Issues in Sentencing and Changes to the Probation Law

Jamie Markham
(919) 843-3914
markham@sog.unc.edu

December 8, 2010

I. Issues Related to Prior Record Level

Proof of prior convictions. The State bears the burden of proving by a preponderance of the evidence that a prior conviction exists. G.S. 15A-1340.14(f). A prior conviction may be proved by (1) stipulation of the parties; (2) court records; (3) records of the Division of Criminal Information, the Division of Motor Vehicles, or the Administrative Office of the Courts; or (4) any other method found by the court to be reliable. *Id*. A prosecutor's unsupported statement about a defendant's record level, standing alone, is insufficient to prove the existence of a prior conviction. State v. Silas, 168 N.C. App. 627 (2005).

Defendants often stipulate to prior convictions. Older cases held that a signed prior record level worksheet was, by itself, insufficient to show that a defendant clearly stipulated to his or her record. *See, e.g.*, State v. Alexander, 359 N.C. 825 (2004). However, those cases were decided before the AOC amended the form (AOC-CR-600) to include an explicit stipulation section, Section III. Since then, signed worksheets have been deemed a proper stipulation. State v. Hussey, 194 N.C. App. 516 (2008). Of course, if the stipulation portion of the worksheet is not signed, the worksheet alone will not satisfy the State's burden. State v. Jacobs, __ N.C. App. __, 688 S.E.2d 112 (2010) ("Unfortunately, this change to the sentencing worksheet seems to have gone largely unnoticed at felony sentencing hearings."). The absence of a signature does not, however, necessarily mean the defendant did not stipulate to his or her record. For instance, a failure by defense counsel to dispute a worksheet to which it refers at sentencing has been deemed a stipulation. *See* State v. Cromartie, 177 N.C. App. 73 (2006) (defense counsel's statement that "I don't have the sheet in front of me, but I don't believe he's been convicted of anything since '97" constituted a stipulation); State v. Alexander, 359 N.C. 824 (2005) (defense counsel's statement that "up until this particular case [the defendant] had no felony convictions, as you can see from his worksheet" deemed a stipulation).

Prior convictions from other jurisdictions. By default, a prior conviction for a crime that another jurisdiction classifies as a felony counts as a Class I felony for record-level purposes in North Carolina. Convictions for crimes that another state classifies as misdemeanors count as Class 3 misdemeanors here—and so do not factor into a defendant's prior record level at all. If the offender can prove by a preponderance of the evidence that an offense classified as a felony in another jurisdiction is *substantially similar* to an offense that is a misdemeanor in North Carolina, the conviction will be treated as that class of misdemeanor for prior record level purposes. Conversely, if the State proves by the preponderance of the evidence than an offense classified as either a misdemeanor or a felony in another jurisdiction is substantially similar to a particular felony in North Carolina, or that a misdemeanor offense from another jurisdiction is substantially similar to a Class A1 or Class 1 misdemeanor here, then the out-of-state crime is treated as the class of its North Carolina counterpart for prior record level purposes. G.S. 15A-1340.14(e).

Proof of the existence of an out-of-state conviction falls within the prior-conviction exception to the rule from *Blakely v. Washington*, 542 U.S. 296 (2004); the issue need not be submitted to a jury and proved beyond a reasonable doubt. State v. Hanton, 175 N.C. App. 250 (2006). A defendant may validly stipulate to the bare fact that an out-of-state conviction exists, and may also stipulate that the crime is a felony or misdemeanor in the other state. State v. Hinton, 196 N.C. App. 750 (2009).[1] Those stipulations alone are a sufficient basis for the State to treat an out-of-state felony at the default Class I level for prior record purposes. *Id.*; State v. Bohler, __ N.C. App. __, 681 S.E.2d 801 (2009). A defendant may not, however, validly stipulate that an out-of-state felony is substantially similar to a more serious offense in North Carolina. Substantial similarity is a question of law that must be determined by the trial court, not by the jury and not by stipulation. State v. Hanton, 175 N.C. App. 250 (2006); State v. Palmateer, 179 N.C. App. 579 (2006).

