

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 23679
Plaintiff-Appellee	:	
	:	Trial Court Case No. 03-CRB-2083
v.	:	
	:	
CHRISTOPHER YOUNG	:	(Criminal Appeal from Montgomery
	:	County Municipal Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 3rd day of September, 2010.

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RAYMOND DUNDES, Atty. Reg. #0041515, Area One Prosecutor's Office, 195
South Clayton Road, New Lebanon, Ohio 45345
Attorney for Plaintiff-Appellee

TINA M. McFALL, Atty. Reg. #0082586, Law Office of the Public Defender, 117
South Main Street, Suite 400, Dayton, Ohio 45422
Attorney for Defendant-Appellant

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BROGAN, J.

{¶ 1} Christopher Young appeals from the trial court's judgment entry denying his motion to terminate probation and to vacate the sentence he received following the revocation of his probation.

{¶ 2} In his sole assignment of error, Young contends that his probationary period had expired and that the trial court lacked subject-matter jurisdiction to revoke him. The State has not filed an appellate brief.

{¶ 3} The record reflects that Young pled guilty to petty theft in September 2003 after stealing a cell phone belt clip valued at \$6.99. He received six months of supervised probation with conditions. On November 14, 2003, Young was charged with violating those conditions. He failed to appear for a January 12, 2004 revocation hearing, and the trial court issued a bench warrant. By that time, he had served a little more than four months of his six-month probationary period. He was arrested on November 9, 2004 and then released on his own recognizance. Young was ordered to appear for a status hearing on November 16, 2004, but he again failed to appear. He was again arrested on December 6, 2004 and released. The trial court set a revocation hearing for December 28, 2004, but Young failed to appear. He was rearrested on January 25, 2005 and again released. The trial court reset the revocation hearing for December 13, 2006. Young appeared but his appointed counsel failed to receive notice and did not appear.

{¶ 4} The matter was reset again for January 17, 2007, but Young failed to appear. He was rearrested on April 6, 2009, and the revocation hearing was reset for April 15, 2009. Young appeared on that date, but his counsel was not notified and did not appear. The matter was reset for June 3, 2009 but Young again failed to appear and a fifth capias warrant was issued. Young turned himself in on June 4, 2009, and the revocation hearing was conducted on June 24, 2009, nearly six years after he originally had been placed on probation. The trial court revoked Young's

probation and sentenced him to the originally suspended thirty days. He served twenty one days in jail and received jail-time credit for another six days. The defendant was ordered released three days early pending resolution of a “motion to terminate probation and vacate sentence” that his attorney filed on his behalf after the revocation. The trial court overruled Young’s motion on August 25, 2009, finding that his term of probation had been tolled because he had absconded from November 14, 2003 to June 24, 2009. The trial court stayed execution of its order for Young to serve the remaining three days of his sentence pending the outcome of this appeal.

{¶ 5} In his assignment of error, Young insists that the trial court lacked subject-matter jurisdiction to revoke his probation because his probationary term expired prior to the revocation order. In support, Young relies on former R.C. 2951.09 and case law applying the statute. In relevant part, R.C. 2951.09 provides: “At the end or termination of the period of probation, the jurisdiction of the judge or magistrate to impose sentence ceases and the defendant shall be discharged.”

{¶ 6} Although R.C. 2951.09 was repealed effective January 1, 2004 as part of a major revision to Ohio’s misdemeanor sentencing statutes, Young correctly notes that it remains applicable to defendants who were sentenced on their underlying offense prior to the repeal date. See R.C. 2951.011(B)(1) (providing, with an exception not applicable to Young, that “Chapter 2951 of the Revised Code, as it existed prior to January 1, 2004, applies to a person upon whom a court imposed a sentence for a misdemeanor offense prior to January 1, 2004”); *State v. Eberth*, Mahoning App. No. 05 MA 108, 2006-Ohio-4683, ¶8, quoting Section 3 of

Am.Sub.H.B. 490 of the 124th General Assembly (“The provisions of the Revised Code in existence on or after January 1, 2004, apply to a person who commits a misdemeanor offense on or after that date.”). Because Young was convicted and sentenced for petty theft in September 2003, R.C. 2951.09 remains applicable to him.

