**Behavioral Incentive Dates (“B.I.D”) - EPISODE NOTES**

Hello everyone and welcome back to the Good Judge-Ment Podcast. I am Wade Padgett

*And I remain Tain Kell.*

Tain, today we are going to discuss a topic that 1) initially was difficult to apply; and 2) which I have done wrong in the past.

*Wow, that does not give me much insight. There are lots of things we have struggled to understand and have done wrong while on the bench. Tell me more.*

That’s true – but today, we are going to discuss Behavioral Incentive Dates

*Oh yes, the “B.I.D” – I remember it well*

This episode may well be a bit shorter than our usual episodes – but we have honestly struggled with this topic over the years and we thought that we may share some recent cases with our audience – just in case they have struggled with B.I.D.s

*With that all said, let’s dive right in.*

Throughout this episode, we are going to break down the relevant statute but we probably need to start with the statute itself.

O.C.G.A. § 17-10-1(a)(1)(B)(i) is the statute – rather than try to interpret it, we will read it to you (then we are going to break it down – in detail):

(B)(i) When a defendant with no prior felony conviction is convicted of felony offenses or is charged with felony offenses and is sentenced pursuant to subsection (a) or (c) of Code Section 16-13-2 or Article 3 of Chapter 8 of Title 42, and the court imposes a sentence of probation or not more than 12 months of imprisonment followed by a term of probation, the court **shall** include a behavioral incentive date in its sentencing order that does not exceed **three years** from the date such sentence is imposed.

Within 60 days of the expiration of such incentive date, if the defendant has paid all restitution owed; not had his or her probation revoked in the immediately preceding 24 months, or when the court includes a behavioral incentive date less than two years from the date a sentence was imposed, not had his or her probation revoked during such period; and not been arrested for anything other than a nonserious traffic offense as defined in Code Section 35-3-37, the Department of Community Supervision shall notify the prosecuting attorney and the court of such facts.

The Department of Community Supervision shall provide the court with an order to terminate such defendant's probation which the court shall execute unless the court or the prosecuting attorney requests a hearing on such matter within 30 days of the receipt of such order. The court shall set the matter for a hearing as soon as possible but not more than 90 days after receiving the order to terminate. The court shall take whatever action it determines would be for the best interest of justice and the welfare of society.

(We broke down the statute in a way that reads easier – the above is all within one section and is not broken down in the O.C.G.A.)

Whew, that’s a lot of words. Let us break it down a bit with the help of some appellate cases which have interpreted the statute

In *Smalley v. State*, 371 Ga. App. 253 (2024), the Court of Appeals noted that “Pursuant to OCGA § 17-10-1 (a) (1) (B) (i), the legislature has established a pathway for early termination of probationary sentences served by first-time felony offenders who meet certain conditions.”

**POINT 1:** The defendant in question must have no prior felony convictions.

When a defendant with no prior *felony* convictions and is then convicted of a felony ***or*** is charged with a felony and is sentenced under the First Offender Act or receives a Conditional Discharge

This is an “or” provision

Remember, a sentence under the First Offender Act or under Conditional Discharge is not a conviction See *Smalley*, at 255-256; *Mays v. State*, 345 Ga. App. 562, 565 (2018)

**POINT 2:** This sentencing is for a felony. It could be sentenced under First Offender or Conditional Discharge.

The sentence being imposed for *this* case is either straight probation or a split sentence of not more than 12 months incarceration.

This is an “and” phrase, not an “or”

**POINT 3:** This sentence is either straight probation or a split sentence with no more than 12 months of incarceration

If points 1 through 3 above are all “true” – 1) defendant has no prior convictions, 2) this case results in a felony conviction or is a felony sentenced under First Offender or Conditional Discharge; and 3) the sentence being imposed is either straight probation or a split sentence with no more than 12 months of incarceration – then the trial court has an *obligation* to set a B.I.D.

The statute says that the trial court ***shall*** include a B.I.D. in the sentence

This obligation is mandatory – the legislature’s use of the word “shall” is mandatory, not discretionary. *Smalley*, at 256.

**POINT 4:** If points 1-3 are “true,” the trial court ***shall*** include a B.I.D.

Finally, from the trial court’s perspective, how long must the B.I.D. be?

Under the statute, the court must impose a B.I.D. of “no more than 3 years”

Not to be too obvious, but the trial court can set a B.I.D. of 1 year, 2 years or 3 years.