The General Statutes do not prescribe a particular method for determining whether out-of-state crimes are substantially similar to crimes in North Carolina. The court can base its determination on a comparison of the other state's criminal statutes to the criminal laws of North Carolina. *See* State v. Rich, 130 N.C. App. 113 (1998) (holding that photocopies of statutes from New York and New Jersey were sufficient proof that the defendant's crimes in those states were substantially similar to crimes in North Carolina); State v. Hadden, 175 N.C. App. 492 (2006) (photocopies of statutes from New York and Illinois, along with testimony by a detective, sufficient to prove substantial similarity); *cf*. State v. Cao, 175 N.C. App. 434 (2006) (computerized printout of defendant's criminal history record from Texas, showing only the names of offenses committed there, sufficient to prove existence of the convictions but insufficient evidence of substantial similarity to North Carolina crimes). If an out-of-state crime has elements that are substantially similar to multiple North Carolina offenses, and the prosecutor relies only on the statutory definitions in proving substantial similarity, the rule of lenity requires that the court assign record points corresponding to the less serious North Carolina offense. *Hanton*, 175 N.C. App. at 259.

With an appropriate determination of substantial similarity, an out-of-state conviction for impaired driving may count for a prior record point under G.S. 15A-1340.14(e). In State v. Armstrong, __ N.C. App. __, 691 S.E.2d 433 (2010), the defendant argued that DWI offenses from Alabama were not substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina because DWI is an unclassified misdemeanor here. The court of appeals disagreed, holding that DWI is considered a Class 1 misdemeanor under G.S. 14-3, and is thus covered by G.S. 15A-1340.14(e).

The latest version (12/2009) of the Prior Record Level Worksheet includes a check-box for the court to record its determination of substantial similarity.

Additional point if all elements of a conviction offense are included in a prior offense. If the court finds that all the elements of a defendant's present offense are included in any prior offense for which the defendant was convicted, the defendant receives an additional prior record level point under G.S. 15A-1340.14(b)(6). The point applies regardless of whether the prior offense was used in calculating the offender's prior record level. *Id.*; State v. Bethea, 122 N.C. App. 623 (1996) (permissible to count the additional point when all the elements

[1] In some jurisdictions, it is difficult to determine whether certain crimes are felonies or misdemeanors. In New Jersey, for example, misdemeanors are classified into four degrees, three of which are considered "high misdemeanors" that are treated as felonies for some purposes. California has certain crimes that are known as "wobblers," in that they may be charged as felonies or misdemeanors in the discretion of the prosecutor. How the other jurisdiction classifies those crimes may be a mixed question of law and fact.

of the defendant's current crime were included in a prior offense that did not factor in his record level because it was used to establish his status as a habitual felon). A defendant qualifies for the additional point only when the most serious conviction in a consolidated judgment is included within the elements of a prior offense. State v. Mack, 188 N.C. App 365 (2008).

Like substantial similarity of an out-of-state offense, the same-elements finding is a question of law to which the defendant cannot validly stipulate. State v. Prush, 185 N.C. App. 472 (2007). Qualification for this point is proved through a comparison of the elements of the offense of conviction with the elements of prior convictions. A defendant convicted of attempted felony larceny can qualify for the point by virtue of prior felony larceny convictions, even when the prior convictions did not include as elements that the defendant took property valued over $1,000. State v. Ford, 195 N.C. App. 321 (2009) (holding that for purposes of G.S. 15A-1340.14(b)(6), it does not matter under what provision of G.S. 14-72 defendant's prior larceny crimes were elevated from misdemeanors to felonies). Similarly, a defendant convicted of delivery of a controlled substance under G.S. 90-95(b) can qualify for the additional point if he or she has a prior conviction for delivery of a controlled substance, even if the precise controlled substance delivered is not the same in each case. State v. Williams, __ N.C. App. __, 684 S.E.2d 898 (2009) (additional point proper for defendant convicted for delivery of a Schedule II controlled substance, cocaine, who had a prior conviction for delivery of a Schedule VI controlled substance, marijuana).

