

# Probation Violations



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## Preliminary Issues

**Notice.** Under G.S. 15A-1345(e), when a probationer is alleged to have violated probation, the State must give the probationer “notice of the hearing and its purpose, including a statement of the violations alleged . . . at least 24 hours before the hearing,” unless such notice is waived by the probationer. The DCC-10 (Violation Report) form ordinarily constitutes notice of the alleged violations and the hearing. Probation may only be revoked based on violations alleged in the notice provided to the defendant. *State v. Cunningham*, 63 N.C. App. 470 (1983).

**Preliminary violation hearings.** Under G.S. 15A-1345(c), a preliminary hearing on a probation violation must be held within seven working days of an arrest, unless the probationer waives the preliminary hearing or a final violation hearing is held first. The purpose of the preliminary hearing is to determine whether there is probable cause to believe that the probationer violated a condition of probation. If the hearing is not held the probationer must be released seven working days after his arrest to continue on probation pending a hearing. That doesn’t mean the violation is “dismissed”; it just means the probationer cannot be detained any longer without a hearing.

The preliminary hearing should be conducted by “a judge sitting in the county where the probationer was arrested or where the alleged violation occurred.” No statutory language limits authority to conduct preliminary hearing to a judge “entitled to sit in the court which imposed probation” (as is the case in G.S. 15A-1344(a), limiting authority to alter or revoke probation). Thus, any judge—district or superior court—may conduct the preliminary hearing, regardless of whether the underlying crime is a misdemeanor or felony.

The preliminary hearing only needs to be held when the probationer is detained solely for a violation of probation. A preliminary hearing is not required when the probationer is released on bail pending the final violation hearing, and is likewise unnecessary when the defendant is also being held on a new charge for which he or she is unable to obtain pretrial release. *State v. O’Connor*, 31 N.C. App. 518 (1976). In any event, the failure to hold a preliminary hearing apparently does not deprive the court of jurisdiction to hear a final violation hearing. *State v. Seay*, 59 N.C. App. 667 (1982).

## The Violation Hearing

**Where and by whom.** Any judge of same level as the sentencing judge, located in the district where (a) the probation was imposed, (b) the alleged violation took place, or (c) the probationer currently resides, has authority to modify, extend, terminate, or revoke probation. G.S. 15A-1344(a). There is a limited exception to this rule: under G.S. 15A-1342(h), a judge who sentences the offender to unsupervised probation may limit jurisdiction to alter or revoke the probation to him or herself.

Under G.S. 7A-272(c), with the consent of the presiding district court judge, the prosecutor, and the defendant, the district court has jurisdiction to accept a plea of guilty or no contest to a Class H or I felony. If a person enters a felony plea in district court, is placed on probation, and is later alleged to have violated that probation, the violation hearing is, by default, held in superior court. G.S. 7A-271(e). The district court can hold the violation hearing if the State and the defendant consent (the judge gets no vote regarding the violation hearing). Appeal of a violation hearing held in district court is to the superior court, not to the court of appeals. *State v. Hooper*, 358 N.C. 122 (2004).

## The Nature of the Hearing

**Evidence.** The rules of evidence do not apply at hearings to revoke probation. G.S. 15A-1345(e). Hearsay is admissible, though it probably should not be the sole information upon which revocation is based. *See State v. Hewett*, 270 N.C. 348 (1967). The exclusionary rule does not apply at probation revocation hearings; evidence obtained as a result of an unlawful search is admissible. *State v. Lombardo*, 74 N.C. App. 460 (1985).

**Standard of proof.** To activate a suspended sentence for failure to comply with a probation condition, the State must present evidence sufficient to *reasonably satisfy* the judge that the defendant has willfully violated a valid condition of probation, or that the defendant has violated a condition without lawful excuse. *State v. White*, 129 N.C. App. 52 (1998). If the defendant offers evidence that he or she was unable to comply with the conditions of probation, the court must make findings that the defendant's evidence was considered. *State v. Hill*, 132 N.C. App. 209 (1999).

