

The Applicable Conditions for Probation and their Determination

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Keywords: Probation, application, determination

Abstract: Probation is a crucial penalty enforcement system in China's criminal law and a common legal issue encountered in criminal trial practice. In trial practice, incorrect understanding and determination of probation conditions often result in improper or overly strict application of probation. It is essential to accurately understand and determine the conditions of probation to ensure proper application. Problems arise when the conditions are not met or are too lenient. Therefore, it is crucial to grasp the conditions of probation thoroughly. It is important to have a comprehensive and accurate understanding of the conditions of probation in order to correctly apply probation. Therefore, this paper provides an in-depth discussion of the conditions for applying probation, aiming at fully and accurately understand them. Additionally, the concept of discretionary conditions of probation is introduced. These efforts aim at promoting the application of the probation system and contribute to the development of a rule of law society and the realization of judicial justice.

1. Introduction

The probation system is a special criminal law system in China, as well as an important human rights system, which embodies the principles of combining punishment with leniency and punishment with education in China's criminal law, and plays an important role in the implementation of China's criminal law. According to the statistics of the Supreme People's Court, from 2006 to 2008, the number of people sentenced to probation nationwide accounted for 23.61%, 24.87%, and 25.16% of the total number of people sentenced to criminal law in that year, and 53.3%, 56.24%, and 56.5% of the number of people sentenced to less than three years' fixed-term imprisonment and custodial punishment in that year, respectively, and the total number of people sentenced to probation in the statistics of 2021 was more than 440,000 people, which accounted for 25.8% of the number of people sentenced nationwide in that year. 25.8% of the number of people sentenced nationwide. It can be seen that the proportion of probation applied by the court to the judgment of public prosecution cases in China is increasing year by year. Therefore, this paper centers on the development of the probation system, discusses the understanding of the application and conditions of probation and some of its own views, and puts forward the idea of discretionary probation conditions to further promote the application of the probation system.

2. Application of probation in China

The statutory conditions for probation are those directly stipulated by the Criminal Law, which must be met for the application of probation. Article 72 of the Criminal Law provides that: "A suspended sentence may be pronounced on a criminal who has been sentenced to a term of imprisonment of less than three years and who, at the same time, has committed a less serious crime, has demonstrated remorse for the crime, and is not in danger of recidivism, while the pronouncement of the suspended sentence has no significant adverse impact on the community in which he or she resides.

Article 72 further provides that: "Probation shall be pronounced on those under eighteen years of age, pregnant women and those who have reached the age of seventy-five years.

For criminals sentenced to detention or imprisonment for a term of less than three years. This condition restricts the application of probation in terms of the type and duration of the sentence. It can be seen from this that probation is generally applied to minor crimes, so the term of imprisonment is shorter. It should be noted that the term "detention and imprisonment for a term of less than three years" refers to the sentence pronounced. This is because the pronounced sentence reflects the severity of the crime, whereas the statutory sentence does not. Thus, if the statutory sentence for a particular crime is more than three years, but the sentence is reduced so that it does not exceed three years, the condition is still met. Since the Penal Code imposes a limit on the length of the sentence (the degree of sentence received), but not on the offense, the possibility of imposing a suspended sentence on an offender whose offense is a serious crime cannot be ruled out. Some people are opposed to this on the grounds that probation is only applicable to minor crimes, and the fact that the Criminal Law stipulates that only those sentenced to imprisonment for less than three years may be sentenced to probation itself shows that there is no need to list serious crimes as a restrictive provision. Therefore, serious crimes cannot be sentenced to probation. The author believes that this view is too arbitrary, is the conditions of this probation misinterpretation. Indeed, probation is generally applicable to less serious crimes.[1]

However, the term less serious crime refers to a specific offense and not to a category of offenses as a whole. It cannot be said that all specific crimes under a certain category of offenses (those that fall under the category of serious crimes) are serious. Crimes such as intentional homicide, intentional serious injury, etc., are serious crimes, but as a molecule in the aggregate, a particular offense may be a lesser offense. For example, injury causing death in self-defense, and righteous indignation murder in special circumstances. If from the crime, injury to death, intentional homicide is serious crimes, but from the specific case of crime, but is a lesser crime, so intentional homicide, intentional injury and other crimes are serious crime cases, if the offender is sentenced to imprisonment or less than three years, can still be sentenced to probation (of course, but also need to have the other conditions of probation).