II. Impermissible Consideration of a Defendant's Decision to Exercise His or Her Right to a Jury Trial

Where it can be inferred from the language of the trial judge that a sentence was imposed at least in part because the defendant did not agree to a plea offer by the state and insisted on a trial by jury, a defendant's constitutional right to trial by jury has been abridged, and a new sentencing hearing must result. State v. Boone, 293 N.C. 702 (1977). By statute, a judge "shall not consider as an aggravating factor the fact that the defendant exercised the right to a jury trial." G.S. 15A-1340.16(d).

There is, however, an inherent tension between the rule against punishing a defendant for his or her election to proceed to trial and the reality that the State routinely encourages guilty pleas by offering substantial benefits in return for them—a practice that is entirely permissible and essential to the operation of our criminal justice system. Bordenkircher v. Hayes, 434 U.S. 357 (1978).

Determining whether a defendant's exercise of his or her jury trial right impermissibly influenced a sentence requires careful consideration of what the trial judge may have said, either at trial or at sentencing, about the defendant's choice. The following scenarios are based on reported North Carolina cases that were remanded for resentencing based on the court's comments.

1. The trial judge held a bench conference about the possibility of a negotiated plea of guilty. Upon being advised that the defendants demanded a jury trial, the trial judge told counsel in no uncertain terms that if the defendants were convicted by a jury he would give them the maximum sentence. The defendants were convicted at a jury trial and sentenced near the maximum. State v. Cannon, 326 N.C. 37 (1990).

2. Before trial, the court said, "[T]he District Attorney has indicated to me that . . . if you are willing to plead guilty to one . . . B-1 felony, that he would be willing to put the sentencing [in] my hands and trust me to reach a fair sentence that everyone would be satisfied with. . . . But if you say no, I want to have my jury trial, and let me emphasize that you have every right to a jury trial, and to let twelve people decide your case . . . then I will not be able to give you the help that I can probably give you at this point. . . . [I]f they find you guilty of the charges against both of these young girls, it will compel me to give you more than a single B-1 sentence, and I would have to give you at least two, and maybe more." After a jury trial, the court said, "I regret that you [did] not choose to take the offer that had been made to you at the beginning of the trial to plead guilty for a lesser sentence. . . . And based upon the jury verdicts as to each of these felonies, I intend to give you consecutive sentences for each of them." The court sentenced the defendant to consecutive terms totaling 1,384–1,736 months. State v. Hueto, 195 N.C. App. 67 (2009).

3. At a pretrial hearing, a defendant asked the trial court to consider a possible sentence of five years of imprisonment and five years of probation in response to an offer by the prosecutor to recommend a sentence of ten years. In response to this request, the trial court said, "So I'm just telling you up front that the offer the State made is probably the best thing." The defendant declined the State's offer. After defendant was found guilty of the offenses by a jury, the trial court stated, "Way back when we dealt with that plea different times . . . I told you that the best offer you're gonna get was that ten-year thing, you know." The defendant was sentenced as a habitual felon to 10 consecutive 116–149 month sentences. State v. Haymond, __ N.C. App. __, 691 S.E.2d 108 (2010).

4. At sentencing the trial court said, "[The defendant] tried to be a con artist with the jury [and] rolled the dice in a high stakes game with the jury, and it's very apparent that [he] lost that gamble. . . . [No] rational person would never have rolled the dice and asked for a jury trial with such overwhelming evidence." Nothing in the record showed the defendant ever actually received or refused a plea offer from the State. State v. Peterson, 154 N.C. App. 515 (2002).

