Adequate Notice of a Probation Violation: State v. Moore

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When it comes to giving proper notice of a probation violation, what is the critical thing: identifying the condition actually violated, or describing the behavior constituting the violation? The supreme court tells us in State v. Moore.

Since Justice Reinvestment, not all violations of probation are created equal. Violations of certain conditions (commit no criminal offense and absconding) allow for revocation. For other violations—so-called technical violations—the court can respond with confinement in response to violation (CRV), a quick dip in the jail, or some other response aside from revocation (or of course no response at all).

With that backdrop in mind, the court of appeals has held several times that before a defendant may be revoked, he or she must be put on notice of a revocation-eligible violation. And that notice must reference a violation of a revocation-eligible *condition*: a new criminal offense, absconding, or some other violation after two prior CRVs. State v. Tindall, 227 N.C. App. 183 (2013) (discussed here). In *Tindall*, for example, the court said it was improper to revoke based on a drug possession violation alleged as a violation of the "use, possess or control" condition—even if the alleged drug possession could, factually, support a new criminal charge. The court could not swap horses from technical to revocation-eligible when the defendant wasn't on notice that revocation might be at stake. *See also* State v. Kornegay, 228 N.C. App. 320 (2013) (violations of technical drug and firearm possession conditions couldn't be reframed as criminal offenses without advance notice); State v. Lee, 232 N.C. App. 256 (2014) (sufficient notice to allow revocation when framed as a new criminal offense violation, even though charges were still pending when alleged).

The supreme court saw things differently in *Moore*.

You may recall that I wrote about *Moore* here when it was decided by the court of appeals. The issue in the case was a violation report that looked like this:

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2. Other Violation
   THE DEFENDANT HAS THE FOLLOWING PENDING CHARGES IN ORANGE
   COUNTY. 15CR 051315 NO OPERATORS LICENSE 6/8/15,15CR 51309
   FLEE/ELUDE ARREST W/MV 6/8/15. 13CR 709525 NO OPERATORS
   LICENSE 6/15/15, 14CR 052225 POSSESS DRUG PARAPHERNALIA
   6/16/15, 14CR 052224 RESISTING PUBLIC OFFICER 6/16/15,
   14CR706236 NO MOTORCYLE ENDORSEMENT 6/29/15,14CR 706235
   COVER REG STICKER/PLATE 6/29/15,AND 14CR 706234 REG CARD
   ADDRESS CHANGE VIOLATION.
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As you can see, it was alleged under the ambiguous caption of "Other Violation," not as a violation of the "commit no

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criminal offense" condition. After he was revoked, the defendant argued on appeal that the violation report provided insufficient notice to support revocation under the rule first set out in *Tindall*.

In a divided opinion, the court of appeals disagreed with him—but not because the *Tindall* rule was unsound. Rather, the majority said, the substance of the violation (a list of pending of charges) so obviously concerned new criminal offenses that even the ambiguous caption would suffice. The court found no error and upheld the revocation. The dissenting judge would have vacated the revocation based on the notice he deemed inadequate under the bright line rule from *Tindall*.

The defendant appealed to the supreme court, arguing that the violation report failed to provide the notice required by G.S. 15A-1345(e). That provision requires the State to "give the probationer notice of the hearing and its purpose, *including a statement of the violations alleged*."

The supreme court concluded as a matter of statutory interpretation that "violations alleged" in this context refers to the *action that violates the rule*, not the underlying *rule itself*. So it is the allegation of the offending behavior, not the identification of the condition violated that matters under the statute. That being the case, the ambiguously captioned list of pending charges in the violation report provided statutorily sufficient notice of the violation, as proof of those criminal acts would clearly be a violation of the requirement to commit no criminal offense. Moreover, to the extent that the court of appeals' decisions in *Tindall*, *Kornegay*, and *Lee* had added an additional requirement that a report identify a revocation-eligible condition before a defendant could be revoked, the court expressly overruled them.

The majority's decision was based solely on the defendant's statutory argument under G.S. 15A-1345(e). (It is striking to me that the court made no mention of G.S. 15A-1345(a), which says to an arrest a probationer, the officer must make a written statement "that the probationer has violated *specified conditions* of his probation.") The question of whether the ambiguously captioned violation report gave the defendant adequate notice as a matter of constitutional due process was not before the court.

Justice Ervin concurred in the result, but wrote separately to say he felt the revocation could have been upheld without overruling the *Tindall* line of cases. The majority's behavior-focused rule works fine when (as in Moore's case) a description of that behavior unambiguously points to a single particular condition. But in cases like *Tindall* and *Kornegay*, where some of the alleged behaviors (like possessing drugs) could have constituted either a new crime or a technical violation, the lack of a clear caption could leave the defendant wondering whether or not revocation was a possible outcome of the hearing.

Justice Beasley dissented, writing that requiring only a description of a probationer's violating behavior fails to provide constitutionally sufficient notice under the Fourteenth Amendment—particularly in a world where only violations of certain conditions can result in revocation.

The decision in *Moore* could be read to allow Community Corrections to allege all violations under a generalized "violations" heading, leaving it to the probationer and the court to figure out the condition violated—and the possible consequences thereof—based on the description of the offending behavior alleged. The fact of the matter, though, is that Community Corrections is not going to do that. I confirmed with probation leadership today that they have no plans to act on whatever additional flexibility *Moore* might offer. Instead, they will continue to allege violating behavior under the caption of the condition allegedly violated. That is the way their computer system steers officers to enter violations (select the condition violated, then enter a free-text description of the violating behavior), and that will be the recommended practice by policy and training. The only reason that didn't happen in *Moore* was a clerical glitch—something I confirmed earlier in the week with the officer who supervised the case.

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