I assume the trial court could set a B.I.D. of less than a year – just as long it does not exceed 3 years (i.e. 18 months, 3 months, 30 months are all “less than 3 years”)

I am not sure I would impose a B.I.D. for less than 1 year for a felony case – but I believe the court could do so if that was appropriate resolution

**POINT 5:** The B.I.D. must not exceed 3 years

We are going to discuss what happens with a B.I.D. after the sentence is imposed but before we do that, let’s discuss the “why” of the statute

There is a body of thought that once a person is placed on supervision (i.e. probation), if they are going to fail, they will do so within the first 3 years

This school of thought became prominent a few years ago (2017 time frame) which is when felony punishment for possession of “serious” drugs in a small amount was reduced from 2-15 years to 3 years. These changes to the punishment section of O.C.G.A. § 16-13-30 became effective in 2013.

B.I.D.’s became effective in 2017

In *Smalley*, the court looked at how the statute has been modified since it was enacted in 2017

Prior to 2018, the B.I.D. statute did not reference First Offender or Conditional Discharge – it only applied to cases where a defendant with no prior convictions was being sentenced to a straight probation for a felony *Smalley*, at 255; see *Mays v. State*, 345 Ga. App. 562, 564 (2018).

In 2018, the legislature amended the provision, adding the existing language concerning First Offender and Conditional Discharge – and also adding the language concerning the applicability of the statute when a split sentence is imposed. See also *Clark v. State*, 371 Ga. App. 37, 39 (2024) (noting that prior to 2018, the statute did not apply to First Offender or Conditional Discharge sentences)

(BTW-if you have questions about First Offender or Conditional Discharge, please listen to our prior episode when we specifically discussed these statutes – addressing the similarities and differences between them – Episode 139 – published in February 2024)

In *Smalley*, the State argued that B.I.D.s only applied when a First Offender or Conditional Discharge sentence was imposed and the defendant had no prior convictions

The Court rejected that argument – noting that if that reading of the statute was correct, the language of the statue (“and” vs. “or” argument) would be meaningless – which is something that appellate courts do not condone…

We have given you the 5 Points – if those preconditions exist, the court must include a B.I.D. in the sentence

So, the B.I.D. is listed in the sentence and the time of the B.I.D. (less than 3 years) has passed. Now what?

We are glad you asked!

Once the time in the B.I.D. has passed and provided:

1. the defendant has paid all restitution owed,
2. has not had probation revoked in the preceding 24 months,
3. has not been arrested for anything other than a “nonserious” traffic offense,

THEN: DCS (Dept of Community Supervision) has an obligation to notify the prosecutor and court of those facts

DCS then provides the court with an order terminating probation which the court shall execute UNLESS the prosecutor requests a hearing within 30 days of receiving the notice from DCS

The court has an obligation to set the matter for a hearing within 90 days of receiving the termination order from DCS.

Then, the court “shall take whatever action it determines would be for the best interest of justice and the welfare of society.”

Does that statutory language mean that the court must terminate probation after the hearing (assuming the defendant qualified) and over the objection of the prosecutor?

NO – see *Clark v. State*, 371 Ga. App. 37, 43-44 (2024)

There is one other provision of § 17-10-1 we need to discuss (somewhat reluctantly – because this is a bit confusing)

In another amendment, effective May 3, 2021, the legislature added another new subsection, O.C.G.A. § 17-10-1(a)(1)(B)(ii).

Most of the cases refer to this new subsection as the “retroactivity” section of the statute – under that subsection:

The provisions of subsection (B) are intended to be retroactive for any person sentenced under First Offender or Conditional Discharge who did not get a B.I.D.

If you have a case involving the retroactive provisions of § 17-10-1, please take the time to read the decision in *Clark v. State*.

