

DEFENDING A PROBATION VIOLATION

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Mecklenburg County**

On January 2, 1997, Judge L.N. Order of the Mecklenburg County Superior Court sentenced the defendant, John Reuben to an Intermediate Punishment of six (6) to 8 (8) months at the North Carolina Department of Corrections. That sentence was suspended. Judge Order placed Mr. Reuben on three (3) years of supervised probation with the following conditions: the first six (6) months of probation were to be under intensive supervision; defendant was to pay court costs and fines in the amount of \$5,500. A copy of the terms and conditions of Mr. Reuben's probation was provided to him on the date of his sentencing. Being remarkably far-sighted, Mr. Reuben has kept a copy of that document.

On March 24, 2000, Probation Officer Laverne Pugh advised Mr. Reuben that she was extending the period of his probation for two (2) years in order to give him an opportunity to complete the payment of his court costs and fines.ⁱ She prepared and signed an order extending his probation, and had the order signed by District Court Judge Cora Damatta.ⁱⁱ Officer Pugh gave him a copy of that order. Being unusually far-sighted, Mr. Reuben has kept a copy of that document.

On September 30, 2002, Mr. Reuben was laid off from his job as a substitute instructor at an unaccredited community college. On October 1, 2002, Mr. Reuben decided that he could no longer pay the weekly charge for his seedy room in his seedy boarding house. He explained to the boarding house manager that he was unable to renew since he had serious obligations to the Court and paying for his room would make him unable to meet those obligations. The boarding house manager gave Mr. Reuben his card and told him to come back any time he needed him. The manager can still be contacted at the address and phone number on his card.

On October 31, 2002, Mr. Reuben was found passed out in the gutter outside a homeless men's shelter in Charlotte, NC. Police officers were unable to get any coherent information from him, and he was admitted for observation at the psychiatric ward of a local hospital. A few days later, Mr. Reuben was released. The hospital determined that he had suffered a nervous breakdown as a result of the catastrophes that had befallen him and the tremendous pressure he felt from his court-imposed obligations. With no other opportunities available to him, Mr. Reuben took to a life of small-time work. Hoping to earn some money by providing holiday decorations from curbside, Mr. Reuben was arrested on December 24, 2002, while harvesting holiday greenery from private property. He was charged with Trespass to Remove Pine Needles. He was released on December 26, 2002, with a sentence of two days, with credit for two days served.

On December 29, 2002, Officer Pugh prepared the following report. She placed it in the inter-office courier mail basket in the probation office, and addressed it to the clerk of courts.ⁱⁱⁱ At Mr. Reuben's weekly office appointment on December 30, 2002, Officer Pugh arrested him for violating the terms and conditions of his probation. On January 3, 2003, he was assigned counsel. On January 18, 2003, Mr. Reuben contacted you by telephone to share his tale of woe.^{iv}

What's wrong with this picture? For purposes of this discussion, please give no consideration to days of the week. Look over the material above as well as the exact copy of the violation report served on Mr. Reuben for any possible issues.^v

State of North Carolina >File No. County of Hearing _____
>File No. County of Origin XXXXXXXX

In the General Court of Justice
MECKLENBURG County CHARLOTTE Seat of Court District X Superior

STATE VERSUS

REUBEN, JOHN CONTEMPT REPORT
WHITE MALE DOB: 04/01/1952 G.S. 15A-1345

ADMINISTRATIVE REVIEW

The violations listed on this Violation Report were reviewed with _____, Chief Probation Officer on 12/29/2003

SIGNATURE OF PROBATIONER

I have received a copy of this Violation Report and understand its contents and that I must appear in Court as directed by my Probation/Parole Officer.

Signature of Probationer Date

HEARING NOTICE

WHEREFORE, the undersigned requests that a hearing on the charge(s) contained in this report be conducted pursuant to G.S. 15A-1345(e) on the date and at the time and place set forth below, that the notice of this hearing be given in any manner provided by law, and that after such hearing the Court take the action which it considers proper under G.S. 15A-1344(d) and/or 15A-1344(e1).