3. Different doctrines of application of probation

Article 72 of the Penal Code, in addition to not having a limit on the number of offenses, does not limit the number of offenses. So is it possible to apply probation for multiple offenses? In this regard, there are three kinds of claims: (1) several crimes can be sentenced to probation. Offenders who are sentenced to detention or less than three years of imprisonment may be considered for probation if they meet certain conditions. (2) Probation should not be applied to several crimes, as it is only applicable to lighter crimes and those that does not cause significant social harm. (3) While several crimes can be sentenced to probation, it is only possible if the total sentence does not exceed three years.

The author believes that the above three claims are not proper. First, China's criminal law on

probation does not limit the provisions of the object of several offenses. Moreover, not all criminals who have committed several crimes are serious crimes, social harm. For example, several crimes contain negligence, minor criminal offenses. Therefore, can not be generalized that several crimes can not be sentenced to probation. Secondly, if the decision to execute the sentence is less than three years' imprisonment after the combination of several offenses, it is not the same as meeting the limitations of the probation conditions. Because the "decision to carry out the penalty of imprisonment for less than three years" is, after all, different from the "sentenced to imprisonment for less than three years", there should be some limitations on the length of the sentence. However, it is biased to limit the total term of imprisonment to less than three years. Because although the length of the sentence can indicate the severity of the crime, the sum total of the criminal law is the total sentence for several crimes, which does not reflect the severity of each crime, therefore, the author believes that the maximum sentence for several crimes should be no more than three years as a more appropriate limit.[2]

Probation is not applied to criminals who do not meet the conditions for its application and who constitute repeat offenders. Repeat offenders are undoubtedly repeat offenders who have a tendency to be provocative to the social order and the law as repeat offenders, and their repeated criminal behavior is socially dangerous, so it is clearly contrary to the purpose of probation to impose a suspended sentence on them, and probation may not be used for repeat offenders.

According to the circumstances of the crime and the manifestation of remorse, it is true that non-incarceration will no longer jeopardize society. If the previous paragraph is a prerequisite for probation, this article is a substantive element of the application of probation, which is the most essential and fundamental element of the conditions of probation. The key point of this condition is that "non-incarceration does not jeopardize society any longer". How should this be understood? First of all, it refers to a possibility and a tendency, not a certainty of not endangering society anymore. Secondly, the term "harm" should refer to the crime, not to the offense in general. The harm may be either a crime of the same nature as that committed by the offender in the past or a new crime of a different nature from the previous one.[3]

There are many aspects that can be examined to confirm whether an offender will endanger society again. Among these many aspects are the main ones. Article 72 of the Criminal Law stipulates that the examination of whether the offender will endanger society again if he or she is not incarcerated must be based on two aspects, i.e., the circumstances of the crime and the manifestation of remorse. What is a criminal circumstance, the criminal law does not have a clear provision. In the author's opinion, crime circumstances refer to various factual situations in the course of the crime, usually including the motive, means, time and place of the crime, and the object of aggression. There are views that the criminal circumstances refers to the factual situation that does not affect the nature of the crime and does not belong to the elements of the crime. The author does not agree with this view. The circumstances of the crime include both the factual situation that determines the nature of the crime and the factual situation that does not affect the characterization. In terms of examining whether the offender is endangering the society again, if we only look at the circumstances that do not affect the nature of the crime, without examining the other circumstances that affect the conviction, it will inevitably affect the comprehensiveness and accuracy of the judgment of the offender's social dangerousness. The concept of remorseful performance refers to an offender's mental attitude and behavioral remorse during and after the commission of a crime. That is, in the ideological understanding, the crime committed by the remorse, self-blame and shame, and from the heart is willing to repent and voluntarily accept punishment. In action, all confessed to the crime, account for the same case, prosecute others, actively compensate the victim for financial losses, and efforts to prevent the occurrence or expansion of the results of the crime and so on. We need to determine whether the offender has

remorseful performance, must be based on the above subjective and objective aspects of the performance, one cannot do without the other. For instance, a criminal who pleads guilty but refuses to admit to the facts of the crime, shirks responsibility, or avoids it, cannot be recognized as showing remorse for the crime. Similarly, if a criminal is able to truthfully confess to all the facts of the crime but does not admit guilt or show remorse, they cannot be recognized as showing remorse for the crime.

