

PROBATION VIOLATIONS: JURISDICTION AND RELATED ISSUES

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1. Notice

Under **15A-1345(e)**, the State must give the probationer “notice of the hearing and its purpose, including a statement of the violations alleged. . . . at least 24 hours before the hearing,” unless such notice is waived by the probationer. The DCC-10 (Violation Report) form ordinarily constitutes notice of the alleged violations and the hearing. Defendants have argued that a lack of proper notice deprives the court of jurisdiction to revoke probation, but the appellate courts have not held that improper notice raises a jurisdictional issue.

2. Preliminary Hearing

Under **15A-1344(c)**, a preliminary hearing on a probation violation must be held within seven working days of an arrest to determine whether there is probable cause to believe that the probationer violated a condition of probation, unless the probationer waives the preliminary hearing or a final hearing is held first. If the hearing is not held the probationer must be released seven working days after his arrest to continue on probation pending a hearing. If the hearing is held and probable cause is not found, the probationer must be released to continue on probation.

a. Proper court and procedure

15A-1345(d): The preliminary hearing should be conducted by “a judge sitting in the county where the probationer was arrested or where the alleged violation occurred.” No statutory language limits authority to conduct preliminary hearing to a judge “entitled to sit in the court which imposed probation” (as is the case in **15A-1344(a)** limiting authority to alter or revoke probation). Thus, any judge—district or superior court—may conduct the preliminary hearing.

The probationer is entitled at the hearing to appear and speak on his or her own behalf, to present relevant information, and may, on request, personally question adverse informants. Formal rules of evidence do not apply, and under **15A-1345(e)**, “recollection of evidence or testimony introduced at the preliminary hearing on probation violation [is] inadmissible as evidence at the [final] revocation hearing.”

b. Right to counsel at the preliminary hearing

Under **15A-1345(e)**, a probationer is clearly entitled to be represented by counsel at the *final* revocation hearing. If indigent, the probationer is likewise entitled to have counsel appointed under 7A-451(a)(4) for a “hearing for revocation of probation.” It is

less clear, however, that this statutory right to counsel applies to the 15A-1345(d) *preliminary* hearing.

If the statutory right to counsel does not apply, most defendants probably have a right to counsel at the preliminary hearing as a matter of constitutional due process. Under *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973), a probationer has a due process right to counsel at both preliminary and final revocation hearings if:

- (1) he or she claims not to have committed the alleged violation;
- (2) there are “substantial reasons which justified or mitigated the violation . . . that [are] complex or otherwise difficult to develop or present”; or
- (3) the probationer is incapable of speaking effectively for him or herself.

Therefore, any defendant who disputes the alleged probation violations (and who would thus be unlikely to waive the preliminary hearing) is entitled to counsel under *Gagnon*.

c. Consequences of a failure to hold the preliminary hearing

Under the following line of cases, there are exceptions to general requirement that the preliminary hearing be held within seven days. Moreover, there appears to be little recourse for the probationer who does not receive a timely preliminary hearing. Defendants have argued—but no appellate court has held—that the failure to hold the preliminary hearing deprives the court of jurisdiction to hold the final revocation hearing.

State v. Seay, 59 N.C. App. 667 (1982): A preliminary hearing is not a prerequisite to holding a final revocation hearing, so long as the final hearing is held.

State v. O’Connor, 31 N.C. App. 518 (1976): No preliminary hearing is necessary when the defendant is released on bond pending the final revocation hearing. Likewise, no preliminary hearing is necessary if the defendant is being held on a new charge for which he or she is ineligible for pretrial release.

State v. Clemmons, 97 N.C. App. 502 (1990): The failure to hold a preliminary hearing within seven days did not violate the defendant’s due process rights when the failure to hold the hearing did not prejudice the defendant. Defendant was held for 11 days without a hearing, but because he was arrested in Virginia—prima facie evidence that he had left the jurisdiction in violation of his probation—the court held there was no need for the preliminary hearing to determine probable cause.

State v. Mabry, 166 N.C. App. 518 (2004) (unpublished): Defendant, held for 25 days without a preliminary hearing, failed to show how the lack of the hearing prejudiced him. Because the final revocation hearing was ultimately held, the failure to hold the preliminary hearing was deemed harmless.

State v. Jones, 176 N.C. App. 191 (2006) (unpublished): Defendant who was held for nearly three months without a preliminary hearing argued that the failure to hold the preliminary hearing deprived the court of jurisdiction to hear the probation violation reports. The failure to hold the hearing, however, was not assigned as error and was thus not properly preserved for appellate review.

3. The Final Revocation Hearing

- a. The following statutes set out the basic guidelines for when, how, and by whom probation may be extended, modified, terminated, or revoked.

15A-1344(a): Any judge of same level as the sentencing judge, located in the district where (a) the probation was imposed, (b) the alleged violation took place, or (c) the probationer currently resides, has authority to modify, terminate, or revoke probation. Exception: Under **15A-1342(h)**, a judge who sentences the offender to unsupervised probation may limit jurisdiction to alter or revoke the probation to him or herself (or a presiding judge in the court where the defendant was sentenced if the sentencing judge is no longer on the bench).