Hearing Date: _____ Time: _____ AM/PM Place: _____

OATH AND SIGNATURE OF OFFICER

I have read the Violation Report, and state that the contents are true to my own knowledge except those which are stated upon information and belief, and as to them I believe that they are true.

Signature Name (Type or Print) Title Date

SWORN AND SUBSCRIBED TO _____
Signature of Person Authorized to Administer Oaths.
On _____ . _____ Deputy CSC/Assist CSC _____ Superior Court Clerk
Date _____ Magistrate _____ Notary Public
Date Commission Expires _____.

REUBEN, JOHN XXXXXXXXX
DCC10 Rev. 1/02

The probation officer, being duly sworn, states that the defendant was placed on probation pursuant to the following Judgment Suspending Sentence

Date of Judgment	Court	County of Origin	File No.	Offense
01/02/97	SUPERIOR	MECKLENBURG	96XXXXXX	Poss. Cocaine

Length of Sentence Min: 0YR 06MO 0DY Max: 0YR 08MO 0DY
Length of Term of Probation: 0 YRS. 36MOS. 0DYS.
Sentencing Judge: L.N. ORDER

Of the conditions of probation imposed in that judgment, the defendant has willfully violated:

1. Special Condition of Probation "Not to be away from the defendant's residence during the specified hours as set by the court or probation officer..." in that
SPECIAL CONDITION OF THE INTENSIVE SUPERVISION, NOT TO BE AWAY FROM HIS PLACE OF RESIDENCE BETWEEN THE HOUR OF 0600 AM TO 0600 PM, IN THAT HE MISSED HIS CURFEW ON 07/04/1997, 07/17/1997, 07/18/1997.
2. Special Condition of Probation, "Not use, possess or control any illegal drug or controlled substance unless it has been prescribed for the defendant by a licensed physician and is in the original container with the prescription number affixed on it..." in that
THE DEFENDANT ADMITTED TO ILLEGAL DRUG USE ON 12/05/1999.
3. Regular Condition of Probation, "Pay the costs of court, any fine ordered by the court and make restitution or reparation as provided..." in that
THE DEFENDANT HAS ONLY PAID \$5,240.00 OF THE \$5,500 IN COURT COSTS AND FINES IMPOSED BY THE COURT, THE LAST PAYMENT BEING RECEIVED ON 10/14/2002.
4. Regular Condition of Probation, "Remain gainfully and suitably employed or faithfully pursue a course of study or of vocational training. . . ." in that
THE DEFENDANT HAS PROVIDED NO PROOF OF EMPLOYMENT SINCE 09/23/02.
5. Regular Condition of Probation, "Commit no criminal offense in any jurisdiction," in that
ON 12/24/2002 THE DEFENDANT COMMITTED THE OFFENSE OF TRESPASSING UPON POSTED PROPERTY TO REMOVE PINE NEEDLES.
6. Regular Condition of Probation, "Satisfy child support and other family obligations as required by the court," in that

ⁱ N.C. G.S. §15A-1342(a) authorizes an extension of probation for completing restitution or to continue medical or psychiatric treatment. It does not authorize an extension for payment of costs and fines. Furthermore, probation can only be extended under this section during the last six months of the original period of probation.

ⁱⁱ N.C. G.S. §7A-271 vests exclusive jurisdiction over felony matters to the Superior Court. District Judge Damatta had no jurisdiction to extend probation on a Superior Court matter.

