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2011 IL App (3d) 100297-U

Order filed October 4, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE
OF ILLINOIS,

Plaintiff-Appellee,

v.

JOHN E. WILKINS, SR.,

Defendant-Appellant.

) Appeal from the Circuit Court
) of the 21st Judicial Circuit,
) Iroquois County, Illinois,
)
) Appeal No. 3-10-0297
) Circuit No. 04-CF-63
)
) Honorable
) Gordon L. Lustfeldt,
) Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices O'Brien and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* Notice of a petition to extend probation by mail, without personal service or the issuance of a summons or warrant, does not toll a probation period under section 5-6-4(a) of the Unified Code of Corrections (730 ILCS 5/5-6-4(a) (West 2008)).

¶ 2 Defendant, John E. Wilkins, Sr., appeals from the trial court's order revoking his probation and sentencing him to two concurrent terms of three years in prison. On appeal, defendant claims that (1) the trial court lacked jurisdiction to revoke his probation under

section 5-6-4(a) of the Unified Code of Corrections (Code) (730 ILCS 5/5-6-4(a) (West 2008)), and (2) the State failed to prove defendant committed a violation of probation by a preponderance of the evidence. We find that the trial court did not have authority to revoke defendant's probation and reverse.

¶ 3 In 2005, defendant was tried and convicted of sexually abusing two female children under the age of 13. The trial court sentenced defendant two concurrent terms of 48 months' probation. Among other things, the trial court directed defendant to "participate in Court approved counseling" from November 30, 2005, to November 30, 2009.

¶ 4 Defendant attended six individual and weekly group counseling session at the Community Resource and Counseling Center (CRCC) from December of 2005 through March 6, 2007, the date he was terminated from the counseling program. Two weeks later, the State filed a petition to revoke the defendant's probation, claiming that defendant had "willfully failed to participate in counseling as ordered in that CRCC terminated him from their program for lack of appropriate participation."

¶ 5 At the hearing, Christine Mayer, a counselor at CRCC, testified that defendant was terminated from the program because he had not identified any goals he was willing to work on, did not actively participate in group counseling, was argumentative and disruptive during group therapy, and refused to admit that he had committed sexual abuse.

¶ 6 Defendant testified that he did not participate in counseling sessions because he did not like one of the facilitators, Dr. Jeff Reynolds. Defendant claimed that he would participate if he was able to see Dr. James Simone, a mental health provider at the Veteran's Affairs Hospital.

¶ 7 The trial court found that the State proved the petition to revoke and set the cause for sentencing. At the sentencing hearing, defendant again stated that he would be willing to attend counsel with Dr. Simone. The trial court then sentenced defendant to 120 days in the county jail, but suspended the sentence to allow defendant to undergo counsel with Dr. Simone. The trial court advised defendant that if he violated his probation again, defendant could receive up to 7 years in prison.

¶ 8 The cause was called for review on February 8, 2008. A report from Dr. Simone indicated that defendant had been unsuccessfully discharged from his treatment program in November of 2007. Dr. Simone's report also noted that defendant "remains at a high risk to re-offend."

¶ 9 The trial court ordered defendant to serve the 120-day sentence. The court further stated that, after serving his sentence, defendant was to remain on probation and seek counseling.

¶ 10 Defendant served his jail term and began counseling at a new facility, East Central Illinois Humanistics, Inc. (ECIH), in the fall of 2008. On October 15, 2009, ECIH reported that defendant had attended every counseling session, but needed more time to complete the program. The report recommended that defendant's probation be extended to allow defendant the opportunity to complete his treatment within one year, as defendant's probation was due to expire on November 30, 2009.

¶ 11 Based on ECIH's recommendation, the State filed a petition to extend defendant's probation on November 6, 2009. The petition alleged that:

"[Defendant] has failed to comply with the terms or conditions of Probation in that:

a) The defendant has not completed sex offender counseling as ordered."

¶ 12 On December 1, 2009, the case was called on the petition to extend. The trial court noted that "the petition was on file before the time ran," and scheduled a hearing on the matter for December 28, 2009.

¶ 13 On December 15, 2009, defendant's probation officer, Gary Barrett, received notification that defendant had been placed on a 30-day suspension from the ECIH counseling program because he refused to participate and had failed to attending any counseling session since November 30, 2009.

¶ 14 On December 23, the State filed a petition to revoke defendant's probation, in which it stated:

"[Defendant] has willfully failed to participate in counsel as ordered in that [ECIH] suspended him for thirty (30) days from their program for lack of appropriate participation: 1) non-participation 2) absence without leave."

¶ 15 The State noticed up its petition to revoke at the hearing on December 28, 2009. Defendant was not present. Defense counsel informed the court that she was unaware that the State had filed a petition to revoke. Both parties agreed that the petitions should be heard together. As a result, the court scheduled a new hearing date for January 27, 2010.