15A-1344(d): Upon notice and hearing for good cause shown (i.e., not necessarily a violation), the court may at any time prior to expiration or termination modify the conditions of probation and/or extend the period up to the five year maximum.

15A-1342(a) and **15A-1343.2(d)**: During the last 6 months of the original probationary period, with the consent of offender, the court may extend probation by up to three years (including beyond the 5 year maximum), if necessary to complete (1) a program of restitution or (2) medical/psychiatric treatment.

- b. Objections to improper sentences

The permissible length of a probationary term is set by **15A-1343.2(d)**. Unless the court makes specific findings that a longer or shorter period of probation is necessary, the sentence must fall within the range set out in the statute. Numerous appellate decisions have remanded cases for resentencing when a defendant was given a longer probationary period without findings. See, e.g., *State v. Cousart* (N.C. Ct. App., Mar. 6, 2007); *State v. Mucci*, 163 N.C. App. 615 (2004).

Note that the cases cited immediately above were *direct appeals* of the original sentences. In the context of a probation revocation, however, a defendant cannot challenge his or her original, suspended sentence by appealing an order activating the sentence. *State v. Noles*, 12 N.C. App. 676 (1971); *State v. Rush*, 158 N.C. App. 738 (2003). Moreover, recent court of appeals decisions state that a court is not deprived of jurisdiction to revoke probation when the original probationary period was longer than allowed under 15A-1343.2, or when the underlying sentence was unconstitutionally aggravated under *Blakely v. Washington*, 542 U.S. 296 (2004)

State v. Lindsay (N.C. Ct. App., June 5, 2007) (unpublished): Defendant was sentenced to 60 months of probation, though 30 months was the maximum allowable without specific findings that a longer period was necessary. Defendant absconded at about the 30 month point; the probation officer filed a violation report at the 33 month point. Defendant argued that the trial court lacked jurisdiction to revoke because the violation report was not filed during the lawful period. The court of appeals disagreed, holding that the court had jurisdiction to revoke, and that the defendant was not entitled to collaterally attack the original sentence on an appeal of the revocation. Note: A Motion for Appropriate Relief under **15A-1415(b)(8)** (sentence unauthorized at the time imposed) might be proper under these circumstances. Note also that a trial judge may make such a motion *sua sponte* under G.S. 15A-1420(d). See also *State v. Abraham* (N.C. Ct. App., Sept. 4, 2007).

State v. Holmes, 361 N.C. 410 (2007): Defendant argued that his suspended sentence should not be activated in the aggravated range when aggravating factors were found by a judge and not submitted to a jury in violation of *Blakely*. The court disagreed, holding that the propriety of the original sentence could not be collaterally attacked on appeal of the revocation.

Another recent case, *State v. Carpenter* (N.C. Ct. App., Sept. 4, 2007), added that the North Carolina Supreme Court has recognized only one exception to the rule against collateral attacks on a suspended sentence during the appeal of its activation. Under *State v. Neeley*, 307 N.C. 247 (1982), a defendant may raise a claim that he or she was denied counsel at the original trial on the appeal of a probation revocation.

c. Objections to invalid conditions of probation

Under **15A-1342(g)**, a defendant's failure to object to a condition of probation imposed under 15A-1343(b1) at the time the condition is imposed does not constitute a waiver of the right to object *at a later time* to the condition. In *State v. Cooper*, 304 N.C. 180 (1981), the North Carolina Supreme Court held that the "at a later time"

language of the statute does not grant a *perpetual* right to challenge a condition of probation. Rather, the defendant must object no later than the revocation hearing.

d. Class H & I felonies

7A-272(c): With the consent of the presiding district court judge, the prosecutor, and the defendant, the district court has jurisdiction to accept a defendant's plea of guilty or no contest to a Class H or I felony.

7A-271(e): The superior court has exclusive jurisdiction over probation violation hearings where the district court accepted a plea under 7A-272(c), except that the district court shall have jurisdiction to hear these matters with the consent of the State and the defendant. [Note: the State may be unenthusiastic about consenting to hearing a probation violation in district court, because the appeal of a district court revocation is to the superior court.]

State v. Hooper, 358 N.C. 122 (2004): If an H or I felony sentence is pled in district court under 7A-272(c) and a subsequent revocation hearing is held in district court, the appeal of the revocation is to the superior court, not to the court of appeals.

e. Consecutive and concurrent sentences

15A-1344(d): An activated sentence runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject, unless the revoking judge specifies that it is to run consecutively with the other period. The revoking judge may do this without regard to what the original judgment states. *State v. Paige*, 90 N.C. App. 142 (1988).

f. Reduction of the initial sentence

15A-1344(d1): A revoking court can reduce the length of a sentence of imprisonment, but only within the original range (i.e., presumptive, mitigated, or aggravated) established for the class of offense and prior record level of the sentence being activated.

g. Probation violation hearings held after the probationary period has expired

Sometimes probation violation hearings cannot be held before the probationer's period of probation has expired, either because the alleged violation occurred near the end of the period of probation and the matter could not be calendared quickly enough, or because the probationer eluded arrest on the violation. G.S. **15A-1344(f)** is a grant of additional jurisdiction to the courts to hear probation violations after the

period of probation has expired. This section was modified in 2008 (S.L. 2008-129) to broaden the court's power in the after-the-expiration scenario, and to make it easier for the State to preserve the court's jurisdiction to act.