5. At a pretrial hearing, the court said, "Now, [defendant], if you pled straight up . . . I'd sentence you at the bottom of the mitigated range. . . . [I]f you go to trial . . . I'll be perfectly honest with you, I'm not going to sentence him—I doubt I would sentence him in the aggravated range. I may, but it just depends upon how bad it is, but he definitely would probably get a sentence in the—he would definitely get a sentence in the presumptive range. I probably wouldn't go back to the mitigated range since I'm offering this now prior to trial, but I'll let you think about it, unless you already know that he's not interested in it." At sentencing, after a jury trial: "All right. [Defense counsel], you care to be heard on behalf of your client? I believe I previously indicated what the Court's position would be at sentencing, but I'll still consider whatever you have to say." State v. Young, 166 N.C. App. 401 (2004).

6. At sentencing, the court said, "Now, Mr. [Defendant], prior to calling the jury in, you had an opportunity to plead guilty in a plea bargain where the Court offered you the minimum sentence for one crime which would have been about 22 years. . . . If you truly cared—if you had one ounce of care in your heart about that child—you wouldn't have put that child through this. You would have pled guilty, and you didn't. That's your choice. . . . I'm not punishing you for not pleading guilty. I am not going to punish you for not pleading guilty. I would have rewarded you for pleading guilty." The court sentenced the defendant to approximately 200 years of imprisonment. State v. Pinkerton, __ N.C. App. __, 697 S.E.2d 1 (2010), *pet. for writ of supersedeas allowed*, __ N.C. __, 700 S.E.2d 230 (2010).

General Principles

- A mere reference by the court or by the State to a defendant's failure to accept a plea offer or to the sentence a defendant might have received under a plea does not, standing alone, raise an inference that the court impermissibly considered the defendant's decision at sentencing. State v. Allen, __ N.C. App. __, 684 S.E.2d 526 (2009) (sentence upheld despite State's repeated reference to the defendant's failure to accept a plea when trial court made no comments on the matter); State v. Person, 187 N.C. App. 512 (2007) (trial court's brief reference at sentencing to defendant's rejection of an earlier plea offer did not, in context, raise an inference that the rejection played a part in the court's sentence); State v. Anderson, 194 N.C. App. 292 (2008) (trial court's comment at a mid-trial hearing that he would be "amenable to a probationary sentence" if the parties agreed to one as part of a plea not improper); State v. Gantt, 161 N.C. App. 265 (2003) (trial court's brief reference to the defendant's failure to "take advantage" of an earlier "opportunity" to plead guilty not improper).

- Pretrial discussion of the maximum sentence a defendant might face upon rejecting a plea does not give rise to an inference that the court is planning to punish the defendant for going to trial. A court may engage in such discussions to ensure that a defendant fully understands the possible ramifications of his rejection of the plea. State v. Tice, 191 N.C. App. 506 (2008).

- Repeated comments by the trial judge about defendant's choice to exercise his right to a jury trial tend to support an inference that the defendant's election weighed in the court's decision. State v. Peterson, 154 N.C. App. 515 (2002).

- Statements by the court suggesting that a defendant was foolish to go to trial, or statements with an "I told you so" tone, tend to raise an inference of impropriety. E.g., State v. Haymond, __ N.C. App. __, 691 S.E.2d 108 (2010).

- Statements by the court indicating that its "hands will be tied" or that it will be "forced" to give a longer sentence if the defendant does not plead guilty tend to raise an inference of impropriety—if, in actuality, the court's hands will *not* be tied. State v. Haymond, __ N.C. App. __, 691 S.E.2d 108 (2010); State v. Hueto, 195 N.C. App. 67 (2009).

- Pretrial statements by the judge expressing certainty about the sentence he or she will give after a jury trial tend to give rise to an inference that the defendant's exercise of his or her right to a jury trial improperly affected the court's decision. State v. Boone, 33 N.C. App. 378 (1977); State v. Cannon, 326 N.C. 37 (1990); State v. Young, 166 N.C. App. 401 (2004).

- A sentence is not necessarily discriminatory when a defendant convicted by a jury gets a more severe punishment than co-defendants who pled guilty. State v. Jones 21 N.C. App. 666 (1974).

