Is There a Tolling Donut Hole?

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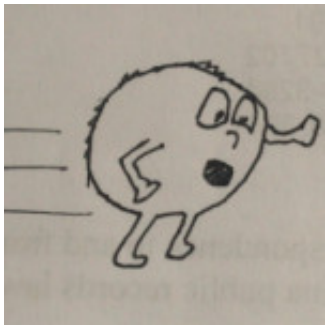
I wrote previously (here and here) about the "donut hole" in the probation law regarding absconding. In short, due to a wrinkle in legislative effective dates, persons on probation for an offense committed before December 1, 2011 who abscond after that date cannot be revoked for absconding. Today's post considers whether a similar phenomenon arises in the context of probation tolling.



(Incidentally, I have learned that some judges do not like it when people use the undignified term "donut hole," which I borrowed from a coverage gap in Medicare, to describe the absconding issue linked above. With that in mind you may wish to use a different description in court. But I stand by it—and continue to think the *Absconding Donut Holes* would be a great name for your office softball team. My trademark application for this logo concept is pending, but I'd probably let you use it with my express written consent.)

Back to tolling. Tolling in the probation context was a law that stopped the running of a person's probation period when he or she had pending charges for an offense which, upon conviction, could result in revocation—so, essentially, anything other than a Class 3 misdemeanor. I first described the law, as codified in G.S. 15A-1344(d) between the late 1970's and 2009, here. The law was amended in 2009, as described here (page 8). The 2009 amendment moved the tolling provision to G.S. 15A-1344(g), and added a provision stating that if the charge that tolled a person's probation was acquitted or dismissed, the person would receive credit for the time spent under supervision during the tolled period. Finally, the tolling law was repealed outright for persons placed on probation on or after December 1, 2011.

With that recent legislative history in mind, I generally say there are three categories of probationers when it comes to tolling: (1) those placed on probation on or after December 1, 2011, for whom there is no tolling; (2) those placed on probation before December 1, 2011, for an offense committed on or after December 1, 2009, who are subject to tolling under G.S. 15A-1344(g) with the benefit of the credit-back provision for dismissed or acquitted charges; and (3) those placed on probation before December 1, 2011, for an offense committed before December 1, 2009, who are subject to "old school" tolling (another phrase to avoid in court, perhaps) under G.S. 15A-1344(d), with no credit back against the probation period even if the charge that tolled the probation does not result in a conviction.

Because people can be on probation for a long time, there are still many of probationers in each category. And sometimes which tolling law (if any) applies to them matters a lot—particularly when a violation is alleged near the end

of their probation period, and the particular brand of tolling will resolve the threshold question of whether or not the court still has jurisdiction to act in the case.

All of that background brings us to today's real topic, which is the possible donut hole in the tolling law. The issue is that the effective date clause of the 2009 amendments to the law (moving it from -1344(d) to -1344(g), etc.) arguably left nothing of G.S. 15A-1344(d) for probationers with offense dates before December 1, 2009. The amending legislation was S.L. 2009-372. New G.S. 15A-1344(g) was created in section 11.(b) of that bill, effective for offenses committed on or after December 1, 2009. The tolling clause in old G.S. 15A-1344(d) was stricken in section 11.(a) of the bill, effective for "hearings held on or after December 1, 2009." The argument, then, is that the moment you have a hearing—even for a person on probation for an offense committed before December 1, 2009—section 11.(a) of the bill kicks in and pulls the G.S. 15A-1344(d) rug out from under the case. And frequently (especially in a case of that vintage), tolling may have been the only thing keeping the case alive.

I doubt that is what the legislature intended to do. I think the reference to "hearings held" in section 11.(a) of the bill was probably referring to other changes made in the same section of the bill clarifying what may be done at a violation hearing held in the defendant's absence. It doesn't really make sense to trigger a change to the tolling law by a hearing date, because tolling necessarily happens (if at all) *in advance* of a hearing. But intentions aside, only one effective date clause (set out in section 20) applies to the entirety of section 11.(a) of the bill. There's certainly room for argument.

The issue has yet to come up in a published case, but the court of appeals noted it footnote 3 of State v. Karmo, 749 S.E.2d 111 (2013) (unpublished). That brief dictum appears to take the defendant-friendly view that old-school tolling disappeared for good in 2009. I also mentioned the issue in footnote 47 of this bulletin on probation violations.