Improper Periods of Probation

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I haven't done any sort of official tally, but I think the most common sentencing error in North Carolina might be sentencing the defendant to an improper period of probation. It came up again this week in State v. Wheeler, so I thought I'd take the opportunity to write about it.

The basic rule is in G.S. 15A-1343.2(d): "Unless the court makes specific findings that longer or shorter periods of probation are necessary, the length of the original period of probation for offenders sentenced under [Structured Sentencing] shall be as follows:

(1) For misdemeanants sentenced to community punishment, not less than six nor more than 18 months;

(2) For misdemeanants sentenced to intermediate punishment, not less than 12 nor more than 24 months;

(3) For felons sentenced to community punishment, not less than 12 nor more than 30 months; and

(4) For felons sentenced to intermediate punishment, not less than 18 nor more than 36 months.

With the appropriate findings, the court can order probation for up to five years. The suspended sentence judgment forms (AOC-CR-603, for example) include a check-box in the "Suspension of Sentence" block for the judge to record the finding.

In *Wheeler*, the defendant was placed on probation for 24 months for a community-sentenced misdemeanor, with no judicial finding that a period longer than 18 months was necessary. The court thus remanded the case for findings pursuant to G.S. 15A-1343.2—as it did in State v. Lamond, __ N.C. App. __ (2009), State v. Branch, __ N.C. App. __ (2008), and State v. Cousart, 182 N.C. App. 150 (2007), just to name a few.

If the defendant catches the error right away and appeals, it's a relatively easy fix: the appellate court will probably reverse the sentence and remand it to the trial court, which can either make a finding that a longer period is necessary or sentence the defendant to a probationary period within the statutory defaults. (That's what happened in all the cases I cited above, but I don't think it's a given that the appellate court will *always* remand for findings. In other circumstances where a record lacked sufficient evidence to support requisite factual findings, the appellate division has chosen to "conserve judicial resources" by *not* remanding the case. *See, e.g.*, State v. Bryant, 361 N.C. 100 (2006).) But what happens when the error isn't discovered until the defendant has already violated probation? And what if the violation occurred after a proper period of probation would have expired?

I don't see a published case answering that question, but an unpublished case, State v. Lindsay, 645 S.E.2d 229 (2007), provides some guidance. In *Lindsay*, the defendant was sentenced to 60 months of probation, even though 30 months was the default statutory maximum for her community-sentenced felony. In month 33, her probation officer filed a violation report, and her probation was revoked. The defendant argued on appeal that the revoking court had been without jurisdiction to hear her case because the original sentencing judge failed to make a finding that a period longer than 30 months was necessary, and the violation report was filed after the expiration of the maximum term allowable

without a finding.

The court of appeals disagreed, saying the defendant could not collaterally attack her original sentence through the appeal of her probation revocation. Her proper recourse, the court said, would have been to appeal the sentence within 14 days of the original judgment or to petition for writ of certiorari. Another possibility, I think, would be for the defendant to file a motion for appropriate relief under G.S. 15A-1415(b)(8) arguing that the sentence was unauthorized—that's a ground for an MAR that may be raised at any time. Whatever the procedure, I think it's clear that the court of appeals was *not* willing in *Lindsay* to condone a sort of probationer self-help; she could not simply "abscond probation after thirty months had passed, rather than pursue relief from the improper sixty-month term through proper legal channels." 645 S.E.2d at *2. Above all else, the Lindsay case demonstrates how messy the downstream effects of an improper period of probation can be.

One additional note about the *Wheeler* case: as a helpful commenter pointed out, the court of appeals apparently shares my belief, discussed here, that the limits on consecutive sentences for misdemeanors apply with equal force to suspended sentences. In *Wheeler*, the defendant was sentenced to consecutive terms for three misdemeanors: assault inflicting serious injury, false imprisonment, and a false fire alarm. All the sentences, which totaled 165 days, were suspended. (The court of appeals actually wrote that "the trial court suspended the sentences and *placed Defendant on probation* for a total of 165 days," but that must be a typo. As discussed above, Wheeler's court-ordered period of probation was 24 months.) The Class A1 assault was the most serious offense, punishable by up to 75 days for this Level II offender. Applying the rule from G.S. 15A-1340.22(a) that the cumulative length of the sentences of imprisonment may not exceed twice the maximum sentence authorized for the class and prior conviction level of the most serious offense, the court of appeals said the trial court could only impose consecutive sentences totaling 150 days—even though they were suspended.