

14.8 Violation of Probation

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14.8 Violation of Probation

A. Motion and Notice Required

The progress of the juvenile on probation may be reviewed on motion of the juvenile court counselor, the juvenile, or the court. Conditions or the duration of probation may be modified only after notice and a hearing. G.S. 7B-2510(d). The juvenile and the juvenile's parent, guardian, or custodian are entitled to five days written notice before a hearing on an alleged violation of probation. G.S. 7B-1807. If the clerk gives less than five days notice of the violation hearing and counsel has not had sufficient time to prepare, counsel should ask for a continuance.

Counsel should also oppose any motion for review filed by the prosecutor. A sample motion to dismiss for lack of standing is available on the [Office of the Juvenile Defender website](#). According to G.S. 7B-2510(d), the only individuals who are permitted to file a motion for review are the juvenile court counselor, the juvenile, and the court, not the prosecutor. Based on G.S. 7B-2510(d), counsel should argue that any violations described in the prosecutor's motion for review that are not included in a motion for review filed by the juvenile court counselor cannot form the basis of a finding that the juvenile violated the conditions of probation.

Counsel should also object on notice and due process grounds to any other violations that were not included in the motion for review filed by the juvenile court counselor. Juveniles have the right to notice before a hearing on an alleged probation violation. G.S. 7B-2510(e). In criminal court, it is improper for a court to revoke probation based on conduct not alleged in the violation report. *State v. Cunningham*, 63 N.C. App. 470, 475 (1983); *cf. State v. Hubbard*, 198 N.C. App. 154 (2009) (trial court properly revoked probation based on a condition not described in the violation report because the report contained facts that supported the violation found by the court). Counsel should argue that the same principles apply to juvenile cases and that finding a violation that was not alleged would violate the juvenile's rights to notice and due process.

B. Secure Custody Pending Hearing

Where the juvenile is alleged to have violated probation, the court may order secure custody pending the probation violation hearing if the juvenile is alleged to have damaged property or injured persons. G.S. 7B-1903(d).

C. Preparation for Hearing

Preparation for a hearing on a motion alleging a violation of probation is generally the same as for a hearing on a petition. Counsel should meet with the juvenile and prepare the juvenile to testify when helpful to the case, talk with the juvenile court counselor and review the counselor's records, and make other contacts as required to investigate and respond to the alleged violation. Witnesses and records should be subpoenaed as necessary. If appropriate, counsel should explore negotiating an agreement with the juvenile court counselor or prosecutor.

Counsel should check the following items during hearing preparation to determine whether:

- the motion alleging violation of probation was filed within the probationary period;
- the juvenile was given adequate written notice of the alleged violation and hearing;
- the juvenile court counselor has correctly calculated the period of probation;
- the original order of probation was for a period of probation within the statutory provisions of G.S. 7B-2510(c); and
- the condition of probation that is alleged to have been violated was set forth in the dispositional order and was a condition of probation allowed under G.S. 7B-2510(a).

D. Burden of Proof

To establish that the juvenile violated the terms of probation, the State must prove the violation “by the greater weight of the evidence.” G.S. 7B-2510(e). If the State establishes a violation, the trial court may not revoke probation unless the violation was willful or without a lawful excuse. The juvenile has the burden of showing one of these grounds. *In re Z.T.W.*, 238 N.C. App. 365, 369–70 (2014). Evidence showing inability to comply satisfies this burden. *Id.* If the juvenile presents evidence of an inability to comply with the terms of probation, the court must consider and evaluate the evidence before ruling on the violation. *Id.*

The rules of evidence do not apply at probation violation hearings because they are considered “dispositional.” *In re D.J.M.*, 181 N.C. App. 126, 131 (2007); *see also* G.S. 7B-2501. The court therefore may rely on hearsay to find that the juvenile violated the terms of probation. *In re Z.T.W.*, 238 N.C. App. at 368–69. Counsel should still object to evidence that is not relevant or reliable, including hearsay, and argue that such evidence is insufficient to support a finding that the juvenile violated the terms of probation.

Practice note: Counsel should argue against an allegation that the juvenile has violated probation by virtue of having been alleged to be delinquent or charged with a new offense. Under G.S. 7B-2510(a)(2), the court may order the juvenile not to violate any laws. The juvenile is not in violation, however, by merely being accused of violating a law. The State must produce sufficient evidence to meet its burden of proof of the acts allegedly committed by the juvenile. *See State v. Seagraves*, 266 N.C. 112, 113 (1965)

(per curiam) (holding that the “burden of proof is on the State to show that the defendant has violated one of the conditions of his probation”).

