

Probation Violation Points to Check
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1. Check to determine that the Probation Violation Report was filed within the probation period.
2. Remember that the probation period should be argued to be defined in periods of 30 day months, not calendar months. You lose about 5 days a year from this. This argument is based on the statutory definition of month imprisonment being 30 days and the application of equal protection, which require that all probationers sentenced to a probationary period of specific months, be exposed to the same time period for risk of activation on violation. There is statutory construction statute N.C.G.S. §12-3 which defines month imprisonment as 30 days (12-3(12)). Unfortunately in the same statute there is a general definition of month if not otherwise specified saying it is a calendar month (12-3(3)).
3. Check to make sure that the Probation Violation Report was filed with the Clerk. The best evidence is a file stamp and State must prove filing beyond a reasonable doubt for the Court to have jurisdiction. State v. Moore, 148 N.C. App. 568, 559 S.E.2d 565.
4. Also check to make sure that a hearing was attempted to be scheduled for some time within the probationary period as this is also a jurisdictional requirement. State v. Hall, 160 N.C. App. 593; 586 S.E.2d 561 (2003). Remember that the probation statute does not actually require the probationer to even be present to hold the hearing so long as reasonable notice was attempted to be given. (15A-1344(d)&(e)). DA's often raise the argument that no hearing should have been scheduled since the probationer was an absconder. The solution to this is the State should have mailed a notice to the probationer's last known address setting forth the hearing and if he failed to appear in court then issue an OFA. This would cover all Moore and Hall objections from the State side. Additionally the NC Supreme Court has now made it explicitly clear that actual reasonable efforts to hold a hearing, not just schedule one, must be made and in addition the trial court must specifically find facts supporting the proposition that the State made reasonable efforts or the Court is without jurisdiction to hear the case. State v. Bryant, ___ N.C. ___, 637 S.E.2d 532; 2006 N.C. LEXIS 1288.(December 15, 2006)
5. Check to make sure the length of probation period is correct or that special findings were made to justify longer ranges. (15A-1343.2(d))
6. Check to be sure client had counsel on the underlying conviction. If he was indigent and denied counsel, or the record is silent as to counsel, under State v. Neeley, and now Alabama v. Sheldon, the suspended sentence cannot be activated. Only a fine and conditions such as drug treatment were authorized punishment and only contempt proceedings can be used to enforce.
7. Check the judgment itself to make sure that any probation condition that is claimed to have been violated is actually in the judgment. To be valid a condition of probation must be set forth in the judgment itself. 15A-1343(b)3rd paragraph.
8. Be sure the imposed sentence on the underlying conviction conforms with the requirements for the criminal history level as found by the Court.
9. Remember that the REVOKING court actually determines whether multiple sentences run concurrently or consecutively and according to 15A-1344(d), unless the revoking judge specifies consecutive, the cases run concurrently. (Sometimes silence can be golden.) Be sure to check the Clerk's final judgment to make sure the cases are not consecutive unless ordered by the revoking judge in open court. You may need to file an MAR to correct the judgment if they just follow what the sentencing judge put in his judgment.
10. Under State v. Burns, 171 N.C. App. 759, 615 S.E.2d 347 (2005), a judgment under 90-96 is clarified to be regular probation and in order to find a violation of that probation the State must timely file a violation report and hold the violation hearing within the period as required by the Moore and Hall cases. By clear implication this would also apply to deferred prosecutions because those actions are also contained in the probation statutes. (A smart DA, if the court grants this challenge, will take the VD and then recharge).