## Potential Outcomes of a Violation Hearing

**Continue probation unchanged.** Self-explanatory.

**Modification.** For good cause shown (i.e., not just after a violation), the court may at any time prior to expiration or termination modify the conditions of probation. G.S. 15A-1344(d). In addition to the conditions of probation set out in the General Statutes, the court may add any condition of probation determined by the court to be reasonably related to the defendant's rehabilitation. Upon a finding that an offender sentenced to community punishment has violated on or more conditions of probation, the court may add conditions of probation that would otherwise make the sentence an intermediate punishment. G.S. 15A-1344(a).

**Extension.** The General Statutes describe two different types of probation extensions, *ordinary extensions* under G.S. 15A-1344(d), and *special-purpose extensions* under G.S. 15A-1343.2. (I use the terms “ordinary” and “special-purpose” for clarity; they do not appear in the General Statutes.)

*Ordinary extensions* may, after notice and hearing, be ordered at *any time* prior to the expiration of probation for “good cause shown” (no violation need have occurred). The total maximum probation period for extensions under this provision is 5 years. G.S. 15A-1344(d).

*Special-purpose extensions* can be used to extend the probationer’s period of probation by up to 3 years beyond the original period of probation, including beyond the five-year maximum, if all of the following criteria are met:

- (1) The probationer consents to the extension;
- (2) The extension is being ordered during the last six months of the *original* period of probation (note: if probation has previously been extended, the offender is no longer in his or her *original* period of probation); and
- (3) The extension is necessary to complete a program of *restitution* or to complete *medical or psychiatric treatment*. G.S. 15A-1343.2.

Extensions for these special purposes are the only way to extend a period of probation beyond 5 years, and only when the *original* period was 5 years could probation be extended to as long as 8 years under this provision.

**Termination.** The court may terminate probation at any time if warranted by the conduct of the defendant and the ends of justice. G.S. 15A-1342(b). The concept of “unsuccessful” or “unsatisfactory” termination does not appear in the General Statutes or appellate case law.

**Contempt.** If a probationer willfully violates a condition of probation the court may hold him or her in criminal contempt in lieu of revocation. G.S. 15A-1344(e1). Unlike probation violations, contempt must be proven beyond a reasonable doubt. A sentence for criminal contempt may not exceed 30 days. Time spent imprisoned for contempt under this provision apparently counts for credit against the suspended sentence if it is ever activated. *State v. Belcher*, 173 N.C. App. 620 (2005).

**Revocation.** Revocation means the probationer’s suspended is sentence is activated. Often the sentence will be activated in the same form it was entered by the original sentencing judge, but the revoking judge has limited discretion to modify the sentence.

*Reduction of the suspended sentence.* A revoking court can, upon revocation, reduce the length of a suspended sentence of imprisonment. For felonies, the reduction must be within the original range (i.e., presumptive, mitigated, or aggravated) established for the class of offense and prior record level of the sentence being activated. G.S. 15A-1344(d1).

*Consecutive/concurrent sentences upon revocation.* Under G.S. 15A-1344(d), a “sentence activated upon revocation of probation commences on the day probation is revoked and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period *unless the revoking judge specifies that it is to run consecutively with the other period.*” The court of appeals has interpreted the last clause of this provision to mean that the revoking judge can change the concurrent/consecutive decision rendered by the original sentencing judge. *State v. Hanner*, 188 N.C. App. 137 (2008); *State v. Paige*, 90 N.C. App. 142 (1988). The revoking judge can, under *Hanner* and *Paige*, turn what would have been concurrent sentences into consecutive sentences—even, apparently, when the original concurrent sentences were entered pursuant to a plea. (The original judgment in *Hanner* was part of a plea, though it appears that the original sentencing court ran certain sentences concurrently even though the defendant had actually *agreed* that they would run *consecutively*.) If the revoking judge does not specifically state on the judgment activating the suspended sentence that it is to run consecutive to another sentence, DOC will run it concurrently with any other sentence the defendant is obligated to serve.

*Revocation based on a new crime.* Generally, a conviction for a new crime is also a violation of probation, though probation may not be revoked solely for a conviction of a Class 3 misdemeanor. G.S. 15A-1344(d). Probation likewise should not be revoked solely on the basis of a *pending charge* until there is a conviction or a plea of guilty to that charge. *State v. Guffey*, 253 N.C. 43 (1960). Additionally, probation generally should not be revoked on the basis of a criminal charge of which the probationer has been acquitted, *State v. Hardin*, 183 N.C. 815 (1922), unless the revoking judge makes independent findings that the defendant’s behavior constitutes a violation. *State v. Causby*, 269 N.C. 747 (1967).

