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Topic: Restitution as a Condition of Probation

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RESTITUTION AS A CONDITION OF PROBATION

Since the enactment of G.S. 15-199(10), effective October 1, 1977, there has been renewed emphasis on the use of restitution to the victim of a crime as a condition of probation or suspended sentence. [G.S. 15-199(10) has been continued in effect as G.S. 15A-1343(d) by Ch. 1147 of the 1977 Session Laws (2d Session 1978), effective July 1, 1978.] In legal training sessions, many probation officers have mentioned the problems they have in making sure restitution is paid. The purpose of this memo is to pass on to court officials some suggestions that may make the system of restitution more effective.

1. Restitution: To Whom and for What? G.S. 15A-1343(d) provides that restitution ordered as a condition of probation must be to a specifically named aggrieved party, which may be a corporation, association, or government agency as well as an individual. The restitution must be "for the damage or loss caused by the defendant arising out of the offense or offenses for which the defendant has been convicted." This includes compensation to an individual victim for injury or loss suffered as a result of the crime. Also, the North Carolina Supreme Court has recently held that, in "a prosecution for sale or possession of contraband," restitution to a police agency may be ordered "as a condition for suspension of sentence or probation, [for] any sum paid by its agents to the defendant in order to obtain evidence of the crime" [Shore v. Edmisten, 290 N.C. 634 (1976) (upheld restitution of $60 to police department for "drug buy" necessary to convict defendant of drug charge)]. The Court said that "[t]o allow the defendant to retain this money would result in unjust enrichment to him," and it specifically upheld G.S. 90-95.3, which authorizes restitution to police agencies for the cost of a drug purchase that leads to the defendant's conviction (id. at 634-35). The Court also said that the defendant could not be required to pay the "normal operating costs" of police, prosecution, or probation (id. 633-34).

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What about transportation costs? Consider a hypothetical case that came up in a recent class for probation officers. A defendant is placed on probation in North Carolina for breaking and entering. He then violates probation by leaving the state without permission and must be brought back to North Carolina from Georgia, where he has turned himself in to authorities. May the North Carolina judge thereafter modify the original probation to require the probationer to pay back the cost of his transportation to the agency that has paid it? There seems to be a serious question whether this cost may legitimately be the subject of a restitution condition. The transportation cost does not appear to "arise out of" the defendant's offense (breaking and entering). Also, imposing this cost would go well beyond what the holding in Shore v. Edmisten, supra, would allow, since the cost is not a sum paid to obtain evidence of a crime.

2. The Amount of Restitution. Probation officers have had a serious problem with some restitution judgments in which either the total amount of restitution or the payment schedule is not clearly stated. Judges can prevent much confusion later if, in sentencing, they will set the precise total to be paid and direct in what amounts it is to be paid and how often. G.S. 15A-1343(d) provides that the "court shall fix the manner of performing the restitution," although it "may take into consideration the recommendation of the probation officer."

Under G.S. 15A-1343(d), the amount of restitution should be based on (a) the amount of damage or loss caused by the defendant's crime, to the extent that this is shown by the record; and (b) the defendant's ability to pay. The North Carolina Supreme Court has said that the amount imposed must be supported by the record, which may include evidence presented at trial, information in the pre-sentence report, and information presented at the sentence hearing (Shore v. Edmisten, supra, at 637-38). It may be a wise practice to have a probation officer investigate the amount of damage or loss and report on it to the court, if information is not otherwise available. It is also important to determine the defendant's ability to pay, taking into consideration [as G.S. 15A-1343(d) requires] "the resources of the defendant, his ability to earn, his obligation to support dependents, and such other matters as shall pertain to his ability to make restitution . . . ." The statute also provides that when the amount of loss is more than the defendant can pay, the court may order partial restitution. Here again, it may be advisable to have a probation officer investigate the defendant's ability to pay. (The Department of Correction now has a staff of specialized "restitution officers" who help probation officers in enforcing restitution conditions; perhaps these officers can assist the court in determining how much a defendant can pay.)

3. The Amount of Fines and Court Costs. Fines, like restitution, should be set only after considering the defendant's financial resources (G.S. 15A-1362). If payment of fines or costs is imposed as a condition of probation, the amount of each should be specified in the judgment. Otherwise--if, for example, the court orders "costs of court" to be paid without specifying the amount--problems of interpretation may arise later. For example, in one case brought to my attention, a defendant was convicted of twenty worthless check charges that had been consolidated for guilty plea and judgment. Apparently the court ordered the payment of "costs" but did not indicate whether the matter was to be considered one "case" for the purposes of determining the total court cost under G.S. 7A-304. The law is unclear as to whether, in such a case, one or twenty costs should be assessed, although apparently most courts would consider one to be proper in this situation. If the trial court will specify in the judgment the exact amount of the costs it is imposing, it can avoid problems later. (It would be a hardship for a probationer, who believes that he has only one set of costs to pay, to find later that under someone else's interpretation of an unspecific judgment, he must pay twenty sets.)

4. Attorney Costs. When a defendant receives appointed counsel under G.S. 7A-450 and 7A-451, is convicted, and then is placed on probation, some courts apparently require that he pay the costs of appointed counsel as a "standard condition" of probation. Imposing such a condition has been lawful under North Carolina court decisions [e.g., State v. Foust, 13 N.C. App. 382 (1972)] and is now explicitly authorized by G.S. 15A-1343(b)(14). However, it would seem to be a good policy not to impose this condition automatically, but rather to impose payment (or partial payment) of counsel costs only where it appears that the probationer will be able to pay them. Doing otherwise would seem to compromise the constitutional right to appointed counsel. In holding that an Oregon law allowing counsel costs to be imposed as a condition of probation did not violate the equal protection clause of the Fourteenth Amendment, the U.S. Supreme Court emphasized the fact that Oregon law gives the probationer the right to raise, in a revocation proceeding, the affirmative defense that he is unable to pay despite a good-faith effort [Fuller v. Oregon, 417 U.S. 40 (1974)]. This defense thus appears to be constitutionally required. In keeping with the Supreme Court's decision, the North Carolina Court of appeals recently held that a probationer is entitled to have the trial judge consider evidence tending to show that he is "unavoidably without the means to make payments as required by his probationary judgment," although the trial judge "is not required to accept defendant's evidence as true" [State v. Young, 21 N.C. App. 316, 321 (1974)].

5. Defense to Action for Failure to Pay Restitution, Costs, or Fine. G.S. 15A-1364 and the decision just cited establish the defendant's right to raise the affirmative defense of good-faith inability to pay in a proceeding to revoke probation or punish the defendant for failing to pay a fine, costs, or restitution. The court may, when appropriate, reduce or remit the fines, costs, or restitution amount [G.S. 15A-1364(c), -1344(d)].

6. Other Statutory Provisions Regarding Restitution. G.S. 15A-1343(d) provides that restitution judgment does not abridge the victim's right to bring a civil action against the offender, although the amount of restitution actually paid becomes a set-off against the civil claim. The statute also provides that third parties (such as insurance companies) that are liable to pay for the victim's loss may not benefit from a restitution judgment.

- Stevens H. Clarke