

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 116

COURTS, DISTRICT - Imposition of consecutive suspended or deferred sentences;
CRIMINAL LAW AND PROCEDURE - Sequence of consecutive suspended or deferred sentences for defendants convicted of multiple counts;
SENTENCE - Sequence of consecutive suspended or deferred sentences for defendants convicted of multiple counts;
MONTANA CODE ANNOTATED - Sections 46-18-203, 46-18-401(4);
OPINIONS OF THE ATTORNEY GENERAL - 38 Op. Att'y Gen. No. 13 (1979), 37 Op. Att'y Gen. No. 43 (1977).

- HELD: 1. When a sentencing court imposes a suspended sentence or deferred sentence on more than one count and orders the periods of suspension or deferral to run consecutively, for the purposes of probation revocation, the probationary period for count I is considered to run before the probationary sentence on count II.
2. A petition to revoke a suspended sentence may apply to more than one suspended sentence.

19 October 1988

Larry J. Nistler
Lake County Attorney
Lake County Courthouse
Polson MT 59860

Dear Mr. Nistler:

You have requested my opinion regarding these two questions:

1. When a sentencing court imposes a suspended sentence or deferred sentence on more than one count and orders the periods of suspension or deferral to run

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consecutively, when does the probationary period for each count run?

2. Does a petition to revoke a suspended sentence apply only to the suspended sentence then being served?

Initially, it must be noted that when a sentencing court has suspended sentences and/or deferred imposition of sentences on more than one count against a defendant, the periods of suspension or deferral run concurrently unless the sentencing court specifically orders the periods of suspension or deferral to run consecutively. § 46-18-401(4), MCA. See also State ex rel. Herman and Roy v. Powell, 139 Mont. 583, 367 P.2d 553 (1961); 38 Op. Att'y Gen. No. 13 at 44 (1979); 37 Op. Att'y Gen. No. 43 at 183 (1977).

Your first question arises in the context of a revocation proceeding, and refers to the situation where a sentencing court has imposed consecutive suspended or deferred sentences on multiple counts. The answer to the question of when the probationary periods run for each count must be resolved on a case-by-case basis. In determining which period of suspension or deferral is being served at any particular time, the sentencing terms of the original judgment must be consulted.

If the original judgment does not provide guidance regarding the sequence of suspended or deferred sentences, the question should be dealt with by the judge presiding at the revocation proceeding.

I can find no applicable statute or case law which addresses the exact question of the sequence of probationary periods for consecutive suspended or deferred sentences on multiple counts. However, logic dictates that, unless otherwise specified in the original judgment, the suspended or deferred sentence on the first count would run first, and the second count would run second, etc. See § 46-18-203(2), MCA. See also State v. Martinez, 656 P.2d 911, 913 (N.M. Ct. App. 1982) (probation violations may be separated on a count-by-count basis where consecutive rather than concurrent suspended sentences are ordered on multiple counts). Thus, for example, if consecutive suspended sentences of five years on count I and ten years on count II were imposed, a violation of the conditions of probation in the sixth year after conviction would warrant revocation of the sentence on count II only. Under the same example, a violation of the conditions of probation in the second year after conviction would warrant revocation of the sentences on both counts. In

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both situations, credit for elapsed time while on probation may or may not be allowed, according to the discretion of the judge presiding at the revocation proceeding. Credit, however, must be allowed for jail time already served. §§ 46-18-201(3), 46-23-1013, MCA. The statutory "good time" allowance does not apply to probation or parole. § 53-30-105(3), MCA. It should be noted that judges acting in revocation proceedings must exercise sound discretion, and their actions are lawful if such discretion is exercised. § 46-18-203, MCA; State v. Ford, 42 St. Rptr. 1530, 707 P.2d 16 (1985); State v. Kern, 41 St. Rptr. 1810, 695 P.2d 1300 (1984).

Your second question asks whether the revocation of suspended or deferred sentences applies only to the sentence then being served. The conditions of release are a part of the judgment in the case, and there is no prohibition against revoking the uncompleted sentences in a single proceeding where the terms of the judgment have been violated. Thus, if the suspended or deferred sentences are to be served consecutively, and time remains on more than one period of suspension or deferral, then more than one suspension or deferral may be revoked in the same proceeding for violation of the terms of the judgment. See, for example, Shearer v. State of Alaska, 619 P.2d 726 (Alaska 1980) (a single revocation proceeding may result in revocation of probation on more than one conviction). This is constitutionally permissible because revocation of a suspended or deferred sentence does not constitute punishment for a new offense. See State v. Watts, 43 St. Rptr. 670, 672, 717 P.2d 24, 26 (1986). And, since a defendant's guilt or innocence of the underlying offense is not at issue in a revocation proceeding, he need not be afforded the full range of constitutional rights due him at trial. See Gagnon v. Scarpelli, 411 U.S. 772, 93 S. Ct. 1756 (1973); State v. Oppelt, 184 Mont. 48, 601 P.2d 394, 398 (1979). Due process does, however, require that a person accused of violating probation be notified of the alleged violations which form the basis of the State's petition to revoke suspended or deferred sentences. See Gagnon v. Scarpelli, *supra*; State v. Steffans, 195 Mont. 395, 636 P.2d 836 (1981).

THEREFORE, IT IS MY OPINION:

1. When a sentencing court imposes a suspended sentence or deferred sentence on more than one count and orders the periods of suspension or deferral to run consecutively, for the purposes of probation revocation, the probationary period for count I is considered

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to run before the probationary sentence on count II.

2. A petition to revoke a suspended sentence may apply to more than one suspended sentence.

Very truly yours,

MIKE GREELY
Attorney General