E. Alternatives on Finding of a Violation

If the court finds that the juvenile violated conditions of probation, it may keep in place the original conditions, modify the conditions or, with one exception, order a new disposition at the next higher level from the original disposition. G.S. 7B-2510(e). The exception is that the court may not order a Level 3 disposition for a violation of probation if the original adjudication was for an offense classified as minor under G.S. 7B-2508. G.S. 7B-2510(f). Counsel should ask the court to enter a new disposition immediately rather than hold the juvenile in detention and continue the matter.

If the court orders a new disposition, it may order a period of confinement in a secure juvenile detention facility for up to twice the term authorized by G.S. 7B-2508, which sets forth dispositional limits for each class of offense and delinquency history level. G.S. 7B-2510(e). If the court orders detention, counsel should request that the juvenile be given credit for any time already served. Although the court is not required to give the juvenile credit for time served, *In re D.L.H.*, 364 N.C. 214, 216 (2010), counsel should advise the court that there is no prohibition against giving the juvenile credit. If the probation violation hearing was delayed and the juvenile spent a significant amount of time in detention, counsel should argue that many of the purposes of dispositions under G.S. 7B-2500, such as promoting public safety and emphasizing accountability, have already been met. *See supra* “Credit for time served” in § 8.6F, Secure Custody Hearing.

F. Use of Previously-Adjudicated Violations at Subsequent Proceedings

Subsequent adjudication proceedings. A finding by the court of a violation of probation for a certain act does not bar the filing of a petition and an adjudication of delinquency based on the same act. In *In re O’Neal*, 160 N.C. App. 409 (2003), the trial court found that the juvenile willfully violated the conditions of probation by becoming “physically aggressive” with another juvenile. The State later filed a petition for misdemeanor assault based on the same conduct and the juvenile was adjudicated delinquent for the offense. The Court of Appeals rejected the juvenile’s argument that the adjudication for the assault charge after the probation determination violated the protection against double jeopardy. The Court held that double jeopardy protections do not apply to probation revocation proceedings.

Subsequent probation hearings. A separate question is whether the court may modify probation or enter a new disposition for conduct that was the subject of a previous probation hearing. If the juvenile court counselor files a motion for review alleging a violation that was adjudicated at a prior probation violation hearing, counsel should move to dismiss on res judicata and collateral estoppel grounds.

Under the doctrine of res judicata, “a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties.” *Whitacre*

P'ship v. BioSignia, Inc., 358 N.C. 1, 15 (2004). Under the doctrine of collateral estoppel, the determination of an issue in a prior proceeding “precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding.” *Id.* Counsel must assert res judicata and collateral estoppel at the hearing on the alleged violation; otherwise, the claims are waived. *State v. McKenzie*, 292 N.C. 170, 177 (1977).

Appellate courts elsewhere have reversed probation revocation orders in adult cases based on res judicata and collateral estoppel grounds. *See People v. Quarterman*, 136 Cal. Rptr. 3d 419 (Cal. Ct. App. 2012); *Shumate v. State*, 718 N.E.2d 1133 (Ind. Ct. App. 1999); *Knox v. Pennsylvania Bd. of Probation and Parole*, 588 A.2d 79, 82 (Pa. Commw. Ct. 1991).

In *State v. Powell*, ___ N.C. App. ___, 793 S.E.2d 282 (2016) (unpublished), the North Carolina Court of Appeals refused to recognize that collateral estoppel barred revocation at a later probation hearing based on a violation decided at an earlier hearing. In *Powell*, the defendant violated a condition of his probation by possessing a firearm in March 2015. The probation officer filed a violation report and, after a hearing, the trial court extended the defendant’s probation based on the violation. In August 2015, the probation officer filed another violation report based on the March 2015 possession of a firearm and on absconding, but the State presented no evidence on absconding. The trial court revoked the defendant’s probation based on the March 2015 possession of a firearm alone. The Court of Appeals held that collateral estoppel did not apply because the State was not contesting the finding from the prior probation hearing that the defendant possessed a firearm. Rather, the State was relying on it. The Court of Appeals did not consider whether the trial court’s earlier judgment to extend probation barred the State from relitigating that judgment and requesting revocation. Counsel should continue to argue that both the judgment as well as findings from a prior probation hearing should be given res judicata and collateral estoppel effect.

The *O’Neal* decision, discussed at the beginning of this subsection G., is distinguishable from a case in which the State seeks to revoke a juvenile's probation based on a violation decided at previous probation hearing. *O’Neal* held only that double jeopardy principles do not apply to probation violation hearings and do not bar a subsequent adjudication of delinquency for the same act. The argument here is based on the separate doctrines of res judicata and collateral estoppel. *But see State v. Powell*, ___ N.C. App. ___, 793 S.E.2d 282 (2016) (unpublished) (stating without analysis that the defendant’s collateral estoppel argument was in essence a double jeopardy argument despite their differences).