

Probation Violation Points to Check  
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(Revised to consider effects of new legislation effective 12/1/08)

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. ***(NOTE WELL: Amendment by the legislature makes this paragraph now inapplicable to probation violations taken out after December 1, 2008. The revised statute says that these changes apply to offenses committed after 12/1/08 so anyone who was put on probation prior to 12/1/08 should still be covered under Bryant. The section that allows the Court to now extend probation after expiration of the period applies to any probation revocation hearing after 12/1/08.) Additional legislative amendments now make the former requirement that the State prove reasonable efforts to hold the hearing during the period of probation no longer required and lack of such evidence no longer deprives the Court of jurisdiction. Additionally, the new amendments now allow the Court to extend and/or modify the probation even after the period of probation has expired so long as the allegations of violation were timely filed before the probation period expired.***
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 (15A-1343.2(d) **CAUTION:** Be aware of the unpublished opinion from the COA in State v. Lindsay, COA06-869, 2007 NC App LEXIS 1114 (June 5, 2007) which holds in a portion of its ruling that a challenge to the failure of the judgment to indicate findings required for a longer period of probation may not be challenged at the probation revocation hearing but must be done at the time the judgment is entered by appealing to the COA. (This is a silly argument in practice since it assumes without evidence that the missing check block is incorrect and the length period is correct and that the length period listed was the amount announced by the Court to counsel at the time it was entered or that trial counsel ever saw a copy of the judgment). Remember, unpublished opinions are not binding and since there is no other case on this point apparently this panel did not feel sufficiently confident in their analysis to subject it to widespread public scrutiny.
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)3<sup>rd</sup> 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. In order for the written judgment to be different than that stated (or in this instance NOT stated) by the Court, the defendant must have been present in court when the written judgment is entered, with counsel, and have been afforded an opportunity to be heard. State v. Hanner, 654 S.E.2d 820, 823 (N.C. Ct. App. 2008); State v. Crumbley, 135 N.C. App. 59, 67 (N.C. Ct. App. 1999).

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 as required by the Moore case. 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 7<sup>th</sup> day the probationer must be released to await the final hearing. This requirement may be waived by counsel but such a waiver must be affirmatively made and cannot be implied by default. If the file is silent then no waiver can be presumed. State v. Neeley.
17. 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. Be sure to check the jurisdictional basis of any earlier probation hearing in which the defendant's probation was extended, either as a result of a violation hearing or due to a consent modification. Probation can only be extended in the last 6 months to allow for more time to pay restitution or to complete medical or psychiatric treatment, unless it is in response to a finding of violation. If the earlier extension is not lawful or was lacking jurisdiction, the Court will be without jurisdiction in the latest violation proceeding. State v. Satanek, \_\_\_\_ N.C. App.\_\_\_\_, \_\_\_\_, 660 S.E.2d 623, 625 (2008); State v. Reinhardt, 183 N.C. App. 291, 644 S.E.2d 26 (2007).
22. As a result of legislative amendment effective December 1, 2008, if a probation violation report was filed within the probationary period, then whenever the revocation hearing is later held, the Court, upon a finding of willful violation, can activate the sentence, terminate probation, or now extend and modify the period and conditions of probation, just as if the probation period had not expired. Previously the Court only had authority to revoke or terminate probation if the probation period had expired.
23. Be aware that the State, and the COA, have finally caught on to a little known and even less used, portion of the probation statutes to extend the period of probation. Whenever a probationer has new pending charges the period of probation is tolled until those new charges are resolved. (This is the ONLY time the period is tolled). Essentially the period of probation is extended by however long the new charges were pending before resolution. The COA has pronounced this to be an automatic function, so if the Court is aware of it, the state need not raise or allege it (but someone has to realize it at the trial level or it may have no practical effect). State v. Patterson, 660 S.E.2d 155, 158 (N.C. Ct. App. 2008); State v. Hanner, 654 S.E.2d 820, 823 (N.C. Ct. App. 2008).
24. If you have an out-of-county probation violation in order for the court to have jurisdiction the violation report must allege at least one of three things: 1) the probation was transferred to the current county by court order; 2) the probationer currently resides within the present county; 3) or the alleged violation occurred in the present county. Without one of these three conditions the court lacks jurisdiction. If the time period has expired before a new violation report properly alleging a jurisdictional requirement can be taken out you should be entitled to a dismissal. 15A-1344(a)
25. A finding of violation of probation, even one which the Court determines should be continued on probation, now will qualify as a statutory aggravating factor for any future criminal convictions. Accordingly, if for some reason all parties agree that a defendant should be continued on probation we should do our utmost to see that there is no finding of willful violation and arrange modifications by consent if it can be done within the statutory framework.

