

PROBATION VIOLATIONS

January 2017

- **Notice**

- A probationer is entitled to at least 24 hours' notice of any alleged violation of probation. G.S. 15A-1345(e). That notice usually comes via a probation violation report:
 - *Supervised probation*: DCC-10 filed by probation officer.
 - *Unsupervised*: AOC-CR-220, Notice of Hearing on Violation of Unsupervised Probation.

- **Jurisdiction/Timing**

- In general, a judge has power to act on a probation matter at any time before probation expires.
- The court may act after expiration if a violation report was filed (and file stamped) before the case expired. G.S. 15A-1344(f).
- If an earlier extension was improper and probation would have expired without it, the court lacks jurisdiction now. *E.g.*, State v. Gorman, 221 N.C. App. 330 (2012).

- **Bail**

- Prehearing release for a probationer arrested for an alleged violation is generally the same as pretrial release for a criminal charge.
- If a probationer arrested for an alleged violation also has a pending felony charge or has ever been convicted of a reportable sex crime, the judicial official shall determine whether the probationer poses a danger to the public before imposing conditions of release.
 - If the probationer is deemed dangerous, he or she shall be denied release.
 - If the probationer is not dangerous, conditions of release shall be imposed as usual.
 - If dangerousness cannot be determined, the probationer may be detained for up to seven days to obtain sufficient information.
 - After seven days, if no determination has been made, release conditions shall be imposed as usual. G.S. 15A-1345(b1); AOC-CR-272.

- **Preliminary Hearing**

- A probationer detained for a probation violation is entitled to a preliminary hearing on the violation within seven working days of his or her arrest, unless the probationer waives it or the final violation hearing is held first.
- If no preliminary hearing is held within seven working days, the probationer must be released pending a hearing. G.S. 15A-1345(c)-(d).

- **Final Hearing**

- Venue: Probation violations may be heard in the district where:
 - probation was imposed,
 - the alleged violation took place, or
 - the probationer currently resides. G.S. 15A-1344(a).
- Confrontation: A probationer may confront and cross-examine witnesses, unless the court finds good cause for not allowing confrontation.
- Counsel: A probationer has a right to counsel for a violation hearing. The court must comply with G.S. 15A-1242 when accepting a waiver of the right to counsel for a violation hearing.

- Evidence:
 - The rules of evidence do not apply at a violation hearing.
 - Hearsay is admissible. *State v. Murchison*, 367 N.C. 461 (2014).
 - The exclusionary rule does not apply. *State v. Lombardo*, 74 N.C. App. 460 (1985).
- Standard of proof: The State must present evidence proving to the judge's *reasonable satisfaction* that the probationer willfully violated a valid condition of probation.
- Willfulness:
 - The probationer may offer evidence that a violation was not willful. If the probationer offers such evidence, the court must consider it and make written findings of fact clearly showing that it was considered.
 - If the alleged violation concerned the nonpayment of a monetary obligation, the defendant must be given an opportunity to show that the nonpayment was attributable to a good faith inability to pay.
- Class H and I felonies pled in district court: By default, probation violation hearings for felony defendants who pled guilty in district court are in *superior court*. Hearings may be held in district court with the consent of the State and the defendant. G.S. 7A-271(e).
- **Appeals**
 - A probationer may appeal to superior court for a de novo violation hearing if a district court judge revokes probation or imposes special probation.
 - There is no right to appeal other modifications of probation, including imposition of a period of confinement in response to violation (CRV). *State v. Romero*, 745 S.E.2d 364 (2013).
 - There is no right to a de novo hearing in superior court if the defendant waived his or her right to a hearing in district court. G.S. 15A-1347.
 - Appeal of a violation hearing held in district court for a Class H or I felony pled in district court is to superior court for a de novo hearing. *State v. Hooper*, 358 N.C. 122 (2004).

