

RULE 3.790 | PROBATION AND COMMUNITY CONTROL

(a) Suspension of the Pronouncement and Imposition of Sentence; Probation or Community Control. Pronouncement and imposition of sentence of imprisonment shall not be made on a defendant who is to be placed on probation, regardless of whether the defendant has been adjudicated guilty. An order of the court placing a person on probation or community control shall place the probationer under the authority of the Department of Corrections to be supervised as provided by law. The court shall specify the length of time during which the defendant is to be supervised.

(b) Revocation of Probation or Community Control; Judgment; Sentence.

(1) Generally. Except as otherwise provided in subdivisions (b) (2) and (b) (3) below, when a probationer or a community controllee is brought before a court of competent jurisdiction charged with a violation of probation or community control, the court shall advise the person of the charge and, if the charge is admitted to be true, may immediately enter an order revoking, modifying, or continuing the probation or community control. If the violation of probation or community control is not admitted by the probationer or community controllee, the court may commit the person or release the person with or without bail to await further hearing or it may dismiss the charge of violation of probation or community control. If the charge is not admitted by the probationer or community controllee and if it is not dismissed, the court, as soon as practicable, shall give the probationer or community controllee an opportunity to be fully heard in person, by counsel, or both. After the hearing, the court may enter an order revoking, modifying, or continuing the probation or community control. Following a revocation of probation or community control, the trial court shall adjudicate the defendant guilty of the crime forming the basis of the probation or community control if no such adjudication has been made previously. Pronouncement and imposition of sentence then shall be made on the defendant.



(2) Lunsford Act Proceedings. When a probationer or community controllee is arrested for violating his or her probation or community control in a material respect and is under supervision for any criminal offense proscribed in chapter 794, Florida Statutes, section 800.04(4), Florida Statutes, section 800.04(5), Florida Statutes, section 800.04(6), Florida Statutes, section 827.071, Florida Statutes, or section 847.0145, Florida Statutes, or is a registered sexual predator or a registered sexual offender, or is under supervision for a criminal offense for which, but for the effective date, he or she would meet the registration criteria of section 775.21, Florida Statutes, section 943.0435, Florida Statutes, or section 944.607, Florida Statutes, the court must make a finding that the probationer or community controllee is not a danger to the public prior to release with or without bail.

(A) The hearing to determine whether the defendant is a danger to the public shall be conducted by a court of competent jurisdiction no sooner than 24 hours after arrest. The time for conducting the hearing may be extended at the request of the accused, or at the request of the state upon a showing of good cause.

(B) At the hearing, the defendant shall have the right to be heard in person or through counsel, to present witnesses and evidence, and to cross-examine witnesses.

(C) In determining the danger posed by the defendant's release, the court may consider:

(i) the nature and circumstances of the violation and any new offenses charged;

(ii) the defendant's past and present conduct, including convictions of crimes;

(iii) any record of arrests without conviction for crimes involving violence or sexual crimes;

(iv) any other evidence of allegations of unlawful sexual conduct or the use of violence by the defendant;



(v) the defendant's family ties, length of residence in the community, employment history, and mental condition;

(vi) the defendant's history and conduct during the probation or community control supervision from which the violation arises and any other previous supervisions, including disciplinary records of previous incarcerations;

(vii) the likelihood that the defendant will engage again in a criminal course of conduct;

(viii) the weight of the evidence against the defendant; and

(ix) any other facts the court considers relevant.

(3) Anti-Murder Act Proceedings. The provisions of this subdivision shall control over any conflicting provisions in subdivision (b)(2). When a probationer or community controllee is arrested for violating his or her probation or community control in a material respect and meets the criteria for a violent felony offender of special concern, or for certain other related categories of offender, as set forth in section 948.06(8), Florida Statutes, the defendant shall be brought before the court that granted the probation or community control and, except when the alleged violation is based solely on the defendant's failure to pay costs, fines, or restitution, shall not be granted bail or any other form of pretrial release prior to the resolution of the probation or community control violation hearing.

(A) The court shall not dismiss the probation or community control violation warrant pending against the defendant without holding a recorded violation hearing at which both the state and the accused are represented.



(B) If, after conducting the hearing, the court determines that the defendant has committed a violation of probation or community control other than a failure to pay costs, fines, or restitution, the court shall make written findings as to whether the defendant poses a danger to the community. In determining the danger to the community posed by the defendant's release, the court shall base its findings on one or more of the following:

(i) The nature and circumstances of the violation and any new offenses charged;

(ii) The defendant's present conduct, including criminal convictions;

(iii) The defendant's amenability to nonincarcerative sanctions based on his or her history and conduct during the probation or community control supervision from which the violation hearing arises and any other previous supervisions, including disciplinary records of previous incarcerations;

(iv) The weight of the evidence against the defendant; and

(v) Any other facts the court considers relevant.

(C) If the court finds that the defendant poses a danger to the community, the court shall revoke probation or community control and sentence the defendant up to the statutory maximum, or longer if permitted by law.

(D) If the court finds that the defendant does not pose a danger to the community, the court may revoke, modify, or continue the probation or community control or may place the probationer into community control as provided in section 948.06, Florida Statutes.

Committee Notes

1968 Adoption. Subdivisions (a) and (b) contain the procedural aspects of section 948.01(1), (2), and (3), Florida Statutes. It should be noted that in (b) provision is made for no pronouncements in addition to no imposition of sentence prior to the granting of probation. The terminology in section 948.01(3), Florida Statutes, is that the trial court shall “withhold the imposition of sentence.” The selected terminology is deemed preferable to the present statutory language since the latter is apparently subject to misconstruction whereby a sentence may be pronounced and merely the execution of the sentence is suspended.

The Third District Court of Appeal has indicated that the proper procedure to be followed is that probation be granted prior to sentencing. A sentence, therefore, is not a prerequisite of probation. See *Yates v. Buchanan*, 170 So.2d 72 (Fla. 3d DCA 1964); also see *Bateh v. State*, 101 So.2d 869 (Fla. 1st DCA 1958), decided by the First District Court of Appeal to the same effect.

While a trial court initially can set a probationary period at less than the maximum allowed by law, this period may be extended to the maximum prior to the expiration of the initially-set probationary period. *Pickman v. State*, 155 So.2d 646 (Fla. 1st DCA 1963). This means, therefore, that any specific time set by the court as to the probationary period is not binding if the court acts timely in modifying it. It is clear, in view of the foregoing, that if a trial judge pronounces a definite sentence and then purports to suspend its execution and place the defendant on probation for the period of time specified in the sentence, matters may become unduly complicated.

If such procedure is considered to be nothing more than an informal manner of suspending the imposition of sentence and thus adhering to present statutory requirements, it should be noted that the time specified in the “sentence” is not binding on the court with reference to subsequent modification, if timely action follows. On the other hand, if the action of the trial court is considered strictly, it would be held to be void as not in conformity with statutory requirements.

A probationary period is not a sentence, and any procedure that tends to mix them is undesirable, even if this mixture is accomplished by nothing more than the terminology used by the trial court in its desire to place a person on probation. See sections 948.04 and 948.06(1), Florida Statutes, in which clear distinctions are drawn between the period of a sentence and the period of probation.

(c) Contains the procedural aspects of section 948.06(1), Florida Statutes.

1972 Amendment. (a) of former rule deleted, as its substance is now contained in rules 3.710, 3.711, and 3.713. Former subdivisions (b) and (c) are now renumbered (a) and (b) respectively.

1988 Amendment. This amendment changes wording to conform with current responsibilities of the Department of Corrections to supervise a person placed on either probation or community control and brings community control within the scope of the rule.