*Credit for time served.* If probation is revoked and a sentence is activated, the probationer should get credit for the following time under G.S. 15-196.1:

- The active portion of a split sentence. *State v. Farris*, 336 N.C. 553 (1994);
- Time spent at DART-Cherry as a condition of probation. *State v. Lutz*, 177 N.C. App. 140 (2006);
- Presentence commitment for study. *State v. Powell*, 11 N.C. App. 194 (1971);
- Hospitalization to determine competency to stand trial. *State v. Lewis*, 18 N.C. App. 681 (1973);
- A federal court interpreted G.S. 15-196.1 to allow credit for time spent in confinement in another state awaiting extradition. *Childers v. Laws*, 558 F. Supp. 1284 (W.D.N.C. 1983);
- Time spent in the now-defunct IMPACT boot camp program. *State v. Hearst*, 356 N.C. 132 (2002);
- Time spent imprisoned for contempt under G.S. 15A-1344(e1). *State v. Belcher*, 173 N.C. App. 620 (2005);
- But credit should NOT be awarded for time spent under electronic house arrest. *State v. Jarman*, 140 N.C. App. 198 (2000).

**Elect to serve.** Technically a probationer may not “elect to serve” his or her sentence; G.S. 15A-1341(c) used to have a provision allowing for that, but it was repealed in 1995 (S.L. 1995-429). A defendant can, of course, simply admit to a violation of probation that can then serve as a basis for

revocation. Regarding admissions generally, they are sometimes a part of an agreement in which the probationer admits a violation in return for the DA's recommendation to the court that probation not be revoked. Be aware, however, that a judicial finding of a violation of probation, even if it does not lead to revocation, can serve as the basis for an aggravating factor if the person is later sentenced for a felony. G.S. 15A-1340.16(d)(12a).

## Defenses

**Lack of notice.** A defendant must be given a written statement explicitly setting forth the conditions on which he or she is being released. If any conditions are modified, the probationer must receive a written statement of the modification. G.S. 15A-1343(c). Probation may not be revoked for violation of a condition unless the defendant had written notice that the condition applied to him or her; oral notice alone is insufficient. *State v. Suggs*, 92 N.C. App. 112 (1988). A violation report need not indicate precisely which condition the probationer has violated; rather, it need only allege facts that amount to a violation. *State v. Hubbard*, \_\_ N.C. App. \_\_ (July 7, 2009).

**Willfulness.** Probation may not be revoked unless a violation was either willful or without a lawful excuse. *State v. Hewett*, 270 N.C. 348 (1967). With respect to monetary conditions, probation may not be revoked for failure to pay all or part of what has been ordered if the probationer made a good faith effort to pay. The burden is on the probationer to show that he or she could not pay despite an effort made in good faith. *State v. Jones*, 78 N.C. App. 507 (1985). If the money owed is for a fine and the defendant has shown a good faith inability to pay, the court may (1) allow additional time for the defendant to pay, (2) reduce the amount owed, or (3) remit the fine altogether. G.S. 15A-1364(c).

**Jurisdiction.** A court's jurisdiction to review a probationer's compliance with the terms of his or her probation is limited by statute. Once the period of probation expires, the court loses power over the defendant, except as provided in G.S. 15A-1344(f). *State v. Camp*, 229 N.C. 524 (1980).

Sometimes probation violation hearings cannot be held before the probationer's period of probation has expired, either because the alleged violation occurred near the end of the period of probation, or because the probationer absconded or eluded arrest on the violation. G.S. 15A-1344(f) is a grant of additional jurisdiction to the courts to hear probation violations after the period of probation has expired. This section was modified in 2008 (S.L. 2008-129) to broaden the court's power in the after-expiration scenario, and to make it easier to preserve the court's jurisdiction to act.