Under the amended law (effective for hearings held after December 1, 2008, regardless of when the offender was originally placed on probation), the court may "extend, modify, or revoke probation" (under prior law, the court only had power to revoke) after the expiration of the period of probation if (1) the State files a written violation report before the expiration of the probation period, (2) the court finds that the probationer violated one or more conditions of probation prior to the expiration of the period of probation, and (3) the court finds for good cause shown and stated that probation should be extended, modified, or revoked.

The requirement to *file* a written violation report before the expiration of the period of probation means the violation report must be file stamped before the period expires. *State v. Hicks*, 148 N.C. App. 203 (2001), *State v. Moore*, 148 N.C. App. 568 (2002). In the absence of a file stamped motion, dated before the period of probation expires, the trial court is without jurisdiction to revoke probation after the end of the probationary period.

Prior to the 2008 amendments to the law, in order to preserve its jurisdiction to revoke after the period of probation expired, the court had to make a finding of the State's "reasonable effort to notify the probationer and to conduct the hearing earlier." The State lost a handful of appeals on this point. *State v. Burns*, 171 N.C. App. 759 (2005); *State v. Hall*, 160 N.C. App. 593 (2003); *State v. Bryant*, 361 N.C. 100 (2006). Under the 2008 amendments to the law, the court no longer has to make a finding of the State's reasonable effort to preserve its jurisdiction to act after the period of probation. The AOC forms have been changed accordingly.

h. Revocation on the basis of new crimes

State v. Guffey, 253 N.C. 43 (1960): Probation should not be revoked solely on the basis of a pending criminal charge unless there is a conviction or a plea of guilty to that charge.

15A-1344(d): Probation may not be revoked solely for a conviction of a Class 3 misdemeanor.

State v. Hardin, 183 N.C. 815 (1922): Probation should not be revoked on the basis of a criminal charge of which the probationer has been acquitted.

But cf. State v. Causby, 269 N.C. 747 (1967), and *State v. Monroe*, 83 N.C. App. 143 (1986). Acquittal on a new charge does not prevent a judge from revoking

probation based on the facts and evidence underlying the new charge, so long as the revoking judge makes independent findings that those facts constitute a violation. In *Causby*, for example, the defendant-probationer was acquitted of possession of intoxicating liquors for the purpose of sale, but nonetheless had his probation revoked for violating the condition that he not have any alcoholic beverages on his premises.

i. Tolling the probationary period while new charges are pending

15A-1344(d): “The probation period shall be tolled if the probationer shall have pending against him criminal charges . . . which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation.”

State v. Patterson, __ N.C. App. __ (May 6, 2008) (“[A] defendant’s probationary period is automatically suspended when new criminal charges are brought under N.C.G.S. 15A-1344(d)”) (internal quotations omitted).

State v. Henderson, 179 N.C. App. 191 (2006): Defendant-probationer had 31 days remaining on his probation when he was arrested and charged with assault with a deadly weapon. Therefore, the trial court had jurisdiction to revoke or modify defendant’s probation up to 31 days after the charge was no longer pending.

In light of the language of the statute and the court of appeal’s decisions in *Patterson* and *Henderson*, the Division of Community Corrections recently (i.e., in late 2008) changed its tolling policy to make clear that the clock stops running on a probationer’s period of probation when he or she is charged with a new crime other than a Class 3 misdemeanor.

4. Right to Counsel at Revocation Hearings

a. Waiver of right to counsel

The court must comply with **15A-1242** at a probation hearing, just as it would at trial. The judge must make a thorough inquiry and be satisfied that the defendant (1) has been clearly advised of his right to counsel, (2) understands the consequences of a decision to proceed without counsel, and (3) comprehends the nature of the charges and the range of permissible punishments. See Jessica Smith, *Selected Counsel Issues in North Carolina Criminal Cases*, Administration of Justice Bulletin 2007/04 (School of Government 2007).

Cf. State v. Sellers (N.C. Ct. App., Sept. 4, 2007), discussing the non-applicability of 15A-1022 (guilty plea inquiry) to probation proceedings: “Unlike when a

defendant pleads guilty, there is no requirement that the trial court personally examine a defendant regarding his admission that he violated probation.”

State v. Evans, 153 N.C. App. 313 (2002) (holding that the presence of a written waiver is no substitute for compliance with 15A-1242).