

[Cite as *State v. Hardy*, 2010-Ohio-3419.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93677

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ALONZO HARDY

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-313286

BEFORE: Stewart, P.J., Sweeney, J., and Jones, J.

RELEASED: July 22, 2010

JOURNALIZED:

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MELODY J. STEWART, P.J.:

{¶ 1} Defendant-appellant, Alonzo Hardy, appeals from the trial court's July 7, 2009 order denying his motion to vacate the September 19, 2002 judgment entry that revoked his probation and reinstated his original prison term. For the reasons that follow, we affirm.

{¶ 2} Appellant was indicted in Case No. CR-313286 in August 1994 for ten counts of felonious sexual penetration, two counts of gross sexual imposition, and one count of rape. In February 1995, he pled guilty to four counts of attempted felonious assault, one count of gross sexual imposition,

and one count of attempted rape. The court sentenced him to a prison term of eight to 15 years. On April 16, 1997, the trial court granted appellant's motion for shock probation, suspended his jail sentence, and placed him on probation for a period of five years.

{¶ 3} While on probation in 1998, appellant picked up a second criminal case, CR-365921. He was indicted in that case on numerous drug offenses and on September 11, 1998 pled guilty to one count of trafficking cocaine. He was sentenced to three years in prison. Also, on September 11, 1998, in CR-313286, the trial court found appellant had violated the terms of his probation. The court ordered appellant's probation continued.

{¶ 4} On March 23, 2002, appellant was again arrested and jailed on drug charges. On April 11, 2002, the trial court extended appellant's probation until October 11, 2002. On September 19, 2002, the trial court determined that appellant had again violated his probation. The court terminated appellant's probation and ordered the remainder of his original prison sentence into execution, with credit for time served. Appellant attempted to file a delayed appeal of this order on November 25, 2003. This court denied leave to appeal and dismissed the appeal.

{¶ 5} In March 2004, defendant filed a motion to withdraw his guilty plea in CR-313286, pursuant to Crim.R. 32.1. The trial court denied the motion. On appeal, this court found that appellant's assigned errors and

argument were related to the trial court's decision to revoke his probation on September 19, 2002, and not to any alleged error relating to his plea, and affirmed the lower court's ruling. *State v. Hardy*, 8th Dist. No. 84701, 2005-Ohio-114. We held that appellant could not use the appeal of a subsequent order to challenge the prior revocation of probation, which was never directly appealed. *Id.* at ¶9.

{¶ 6} On July 1, 2009, appellant filed a pro se "Motion to Vacate the *void ab initio* Judgment Entry of September 19, 2002." The trial court denied the motion. Appellant appeals this denial, challenging the trial court's jurisdiction to issue the September 19, 2002 order revoking his probation and ordering his original prison sentence into execution. Appellant claims that his period of probation ended on July 8, 2002 and, therefore, on September 19, 2002, the court lacked subject matter jurisdiction to reinstate the original prison sentence. We disagree.

{¶ 7} Pursuant to R.C. 2951.09, the trial court's jurisdiction to impose sentence ceases at the termination of the period of probation. See *City of Lakewood v. Davies* (1987), 35 Ohio App.3d 107, 519 N.E.2d 860, *State v. Jackson* (1995), 106 Ohio App.3d 345, 666 N.E.2d 255. However, the trial court may retain jurisdiction if the probation period is extended or if the probation period is tolled. R.C. 2951.07. In this case, the trial court placed appellant on probation for five years beginning April 16, 1997. Thus, absent

a tolling of time, appellant's probation would have expired on April 16, 2002, and the trial court would have been without jurisdiction on September 19, 2002 to revoke probation and impose the original sentence.

{¶ 8} However, R.C. 2951.07, in effect at that time, provided:

{¶ 9} "Probation under section 2951.02 of the Revised Code continues for the period that the judge or magistrate determines and, subject to division (F)(1)(a) of that section, may be extended. Except as provided in division (F)(1)(a) of that section, the total period of an offender's probation shall not exceed five years. If the probationer absconds or otherwise absents himself or herself from the jurisdiction of the court without permission from the county department of probation or the court to do so, *or if the probationer is confined in any institution for the commission of any offense whatever*, the probation period ceases to run until such time as the probationer is brought before the court for its further action." (Emphasis added.)

{¶ 10} The state argues that, pursuant to statute, appellant's probation did not expire on April 16, 2002, but was tolled for the three-year period appellant was confined in prison for the 1998 drug conviction. The state contends that as a result of this statutory tolling, on September 19, 2002, appellant's five-year probation period had not expired and the trial court retained jurisdiction to revoke appellant's probation and impose the original sentence.

{¶ 11} Appellant does not dispute that his confinement in Case No. CR-365921 tolled the running of the probationary period. However, he contends that his probation period was tolled for only 87 days, not the three years argued by the state. Appellant argues that according to the language of the statute, the probation period is tolled upon a probationer's confinement in an institution, but the tolling lasts only "until such time as the probationer is brought before the court for its further action." By applying a strict interpretation of the statute, appellant insists that the tolling of his probation period began when he was arrested and confined in jail on July 23, 1998 on the drug charges, but ended when he was brought before the court on September 11, 1998 on the probation violation. He argues that the court took "further action" when it ordered his probation continued. As a result, he claims his probationary period did not cease, but continued to run while he was confined in prison on the drug conviction. Appellant asserts that a second tolling of his probation period began on March 24, 2002, when he was arrested in the second drug case, and ended on April 30, 2002, when he was released on bond in that case. By counting only the days he was confined in jail, and not the days he was confined in prison, appellant calculates that his five-year period of probation expired on July 8, 2002, depriving the court of jurisdiction to act on September 19, 2002.