Under the amended law (effective for hearings held after December 1, 2008, regardless of when the offender originally was placed on probation), the court may "extend, modify, or revoke probation" after the expiration of the period of probation if (1) the State files a written violation report before the expiration of the probation period, (2) the court finds that the probationer violated one or more conditions of probation prior to the expiration of the period of probation, and (3) the court finds for good cause shown and stated that probation should be extended, modified,

or revoked. The amended law does not change the requirement that to be *filed*, a violation report must be file stamped before the period expires. *State v. Hicks*, 148 N.C. App. 203 (2001), *State v. Moore*, 148 N.C. App. 568 (2002). In the absence of a file stamped motion, dated before the period of probation expires, the trial court is without jurisdiction to conduct a probation violation hearing after the end of the probationary period. Note that these jurisdictional provisions apply with equal force for those on probation under G.S. 90-96, and probably also to those on supervised probation pursuant to a deferred prosecution agreement. *State v. Burns*, 171 N.C. App. 759 (2005).

Prior to the 2008 amendments to the law, in order to preserve its jurisdiction to act after the period of probation expired, the court had to make a finding of the State’s “reasonable effort to notify the probationer and to conduct the hearing earlier.” *State v. Hall*, 160 N.C. App. 593 (2003); *State v. Bryant*, 361 N.C. 100 (2006). Under the 2008 amendments to the law, the court no longer has to make a finding of the State’s “reasonable efforts” to preserve its jurisdiction to act after the period of probation.

*A note on absconders.* “Absconder” is not a statutory term; rather, it is defined in DCC policy as follows:

<p>STATE OF NORTH CAROLINA DEPARTMENT OF CORRECTION <i>Division of Community Corrections</i> <b>POLICIES - PROCEDURES</b></p>	<p>Number: V.I Page: 1 Subject: <b>Absconders</b> Date: February 1, 2008</p>
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**GENERAL PROVISIONS**  
An *absconder* is an offender who is actively avoiding supervision by making his/her whereabouts unknown to the supervising officer. Prior to declaring an offender as an absconder by using a *Violation Report* (see V.H, *Violations*), the officer will make due and diligent attempts to locate the offender and will document these efforts in the automated narrative system..

**1. REQUIREMENTS FOR DECLARING AN OFFENDER AN ABSCONDER**  
Prior to declaring an offender as an absconder the officer will:

- (a) Telephone the offender, if he/she has a telephone;
- (b) Conduct a home contact, including a contact in the evening or on the weekend. The officer must leave a notice to the offender directing them to report for an office contact or otherwise contact their officer;
- (c) Make a work and/or school collateral contact;
- (d) Make relative/reference contact(s) based on information in the file;
- (e) Conduct a law enforcement check including a jail/hospital check; and
- (f) Check with the landlord if applicable.

This process will begin when the officer has specific information that the offender has absconded or when the officer has been unable to locate:

- Community offenders for thirty (30) days;
- Intermediate offenders for two (2) weeks; or
- Sex offenders for twenty-four (24) hours.

Multiple conditions of probation might be violated when a person “absconds,” but there is nothing legally special about a violation report alleging absconding. For instance, probationers alleged to have absconded are still subject to the jurisdictional provisions of G.S. 15A-1344(f) regarding violation hearings held after the expiration of the probationary period.

**Tolling.** Under G.S. 15A-1344(d) (soon to be G.S. 15A-1344(g)), a “probation period shall be tolled if the probationer shall have pending against him criminal charges in any court of competent jurisdiction, which, upon conviction, could result in revocation proceedings against him for violation of the terms of this probation.” Though the tolling provision has been in the law for many years, DCC recently changed its approach to tolling in response to two court of appeals decisions. In *State v. Henderson*, 179 N.C. App. 191 (2006), and *State v. Patterson*, 190 N.C. App. 193 (2008), the court held that under G.S. 15A-1344(d), “a defendant’s probationary period is automatically suspended when new criminal charges are brought,” regardless of when the charge arises. So, when a probationer has a pending charge for any offense other than a Class 3 misdemeanor, time stops running on the person’s period of probation immediately, by operation of law, when the charge is brought, and doesn’t start running again until the charge is resolved, by way of acquittal, dismissal, or conviction. In other words, when a probationer is charged with a new crime, you effectively push pause on a clock counting down how much time the person has left on probation, and you don’t un-pause it until the charge is resolved.

