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New York Sentence Basics

There are now three different types of sentences in New York.

Definite sentences are for a flat one number length of time but must be for one year or less. Definite sentences can be imposed for misdemeanors and are frequently known as misdemeanor sentences but they can also be imposed for felonies. Penal Law §70.00 (4). A prisoner can earn good time credit for up to 1/3 of the term. P.L. §70.30.4 (b), Correction Law §804. While most definite sentences are served at one continuous time, it is also possible to serve a definite sentence as an intermittent (often imposed as a “weekend”) sentence. PL §85.

Definite Sentence

Example: 1 year

Good time possible 1/3 of sentence or 4 months, release after 8 months served.

Indeterminate sentences are imposed for some non-violent felonies and they have a minimum and a maximum term, e.g., 3 to 6 years. A prisoner can get up to 1/3 of the maximum term of an indeterminate sentence reduced as good time. Correction Law §803 (1) (b).

Indeterminate Sentence

Example: 2 to 6 years

Parole Release Hearing for possible release at 2 years.

Good Time possible 1/3 of maximum term or 2 years, release on conditional release at 4 years. Will remain on parole until maximum of the sentence.

Possible release at maximum term, 6 years.

Determinate sentences are imposed for violent felony offenses and, pursuant to the drug law amendment, Chapter 738, Laws of 2004, applicable to crimes committed after January 13, 2005, they are also imposed for drug offenses. Determinate sentences are for a flat one number length of time, e.g., 7 years. Determinate sentences can be reduced by up to 1/7 of the term for good time. Correction Law §803 (1)(c). Determinate sentences are followed by a period of post release supervision which is a lot like parole. Post release supervision must be imposed by the sentencing judge and cannot be administratively imposed by the State Department of Correctional Services. Matter of Garner v. NYS Dept. of Correctional Services, 10 NY3d 358 (2008)

Determinate Sentence

Example: 7 years

Good Time possible 1 year. Conditional Release at 6 years.

Can remain on post release supervision for the period imposed plus the remaining period of good time release if there is a violation.

Felony sentences vary in length according to the severity of the crime. An “A” felony is the most severe and the lowest level of a felony is an “E” felony. Felonies are also graded according to whether they are violent, defined in P.L. 70.02, or non-violent, and vary depending on the defendant’s past criminal history. Different sentences are imposed for first, P.L. 70.00, 70.02, second, P.L. 70.04, 70.06, and persistent felony offenders, P.L. 70.08, 70.10.

People serving certain non-violent indeterminate sentences are eligible for a reduction off their minimum sentence for **merit time**. Correction Law §803 (1) (d). Merit time requires the completion of a program designated by the New York State Department of Correctional Services and a good prison disciplinary record. The amount of merit time varies whether the indeterminate sentence is for a drug law offense (1/3) or not (1/6). Drug law determinate sentences can also be reduced by an additional 1/7 of the term for merit time. Correction Law § 803 (d) (iii).

Effective April 7, 2009, a new credit time allowance became effective for people serving violent felonies, homicides and A-I non-drug convictions. A 6 month time credit is available for those who perform a “significant programmatic achievement.” Two years of college, a masters of professional studies degree, two years as an inmate program associate, a certificate for the labor Dept. for a job apprenticeship program or two years as a hospice aid are required.

Possible Merit Time: Indeterminate Sentence

On a 2 to 6 year sentence:

(Non-drug) 1/6 of 2 years. Merit time parole hearing at 1 year 8 months

(Drug Sentence) 1/3 of 2 years. Merit time parole release hearing at

1 year 4 months.

Possible Merit Time: Determinate Sentence

Drug law sentences, possible merit time additional 1/7 off for possible release with good time at 5 years on a 7 year sentence.

Felonies are divided into two types: violent and non-violent. The violent felony offenses are listed in PL 70.02. While many of the listings, such as rape, kidnapping, and assault, involve common sense uses of violence, common sense is not always helpful in understanding the New York Penal Law. Certain types of burglaries are listed as violent felony offenses. PL 70.02 (b) Murder in the First or Second Degree are not because no A-I felonies are considered violent. However, an attempt to commit Murder in the Second Degree is a violent offense. PL 70.02 (a).