{¶ 12} In support of his contention, appellant cites to the Ohio Supreme Court decision in *Davis v. Wolfe*, 92 Ohio St.3d 549, 2001-Ohio-1281, 751 N.E.2d 1051.

{¶ 13} In that case, Richard Davis was placed on probation for five years beginning on March 26, 1993. In November 1997, the state moved to revoke Davis's probation after he was arrested on a domestic violence charge. On March 10, 1998, two weeks prior to the expiration of Davis's probation, the court continued the probation revocation matter, pending final disposition of the domestic violence charge. The court also tolled the probation until the state reinstated it by motion. The domestic violence case was eventually dismissed in September 1998 following Davis's completion of a diversion program. In February 1999, the state moved to reinstate Davis's probation. On April 26, 1999, Davis's probation was revoked for failure to pay restitution, and his original sentence was reinstated. In 2000, Davis petitioned for habeas corpus, contending that the trial court lacked jurisdiction to revoke his probation after the expiration of the probationary period. The court of appeals agreed and granted the writ. The state appealed.

{¶ 14} The Ohio Supreme Court affirmed the granting of the writ, holding that once the probationary period expired without having been extended, the sentencing court was divested of subject matter jurisdiction.

Davis at 552. The state argued that the court had jurisdiction to act because R.C. 2951.07 tolled the probation period from the date of Davis's arrest on the domestic violence charge until April 26, 1999, when the court took action and revoked his probation. The supreme court disagreed and found that Davis was brought before the common pleas court for further action on November 28, 1997, when the court released him on a personal recognizance bond. Therefore, the domestic relations charge did not toll the probationary period after that date. *Id.* at 551. The court found that even with tolling the probation period for the time Davis was in jail on the domestic violence case and other matters, the probation period had expired prior to April 26, 1999. Therefore, the sentencing court was without authority to revoke Davis's probation. *Id.*

{¶ 15} The facts in the instant case differ significantly from *Davis*. In both cases, the defendants were brought before the court on a probation violation claim after being arrested on criminal charges. However, the disposition of those claims were different. Davis was released on personal bond while the probation violation matter was continued. Before the matter was determined, the criminal charge against him was dismissed. His only incarceration was from arrest to release on bond. Appellant's probation violation matter was determined when the court found him to be a violator and continued his probation. Appellant was convicted of the drug charges

and subsequently incarcerated in prison for three years. Thus, unlike the Davis case, appellant was subject to an additional tolling event, prison confinement, after the court took “further action” on the probation violation.

{¶ 16} While we find appellant’s arguments on the construction of R.C. 2951.07 to be well presented, we cannot agree. When a court interprets a criminal statute, the language should be strictly construed against the state and liberally construed in favor of the accused. R.C. 2901.04(A). However, strict construction should not override common sense and evident statutory purpose. *State v. Sway* (1984), 15 Ohio St.3d 112, 116, 472 N.E.2d 1065.

{¶ 17} It flies in the face of reason to think that the legislature intended appellant’s period of probation to continue to run concurrent with his prison sentence, as appellant argues. It is clear from the language of the statute that the legislature intended a period of probation to “cease to run” while a probationer is incarcerated. Accepting appellant’s argument that his probation was tolled only for the time he was in jail on the pending drug charges, but not for the time he was in prison after being convicted of those charges, leads to an absurd result. “It is a cardinal rule of statutory construction that a statute should not be interpreted to yield an absurd result.” *State ex rel. Ohio Gen. Assembly v. Brunner*, 114 Ohio St.3d 386, 2007-Ohio-3780, 872 N.E.2d 912, at ¶114.

{¶ 18} Accordingly, we find that appellant's period of probation was tolled for the time he was in prison for the 1998 drug conviction. As a result of that tolling, his five-year period of probation had not yet expired on September 19, 2002, and the trial court had jurisdiction to revoke his probation and impose the original sentence. Appellant's single assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, PRESIDING JUDGE

JAMES J. SWEENEY, J., CONCURS

LARRY A. JONES, J., DISSENTS WITH
SEPARATE OPINION

LARRY A. JONES, J., DISSENTING:

{¶ 19} I respectfully dissent from my learned colleagues in the majority. I believe the record supports reversal on appellant's assignment of error in this

case. Unlike the majority, I do not find the case at bar to be as easily distinguishable from the Ohio Supreme Court's decision in *Davis v. Wolfe*, 92 Ohio St.3d 549, 2001-Ohio-1281, 751 N.E.2d 1051.

{¶ 20} Accordingly, I believe the lower court lacked jurisdiction to terminate appellant's probation and reinstate the remainder of his original sentence because the period of probation had expired.

{¶ 21} Accordingly, I would sustain appellant's first assignment of error.