ⁱⁱⁱ N.C. G.S. §15A-1344(f)(1) controls the process of revocation after expiration of the period of probation. It requires that a written motion be filed with the clerk indicating intent to conduct a revocation hearing. The filing issue has been addressed by the North Carolina Court of Appeals in three situations. Where the Violation Report was file-stamped after the expiration of the period of probation, the Court is without jurisdiction to hear the case. *State v. Hicks*, 148 N.C. App. 203, 557 S.E.2d 594 (2001). If the Violation Report was not file-stamped, the Court is also without jurisdiction to hear the case. *State v. Anderson*, 2002 N.C. App. Lexis 1788 (2002). If the Violation Report was not file-stamped but an Order for Arrest was issued, the Court still lacks jurisdiction to hear the case. *State v. Moore*, 148 N.C. App. 568, 559 S.E.2d 565 (2002). Each of these cases suggests that other evidence that would support the contention that the violation report was timely filed could be sufficient for the Court to maintain jurisdiction. Such evidence might include a report that was not file-stamped but for which an Order for Arrest was issued before the expiration of the period of probation.

^{iv} N.C. G.S. §15A-1345(c) requires that a defendant must be given a preliminary hearing on his probation violation report within seven working days of the probationer's arrest, unless that hearing is waived or a revocation hearing is held first. If the probationer is not given the preliminary hearing within seven working days, the statute states that the probationer "must be released ... to continue on probation pending a hearing."

^v The body of the Violation Report raises several additional issues. The report is captioned as a "Contempt Report." Defense counsel ought to argue that the relief sought by the Probation Officer is not revocation but criminal contempt. Some courts will agree, if only because they dislike a sloppy pleading.

Check the signatures on the Report, as well. It was not unusual in Mecklenburg County for a Violation Report to have been notarized by someone from the Probation Department without having been signed by the Probation Officer. If a notarized AND signed copy appears miraculously from the Probation Officer's file, check the court copy as well as your copy to see if either was file-stamped without a signature. In that case, you ought to argue that the Probation Officer had to have added his signature AFTER the Violation Report was notarized and filed.

Always try to check the original judgment to determine whether the violations themselves are legitimate. In this instance, the curfew violations alleged in Paragraph 1 took place after the expiration of the period of intensive supervision. Unless the Court finds some additional authorization for the imposition of a curfew, those allegations are not violations of the Court's original order and judgment.

A popular allegation in Mecklenburg County is an admission of illegal drug use. An admission of use is not prohibited by the Court's judgment; use itself is prohibited. Argue that the report does not allege use of illegal drugs, it alleges essentially that the probationer made an imprudent statement.

Does the allegation actually allege something? Check each paragraph to determine whether there is an allegation. In this example, paragraph 6 cites a condition of probation but fails to allege a violation of that condition. A motion to dismiss that paragraph of the Violation Report would be appropriate.

Are the alleged violations willful or intentional? There is a strong argument to be made that the violations in paragraphs 3 and 4 of our example were neither willful nor intentional. The available facts strongly suggest that the probationer made great efforts to comply with his probation. The probationer's psychiatric hospitalization certainly suggests that his inability to comply cost him dearly. It may also suggest the need for a forensic examination.

An extremely important issue that is not directly addressed in this example is that of jail credit. Try to check the original judgment to see whether jail credit was given at the time of sentencing. If it was, use

that credit as a starting point in calculating available credit at the time of revocation. If it was not, check all available records to be sure that your client is getting all the credit to which he or she is entitled. Remember that any clients who have been around long enough to have gone to Boot Camp are entitled to credit for the time spent there. That information can often be obtained from the Department of Corrections website, Offender Search menu. Make a good faith effort to determine whether any of the jail credit you are planning to submit to the Court was expended in connection with other cases. If you are certifying credit to which your client is not entitled, you are committing a fraud on the court and damaging your own reputation.

This exercise is intended only as an example of some of the things to look for when defending against a probation violation. Other issues will arise, and they really can be dealt with. Check your original judgments, read the statutes, study the violation report and always be ready to argue willfulness and mitigation. If all else fails and there is no choice but to admit to a violation (or if your client tells you up front that she or he intends to admit the violations), argue for an incremental sanction. House arrest, day reporting and drug treatment are all examples. There are many, many more available.