

State v. Gorman and Improper Extensions of Probation

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I have written before ([here](#)) about some of the tricky issues related to extending probation. A recent case from the court of appeals illustrates the complexity of the rules.

In [State v. Gorman](#), __ N.C. App. __ (June 19, 2012), a defendant received four suspended sentences on June 3, 2005, for a series of felony convictions. He was placed on probation for 60 months in each case, pursuant to the judge's finding that a longer period of probation was required than that set out in G.S. 15A-1343.2(d) (thus avoiding the common error about probation length discussed [here](#)). So, the original periods of probation would have expired June 2, 2010. (There is some question about when all of the periods of probation actually began. Looking at the record, it appears to me that three of the four periods began on June 3, 2005, while one may have started after Mr. Gorman finished an active sentence for which there is no judgment form in the [record](#).)

After he was placed on probation, Mr. Gorman went to New Jersey to serve a five-year sentence for a crime that apparently occurred before he was placed on probation in North Carolina. He was in prison in the Garden State from 2005 to 2010.

In 2008, a superior court judge reviewed Mr. Gorman's probation case. That is not unusual, as the law commands a probation officer to bring a probationer's case before the court after three years for a mandatory review. [G.S. 15A-1342\(b\)](#). The probation officer is required to give reasonable notice of the review to the probationer, who may appear. The purpose of the review is to consider whether to terminate the probation early. *Id.* Mr. Gorman obviously didn't appear for the review on account of his incarceration, but it apparently happened without him. The court nonetheless entered four modification orders, extending the defendant's probation in each case by three years so they would all expire in June 2013.

When he was released from prison in 2010 Mr. Gorman returned to North Carolina. In December 2010 his probation officer filed a violation report alleging a series of technical violations. A violation hearing was held in February 2011 and his probation was revoked in all four cases, requiring him to serve one 6–8 month sentence and three 8–10 month sentences, consecutively.

The defendant appealed and made a three-part argument that the trial court lacked jurisdiction to revoke his probation at the February 2011 hearing. First, he did not receive proper notice of the hearing. Second, the 2008 orders extending his probation were improper. And third, his original 60-month period of probation would have expired before the December 2010 violations were filed.

Because the court of appeals agreed with Mr. Gorman on the second argument it didn't need to delve into the first. Even assuming notice had been proper (and the court noted the defendant's "strong arguments" that it wasn't, Slip op. at 6), the superior court was without authority in 2008 to modify probation by extending it for 3 years beyond the original 60-month period. Neither of the two statutory provisions related to extending probation (again, discussed [here](#)) allow such an extension. The only way to extend probation beyond 5 years is what I have described as the "special purpose" extension provisions in [G.S. 15A-1343.2\(d\)](#). Under that law, the court may extend a defendant's original period of probation by up to three years, but only if (1) the defendant consents, (2) the extension is to complete a

program of restitution or to complete medical or psychiatric treatment, and (3) the extension is ordered in the last six months of the original period of probation. None of those things was true in Mr. Gorman's case. First, he didn't consent (because he apparently didn't even know the review was happening). Second, the extension was not identified as being for any special purpose (the latest version of the modification order form, [AOC-CR-609](#), is more helpful in this regard than the version used back in 2008). And third, the extension did not happen in the last six months of the *original* 5-year period of probation. Instead, it happened about two years from the conclusion of that original period.

The extension was even more clearly impermissible under [G.S. 15A-1344\(d\)](#), which I have called the "ordinary" extension provision. That type of extension may be ordered at *any time* before expiration (not necessarily in the last six months of probation) and for good cause shown (without any need for an actual violation), but it may never extend a probation period beyond the statutory maximum of five years. G.S. 15A-1344(d); -1342(a).

Lacking any statutory authority for the extensions, the court of appeals declared them void and vacated them.

As to the defendant's third argument (that his original period of probation would have expired by mid-2010), questions remained as to whether the defendant's criminal matter in New Jersey "tolled" his North Carolina probation such that the December 2010 violation reports were timely even without the improper 2008 extension. The court of appeals remanded the case to the trial court for further consideration of that issue. The tolling law has since been repealed for offenders placed on probation on or after December 1, 2011 ([S.L. 2011-62](#), discussed [here](#)), but it probably applies to a person on probation for an offense that occurred back in 2004. The questions on remand will be whether the tolling law applies and, if so, whether the defendant's New Jersey charges trigger it. If the New Jersey charge was based on a crime that took place before his North Carolina probation began, it seems pretty clear it would not be a proper basis for revocation here, and thus would not trigger the tolling law (which only ever applied to charges that "could result in revocation proceedings") in any event.

Whatever the eventual outcome of the tolling issue, *Gorman* serves as a good reminder of the probation extension rules and the downstream effects that can flow from an improper extension. And even though the court didn't need to consider the defendant's notice argument in *Gorman*, it's worth pointing out that defendants are entitled to notice and a hearing before probation may be extended. The hearing may be held in the defendant's absence, but only if he or she fails to appear after a reasonable effort to notify him or her. G.S. 15A-1344(d).