- Repeated references by the court to the "painful and embarrassing questions" a child victim had to face because of a defendant's election to proceed to trial give rise to an inference that a sentence is based on the defendant's exercise of his jury trial right. State v. Fuller, 179 N.C. App. 61 (2006).

- An inference that the court improperly considered a defendant's exercise of his or her jury trial right can arise even when the state never actually offered a plea agreement. State v. Peterson, 154 N.C. App. 515 (2002).

III. Recent Changes to the Probation Laws

Access to Juvenile Records. Legislation passed in 2009, S.L. 2009-372 (S 920), amended provisions of the Juvenile Code (Chapter 7B of the General Statutes) to give probation officers access to portions of certain probationers' juvenile records without a court order. To protect the confidentiality of a probationer's juvenile record, the law restricts a probation officer's access to juvenile records in several ways. For instance, officers may only access the juvenile record of those on probation for offenses committed when the probationer was less than 25 years old, and may only look at the record of adjudications of delinquency for acts that would be a felony if committed by an adult. The new law does *not* give probation officers access to a probationer's juvenile court counselor's record, which includes social, medical, and psychiatric or psychological information about a juvenile and his or her family.

Warrantless Searches as a Regular Condition of Probation. The same legislation made warrantless searches by probation officers and by law enforcement officers in certain circumstances default conditions of supervised probation under G.S. 15A-1343(b). S.L. 2009-372. For offenders sentenced to probation for offenses occurring on or after December 1, 2009, the conditions apply unless the presiding judge specifically exempts the defendant by striking them from the form. This is a change from prior law, under which a warrantless search condition applied only if added by the judge as a special condition under G.S. 15A-1343(b1), and which authorized only probation officer searches.

*Old law: **Special** warrantless search conditions (offenses committed before December 1, 2009)*

G.S. 15A-1343(b1)(7). Submit at reasonable times to warrantless searches by a probation officer of his or her person and of his or her vehicle and premises while the probationer is present, **for purposes specified by the court** and ***reasonably* related** to his or her probation supervision, but the probationer may not be required to submit to any other search that would otherwise be unlawful. Whenever the warrantless search consists of testing for the presence of illegal drugs, the probationer may also be required to reimburse the Department of Correction for the actual cost of drug screening and drug testing, if the results are positive.

*New law: **Regular** warrantless search conditions (offenses committed on or after December 1, 2009)*

G.S. 15A-1343(b)(13). Submit at reasonable times to warrantless searches by a probation officer of the probationer's **person** and of the probationer's **vehicle** and **premises** while the probationer is present, **for purposes *directly* related to the probation supervision**, but the probationer may not be required to submit to any other search that would otherwise be unlawful. Whenever the warrantless search consists of testing for the presence of illegal drugs, the probationer may also be required to reimburse the Department of Correction for the actual cost of drug screening and drug testing, if the results are positive.

G.S. 15A-1343(b)(14). Submit to warrantless searches by a **law enforcement officer** of the probationer's **person** and of the probationer's **vehicle**, upon a **reasonable suspicion** that the probationer is engaged in criminal activity or is in possession of a firearm, explosive device, or other deadly weapon listed in G.S. 14-269 without written permission of the court.

1. The probation officer search condition

The new regular probation officer warrantless search provision uses nearly the same language as the old special condition, with minor (though perhaps not insignificant) changes. Under prior law, warrantless searches could only be conducted "*for purposes specified by the court* and *reasonably related* to the probation supervision." G.S. 15A-1343(b1)(7) (emphasis added). The new law broadens the search condition by dropping the limitation to searches conducted "for purposes specified by the court," eliminating the need for the judge to check the box on form AOC-CR-603 or AOC-CR-604 (next to what was previously special condition #13) to specify whether searches may be conducted for stolen goods, controlled substances, contraband, child pornography, or some other purpose. At the same time, the condition is narrowed by replacing the term "*reasonably* related" with "*directly* related."

