Other 2016 Legislation Related to Probation, Post-Release Supervision, and Parole

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Prior posts looked at the new probation condition requiring a waiver of extradition and the new, new rules for jail credit for CRV. Today's post covers the rest of this year's most significant legislation related to probation, post-release supervision, and parole.

All of the changes below were enacted in S.L. 2016-77.

New probation condition requiring submission to photographs. A new regular condition of probation is added requiring probationers to "[s]ubmit to the taking of digitized photographs, including the probationer's face, scars, marks, and tattoos, to be included in the probationer's records." G.S. 15A-1343(b)(18). The new condition applies to all probationers, felony and misdemeanor, supervised and—somewhat oddly—unsupervised. I'm not sure who takes the pictures of the unsupervised probationers—I suppose the clerk's office or Community Service staff could do it if they wanted to. The change is effective December 1, 2016, and applicable to offenses committed on or after that date.

Drug screening condition made inapplicable in unsupervised cases. Regular condition (16), "[s]upply a breath, urine, or blood specimen for analysis of the possible presence of drugs or alcohol," was added to the list of conditions that do not apply to unsupervised probationers. It never made much sense as applied to them in any event, as the sample was to provided when instructed by the probation officer.

Clarification of continued probation supervision upon appeal of revocation. In 2015, the General Assembly amended G.S. 15A-1347 to say that when a person appeals a probation revocation, probation supervision continues under the same conditions until the probation expires or the disposition of the appeal, whichever comes first. To summarize this prior post, that provision was confusing. Read literally, it appeared to say that revoked probationers who appealed got to stay on probation in spite of their revocation, even when the judge chose not to allow release conditions during the pendency of the appeal. This year, G.S. 15A-1347(c) is amended again to clarify that supervision continues upon appeal only when the defendant is granted release under Article 26 of Chapter 15A (bail). If the court declines to set release conditions, the person goes to prison to serve the activated sentence.

The change is effective December 1, 2016, and applicable to offenses committed on or after that date. That leaves us in interpretive limbo for the 87,000 people already on probation, plus the others yet to be placed on probation for offenses committed before December 1.

Mandatory deferral of jail credit for prehearing confinement on PRS violation. Post-release supervisees are subject to limits on PRS revocation that are pretty similar to those applicable to probationers: for violations other than a new crime or absconding, a post-release supervisee cannot be revoked, but rather may be returned to prison for only three months. (Exception: sex offenders on PRS may be fully revoked for any violation.) It's like a CRV. In parallel with the 2014 rule forbidding judges from awarding jail credit to 90-day CRVs (discussed in depth here, including the rationale behind the rule), this year's legislation prohibits the Post-Release Supervision and Parole Commission from awarding analogous credit to 3-month terms of confinement for a PRS violation.

For example, suppose a post-release supervisee has a positive drug screen. A PRS warrant issues and he is arrested on the violation. He is held in jail for 7 days pending a preliminary PRS violation hearing, and then held in prison for 45 days pending a final hearing before the Parole Commission in Raleigh. The Parole Commission finds the offender in violation and orders reimprisonment for 3 months under G.S. 15A-1368.3(c)(1). Under the new rule, credit for those 52 days of prehearing confinement shall not reduce the 3-month reimprisonment. The 52 days are instead credited to the remaining maximum term of imprisonment. If the supervisee were to ever get revoked, he would get the credit. If, for some reason, so much prehearing credit were to accumulate that fewer than 3 months remained on the maximum sentence by the time the reimprisonment was imposed, then I think the Parole Commission would need to take the credit into account and limit the reimprisonment accordingly.

This change is effective December 1, 2016, and applicable to offenses committed on or after that date.

PRS and parole hearings by videoconference. Speaking of PRS violation hearings, the legislation makes clear that all hearings related to violations of post-release supervision and parole—preliminary hearings conducted by a hearing officer and final hearings conducted by the full Commission—may be conducted by videoconference. A prior authorization in G.S. 143B-720(f), in place since 2012, applied only to certain hearings conducted by the Commission.

Of course, to conduct a hearing by videoconference, there must be appropriate technology available on both ends of the line, and not every jail has the necessary equipment. My understanding of the current practice is that offenders are temporarily transported from the jail to a nearby prison facility to facilitate the hearing, a practice that will presumably expand if more hearings are conducted electronically.

A question that will eventually need to be answered is whether a hearing conducted in that fashion satisfies the minimal process due at a parole or post-release hearing. A supervisee who has allegedly violated is entitled to, among other things, an “opportunity to be heard” and “the right to confront and cross-examine adverse witnesses.” Morrissey v. Brewer, 408 U.S. 471 (1972). Does a hearing by videoconference effectuate those rights? A federal appeals court upheld Ohio’s videoconference procedure, in which the parole violator had access to counsel and the ability to hear, question, and interact with the witnesses against him. Wilkins v. Timmerman-Cooper, 512 F.3d 768 (6th Cir. 2008). Another circuit rejected a similar procedure, but as a matter of the Federal Rules of Criminal Procedure, not because of a constitutional infirmity. United States v. Thompson, 599 F.3d 595 (7th Cir. 2010). In North Carolina, the procedure is now clearly authorized as a matter of statute.

The revised authority to conduct hearings by videoconference became effective on July 1, 2016.

Justice Reinvestment Council created. The legislation eliminates the state Community Corrections Board and creates in its place the Justice Reinvestment Council. It will have 13 members, including four legislators, two judges, a prosecutor, a sheriff, and a victim service provider, among others. The new body is created to support the JRA’s implementation, to recommend related policy enhancements and initiatives, and to assist in the continued education of criminal justice system stakeholders. G.S. 143B-1161(d).

Still no delegated authority in DWI cases. One proposed amendment that did **not** become law was a proposal to expand probation officers’ delegated authority so that it would also apply in impaired driving cases. (Under existing law, it applies only in cases sentenced under Structured Sentencing.) That provision, present in earlier versions of House Bill 253, did not make it into the enacted law. I had predicted in a few teaching sessions that it would likely become law, and wanted to note here that I was wrong about that.