

PROBATION VIOLATIONS

Statutory Limitations
on Sanctions



The Honorable Robert J. Humphreys,
Court of Appeals of Virginia

Statutory Authorization for Probation - Virginia Code § 19.2-303

After conviction, whether with or without jury, the court may suspend imposition of sentence or suspend the sentence in whole or part and in addition may place the defendant on probation under such conditions as the court shall determine, including monitoring by a GPS (Global Positioning System) tracking device, or other similar device, or may, as a condition of a suspended sentence, require the defendant to make at least partial restitution to the aggrieved party or parties for damages or loss caused by the offense for which convicted, or to perform community service, or both, under terms and conditions which shall be entered in writing by the court. The court may fix the period of probation for up to the statutory maximum period for which the defendant might originally have been sentenced to be imprisoned. Any period of supervised probation shall not exceed five years from the release of the defendant from any active period of incarceration. The limitation on the period of probation shall not apply to the extent that an additional period of probation is necessary (i) for the defendant to participate in a court-ordered program or (ii) if a defendant owes restitution and is still subject to restitution compliance review hearings....

Revocation of Probation and Execution of a Suspended Sentence

§ 19.2-306. Revocation of suspension of sentence and probation. —

A. Subject to the provisions of § 19.2-306.2, in any case in which the court has suspended the execution or imposition of sentence, **the court may revoke the suspension of sentence for any cause the court deems sufficient that occurred at any time within the probation period, or within the period of suspension fixed by the court.** If neither a probation period nor a period of suspension was fixed by the court, then the court may revoke the suspension for any cause the court deems sufficient that occurred within the maximum period for which the defendant might originally have been sentenced to be imprisoned.



Revocation of Probation and Execution of a Suspended Sentence

§ 19.2-306. Revocation of suspension of sentence and probation. —

C. If the court, after hearing, finds good cause to believe that the defendant has violated the terms of suspension, then the court may revoke the suspension and impose a sentence in accordance with the provisions of § 19.2-306.1.



Revocation of Probation and Execution of a Suspended Sentence

§ 19.2-306.1. Limitation on sentence upon revocation of suspension of sentence; exceptions.

A. For the purposes of this section, "technical violation" means a violation based on the probationer's failure to (i) report any arrest, including traffic tickets, within three days to the probation officer; (ii) maintain regular employment or notify the probation officer of any changes in employment; (iii) report within three days of release from incarceration; (iv) permit the probation officer to visit his home and place of employment; (v) follow the instructions of the probation officer, be truthful and cooperative, and report as instructed; (vi) refrain from the use of alcoholic beverages to the extent that it disrupts or interferes with his employment or orderly conduct; (vii) refrain from the use, possession, or distribution of controlled substances or related paraphernalia; (viii) refrain from the use, ownership, possession, or transportation of a firearm; (ix) gain permission to change his residence or remain in the Commonwealth or other designated area without permission of the probation officer; or (x) maintain contact with the probation officer whereby his whereabouts are no longer known to the probation officer. Multiple technical violations arising from a single course of conduct or a single incident or considered at the same revocation hearing shall not be considered separate technical violations for the purposes of sentencing pursuant to this section.

Definition of Technical Violation - Virginia Code § 19.2-306.1

Technical Violation =

1. Failure to report a new arrest.
2. Failure to maintain regular employment.
3. Failure to report within three days of release from incarceration.
4. Failure to permit a home visit by a PO.
5. Failure to follow the instructions of the PO, be truthful and cooperative.
6. Refrain from use of alcohol if it interferes with employment.
7. Refrain from use, possession, or distribution of controlled substances.
8. Refrain from ownership, possession, or use of a firearm.
9. Get permission from PO to change residence.
10. Maintain contact with PO.



Definition of Technical Violation - Virginia Code § 19.2-306.1

Technical Violation

Multiple technical violations arising from a single course of conduct or a single incident or considered at the same revocation hearing **shall not** be considered separate technical violations for the purposes of sentencing pursuant to this section.



Punishment for Technical Violations - Virginia Code § 19.2-306.1

- 1st No incarceration
- 2nd Up to 14 days (rebuttable presumption against incarceration)
- 3rd + Up to maximum amount suspended



Non-Technical Violations

B. If the court finds the basis of a violation of the terms and conditions of a suspended sentence or probation is that the defendant was convicted of a criminal offense that was committed after the date of the suspension, or has violated another condition other than (i) a technical violation or (ii) a good conduct violation that did not result in a criminal conviction, then the court may revoke the suspension and impose or resuspend any or all of that period previously suspended.

Virginia Code § 19.2-306.1(B)



Non-Technical Violations

New Conviction

“Good Conduct” ?

Special Conditions ?



“Good Conduct” Violations



Violation of a Special Condition



Statutory Construction Considerations

Separation of Powers

- Probation is a creature of statute.
- Courts have inherent power to enforce their orders.
- Conditions of probation set by DOC/POs.
- “Special” conditions of probation set by the Court.
- Can a court delegate its authority to a PO?



Recent Cases Attempting to Construe § 19.2-306.1

Wilson v. Commonwealth, 67 Va. App. 82 (2016)

[C]ircuit courts may not delegate to probation officers responsibilities that are the sole province of the circuit courts.



Recent Cases Attempting to Construe § 19.2-306.1

Delaune v. Commonwealth, 76 Va. App. 372 (2023)

The limitation on confinement for conduct defined as a technical violation applies irrespective of whether it is made a “special condition” of probation.



Recent Cases Attempting to Construe § 19.2-306.1

Heart v. Commonwealth, 75 Va. App. 453 (2022)

The statutory language “third or subsequent technical violation” means a “technical violation” of probation preceded by two prior “technical violations” of probation.