¶ 16 At the hearing on both petitions, Barrett testified that he initially requested an extension of defendant's probation because he believed defendant still had issues that needed to be resolved, that he was receiving necessary counseling, and that he had not yet completed his treatment. Barrett noted that he filed the petition to revoke only after he received a letter from ECIH indicating that defendant had been suspended from the treatment program.

¶ 17 Defendant testified that he stopped going to his counseling sessions on November 30, 2009, because he thought his probation had expired. After his 30-day suspension, he returned to his regular counseling program.

¶ 18 The trial court found that, under section 5-6-4(a) of the Code, the filing of the petition to extend tolled the period of probation until the petition was resolved. The court also held that "the state is within its power to file [a petition to revoke] as long as the probation has been tolled by the filing of an earlier petition." The court then granted the State's petition to revoke, stating:

"The issue is did you go or not and when you were there did you participate to the best of your ability. I think the documentary evidence in the case and your own testimony, which I don't find to be very credible, prove it. I mean, you quit going despite the prior admonishments of this court, the prior sentences of this court, the prior comments of this court. You quit without consulting your own lawyer or your probation officer."

¶ 19 At sentencing, the trial court denied defendant's request for probation, noting that another probationary term would "deprecate the seriousness of the offense." The court imposed concurrent sentences of three years in the Department of Corrections and two years of mandatory supervised release.

¶ 20 ANALYSIS

¶ 21 Defendant argues that the court lacked jurisdiction to revoke his probation sentence because the State's petition to revoke was filed outside the original term of probation. The State responds that the trial court had jurisdiction because the probation period was tolled

by the filing of its petition to extend.

¶ 22 The primary rule of statutory construction is to ascertain and give effect to the legislature's intent. *In re Mary Ann P.*, 202 Ill. 2d 393 (2002). The best indication of the legislature's intent is the statute's language, which should be given its plain and ordinary meaning. *Id.* at 405. Where the language is clear and unambiguous, it is to be given effect as written. *Id.* We review issues of statutory construction *de novo*. *People v. Caballes*, 221 Ill. 2d 282 (2006).

¶ 23 Absent tolling of a probation term, a trial court lacks authority to revoke a defendant's probation once the original term has expired. *People v. Herrin*, 385 Ill. App. 3d 187 (2008); *In re Pacheco*, 67 Ill. App. 3d 396 (1978). Pursuant to section 5-6-4(a) of the Code of Corrections, a petition alleging a violation or revocation of probation may toll a defendant's probation term under certain circumstances. See 730 ILCS 5/5-6-4(a) (West 2008). That section provides:

"Except in cases where conditional discharge or supervision was imposed for a petty offense ***, when a petition is filed charging a violation of a condition, the court may:

(1) in the case of probation violations, order the issuance of a notice to the offender to be present by the County Probation Department or such other agency designated by the court to handle probation matters; ***;

(2) order a summons to the offender to be present for hearing; or

(3) order a warrant for the offender's arrest where there is danger of his fleeing the jurisdiction or causing serious harm to others or when the offender fails

to answer summons or notice from the clerk ***.

Personal service of the petition for violation of probation or the issuance of such warrant, summons or notice shall toll the period of probation *** until the final determination of the charge, and the term of probation *** shall not run until the hearing and disposition of the petition for violation." 730 ILCS 5/5-6-4(a) (West 2008).

¶ 24 The language of the statute is plain and unambiguous. The running of a term of probation may be tolled only if (1) a defendant is personally served with the petition, or (2) the circuit court orders a summons or warrant or orders the probation department or another agency to issue a notice to appear.

¶ 25 Here, the statutory tools to toll the running of defendant's term of probation were not used. The State did not personally serve defendant with a copy of the petition to extend, nor did the circuit court order a warrant or summon or order the issuance of a notice to appear. Rather the State simply filed the petition and provided proof of service by mail. Since there was no personal service upon defendant, his probationary term was not tolled by the filing of the petition to extend. Defendant's probation therefore expired on November 29, 2009. Thus, the trial court had no authority to revoke defendant's probation based on the State's petition filed on December 23, 2009. See *Pacheco*, 67 Ill. App. 3d at 398.

¶ 26 The State claims that mailing the petition to extend to defendant substantially complied with the requirements of section 5-6-4(a). We have found no authority to support that proposition. By contrast, courts have consistently held that strict compliance is necessary in cases involving violations, revocations or modifications of probation. *Herrin*,

385 Ill. App. 3d 187; *People v. Thoman*, 381 Ill. App. 3d 268 (2008). In *Thoman*, the court emphasized "strict compliance with the statutory procedures is required because the tolling provision preserves the court's jurisdiction of the subject matter where it would otherwise be wanting." *Thoman*, 381 Ill. App. 3d at 274. Mailing a copy of the petition does not fall into either of the statutorily approved methods by which jurisdiction can be preserved. Accordingly, the trial court's order revoking probation and imposing two concurrent terms of three years in prison must be vacated.

¶ 27

CONCLUSION

¶ 28

The judgment of the circuit court of Iroquois County is vacated.

¶ 29

Vacated.