The new law does not spell out a level of suspicion required for a probation officer to conduct a search without a warrant (it does for searches by law enforcement officers, described below). Does silence in the probation officer search condition amount to tacit approval of suspicionless searches? There is no clear answer in North Carolina. In *State v. Robinson*, 148 N.C. App. 422 (2002), the court of appeals referred to and seemed to endorse a reasonable suspicion standard, even in the context of a warrantless search led by a probation officer. In *United States v. Midgette*, however, the Fourth Circuit suggested (albeit in dicta) that suspicionless searches are acceptable as part of a program that is, considered as a whole, reasonably tailored. 478 F.3d at 624 (4th Cir. 2007).

2. The law enforcement officer condition

The law enforcement officer warrantless search provision allows officers to search a probationer's person and vehicle with reasonable suspicion that the probationer is engaged in criminal activity or is in possession of a firearm, explosive device, or deadly weapon without court permission. Requiring probationers to submit to warrantless searches by a law enforcement officer is a new feature in North Carolina law—at least in the General Statutes. Prior to 1977, courts frequently added supervision conditions allowing searches by law enforcement officers. With the enactment of G.S. 15A-1343 in 1977, however, the legislature ended this practice, limiting warrantless searches to those conducted by a probation officer. *See* State v. Grant, 40 N.C. App. 58, 60 (1979) (invalidating on statutory grounds a probation condition allowing warrantless searches by any law enforcement officer).

The prior statutory prohibition on law enforcement searches was not, however, required as a constitutional matter. To the contrary, probation conditions allowing warrantless searches by law enforcement officers have generally been upheld, including by the Supreme Court in United States v. Knights, 534 U.S. 112 (2001). *See also* Wayne R. LaFave, *Search and Seizure, Vol. 5,* § 10.10(c). By design, North Carolina's new law enforcement warrantless search provision tracks the Court's holding in *Knights*: it limits law enforcement searches to circumstances in which an officer has reasonable suspicion that the probationer is engaged in criminal activity or has a weapon. In fact, it is more limited than the condition at issue in *Knights* in that it does not allow officers to search a probationer's home without a warrant.

If either search condition (probation officer or law enforcement officer) is challenged, the State may argue that its reasonableness is beside the point, as it is consented to as a prerequisite to being on probation in the first place. This contract theory view of probation may at one time have been appropriate in North Carolina; there are older cases analyzing probation searches as "consent searches." *See, e.g.*, State v. Mitchell, 22 N.C. App. 663 (1974). However, legislation passed in 1995 (S.L. 1995-429) removed from the law provisions allowing a defendant to "elect to serve" an active sentence. With that law repealed, a defendant probably cannot be said to consent to the conditions of his or her probation, and no rights should be deemed waived.

Drug Screens as a Warrantless Search. On the old (pre–December 1, 2009) probation judgment forms, special condition #15 read "Supply a breath, urine and/or blood specimen for analysis of the possible presence of a prohibited drug or alcohol, when instructed by the defendant's probation officer." That condition is not on the new forms. It may certainly be added in box #20, "Other," as an ad hoc condition. But does it need to be added? Drug testing is, after all, a kind of search. *See* Schmerber v. California, 384 U.S. 757 (1966). The new search condition even includes the following language: "Whenever the warrantless search consists of testing for the presence of illegal drugs, the probationer may also be required to reimburse [DOC] for the actual cost of drug screening and drug testing, if the results are positive." G.S. 15A-1343(b)(13). Thus, the condition clearly contemplates drug tests as one kind of search that may be done without a warrant. However, it is uncertain whether the regular warrantless search condition allows a probation officer to test for drugs *randomly*, or whether some form of individualized suspicion is required.

Use, Possess, or Control. The same law (S.L. 2009-372 (S 920)) made it a default condition for all supervised probationers that they not use, possess, or control any illegal drug or controlled substance unless it has been prescribed by a licensed physician; that they not knowingly associate with any known or previously convicted users, possessors, or sellers of such substances; and that they not knowingly be present at or frequent places where such substances are sold, kept, or used.