SUMMARY OF PROBATION RESPONSE OPTIONS

- **Revocation**

- Permissible only in response to the following:
 - Violations of “**commit no criminal offense**” condition under G.S. 15A-1343(b)(1).
 - New criminal offense violations need not be based on *convicted* conduct, so long as the probation judge makes an independent finding that a criminal act occurred.
 - A probation officer’s reference to “pending charges” on a violation report does not spoil a new criminal offense violation; as long as the alleged violation is captioned as a “commit no criminal offense” violation, the probationer is on notice of a revocation-eligible violation. *State v. Lee*, 232 N.C. App. 256 (2014).
 - Probation may not be revoked solely for conviction of a Class 3 misdemeanor. G.S. 15A-1344(d).
 - Violations of “**absconding**” condition under G.S. 15A-1343(b)(3a).
 - Willfully avoiding supervision or willfully making whereabouts unknown to the probation officer; more than merely leaving the jurisdiction or failing to report to the supervising officer. *E.g.*, *State v. Williams*, 776 S.E.2d 741 (2015).
 - *For Structured Sentencing misdemeanants placed on probation before 12/1/2015 or any felony or DWI probationer*: Any violation by a defendant who has received **two CRV periods**. G.S. 15A-1344(d2).
 - *For Structured Sentencing misdemeanants placed on probation on/after 12/1/2015*: Any violation by a defendant who has previously received **two periods of quick-dip confinement**, imposed either by a judge or by a probation officer through delegated authority. G.S. 15A-1344(d2).
- Upon revocation the court may:
 - Reduce the suspended sentence within the same grid cell. G.S. 15A-1344(d1).
 - Run sentence concurrently/consecutively to other sentences. G.S. 15A-1344(d).

- **Confinement in Response to Violation (CRV, or “dunk”)**

- In response to a “technical violation” (not a new crime or absconding), confinement of up to 90 days (although no longer than the suspended sentence) for a misdemeanor, or 90 days for a felony. G.S. 15A-1344(d2).
- After two CRV periods, the court may revoke probation for any subsequent violation.
- CRV is served where the defendant would have served an active sentence (i.e., the Statewide Misdemeanant Confinement Program, the local jail, or in prison, as identified in the judgment suspending sentence).
- If a defendant is on probation for multiple offenses and CRV is imposed, the CRV periods must run concurrently on all cases related to the violation.
- A CRV period that uses up the entirety of a defendant’s suspended sentence is sometimes referred to as a “**terminal CRV**,” and it is largely the functional equivalent of revocation.
- *CRV is repealed for Structured Sentencing misdemeanants placed on probation on/after 12/1/2015.*

- **Short-term (2–3 day) jail confinement (“dip”)**
 - 2 or 3 day increments; no more than 6 days/month and only in 3 separate calendar months. G.S. 15A-1343(a1)(3).
 - Served in the local jail.
 - Permissible only for non-DWI offenses committed on/after 12/1/11.
- **Special probation (“split sentence”)**
 - Confinement up to ¼ maximum imposed sentence (DWI: ¼ maximum *authorized* sentence). G.S. 15A-1344(e).
- **Contempt**
 - Up to 30 days confinement; violation must be proved beyond a reasonable doubt under procedures described in Chapter 5A. G.S. 15A-1344(e1).
 - Counts for credit against suspended sentence. *State v. Belcher*, 173 N.C. App. 620 (2005).
- **Extend probation**
 - *Ordinary extension* to 5 years, permissible at any time for good cause. G.S. 15A-1344(d).
 - *Special purpose extension* for up to 3 years beyond original period if:
 - Probationer consents,
 - In last 6 months of original period, and
 - For restitution or medical/psychiatric treatment. G.S. 15A-1343.2; -1342(a).
- **Modify probation**
 - Add/remove/change conditions; permissible at any time for good cause shown. G.S. 15A-1344(d).
 - Intermediate conditions may be added to a community case upon violation. G.S. 15A-1344(a).
- **Transfer to unsupervised probation**
 - Permissible at any time.
 - Court may authorize probation officer to transfer upon payment of moneys. G.S. 15A-1343(g).
- **Terminate probation**
 - Ends probation; permissible at any time. G.S. 15A-1343(b).
 - There is no statutory basis for labeling a termination “unsuccessful” or “unsatisfactory.”
- **Violations in conditional discharge and formal deferred prosecution cases**
 - In general, regular procedural rules apply. *State v. Burns*, 171 N.C. App. 759 (2005).
 - *Conditional discharge*: Upon violation, the court enters an adjudication of guilt and proceeds as otherwise provided. G.S. 15A-1341(a6).
 - *Deferred prosecution*: Upon violation, the court may order that charges be brought to trial. G.S. 15A-1344(d).
 - Upon expiration or early termination, the defendant is immune from prosecution on the charges deferred or discharged and dismissed. G.S. 15A-1342(i).