11. Also be sure to note that a Class 3 misdemeanor conviction, by itself, cannot be grounds for revocation of probation. 15A-1344(d).
12. If you have to try a PV, remember that the violation report controls the proceeding. Object to anything not related to one of the listed violations. Do not automatically allow them to use hearsay. Even in a PV hearing, hearsay must be reliable before it can be used. Do not hesitate to explore the supporting base for a hearsay statement. You will often find that the testifying officer has no actual knowledge of what knowledge if any the declarant had.
13. Although a court is not bound by the strict rules of evidence during a probation violation hearing, *see Hewett, 270 N.C. at 353, 154 S.E.2d at 480*, it is nonetheless improper for the court to consider and rely upon hearsay evidence as the sole basis for making a factual determination, *see id. at 356, 154 S.E.2d at 482*. *State v. Turner*, 2002 N.C. App. LEXIS 1884. (Unpublished Opinion)
14. In trying a PV, do not let the PO say things like “the absconder”. That is what they have to prove. Usually the easiest trials are where they allege absconding and no other violation. Usually this means somebody checked a couple of times and then said they could not find him. If this is the only violation they must affirmatively prove that he intentionally left the jurisdiction.
15. "In a probation revocation proceeding based upon [a] defendant's failure to pay a fine or restitution which was a condition of his probation the burden is upon the defendant to 'offer evidence of his inability to pay money according to the terms of the [probationary] judgment.'" *State v. Jones, 78 N.C. App. 507, 509, 337 S.E.2d 195, 197 (1985)* (citation omitted). Pursuant to N.C. Gen. Stat. § 15A-1364(b), "a convicted defendant ordered to pay a fine or costs *may not* be imprisoned for failure to comply if the delinquency in paying was 'not attributable to a failure on his part to make a good faith effort to obtain the necessary funds for payment.'" *State v. Johnson, 124 N.C. App. 462, 474-75, 478 S.E.2d 16, 24 (1996)* (emphasis added) [*16] (quoting N.C. Gen. Stat. § 15A-1364(b) (1988)), *cert. denied, 345 N.C. 758, 485 S.E.2d 304 (1997)*.
16. Depending on when you get the case and whether or not it will be continued the first time and also whether your client is being held in custody you may wish to move for his unconditional release pending the final hearing. 15A-1345(c) requires that for all probation violations for which a defendant has been arrested and is being held pending a revocation hearing, if they are in custody then before 7 working days either a preliminary hearing to determine PC for the probation violation, or the actual hearing itself must be had. If no hearing is held then on the 7th day the probationer must be released to await the final hearing.
17. Unfortunately the Supreme Court has reversed the COA’s decision in *State v. McMahan*, (COA-05-211), *State v. McMahan, 621 S.E.2d 319, 2005 N.C. App. LEXIS 2477 (N.C. Ct. App., Nov. 15, 2005)* that such aggravated sentences cannot be imposed on violation of probation and that this is structural error requiring reversal as decided in “*Blakely* errors arising under North Carolina's Structured Sentencing Act are structural and, therefore, reversible per se.” *State v. Allen, 359 N.C. 425, 444, 615 S.E.2d 256, 269 (2005)*. According to our Supreme Court, *State v. McMahan, 361 N.C. 420; 646 S.E.2d 112; 2007 N.C. LEXIS 589 (June 28, 2007)* if the underlying sentence imposed was from the aggravated range and there was no stipulation by the defendant to being in the aggravated range it is ***not*** subject to a *Blakely* challenge for the imposition of any aggravated range sentence.
18. If the probation violation is a misdemeanor or felony heard in the District Court then appeal is to the Superior Court for a de novo probation violation hearing. *State v. Hooper, 358 N.C. 122; 591 S.E.2d 514 (2004)*.
19. The District Court may only hear felony probation violations with both the consent of the State and the Defendant. (7A-271(e)). If the Defendant consents and thereafter wishes to appeal, appeal is to the Superior Court for hearing de novo pursuant to *State v. Hooper, 358 N.C. 122; 591 S.E.2d 514 (2004)*.
20. Remember to make sure that any time a defendant spent at any rehabilitation program on an in-patient basis and which was required as a part of his probation is credited against his sentence as days in custody by the clerk if probation is revoked and a sentence activated. *State v. Lutz, 177 N.C. App. 140; 628 S.E.2d 34 (2006)*.

21. The COA determined on 6/5/07 in S v. High, NO. COA06-619, that if a trial judge makes a finding without objection from the defendant that the defendant had absconded supervision then the issuance of an OFA was reasonable efforts to notify the defendant and to hold a hearing. Defense counsel mistakenly tried to raise jurisdiction at the end of the PV hearing after all evidence under the preponderance standard and with hearsay had been allowed in. Raise jurisdictional issues before ever allowing a PV hearing and use the standard of regular rules of evidence and proof beyond a reasonable doubt.