Default Conditions for Intermediate Punishment. Under new G.S. 15A-1343(b4), added by the same legislation, the following conditions apply to intermediate probationers unless the judge specifically exempts the defendant:

- If required by the officer, perform community service and pay the community service fee;
- Not use, possess, or control alcohol;
- Remain within the county of residence unless granted permission to leave by the court or the probation officer;
- Participate in any evaluation, counseling, treatment, or educational program as directed by the probation officer.

The first and last of the new default intermediate conditions may raise a separation of powers issue, in that they arguably involve a delegation of judicial function to an executive agency. North Carolina's courts have not ruled on the issue, but similar arguments have succeeded elsewhere. In United States v.

Nash, 438 F.3d 1302 (11th. Cir. 2006), for example, the Eleventh Circuit held it was improper for a probation officer to decide whether a probationer would have to attend mental health treatment (distinguishing the acceptable scenario in which an officer merely approves a provider to carry out judicially-ordered treatment). Unlike the situation in Nash, however, where the judge delegated decisionmaking authority to a probation officer, the "delegation" in the new North Carolina law is a product of statute. Such statutory delegations are rare in the United States, *see generally* Neil P. Cohen, Law of Probation & Parole, § 7:24, n. 1, but they have been upheld when challenged as a "usurpation of the judicial function," *see* State v. Mobley, 634 A.2d 305 (Conn. Super. Ct. 1993).

The prohibition on the use, possession, or control of alcohol for all intermediate punishment probationers may give rise to arguments that the condition is inappropriate for offenders whose crime did not involve alcohol or substance abuse. Conditions requiring total abstinence have been deemed reasonable in North Carolina for probationers convicted of crimes involving alcohol or drug abuse. *See* State v. Gallamore, 6 N.C. App. 608 (1969) (impaired driving); State v. Shepherd, 187 N.C. 609 (1924) (violation of prohibition laws). Some courts have, however, overturned alcohol-related conditions when they had no nexus to the crime of conviction. *See, e.g.*, State v. Krueger, 190 P.3d 318 (Mont. 2008) (alcohol condition held invalid for a defendant convicted of sexual assault, with no indication that alcohol was involved in the crime, and the defendant had no history of alcohol abuse).

Tolling. Under former G.S. 15A-1344(d), a "probation period shall be tolled if the probationer shall have pending against him criminal charges in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation." Thus, when a probationer has a pending charge for any offense other than a Class 3 misdemeanor (under G.S. 15A-1344(d), probation cannot be revoked solely based on a conviction for a Class 3 misdemeanor), time stops running on the person's period of probation when the charge is brought, and doesn't start running until the charge is resolved by way of acquittal, dismissal, or conviction.

The new law seeks to clarify what "tolled" means, and to mitigate the effect of tolling for probationers who ultimately are not convicted of a new criminal charge. First, in an effort to clarify the statute, the new law breaks the tolling provision out of G.S. 15A-1344(d) and places it in a stand-alone subsection, G.S. 15A-1344(g). Second, the law explicitly states something DCC had assumed to be true: the probationer remains subject to the conditions of probation, including supervision fees, during the tolled period. Third, the law provides that if a probationer whose case was tolled for a new charge is acquitted or has the charge dismissed, he or she will receive credit for the time spent under supervision during the tolled period.

Deferred Prosecution. Under G.S. 15A-1341(a1), a court can place certain defendants on probation as a condition of a deferred prosecution agreement with the district attorney. The new law added G.S. 15A-1342(a1) to make clear that DCC officers are authorized to supervise such offenders—thereby giving statutory authorization to something that was already happening in practice. The statute broke new ground, however, by answering a previously unresolved question about what happens when a defendant being supervised pursuant to a deferred prosecution agreement violates the conditions of that supervision. Previously, practices varied by district, although it appears some districts reported the

violating defendant directly to the district attorney for prosecution. Other districts brought the case before the court for a violation hearing under G.S. 15A-1345, requiring a judge to make a finding of the violation before the deferred prosecution may be revoked. The new law requires in G.S. 15A-1342(a1) that violations of the terms of a deferred prosecution agreement be reported to the court as provided in Article 82 (Probation). A parallel change in G.S. 15A-1344 made clear that all probationers (and not just "convicted defendant[s]") must be brought before the court in accordance with the provisions of G.S. 15A-1345 before probation may be revoked.