The above shows that the application of probation is required to have certain criminal circumstances and repentance. What kind of criminal circumstances can be suspended? It is generally believed that the motive for the crime is despicable, whether the means is cruel, whether the victim is a pregnant woman or an isolated person, whether the offender is out of intention or negligence, indirect intent or direct intent, etc., these circumstances can be reflected in the subjective malignancy of the offender and the social harm. As for remorse, can not think, have remorse can be sentenced to probation. The author believes that there are a variety of remorse, and the degree of remorse also varies. Offenders have remorse, it shows that they have repentance, no longer endanger the ideological basis of society, the deeper the remorse, the stronger the ideological basis. However, it will not do if the remorse is only slight. From this, we can see that the application of probation required by the circumstances of the crime and repentance, regardless of its content, should meet such a requirement, that is, to prove that the offender "not imprisonment will not jeopardize the community again". These are the three statutory conditions for the application of probation, and they are the three elements necessary for the imposition of a suspended sentence, all of which are indispensable.[4]

4. Establishment of discretionary conditions of probation

The application of probation with or without discretionary conditions, although the academic community in the theory of probation is not yet said, but the author is of the view that, whether from the theoretical point of view, or from the point of view of the practical needs of the division of probation of discretionary conditions is indeed necessary. First, from the legislative point of view, article 72 of the criminal law, "..... can be pronounced probation". However, the criminal law does not stipulate under what circumstances "may" and "may not". Therefore, it is necessary to delineate the circumstances in which discretionary "may or may not" be exercised. Secondly, from the point of view of trial practice, it is necessary to examine the consistent performance, ideological quality and other circumstances of the offender in order to apply probation. However, the criminal law does not stipulate that "according to the offender's consistent performance, ideological quality and other circumstances" to determine whether he is endangering society. In many legal theses, there is a lack of convincing elaboration of "consistent performance" and other circumstances. Some say that the perpetrator's consistent performance is a criminal circumstance, some are generally called "before and after the crime performance", into the "repentance performance", the author believes that the perpetrator's consistent performance can not be included in the criminal circumstance, the two can not be confused. How can one say that the performance of a crime is a criminal circumstance when the crime has not yet been committed. Similarly, this cannot be classified as a remorseful performance. Therefore, the consistent performance and other trial practice in the application of probation often consider the factors, it is more appropriate to classify as discretionary conditions. Third, the division of probation discretionary conditions for the trial body to decide whether to apply probation, to provide optional space and specific reference scale, for a comprehensive and accurate confirmation of the offender is not incarcerated no longer endanger society, provides a more adequate basis. Fourth, a clear distinction between the statutory conditions of probation and discretionary conditions, can prevent confusion between the two, is conducive to the correct use of

probation. In summary, the establishment of discretionary conditions of probation, not only in theory is of great significance, but also in trial practice has long been generally recognized and used in improving the probation system is very useful.[5]

So what is the discretionary conditions of probation? The author believes that the so-called discretionary conditions of probation, refer to the spirit of probation legislation, from the trial practice summarized by the people's court flexibility, in the statutory conditions of probation at the same time, to decide whether to apply probation, to be taken into account as appropriate in a variety of circumstances. Mainly includes the following aspects: 1, the offender's side of the situation: the consistent performance before the crime, ideology and morality, style of work, by the reward and punishment; 2, the social impact: social opinion, the masses of people with or without public indignation, the sentence of probation with or without the adverse effects; 3, the social conditions: the offender's family environment, the working environment, the existence of conditions for helping and educating, whether it is conducive to their rehabilitation, the social security situation is good or bad, whether the social order is other special circumstances to be taken into account: such as difficulties in life, production and business needs, serious illness, pregnancy, breastfeeding, old age and so on.

The delineation of discretionary conditions of probation does not imply the exclusion or substitution of the statutory conditions of probation; they are not contradictory. First, the key to determining whether to apply probation is the statutory conditions; as long as the statutory conditions for probation are in place, probation can be pronounced. Conversely, if only the discretionary conditions are present but not the statutory conditions, probation cannot be pronounced. Secondly, emphasizing the statutory conditions does not mean that the discretionary conditions are meaningless, and considering the discretionary conditions on the premise of having the statutory conditions is very useful for the proper application of probation. Practice has proven that, although the statutory conditions for probation, but lack of discretionary conditions, not sentenced to probation in order to sentence probation is better. In short, the statutory conditions of probation and discretionary conditions, there are the following differences: (1) the former directly from the provisions of the law, the latter is summarized from practice; (2) the statutory conditions are fixed, and discretionary conditions can be with the situation, the passage of time and the content of the change, some of the original sentence of probation will not be taken into account, but with the change of the content of the discretionary conditions may become. Discretionary conditions have flexibility; (3) the former on the imposition of probation plays a decisive role, the latter only plays a reference role. Obedience to the former is additional proof of the former; (4) when applying probation, the three statutory conditions must be present at the same time, while the discretionary conditions do not have such a requirement, and can be considered in a comprehensive manner or focus on one of the aspects.