In 2009 the General Assembly made several changes to the tolling law. First, the new law breaks the tolling provision out of G.S. 15A-1344(d) and places it in a stand-alone subsection, G.S. 15A-1344(g). Second, the law explicitly states something DCC had assumed to be true: the probationer remains subject to the conditions of probation, including supervision fees, during the tolled period. Third, the law provides that if a probationer whose case was tolled for a new charge is acquitted or has the charge dismissed, he or she will receive credit for the time spent under supervision during the tolled period. The new provisions apply only to those whose offense (which probably means the original crime, not the new crime or any alleged violation of probation) occurs on or after December 1, 2009.

**Improper period of probation.** G.S. 15A-1343.2 sets out the presumptive lengths for periods of probation as follows:

Misdemeanants sentenced to community punishment: 6 – 18 months.

Misdemeanants sentenced to intermediate punishment: 12 – 24 months.

Felons sentenced to community punishment: 12 – 30 months.

Felons sentenced to intermediate punishment: 18 – 36 months.

The court may always deviate from these defaults and order probation of up to 5 years if it “finds at the time of sentencing that a longer period of probation is necessary.” There is a check-box on the AOC forms (see below) to indicate that the judge has made the requisite finding.

<b>SUSPENSION OF SENTENCE</b>	
Subject to the conditions set out below, the execution of this sentence is suspended and the defendant is placed on <input type="checkbox"/> supervised <input type="checkbox"/> unsupervised probation for _____ months.	
<input type="checkbox"/> 1. The Court finds that a <input type="checkbox"/> longer <input type="checkbox"/> shorter period of probation is necessary than that which is specified in G.S. 15A-1343.2(d).	

When representing a probationer at a revocation hearing, check to make sure the period of probation was within the presumptive statutory range, or, if not, whether the court made the necessary finding that a longer period was necessary. If the period was improper, a motion for appropriate relief (MAR) may be filed at any time under G.S. 15A-1415(b)(8) to correct an unauthorized sentence. Once the MAR is granted, move to dismiss the probation violation if a proper period of probation would already have expired.

**Invalid conditions of probation.** The regular conditions of probation imposed pursuant to G.S. 15A-1343(b) are in every case valid. The standard for other conditions of probation the judge might add is that they be reasonably related to the offender's rehabilitation and reasonably necessary to insure that the defendant will lead a law-abiding life. Probation conditions obviously cannot place unconstitutional constraints on a probationer (e.g., "Go to church every Sunday," or "Get married"). Under G.S. 15A-1342(g), a defendant's failure to object to a condition of probation imposed under G.S. 15A-1343(b1) at the time the condition is imposed does not constitute a waiver of the right to object *at a later time* to the condition. In *State v. Cooper*, 304 N.C. 180 (1981), the North Carolina Supreme Court held that the "at a later time" language of the statute does not grant a *perpetual* right to challenge a condition of probation. Rather, the defendant must object no later than the revocation hearing.

## A Note on Probation Reform

Legislation passed in 2009 (primarily S.L. 2009-372) made many changes related to probation. Among other things, the law makes it a default condition of supervised probation that the probationer submit to warrantless searches by a probation officer of the probationer's person, vehicle, or premises, and to warrantless searches by a law enforcement officer of the probationer's person or vehicle if the officer has reasonable suspicion that the probationer is engaged in criminal activity or has a weapon or explosive without court permission. The law also makes it a default condition of probation that probationers may not use, possess, or control illegal drugs or controlled substances; associate with known or previously convicted users, possessors, or sellers; or be present at any place where drugs are sold, kept, or used. Additionally, the law adds new default conditions for all probationers subject to intermediate punishment: perform community service at the probation officer's direction; not use, possess, or control alcohol; remain within the county of residence unless granted permission to leave; and participate in any evaluation, counseling, treatment, or educational program as directed by the probation officer.

For a detailed analysis of the new legislation, including some of the challenges that might be raised in response to the new default conditions described above, read the summary of the law available at <http://sogweb.sog.unc.edu/blogs/nclaw/wp-content/uploads/2009/08/summary-of-probation-reform-bill.pdf>.