Transfer to Unsupervised Probation. Effective July 1, 2009, G.S. 15A-1343(g) was amended by S.L. 2009-275 (S 1089) to allow a probation officer to transfer a misdemeanant from supervised to unsupervised probation if the probationer: (1) is not subject to any special conditions of probation; (2) was placed on probation solely for the collection of court-ordered payments, and (3) is a low risk according to a Division of Community Corrections risk assessment. This transfer, which does not relieve the probationer of the obligation to make court-ordered payments, may be done without court authorization.

New Pretrial Release Rules for Certain Probationers. New G.S. 15A-534(d2), added by S.L. 2009-412 (S 1078), further amended by S.L. 2009-547 (S 726), provides that when a judicial official is considering pretrial release conditions for a defendant who is charged with a felony and is currently on probation, the official must determine and make a written record of whether the defendant poses a danger to the public. If the official determines that the defendant poses a danger, the official must impose a secured bond under subdivision (a)(4) or electronic house arrest with a secured bond under subdivision (a)(5) . If there is insufficient information to determine whether the defendant poses a danger to the public, the defendant must be retained in custody under a written order until a determination is made. That order must state:

- That the defendant is being held under this subdivision;
- The basis for the official's decision that additional information is needed, and the nature of the information that would be needed to make the determination; and
- A date, within 96 hours of arrest, when the defendant must be brought before a judge for a first appearance, and a statement that if the necessary information is provided before that date, the defendant should be brought before the first available judicial official to set release conditions.

The law also amended G.S. 15A-1345 to require a similar determination of dangerousness when a probationer is arrested for a violation of probation and also has a felony charge pending (or, under a law passed last year, has ever been convicted of a crime that now requires sex offender registration). Prior to imposing release conditions for such probationers, a judicial official must make a written determination of whether the probationer poses a danger to the public. If the probationer is found not to pose a danger, he or she may be released as otherwise provided in Article 26 of Chapter 15A. If the probationer is found to pose a danger to the public, he or she must be denied release pending a revocation hearing.

Though the law requires that dangerous probationers be held without release until a final violation hearing is held, probationers are still entitled under G.S. 15A-1345(c) (and as a matter of constitutional due process under Morrissey v. Brewer, 408 U.S. 471, 485 (1972), and Gagnon v. Scarpelli, 411 U.S. 778 (1973)) to a timely preliminary probation violation hearing. If the judicial official determines that he or she has insufficient information to determine whether the defendant poses a danger, the official must retain the defendant in custody for not more than seven days from the date of arrest to obtain sufficient information to make a determination. If, after seven days, sufficient information is still unavailable, the defendant must be brought before a judicial official, who shall record the lack of information in writing and impose conditions of release.

District court supervision of therapeutic court probationers. The 2009 legislature amended G.S. 7A-271 and -272 and G.S. 15A-1344 to provide legal authority for the practice of district court judges supervising, modifying and revoking probation for defendants placed in drug court treatment program in superior court. A glitch in the 2009 legislation made it unclear whether such authority also extended to defendants placed in "therapeutic court" programs in superior court. (Under G.S. 7A-272, a therapeutic court is one, other than a drug treatment court, in which a criminal defendant is ordered to "participate in specified activities designed to address underlying problems of substance abuse and mental illness that contribute to the person's criminal activity.") S.L. 2010-96 (S 1165), Section 26, clarified that the authority does extend to therapeutic court programs. The change was made effective July 20, 2010. S.L. 2010-97 (S 1242) also made a minor change to the effective date of the jurisdictional changes made in 2009. Under the amendment to the effective date language of S.L. 2009-516, the law is effective not just for probation judgments entered on or after December 1, 2009, but also to judgments modified on or after that date.