No Revocation Solely for Conviction of a Class 3 Misdemeanor

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When I talk about the "commit no criminal offense" probation condition, it's almost always about one particular issue. May a pending charge (or even uncharged conduct) be considered as a violation of that condition? Or must there be a conviction for that offense before it may be considered? I talk about that issue at length in this prior post. It's a longstanding question that matters more in a post–Justice Reinvestment world, where a new criminal offense is just about the only thing that can get someone revoked.

But sometimes even a conviction for a new criminal offense is not a proper basis for revocation. Under G.S. 15A-1344(d), a person's probation "may not be revoked solely for conviction of a Class 3 misdemeanor." Today's post covers a few things about that rule.

First, it survived the Justice Reinvestment Act. The JRA's rule making new criminal offenses one of the sole bases for revocation does not trump or even really conflict with the rule that probation may not be revoked solely for a Class 3 misdemeanor. Rather, the Class 3 misdemeanor provision is an exception to the general rule that probation may be revoked for a new criminal offense—just as it was previously an exception to the rule that probation could be revoked for any violation.

Second, though the Class 3 misdemeanor rule still stands, there is not universal agreement on exactly what it means. The principal point of debate is whether the word "solely" in G.S. 15A-1344(d) allows a person to be revoked for conviction of Class 3 misdemeanor when that conviction is not the defendant's sole violation. For instance, may probation be revoked if a person has a Class 3 misdemeanor conviction *plus* some other technical violation, or perhaps multiple Class 3 misdemeanor convictions? I tend to think not, because I'm not persuaded that additional non-revocable violations accumulate to a tipping point of revocability. But there are no published cases on point. The argument surfaced in a recent unpublished case, State v. Brown, 2014 WL 1047374 (N.C. Ct. App. Mar. 18, 2014). The defendant-probationer in *Brown* had two Class 3 misdemeanor convictions, prompting the State to argue that "a court could revoke . . . for commission of two or more Class 3 misdemeanors or for commission of a Class 3 misdemeanor *and* other probation violations that would not alone be sufficient for revocation." The court of appeals did not need to reach the issue, however, because the defendant also admitted to committing a Class 1 misdemeanor while on probation.

Third, the rule is likely to come into play more often now that more crimes are Class 3 misdemeanors. As part of a plan to reduce the state's bill for appointed lawyers, the legislature last year reduced the offense class for many common offenses to Class 3. (Jeff listed most of them in this prior post.) Those changes were made effective for offenses committed on or after December 1, 2013. It seems to me that convictions for offenses committed before that date are revocation-eligible, even though they wouldn't be if committed today. *Cf.* G.S. 15A-1340.14(c) (which includes a provision updating the offense class of a prior offense to the classification assigned as of the date of the offense now being sentenced).

Finally, with revocation off the table, there is the question of what probation response options are permissible for a Class 3 misdemeanor conviction. The statutory limit refers only to revocation, meaning other non-revocation options like a split sentence, contempt, or electronic house arrest are still permissible. Another impermissible option, though, is

confinement in response to violation (CRV). Despite being ineligible for revocation, the new conviction is, after all, a violation of the "commit no criminal offense" probation condition. And the CRV statute says that CRV is permissible when the defendant has violated a condition of probation *other than* committing a new criminal offense or absconding. G.S. 15A-1344(d2).