

## Revocation-Proof Convictions

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According to data from the Division of Community Corrections, 1270 probationers had their probation revoked in December 2010. Of those, 232 revocations were based on new crimes. I've written before about some of the issues associated with new criminal charges as a violation of probation, a post you can read [here](#). To sum that post up, if a court is going to proceed with a probation violation hearing before the defendant has pled to or been tried on a new criminal charge, it must make an independent factual finding that the defendant committed the alleged criminal act. The revocation should not be based on the mere fact that the probationer has been charged.

Many probationers do get their day in court on new criminal charges before any related probation hearing on the matter. Sometimes, even when a probationer is convicted of a new charge, the court entering judgment on the conviction will write on the judgment something like "THIS CONVICTION SHALL NOT VIOLATE THE DEFENDANT'S CURRENT PROBATION," perhaps also identifying the file number of the preexisting suspended sentence.

Does the court sentencing the new conviction have the power to do that?

It's not clear to me that it always does. A probationer who is convicted of a new crime other than a Class 3 misdemeanor has almost certainly violated the "commit no criminal offense" condition of probation. So the question is not whether it's a violation, but rather what the court hearing any ensuing probation violation will choose to do in response to it.

Generally, the probation violation hearing process begins when a probation officer files a violation report (DCC-10). That report gives the probationer notice of the violations alleged and, if the period of probation is near its end, preserves the court's power to act on the violation after probation expires under [G.S. 15A-1344\(f\)](#) (discussed at the end of [this post](#)). Without a violation report, there really isn't any probation matter before the conviction court when it enters judgment on a new criminal case. The court's proclamation that the new crime is not a violation of the defendant's existing probation seems premature at best.

If a proper probation violation hearing would be held before the same court (district or superior, and in the same district) as the court sentencing the new crime, then I suppose the defendant could waive the 24-hour notice of a probation violation required by [G.S. 15A-1345\(e\)](#) and allow the probation matter to come before the court right away. If the court wanted the defendant's probation in a prior case to continue unchanged despite the new conviction, it could enter an order (on form [AOC-CR-609](#)) saying so. The State may prefer that approach, as the finding of a willful violation could later serve as an aggravating factor under [G.S. 15A-1340.16\(d\)\(12a\)](#) even if it doesn't result in a revocation.

The situation is a little more complicated when the court sentencing the new crime is not the same court that would hear any related probation violation hearing. Typically (at least based on questions I receive), a superior court judge will write on a judgment that the defendant's new felony conviction shall not be a violation of his or her ongoing district court probation. It seems pretty clear to me that the superior court doesn't have jurisdiction over the probation matter in that circumstance. Only a judge "entitled to sit in the court which imposed probation" has power to reduce, terminate, continue, extend, modify, or revoke it under G.S. 15A-1344(a). The superior court could recommend that the

new conviction not serve as a basis for revocation, but I don't think the recommendation is binding on the court that ultimately hears the probation matter. Of course, if everyone knows as a practical matter that the appeal of any district court revocation would wind up before the same superior court judge who said the new crime should not be a violation, it might not be worth pursuing in district court.

Another variation on this situation is when the State agrees as part of a plea bargain on a new criminal charge not to pursue a probation revocation based on the conviction. In those cases I think the State would be bound by its agreement, making the new conviction effectively revocation-proof.