{¶ 7} Notably, R.C. 2951.09 prevents a trial court from revoking a defendant’s probation and imposing a sentence after the probationary period has expired even if the revocation proceeding was initiated prior to the expiration. *Davis v. Wolfe*, 92 Ohio St.3d 549, 552, 2001-Ohio-1281; see, also, *State v. Miller*, Wood App. No. WD-06-086, 2007-Ohio-6364, ¶14-15. In *Davis*, the defendant was placed on five years of probation beginning on March 23, 1993. Thereafter, he was incarcerated for various reasons. The State moved for revocation on November 12, 1997, which was prior to the scheduled probation expiration date of March 23, 1998. The trial court ultimately revoked probation on April 26, 1999. Upon review, the Ohio Supreme Court reasoned in part: “Davis’s five-year probationary period, even assuming it was tolled for all of the time he was incarcerated following his probation, would have expired well before the common pleas court revoked his probation and reimposed his sentence in April 1999. Based on the foregoing, the common pleas court lacked jurisdiction to revoke his probation and sentence him on that date because his probationary period had already expired. R.C. 2951.09.” *Id.* at 552.

{¶ 8} In the present case, the trial court placed Young on six months of probation beginning on September 4, 2003. He was charged with violating his probation on November 14, 2003. The trial court did not revoke Young’s probation

and sentence him to jail until June 24, 2009, several years after his probationary term should have expired. Under R.C. 2951.09 and *Davis*, the trial court lacked jurisdiction to revoke Young's probation at that time unless something extended his probationary term.

{¶ 9} When Young was convicted and sentenced for petty theft in 2003, R.C. 2951.07 provided: "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).¹

{¶ 10} The issue before us is whether the trial court properly found that Young had absconded from court, thereby tolling his probationary term to June 24, 2009. As set forth above, Young served a little more than four months of his probation before voluntarily absenting himself from court the first time by failing to appear for a January 12, 2004 revocation hearing. Young subsequently failed to appear for numerous other scheduled hearings. Each time, he was arrested, released, and

¹R.C. 2951.07 was rewritten as part of House Bill 490, which, as discussed above, became effective January 1, 2004. The amendment altered some language in the statute and changed "probation" to "community control." We quote the former version of the statute here because it applies to Young. See R.C. 2951.011(B)(1).

eventually arrested again after failing to appear. Under R.C. 2951.07, his probationary period was tolled each time he failed to appear until he was brought before the court again.

{¶ 11} The record reflects, however, that Young was arrested on January 25, 2005, for failure to appear and brought before the trial court. He was released on his own recognizance. The trial court subsequently prepared an order for Young to appear before it on January 28, 2005, but admittedly never filed the order. See Doc. #38 at 2. As he had not been ordered to appear on that date, Young did not do so. *Id.* For reasons that are not apparent, the trial court failed to reschedule Young's case for a revocation hearing until nearly two years later on December 13, 2006. *Id.* Young appeared for this hearing, but his public defender did not. *Id.* In its ruling, the trial court acknowledged that the public defender was not sent notice of the hearing. *Id.*

{¶ 12} In light of the foregoing facts, we conclude that Young's probationary term was *not* tolled from January 25, 2005, through December 13, 2006, a period of almost twenty-five months. Pursuant to R.C. 2951.07, the tolling stopped on January 25, 2005 when Young was "brought before the court for its further action." We find nothing in the record indicating that Young absconded or otherwise caused any delay from that date through December 13, 2006, when he appeared alone for a hearing because his attorney did not receive notice. As a result, and regardless of any subsequent failures to appear by Young, we are persuaded that his six-month probationary period expired during the delay between January 25, 2005, and December 13, 2006. That being the case, the trial court lacked jurisdiction to revoke

Young's probation and sentence him to thirty days in jail on June 24, 2009. See R.C. 2951.09; *Davis*, supra.

{¶ 13} Young's assignment of error is sustained. The trial court's judgment is reversed, and Young is discharged from further criminal liability.

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FAIN and FROELICH, JJ., concur.

Copies mailed to:

Raymond Dundes
Tina M. McFall
Hon. James L. Manning