence at a specified time, the court's order establishing the commencement of probationary status will apply, even if the released inmate would also be concurrently on parole.

Should the criminal judgment and commitment not specify or be unclear regarding when probation upon a suspended execution of sentence will begin, the court should be consulted for clarification.

Sincerely,

Dr. Warren Allen
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Heidi Heitkamp
ATTORNEY GENERAL

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