Concurrent and Consecutive Terms

Sentences can be served either concurrently or consecutively. Sentences begin when the person goes to the sentence facility to begin service of the sentence. PL 70.30 (1), (2) Concurrent does not mean retroactive so two identical sentences imposed at different times may result in different release dates.

Where a person is on parole or post release supervision on a prior felony any new determinate or indeterminate sentence imposed under the predicate sentencing laws must run consecutively. P.L. 70.25 (2-a). However, any new definite sentence may run concurrently with parole time owed. P.L. 70.25 (1), Midgely v. Smith, 64 AD2d 223 (4th dept. 1978), People v. Woodard, 201 AD2d 896 (4th Dept. 1994), Matter of Vogler v. Smith, 64 AD2d 824 (4th dept. 1978), People ex rel. Hicks v. Warden, 127 A.D.2d 623 (2nd Dept. 1987), People v. Dupree, 91

AD2d 1071 (2d Dept. 1983) The sentencing judge on the new case must say the new sentence is concurrent to parole time owed.

Presumptions

The presumption established by the Penal Law is that if the judge says nothing indeterminate and determinate sentences run concurrently.

What happens when the court fails to specify whether a definite sentence is to run concurrently or consecutively with another sentence? Unless the judge specifies otherwise, definite sentences imposed on different days are presumed to be consecutive . For felony determinate and indeterminate sentences the presumption is that they will run concurrently with any other sentence. See PL 70.25(1)(a)

Sentence Calculation

The rules for calculation of indeterminate and determinate sentences are listed at **Penal Law §70.30 (1)**. The statute establishes a system in which the time to be served on concurrent sentences is determined by the longest of the concurrent sentences. This is often referred to as the “controlling” sentence. For consecutive sentences, the time is aggregated into one term by adding the terms of imprisonment. For this reason, questions that prisoners sometimes send which assume that they must serve one sentence before beginning a second one are incorrect. It is really one aggregate sentence that is computed.

Felony sentences begin when the prisoner is received by the State Department of Correctional Services. PL 70.30 (1). Concurrent sentences, even if they are for the same length of time, will not necessarily begin and end at the same time if they are imposed on different dates. Concurrent does not mean retroactive. Concurrent sentences can bring additional credit against the new sentence. PL 70.30(1)(a).

When a person is resentenced on the same charge, the new sentence is calculated to commence as if it had been imposed at the same time as the old sentence. All the time credited against the old sentence will be credited to the new one. PL 70.30 (5)

Sentences are reduced by credit allowed for periods of jail time served before the sentence begins to run. PL 70.30 (3). Once any sentence starts to run the time can not be counted as jail time towards another sentence.

Post Release Supervision - PL 70.45

Post Release Supervision starts when the client is released to supervision.

The remaining unserved portion of the penal sentence is held in abeyance while the client serves the post release supervision part of the sentence.

When the post release supervision part of the sentence is completed, the remaining unserved portion of the penal sentence is credited with and diminished by the time served on PRS.

When the client violates post release supervision, the PRS sentence stops running, and resumes upon release to supervision.

Time assessments imposed for violation of post release supervision are initially charged to the remaining portion of the penal sentence.

When a person is subject to two or more periods of post release supervision, such periods shall merge with and be satisfied by the discharge of the period of PRS having the longest unexpired term to run.

Predicate Felonies

Sentences are enhanced for predicate felony offenders. A person who is convicted of a felony defined in the Penal Law, other than an A-I felony, after having been convicted of one or more predicate felony convictions is a predicate felon. PL 70.06 While a DWI can be a predicate felony, persons accused in their current offense of non Penal Law offenses, such as DWI, are not subject to predicate felony sentencing.

In order to be a predicate the sentences must be properly sequenced. The prior sentence must have been imposed before the commission of the present felony. PL 70.06 (1) (b) (ii), PL

70.04 (1) (b) (ii). Crimes committed around the same time before the imposition of any of the sentences cannot be predicate felonies for the other crimes.