Recent Cases Attempting to Construe § 19.2-306.1

Diaz-Urrutia v. Commonwealth, 76 Va. App. ____ 0502224 (April 4, 2023)

“[I]f the defendant has been convicted of a new criminal offense, then the court may revoke the suspension and impose or resuspend any or all of that period previously suspended.

“Additionally, the court may revoke the suspension and impose any or all of the previously suspended sentence if the basis of the violation is “another condition,” i.e. a special condition, that is not an enumerated technical violation or a good conduct violation that does not result in a new criminal conviction.

Recent Cases Attempting to Construe § 19.2-306.1

What is a “good conduct violation?”

Diaz-Urrutia v. Commonwealth, 76 Va. App. ____ 0502224 (April 4, 2023)

“However, Code § 19.2-306.1 is silent as to what the court's revocation and sentencing options are if the defendant has violated a condition that is a “good conduct violation that did not result in a criminal conviction. Whatever restrictions, if any, Code § 19.2-306.1 imposes on a sentencing court's authority to revoke a suspended sentence for a good conduct violation, those restrictions are only triggered when ‘the basis of a violation of the terms and conditions of a suspended sentence’ is a good conduct violation.”



Recent Cases Attempting to Construe § 19.2-306.1

What is a “good conduct violation?”

Diaz-Urrutia v. Commonwealth, 76 Va. App. ____ 0502224 (April 4, 2023)

“When construing a statute, our primary objective is ‘to ascertain and give effect to legislative intent,’ as expressed by the language used in the statute.” We “presume that the legislature chose, with care, the words it used when it enacted the relevant statute.” Additionally, the probation statutes are highly remedial and should be liberally construed to provide trial courts a valuable tool for rehabilitation of criminals.”

“For whatever reasons the General Assembly may have had, the application of the commonly used principles the courts of the Commonwealth use to construe statutes render it difficult to avoid an absurd result in discerning the legislative intent from the language of this statute.”



Recent Cases Attempting to Construe § 19.2-306.1

What is a “good conduct violation?”

Diaz-Urrutia v. Commonwealth, 76 Va. App. ____ 0502224 (April 4, 2023)

Good conduct violations, however, are different than technical violations.

“Good behavior” = “substantial misconduct”

The General Assembly chose not to use “good behavior” as that phrase has been long understood, opting instead for “good conduct.”

Although we ordinarily interpret different words used by the legislature to carry different meanings, good conduct and good behavior do not have materially different ordinarily understood definitions and there is simply no rational way to distinguish their meanings. Compare Conduct, New Oxford American Dictionary, *supra* (“[T]he manner in which a person behaves.”), with Behavior, *Id.* (“[T]he way in which one acts or conducts oneself.”).

“Good conduct” = good behavior”

Recent Cases Attempting to Construe § 19.2-306.1

Diaz-Urrutia v. Commonwealth, 76 Va. App. ____ 0502224 (April 4, 2023)

Other than technical violations, the plain language of the statute only limits the sentencing court's power if “the basis of a violation . . . [is] a good conduct violation.” Code § 19.2-306.1(B). The plain language of the statute therefore indicates that **so long as there is “another condition other than” the implied good conduct condition that has been violated, then the sentencing court is simply not constrained by the statute** because the “basis of [the] violation” is “another condition,” not a good conduct violation.



Recent Cases Attempting to Construe § 19.2-306.1

Diaz-Urrutia v. Commonwealth, 76 Va. App. ____ 0502224 (April 4, 2023)

“We think it significant that the conduct statutorily defined as technical violations are specific requirements imposed on all probationers supervised by probation officers, who are employees of the executive branch of government and not by judges whose task is to focus on the individual defendant and “to balance the appropriate punishment for the crime committed with the available rehabilitative alternatives to incarceration and the protection of the lives and property of the community if the defendant is not isolated from it.”



Recent Cases Attempting to Construe § 19.2-306.1

Diaz-Urrutia v. Commonwealth, 76 Va. App. ____ 0502224 (April 4, 2023)

Four part test:

- 1) The court must determine whether “the violation conduct matches any of the conduct defined as a technical violation. If so, the technical violation limitations apply no matter how it is characterized as a condition.
- 2) If not, does the conduct match another condition of probation.
- 3) If the “other condition” is not generic “good conduct,” there is no limitation on the Court.
- 4) If the violation is for lack of “good conduct” (substantial misbehavior), then ? (stay tuned.)



Recent Cases Attempting to Construe § 19.2-306.1

Thomas v. Commonwealth, ___ Va. App. ___ 047722 (May 9, 2023)

- “Special conditions” of probation may be fashioned by either the court or the PO and are separate from the general conditions imposed on all probationers.
- If the underlying conduct falls within a technical violation and a special condition, the technical violation limitations apply. Otherwise, not.



Recent Cases Attempting to Construe § 19.2-306.1

Thomas v. Commonwealth, ___ Va. App. ___ 047722 (May 9, 2023)

In *Thomas*, the probationer used both drugs and alcohol in violation of a PO imposed special condition applicable to sex offenders while on probation. Because the use of drugs was a technical violation while the use of alcohol was not because it did not “interfere with his employment,” the Court affirmed the violation for consuming alcohol but reverse the violation for the use of drugs.



Recent Cases Attempting to Construe § 19.2-306.1

So what about a “good conduct violation?”

Undecided as yet but arguably there is nothing a court could do given the statutory language.

As the Court said in *Diaz-Urrutia*, The principles of statutory construction “render it difficult to avoid an absurd result in discerning the legislative intent from the language of this statute.”

Hopefully the General Assembly will fix this.



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