So let’s test our “Points” with a couple of examples

1. If a felony case comes up for sentencing and the defendant has previously successfully completed a felony First Offender sentence, is that defendant potentially eligible for a sentence that includes a B.I.D.?
   1. YES. Remember that a sentence under First Offender or Conditional Discharge is not a conviction.
2. Ok, felony sentencing for felony habitual violator where the defendant has previously been convicted of three DUI’s and other traffic offenses in the past. If the sentence imposed is 1 year to serve, followed by 4 years on probation, must the trial court include a B.I.D.?
   1. YES. Regardless of the number of prior misdemeanor convictions, if the defendant has no prior *felony* convictions and the sentence imposed is either straight probation or a split sentence with no more than 1 year in incarceration, a B.I.D. must be imposed.
3. Defendant with no prior convictions is sentenced for burglary to 2 years in confinement followed by 5 years on probation under the First Offender Act. Does that sentence require a B.I.D.?
   1. NO. The sentence includes more than 12 months on probation. The fact that it is sentenced under the First Offender Act is not determinative – more focused on the terms of the sentence.
4. Defendant is no longer on supervision following a conviction for possession of cocaine with intent to distribute. That sentence was completed 10 years ago. Now, the defendant is entering a guilty plea to possession of felony possession of marijuana. The court imposes a sentence of straight probation. Must the sentence include a B.I.D.?
   1. NO. Regardless of age of the prior felony conviction, if the defendant has any prior felony conviction, no B.I.D. is to be included.
5. Final hypothetical – Defendant has no prior convictions and is entering a guilty plea to possession of meth – less than 1 gram. The court imposes a sentence of 3 years on probation. Must the B.I.D. be less than 3 years?
   1. NO. The only obligation is to impose a B.I.D. “not to exceed 3 years.” Will the B.I.D. be essentially meaningless? YES. Is that a problem? NO.

So we have discussed B.I.D.s in prior episodes, but we wanted to address this topic separately – because there have been quite a few appellate decisions on the topic in the last few months and needed clarification

*Remember the “Points”*

***POINT 1:*** *The defendant in question must have no prior felony convictions*

***POINT 2:*** *This sentencing is for a felony. It could be sentenced under First Offender or Conditional Discharge.*

***POINT 3:*** *This sentence is either straight probation or a split sentence with no more than 12 months of incarceration*

***POINT 4:*** *If points 1-3 are “true,” the trial court* ***shall*** *include a B.I.D.*

***POINT 5:*** *The B.I.D. must not exceed 3 years*

Thanks for listening – if you need a copy of this outline with the case citations, it is available at goodjudgepod.com

So that’s all for today’s discussion of B.I.D.s

We come now to the music trivia section of our episode. If you know me, you know I am a big fan of 80’s funk music – and a big Prince fan. “Purple Rain” recently celebrated its 40th anniversary. So let’s talk the album and film “Purple Rain.” Tain, take it away.

*Ok, “music trivia” concerning the movie* ***and*** *the album Purple Rain. This should be interesting because I claim no special knowledge about movies – only music. But I am game for a challenge. Let’s go!*

*1984 was a great year on many fronts. But “Purple Rain” was an important part of culture during that year. [ad lib about what you were doing in 1984]. First Question – we will start easy and give you a 50/50 chance at being correct!*

*True or false: Purple Rain was awarded both an Oscar and multiple Grammy awards. I mean the acting in the movie was truly memorable!*

***ANSWER: True. The movie won an Oscar for best original score and Prince was awarded 4 Grammys for the album.***

*In the movie, Prince and his band regularly performed at a club, the First Avenue nightclub. The paying customers with big hair and lots of shoulder pads danced to the music of several bands each night but the movie featured a running battle between Prince’s band (the Revolution) and another band. What was the name of the band that was also a band in real life?*

***ANSWER: Morris Day and the Time***

*Prince’s band was known as the Revolution. The band featured 2 females, Lisa and Wendy and a male keyboardist who always wore a specific “costume.” What was the keyboardist’s nickname?*

***ANSWER: Doctor (Dr. Fink is the name he is known by in the music business)***

*Speaking of names, do you know Prince’s actual full name?*

***ANSWER: Prince Rogers Nelson***

*In the movie, Prince went on a motorcycle ride with female star, Apollonia. He talked in great detail about a rite of passage that artists must do to be successful – to “purify” themselves. She took off her clothes and jumped into a lake, thinking she was proving her dedication to becoming a music star. Famously, Prince told her it was the wrong lake for the ritual right after she surfaced from under the water completely nude. What was the name of the lake that artists were rumored to be required to jump into while naked to purify themselves?*

***ANSWER: Lake Minnetonka; “That’s not Lake Minnetonka” is the line. In the movie, she actually jumped into the Minnesota River***

*Prince’s first #1 single came from the album, “Purple Rain.” What song was Prince’s first #1 on the Billboard charts?*

***ANSWER: “When Doves Cry” – it was actually the last song recorded on the album but it was the first single released***

*Ok, last question for today. What was the last song that Prince ever performed live which he performed in Atlanta on April 14, 2016?*

***ANSWER: Purple Rain. He died on April 21, 2016 at age 57.***

*Have a great day everyone and thanks for listening. Always party like it’s 1999!*