Sentences imposed more than 10 years prior to the commission of the present felony are not counted. The 10 years is extended by any periods of incarceration. PL 70.06 (1) (b) (iv) & (v), PL 70.04 (1) (b) (iv) & (v). In situations where the prior conviction is vacated and the person is reconvicted it is the later date that controls for purposes of calculating the ten year period. People v. Bell, 73 NY2d 153 (1989). There is a right to a hearing to challenge the designation as a predicate felony offender. See CPL Article 400.

A Youthful Offender adjudication is not counted for second felony offender status. Youthful Offender status in other states where the law tracks the New York statute have been held to not count for second felony offender status. People v. Carpenter, 21 NY2d 571 (1968). Where the foreign jurisdiction is more expansive than the New York statute, such as including people over the age of 19, a foreign conviction has been held to be a predicate for the second felony offender statute. People v. Duffy, 83 AD2d 563 (2d Dept. 1981); People v. Cahill, 190 AD2d 744 (2d Dept 1993).

An out of state felony conviction must be the equivalent of a New York felony. PL 70.06(1)(b)(i) Minor differences in the wording of the other state felony statute may cause the conviction to not count as a predicate for New York sentencing purposes. People v. Gonzalez, 61 NY2d 586 (1984) The test is whether the elements of the foreign crime are the equivalent of an analogous felony as defined in the Penal Law. Differences in such requirements as intent, value or weight have been held to make other jurisdiction convictions not equivalent to New York. People v. Yancy, 86 NY2d 239 (1995); People v. Muniz, 74 NY2d 464 (1989).

Sentences for second violent felony offenses are listed in PL 70.04. Many of the rules applicable to second felony offender status also apply to second violent felony offenders. The sequencing requirement applies to second violent felony offenders. People v. Morse, 62 NY2d 205 (1984).

There are two types of persistent felony offenders. Where there are two or more prior violent felony convictions and the new offense is violent, persistent violent offender status is mandatory. PL 70.08. If the either prior offenses or the new offense are non-violent, persistent felony offender status is discretionary. PL 70.10. In order to qualify the present offense must be a “felony” so you can receive persistent felony status when charged with a non-penal law offense.

Other Sentences

Youthful Offender status allows those who commit crimes between the ages of 16 and 19 and who have not been convicted and sentenced for a felony or previously adjudicated a YO on a felony matter or adjudicated a juvenile delinquent for a designated felony in Family Court to receive reduced sentences and be sentenced as if the crime was an E non-violent felony. Y.O. convictions do not count as a predicate felony. P.L. 60.02, C.P.L. 720

Juvenile Offenders are those who commit serious crimes between the ages of 13 and 15. They are prosecuted as adults and receive reduced sentences compared to adult offenders. P.L. 10.00, 70.05

Sentence of Parole Supervision (Willard Sentence) is available for many non-violent property and drug felonies. Burglary in the Third Degree was recently added to the list and DA consent was eliminated. First felony B drug offenders and second felony C, D, and E offenders

are eligible. CPL 410.91 A conventional sentence is imposed but a 90 day placement with the Division of Parole in a drug treatment campus (boot camp) is substituted for the sentence.

CASAT Sentence. Correction Law 2(18), PL 60.04(6). The Drug law Reform Act of 2004 allowed judges to sentence prisoners into CASAT (Comprehensive Substance Abuse Treatment), an in house DOCS drug treatment program. DOCS interprets the statute as providing no more than a recommendation for placement into the program.

Sentence to Shock Incarceration PL 60.04(7), added by the 2009 Rockefeller Drug law reform, allows judges to sentence defendants directly into the 6 months Shock bootcamp program. Drug Offenders who are under 50 years old, serving their first sentence upstate and who do not have a second felony B level conviction or a prior sex homicide A-I , violent or escape conviction are eligible.

Department of Correctional Services

There are three levels of disciplinary hearings within DOCS, Tier I, Tier II and Tier III. Tier III is the most serious. At each Tier level there are different standards for due process. Tier I and Tier II hearings are for minor offenses. Serious incidents are always brought as a Tier III because it is the only type of proceeding where serious time in the Special Housing Unit and loss of good time can be imposed.

While incarcerated in the Department of Correctional Services prisoners are eligible to participate in programs that may help with the release process. Pay attention to programs such as ASAT and CASAT as these are in prison drug treatment programs the completion of which will impress some judges.