State v. McCaster and the Recalcitrant Probationer

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Suppose a defendant is convicted of a class I felony and has a prior record level of I. That's a "C" block on the felony sentencing grid, where only community punishment is authorized. Community punishment can include a range of punishments from a fine only, up to supervised probation, but does not encompass a straight active sentence. The defendant informs the sentencing court that she wants to serve her time in prison. The defendant further explicitly states she will not accept probation and refuses to meet with probation, missing several opportunities to begin the intake process. What options does the trial court have?

Since a 1995 amendment to G.S. 15A-1341 (repealing subsection (c) of that statute, effective 1/1/1997), the law no longer requires that the defendant consent to be placed on probation, nor may the defendant elect to activate her sentence, at least in any straightforward sense. That said, it seems possible to arrange for an otherwise mandatory suspended sentence to be immediately invoked if certain findings are made and procedural protections observed. Jamie has discussed the issue of electing to serve a sentence before here and here. It's certainly not as easy to immediately invoke a 'C' block sentence in the post-Justice Reinvestment world, but there are options for the trial court if a defendant "refuses" probation. Failure to follow the process to the letter, however, can result in problems, as the *McCaster* case illustrates.

Facts

In *State v. McCaster*, ___ N.C. App. ___ (February 6, 2018), the defendant was convicted at trial of assault on a law enforcement officer causing physical injury (a class I felony) and was sentenced to 5 to 15 months as a Prior Record Level I offender. The sentence was suspended for 12 months and the defendant placed on supervised probation . . . or rather, the court attempted to place the defendant on probation. The defendant wasn't happy about the sentence and became agitated in court ("begging the court to allow her to serve her time"). The defendant appealed the judgment of conviction (which has the effect of staying the probationary sentence, per G.S. 15A-1451(a)(4)). Approximately 17 months later, the appeal was resolved (conviction affirmed) and the defendant was notified to appear in court to be placed on probation. She appeared and again explicitly refused probation, reiterating her desire to serve her prison time. The trial court ordered that she meet with probation before making a decision about serving time. The defendant not only failed to meet with probation that day; at some point she returned to the courtroom and "allegedly cursed the courtroom and threw spices and garlic upon the floor." Slip op. 2-3. The trial court again instructed the defendant to report to probation the next morning, this time adding that a warrant for her arrest would issue should she fail to do so. Once more, the defendant did not meet with probation. She did appear in court the next morning, again informing the court that she would not submit to probation. The trial court then asked the defendant if she was sure about all of this, and the defendant responded: "I have refused probation a hundred times and I am refusing it now." *Id.* at 4. The trial court obliged and revoked her probation on the spot, entering an order that reflected the defendant's refusal in open court to submit to processing for probation. The order further referred to the defendant's "willful violation of the condition(s) that [she] not commit any criminal offense . . . or abscond from supervision." *Id.* at 3. A more detailed order was entered the next day recounting the sequence of events and concluding: "It being obvious that the defendant was refusing to serve probation, the active sentence was instituted." *Id.* at 4. The defendant appealed the revocation of probation, alleging a lack of jurisdiction by the trial court to revoke her probation without her first being served with a

violation report and notice of hearing.

Opinion

One might think the revocation of probation was amply supported by the findings of the trial court under these circumstances. Not so, according to the court of appeals. G.S. 15A-1345(e) requires that the defendant receive notice of the violation hearing, its purpose, and the alleged violation at least 24 hours before the hearing, unless the defendant waives her right to such notice. The defendant here was not provided notice that a probation violation was being adjudicated (nor that revocation was being sought), and no waiver of the defendant's right to notice was obtained.

While Defendant's multiple and repeated objections to probation are documented, the court did not indicate the purpose of the hearing was to revoke Defendant's probation, nor provide her with notice of any statement of her alleged violation, or seek her waiver of same, contrary to the mandate of N.C. Gen. Stat. 15A-1345(e). *Id*. at 7.

The court saw the issue as one of subject matter jurisdiction: "Without prior and proper statutory notice and a statement of violations provided to the Defendant, the trial court lacked jurisdiction to revoke her probation." *Id*. at 7. Therefore, the court of appeals reversed the revocation of probation and remanded the matter back to the trial court.

Takeaway

What's a trial court to do in this situation? The opinion helpfully lists some options. The most obvious and straightforward one is to prepare a notice of hearing and violation report and have the defendant served. Failure of a defendant to complete the probation intake process can constitute absconding, a violation that, if proved or admitted, would be immediately revocation-eligible. The opinion cites *State v. Brown*, 222 N.C. App. 738 (2012), as authority for the proposition that a defendant's failure to report to probation intake can constitute absconding. The potential hiccup (and the problem in *McCaster*) is the defendant's right to notice: the defendant must either be provided 24 hours' notice after being served with the probation paperwork, or must waive the right to that notice on the record. If the violation report and notice of hearing can be served on the recalcitrant probationer who is willing to waive notice the same day, probation could be properly revoked then. If the paperwork can't be prepared and served right away, or if the defendant won't waive notice, the hearing should be held no sooner than 24 hours after the defendant's receipt of notice. This adds a little more time and paperwork to the process, but surely much less so than reversal of the revocation on appeal. At the end of the day, these steps are the only surefire way to quickly revoke an uncooperative probationer.

As other options short of revocation, the opinion notes that the defendant's failure to obey the lawful order of the court to meet with probation would constitute contempt of court. That makes sense to me as a practical matter—after paying a fine or serving an active sentence for contempt, the defendant may perhaps be more amenable to supervision. The opinion also notes that the trial judge could have simply ordered the defendant be taken to the probation office. "Regardless of Defendant's statement and protests, the trial court could have simply ordered Defendant be accompanied by a law enforcement or probation officer to register and implement probation supervision." *Id*. at 8. This option strikes me as perhaps the least effective and fraught with peril—I can't imagine that literally carrying someone kicking and screaming down to the probation intake office would be a welcome event (or very safe) for any of the parties involved. That said, having law enforcement officers effectuate the order of the court for the person to submit to probation seems well within the authority of the court.

Finally, I'll add my own suggestion, something I learned from dealing with clients resistant to probation: Reminding a defendant that post-release supervision on the back end of an active felony sentence is not something that can be avoided may sway a defendant that isn't sure about the whole probation thing. Knowing that he or she will be supervised by the local probation office sooner or later—either on probation or on post-release after doing active time—may convince some reluctant defendants to at least give probation a try.

What do readers think? Are there any other options to consider? Let me know by leaving a comment below.