

WHAT'S NEW IN PROBATION COURT

I. FIRST THINGS FIRST-- BE A KNOW IT ALL

- A. Be the most informed, documented and prepared person in the courtroom on your case.
- B. Know the laws: *Probation*- Article 82, 15A-1341-1347; *Jurisdiction*- 7A-271, 272; *Credits against sentences*- Article 19A; *Probable Cause*- Article 30, 15A-611-612; *Restitution*- Article 81C, 15A-1340.34-.38, *Nonpayment of Fines or Costs*-, Article 84, 15A-1361-66
- C. Check out the length of probation, type of sentence given, jail credit, and terms of probation, don't assume it is correct on the probation violation form.
- D. Check that the monetary conditions from the judgment are correctly reflected in the probation officer's account ledger and the acknowledgment signed by the defendant.(more about this later)

II. PROBABILITIES AND CAUSEATIONS

- A. The probable cause hearing (or the revocation hearing if no probable cause hearing is held) must be held within 7 business days of the defendant's arrest on the violation- if not held, the remedy is unsecured bond and new court date for the revocation hearing. (see 15-A-1345 (c))
- B. The probable cause hearing raises *due process* (14th amendment) confrontation issues- beware the absent officer/file. The defendant has a statutory and constitutional right of confrontation at the probable cause hearing and at the revocation hearing . (see 15A-1345(d) and (e)). The confrontation right in 1345(d) and (e) isn't a guarantee, but if not allowed, the court should make "findings" for not allowing it. {See State v. Coltrane, 307 N.C. 511 (1983)}

III. ABSCONDING

A. The DCC-9 in OPUS is the place all contacts to/from the defendant should be noted. Officers have guidelines on the number and nature of required contacts with defendants. Learn what these “baselines” are and then question the officer about these contacts. Officers often do not print out the “nines” from OPUS for court and rely only on the language of the violation report when advising the court of your client’s performance or lack thereof. Getting specific in asking questions of the testifying officer is often a gold mine of good facts to argue for your client. IN OTHER WORDS... put the officer’s file on trial.

B. If absconding is alleged, be sure that the probation officer has met the criteria of DCC’s own *Policies and Procedures*. {go to www.doc.state.nc.us/dcc/DCC} Prior to declaring the defendant as an absconder, the po must make certain attempts to contact the probationer. Any attempts to re- connect with the PO can be argued to stop the “absconding clock”. All contacts by and with the defendant should be in the DCC9 entries to OPUS. The requirement is that the defendant is actively avoiding supervision.

C. THREE YEAR ABSCONDERS are those persons who haven’t been seen by probation officers in 3 years and in whose cases, a properly prepared and filed violation report has been issued. These folks have not been served with the order for arrest on probation violation and it remains outstanding but continued supervision is not expected to be successful in locating the defendant.

In order to be relieved of the responsibility of supervision , probation must seek to transfer them to *unsupervised probation*. Under DCC policies for case management number V.I, page 5, the officer will , *with the approval of the district attorney,*:

* request that the Court modify the probation judgment to transfer the case to unsupervised,

* prepare 3 copies of AOC-CR-609 Order on Violation of Probation or on Motion to Modify , have one copy signed by the judge, forward a copy to the Monitoring Center , file the original with the Clerk of Court;

* the Monitoring Center will update the warrant status in OPUS and remove the warrant from the DCI system.,

*the update in OPUS will reflect early termination of supervised probation and lastly,

* file with the closed case files for the appropriate year.

Question: what happens if the warrant is not stricken from the repository and the defendant gets arrested on the old probation violation?

IV. RESTITUTION and OTHER MONEY JUDGMENTS

A. If monies are an issue, be sure that the amount alleged is accurate when looking at the judgment. Where restitution is concerned, the bottom line is that there must be some evidence and it just can't be what the prosecutor says it is. See *State v. Mauer*, __ N.C.App. __, __ S.E.2d __ (Feb.16, 2010); *State v. Dallas*, __ N.C.App. __, __ S.E.2d __ (July 6, 2010); *State v. Blount*, __ N.C.App. __, __ S.E.2d __ (Jan.18,2011) and *State v. Davis*, __ N.C.App. __, __ S.E.2d __ (Aug. 17, 2010).

B. Note however, the language in the transcript of plea allows for the defendant to stipulate to restitution as indicated on the restitution worksheet. It would be likely that this could eliminate challenges to the setting of restitution especially in Superior Court where these transcripts are used. In the District Courts, however, look for any indication of a stipulation or evidence when challenging violations for restitution.

C. If you think the monetary assessments are improper or incorrect , make an argument that the setting of restitution at the judgment phase is a condition of probation that when appropriate, it can be attacked at the violation hearing as an invalid condition (15A-1343.(g)). Remember to argue that the State has to prove that the defendant is willfully unemployed or under-employed to get past the good faith requirement. See 15A-1364

D. Note also that costs for lab fees have their own issues. They are properly NOT restitution but costs. See section 7A-304 (a)(8)- lab costs for drug cases- the most common- can be assessed only *if the court finds that the work performed at the local government's laboratory is the equivalent of the same kind of work performed by the SBI under subdivision (7)*{ citing 7A-304(a)(8)}.

E. If you are challenging lack of willfulness in not paying, the burden is on you to show effort to pay so put on the evidence.

V. BEWARE THE DRUG FUDGE

A. The probation officer may “fudge” the results by saying that an inconclusive is a positive. The rapid tests are subject to inaccuracy, especially when stored improperly.