5. Issues to be noted in determining the conditions of probation

In trial practice, the following issues are noted when determining whether an offender is eligible for probation or not:

Probation must be applied to criminals who have been sentenced to detention or imprisonment for a term of less than three years. This is a prerequisite for the imposition of a suspended sentence. However, it should be noted that, before deciding to apply probation, the offender should first be sentenced, and if his or her penalty is indeed detention or imprisonment for less than three years, then the question of applying probation can be further considered. That is, sentencing before, probation after, the order cannot be reversed. On the contrary, if the sentencing before both the "case to be sentenced to probation" box, it is often preconceived notions, in order to reduce the

sentence for probation and the situation of the sentence. For example, in some cases, the offender was sentenced to four years' imprisonment, but the case officer considered his guilty plea, repentance, and will not jeopardize society again, so he was sentenced to three years' imprisonment, and the sentence was suspended. As a result, the sentence was lenient and the probation was abused. Similarly, a defendant who should be acquitted or exempted from criminal punishment should not be sentenced to detention or a term of imprisonment of less than three years, but should be given a suspended sentence.[6]

Where there are statutory mitigating and extenuating circumstances, it cannot be said that the statutory conditions for probation have been met. Although probation is a kind of leniency for criminals, it is by no means a mitigating or lessening of punishment. The former is the execution of the penalty, the latter is the entity in the sense of sentencing (i.e., to determine the penalty). Therefore, probation should never be used as a means of mitigation or reduction for those offenders who should be given a lighter or lesser sentence, but who do not have the conditions for probation. For example, attempted crimes, crimes committed by minors, etc., if they do not meet the conditions for probation, they may be given a lighter or reduced sentence within the range of the legal penalty, but not a suspended sentence.

It is necessary to correctly understand the determination of the offender's remorseful performance. If an offender turns himself in and confesses, it cannot be assumed that he has shown remorse. Some criminals turn themselves in and confess, indeed from sincere remorse, while some are not. Rather, they are motivated by fear, speculation, or even deception. For the latter cannot be considered to have remorse, and therefore does not have the legal conditions for probation. When judging whether an offender is sincerely repentant, it is important to examine both their thoughts and behaviors. Avoid only looking at one side of the situation and neglecting the other. This can lead to unfair trial practices and further harm to the victim. In cases of injury, it is important to note that while the offender may be willing to compensate the victim for their economic losses, this does not necessarily indicate true remorse. However, if the offender is not willing to sincerely repent or instead denies their crimes through sophistry, avoids taking responsibility, or lacks a deep understanding of the harm caused to society by their actions, it is appropriate that probation is not applicable for such criminals.

Attention should be paid to the examination of whether the offender has the conditions of probation at the same time, pay attention to the examination of its discretionary conditions, the examination should not be limited to the offender's work unit issued by the confirmation material, ear should be collected from various aspects of the situation, a comprehensive consideration. The case officer can visit the street committee where the offender lives and works, hold talks, listen to the voices of the public, and understand all aspects of the situation.

The relationship between statutory and discretionary conditions should be handled correctly and the boundaries between the two should be clearly defined. The offender has difficulties in life? If the offender is pregnant or suffers from a serious illness, he or she may be given a suspended sentence if he or she has the statutory conditions for probation, but if he or she has only discretionary conditions, he or she cannot be given a suspended sentence.

It is appropriate to be prudent in imposing suspended sentences in cases where the crime is a serious one, and the statutory and discretionary conditions should be weighed comprehensively to fully confirm that it meets the conditions of probation and does not jeopardize the community by not incarcerating the person before imposing a suspended sentence, and it is important not to impose a suspended sentence for a crime of a serious nature in a frivolous manner in order to prevent adverse impacts.

6. Conclusion

As an important part of the modern criminal justice system, the probation system has significant advantages and values, by giving offenders the opportunity to reform themselves. The probation system helps to reduce the recidivism rate, promote the reform and resocialization of offenders, and make positive contributions to the harmony and stability of the society. Therefore, exploring the various conditions and application of probation can increase the correct application of the probation system in practice, and through the practice of the offender's Different situations, with the judge's discretionary power to create discretionary probation conditions. The probation system will be more perfect and universal application, is conducive to balancing the relationship between justice and efficiency, and promote the development and construction of the probation system. It is hoped that this paper will contribute in its own small way to the application and improvement of the probation system

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