

Defending Probation Violations

Probation is a creature of the statutes---know them, keep a copy on hand. Keep copies of the applicable decisions. Judges (and most DA's) do not know either the law or the statues about probation. Probation statutes apply to deferred prosecutions and to 90-96 cases. (see *State v. Burns*)

- A. **Be sure to check for appointment/waiver of counsel.** If indigent, and counsel was denied, the defendant can't be revoked and given an active sentence .
- B. **Be sure that you read the original judgment,** does it comply with structured sentencing guidelines? What type of sentence was it (community or intermediate) and how much probation did the defendant get (15A-1343.2(d))? If there was a modification to extend, was it timely done and did it comply with the requirements? If a longer probationary sentence was imposed, where the "findings" made. (This may necessitate a transcript being prepared of the sentencing hearing if in Superior Court,-- if in District Court, assume no findings were made since the state is unlikely to be able to produce any "written findings" or a transcript. Extensions without a violation must comply with the statute— and the client must agree!
- C. **What were the conditions of probation?** Did the defendant get a copy of the judgment and any modifications of the judgment? 15A-1343(c) says he must or he can't be held in violation of them. Check out 15A-1342 (g) invalid conditions, even if the defendant agrees but the condition is invalid, he doesn't waive his right to later object.
- D. **Look at the report**—make sure it contains allegations of violations that were imposed as conditions of the judgment. Make sure it was properly signed, file stamped and served. **If your hearing is to be held after the period of probation has expired, be sure to investigate why the state didn't have the hearing before.** 15A-1344-(f) *State v. Burns and State v. Henderson*
- E. **Your client is entitled to have a probable cause hearing** if he is in

custody and his case is not heard within 7 business days, if it can't be heard, the remedy is to unsecure the bond and set a date... he is entitled to at least 24 hours notice prior to having the *revocation* hearing and hearsay is permitted but the evidence against him must be disclosed to him. 15A-1345. Probation cannot be revoked solely on the basis of hearsay evidence.

- F. **If the allegations include non-payment of monies...** the procedures for the hearing include those in 15A-1364. Look at the restitution issues especially.. if the obligation was joint and several with co-defendants, what have they paid?? How was restitution determined?? See 15A-1340.35 through 1340.38 . Do not neglect to introduce specific information on the defendant's personal economic situation, ie. his rent, child support, income, other court ordered obligations, other living expenses. Remember the court must make findings and if the record doesn't support the findings, the court must make a ruling that the defendant has not made a good faith effort to pay. The court can always modify monetary obligations.
- G. **If the allegations include absconding...** does the officer know as a fact, that the defendant left the jurisdiction? Was the defendant in custody somewhere? In the hospital? Dead? If the violation report was filed, what did probation do to find the defendant to get him/her served with the OFA? Locating people is much easier with the internet. If there is a social security number, employment security records will show if the defendant is currently working and paying funds through an employer. **This is an area where knowledge of how your probation officers do their jobs is essential!** Are they required to make/ attempt to make a contact with the probationer at least once every 30 days. Even if the case is in absconder status, something must be done (see *Burns*) and even if they can't find the guy, they can still have a hearing in his absence (15A-1344(d)) (see also *Surratt*). Probation officers are required to keep documentation of contacts relating to a case. These are kept on forms known as 9's. When testifying, ask them to refer to the 9's for the exact place they noted the conduct of the defendant, attempt at contact or any other information they may testify about.
- H. **Response to violations** by the court can be creative. The court can terminate, modify, extend or revoke probation. (but only if all the

statutory requirements are met). Judges sometimes think that they can't modify another judge's judgment. That is not true. See 1344 (d) Remember that the activated sentence should run concurrently with any other sentence the defendant is currently serving unless the revoking judge says otherwise. In order to revoke, the court must find that the defendant has violated, without lawful excuse, a valid condition of probation. The burden of proof is "*reasonably satisfied in the exercise of his sound discretion*"-- a very low threshold!

Know your community resources. If your judge is likely to go with whatever solution is given him/her, be sure *you* have one! Don't let the probation officer's "revocation" be the only thing the judge hears. Investigate the possibilities. Have on hand information about the program(s) you are suggesting so that the court can be made aware of the viability of your suggestion. Remember that there should be a continuum of probation – a ratcheting up of the sanctions on probation so that all community resources are exhausted before the ultimate sanction of serving the sentence is imposed. Probation costs pennies a day for the state but building prisons in the millions!

Make a record for appeal! Be sure to set out clearly the basis for your arguments, cite applicable statutes and case law and make the record complete, get your ruling, then note the appeal and move on. In many cases, we know that if the judge revokes our client, the likelihood that the defendant would get a result from any appeal before serving all of the activated sentence is slim. Don't always assume it would be pointless to appeal. Your client may have to serve his sentence in it's entirety BUT if you have a good issue, you may give the appellate courts an opportunity to make new law which will help the next client with that issue. Decisions on novel issues or even restatement of old decisions helps to support the arguments we make on behalf of our clients. Many probation violations cases *can't* be won on the facts, they must be won on the law!

List of Cases

State v. Neely 307 N.C. 247; 297 S.E. 2d 289, (1982)
Alabama v. Shelton 535 U.S. 654; 122 S. Ct. 1764; 152 L. Ed 2d 888, (2002)

State v. Guion, 2004 N.C. App. LEXIS 849
State v. Seek, 152 N. C. App. 237; 566 S. E. 2d 759, (2002)
State v. Suggs 92 N. C. App. 112; 373 S. E. 2d 687, (1988)
State v. Hicks 148 N.C. App. 203; 577 S. E. 2d 594, (2001)
State v. Anderson, No. COA00-1483 (unpublished opinion) (2001)
State v. Moore 148 N. C. App. 568, (2001)
State v. Hall, 160 N. C. App. 593; 586 S. El. 2d 561, (2003)
State v. Hughes, 136 N. C. App. 92; 524 S. E. 2d 63, (1999)
State v. Love, 156 N. C. App. 309; 576 S. E. 2d 709, (2003)
State v. Hearst, 356 N. C. App. 132; 567 S. E. 2d 124, (2002).
State v. Turner, 149 N.C. App. 974; 563 S. E. 2d 100 (2002)
State v. Smith, 598 S. E. 2d 408; 2004 N. C. LEXIS 954 (N.C. August 16, 2004)
Motion granted; 2004 N. C. LEXIS 1117 (N.C. Oct. 6, 2004) *Motion granted*; 2004
N. C. LEXIS 1177 (N. C. Nov. 8, 2004) *Motion granted*..
State v. Paris Demone Burns, NO. COA04-907, July 19, 2005.
State v. Dexter Leon Suratt, NO. COA05-1156, May 16, 2006
State v. Tyrone Braxton Henderson, NO COA05-1425, 2006 N.C.App, LEXIS 1832,
August 15, 2006