B. Raise due process (ie, Crawford) issues where possible. Due process rights exist in probation matters and judges may be persuaded to extend the Constitutionally guaranteed right to confront and cross examine the witness(evidence) which is also statutorily guaranteed in probation cases. {See 15A-1345(d) and (e).

VI. “SEEK” OUT THE STATEMENT OF PROBATION CONDITIONS

A. State v. Seek and State v. Suggs both reiterate the statutory requirement that the defendant be given a statement of the conditions of probation in writing and that he can't be held to have willfully violated the conditions unless he has been given these conditions and any modifications of conditions *in writing*. 15A-1343(c). Under 15A-1342 (g), note that defendant's failure to object to invalid conditions (ie. excessive fees , fines or restitution without proper findings) at the time they are imposed is not a waiver of any objections thereto. (Some decisions would say that the latest date on which conditions can be challenged as in valid is the date of the revocation hearing)

VII. AS THE BELL TOLLS- SO DOES PROBATION- 15A-1344 (f) and (g)

A. If the defendant gets a new charge, the probation period stops running (tolls) for the time required to conclude the new matter.(15A-1344(d)).

B. The state must still file a violation report within the *period of probation* (but the *period of probation* gets lengthened by the tolled time). *EXCEPT, class 3 misdemeanors do not toll probation!*

If the allegations include a violation for “commission of new crimes”, the judge must make independent findings that defendant committed a criminal act in violation of probation. The allegations in the violation report do not stand alone *unless* the probation officer is the witness to those acts and *he* testifies. (Example: if another LEO finds drugs on your client and charges him, unless that LEO is present in court to testify on the violation, there is no way to make an independent finding .)

VIII. STOP THE GAP

A. Many times, probation gets extended for various reasons. Be sure that if it was extended, it was done in accordance with the language of 15A-1344(f) or 15A-1343.2(d). Probation is based on jurisdiction. Be sure that jurisdiction over the defendant is clearly established.

B. Watch out for Rinehardt issues. Probation gets extended after it ended - but maybe while a violation was pending- and the defendant is violated while on the extended(but unlawfully so) period of probation. (State v. Rinehardt, 183 N. C. App. 291 (2007))

Example: Probation for 12 months, begins 2-1-06, would end 1-31-07 but on 12-1-06 probation violation is filed. Violation is heard and defendant is continued on probation and probation extended in court on 2-20-07 for additional 3 years. New violation is done on 2-2-10. Probation gap exists from 1-31-07 to 2-20-07 – Lapses in probation cost the State jurisdiction over the defendant and the subject matter. NOW, as of 12-1, 2009, the changes in 15A-1345 (f) and (g) continue jurisdiction for the court to extend probation so long as the violation report was timely filed. It really doesn't matter when the hearing is held (and the State doesn't have to show "reasonable efforts" are made to conduct the hearing within the period of probation)

IX. OTHER CONDITIONS OF PROBATION

A. State v. Hubbard- or" how to drink your way out of house and home". If on supervised probation you must report in a "reasonable manner"—which means don't be so drunk when you answer the door to the surveillance officer that you cause a scene- even in your own home.

B. Ammunition alone will not blow up probation! See State v. Sherrod __N.C. App. ___, 663 S. E. 2d 470 (Aug. 5, 2008)

X. OTHER NEW PROBATION STUFF!

A. EVIDENCE BASED PRACTICES- Professional practices that have been shown through vigorous research to produce a particular desired outcome- in community corrections that desired outcome is reduced recidivism. See www.cj institute.org, and www.nicic.org and the Justice Reinvestment Act, see also www.doc.state.nc.us/dcc for the North Carolina version .

B. Use of target interventions through the use of Risk and Needs assessments;

Risk- identify defendants with higher risk of recidivism

Needs- identify defendants with the ability to change criminal behavior

C. Use of Motivational Interview techniques to motivate the defendant into changes in behavior- not confrontational! (Yea , right!)

D. WHAT WILL EBP LOOK LIKE IN PROBATION COURT?

-Question the officer on his/her awareness of it/training??

-Ask questions about the terminology and purposes

-Review the DCC-9 and see if the PO followed the policies of EBP

-How do EBP change/enlarge delegated authority? What about the current statutes?

XI. APPEAL-- (NOT) DENIED!

A. Appeals from probation revocations in District Court are heard in Superior Court and from Superior Court, to the COA.

B. Original jurisdiction for probation violations on H or I felonies plead in District Courts is still in Superior Court- unless the State and the defendant agree (to hearing it in District Court). *Caveat:* holding a revocation hearing on these H and I felonies in District Court *first* is nearly always a good idea- that way you have the appeal *de-novo* to Superior before you have to travel for the COA.

C. The defendant is not likely to be successful on appeal unless a record is made. Don't simply admit then appeal an unfavorable outcome. Make the record, especially in money cases. In cases where you are sure to appeal an unfavorable outcome, DENY, DENY, DENY... then put on evidence to make the record on appeal.

XII. EXPLANATIONS PLEASE!

The best place to win the probation violation is at the door of the courthouse the day of *sentencing!* Don't let the probation officer be the only person your client hears the rules of probation from. If the PO is the only one explaining things to your client, he is probably already in a state of violation.

Final notes:

Read the SOG blogs for helpful commentary at:

<http://sogweb.sog.unc.edu/blogs/ncclaw/>

Ask questions of treatment providers so that you are familiar with their treatment conditions, costs and options.

Never assume the PO has it right. Challenge them when they make evidentiary statements like “the defendant never did community service, never paid any money”. etc.

Did they recently verify the allegations on the violation report? DID YOU?