

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-11-1065

Appellee

Trial Court No. CRA0601286

v.

Larelle A. Mack

DECISION AND JUDGMENT

Appellant

Decided: June 29, 2012

* * * * *

Daniel H. Grna, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Larelle Mack, appeals a March 16, 2011 judgment of the Sylvania Municipal Court that denied his motion to terminate probation¹ under a

¹ Prior to amendment of R.C. 2951.02 and enactment of R.C. 2929.25 under H.B. 490, effective in 2003, the term “probation” was used when referring to suspended sentences for misdemeanors. *See* former R.C. 2951.02. With the statutory change, the term “community control” applies. *See* R.C. 2929.25. For ease of discussion, we use the term probation in this decision as the term was used by the court and parties in the case below.

September 27, 2006 sentence. The sentence was on a conviction for receiving stolen property, a violation of R.C. 2913.51 and a first degree misdemeanor. In the judgment, the trial court sentenced Mack to serve 60 days in jail, but suspended 50 days of the sentence. The court also ordered Mack to serve a three-year period of probation, complete a theft education program, pay restitution in the amount of \$446 and pay a \$250 fine. The court credited Mack with four days for time previously served.

{¶ 2} This is an *Anders* case. Counsel for appellant filed an appellate brief, but also filed a motion for leave to withdraw as counsel in this appeal under the procedure announced in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Pursuant to *Anders*, counsel advises the court that he is unable to find a meritorious ground for appeal and that he has provided appellant with copies of the appellate brief, the motion to withdraw as counsel, and the written notice he sent to appellant advising appellant of his right to file his own appellate brief in this appeal. Appellant has not filed his own brief.

{¶ 3} Under *Anders* procedure, counsel has identified possible trial court error:

Possible Errors for Review

The trial court committed error by failing to grant appellant's motion to terminate his probation.

{¶ 4} Under the possible assignment of error, appellant contends that the three-year period of probation imposed under his September 27, 2006 sentence expired prior to the March 16, 2011 hearing on probation revocation. Appellant argues that the trial court

erred in overruling his motion to terminate probation because the period of probation had expired.

{¶ 5} Appellant served his ten-day jail term. The Sylvania Probation Department concluded, however, that appellant had not complied with conditions of his probation. The probation department notified the trial court of probation violations in notices filed on December 22, 2006, and April 24, 2008. Proceedings on the claimed probation violations were delayed due to repeated failures of appellant to appear for scheduled hearings and due to appellant's incarceration on other criminal charges or convictions.

The issue presented under the potential assignment of error is whether the running of appellant's period of probation was extended beyond the March 11, 2011 probation hearing under the tolling provisions of R.C. 2951.07. The statute provides:

A community control sanction continues for the period that the judge or magistrate determines and, subject to the five-year limit specified in section 2929.15 or 2929.25 of the Revised Code, may be extended. If the offender under community control absconds or otherwise leaves the jurisdiction of the court without permission from the probation officer, the probation agency, or the court to do so, or if the offender is confined in any institution for the commission of any offense, the period of community control ceases to run until the time that the offender is brought before the court for its further action.

{¶ 6} The term “absconds,” as used in R.C. 2951.07, includes a willful failure to appear. *In re Townsend*, 51 Ohio St.3d 136, 137, 554 N.E.2d 1336 (1990).

December 22, 2006 Notice of Probation Violation

{¶ 7} The Sylvania Probation Department notified the trial court on December 22, 2006, that it had determined Mack had failed to comply with the terms of probation and requested the matter be set for a hearing for it to show cause why the suspension of appellant’s sentence should be lifted. The probation department contended that Mack had failed to comply with two conditions of probation—that he complete a theft education program and pay restitution to the crime victim.

{¶ 8} The trial court scheduled the matter for hearing on February 12, 2008, and issued a summons for appellant to appear at the hearing on February 12, 2008. Although appellant was served with summons on December 22, 2006, he failed to appear. The trial court issued a bench warrant for appellant’s arrest. On June 29, 2007, appellant was taken into custody on the bench warrant. The hearing proceeded on July 11, 2007.

{¶ 9} Appellant admitted at the hearing that he started, but did not complete, the theft education program that was required under his sentence. The trial court ordered appellant to serve 30 days of the 50-day suspended sentence. The court ordered that the 20-day balance of the suspended sentence remain suspended and ordered that probation would continue conditioned on payment of restitution.

{¶ 10} On July 11, 2007, the trial court also ordered that appellant’s probation would end on September 27, 2009, the date set under the original sentencing judgment.

Accordingly, the trial court determined under the order that it would not extend the period of probation because of delay caused by failure of appellant to appear at the hearing scheduled in February 2007.

{¶ 11} After the July hearing, appellant was incarcerated from July 11, 2007 through August 23, 2007 at the Wood County Jail. Of that period, 30 days are a result of the court's imposition of 30 days jail time under the July 11, 2007 judgment. The remaining 22-day period of incarceration is unrelated to this case and is subject to tolling under R.C. 2951.07.

April 24, 2008 Notice of Probation Violation

{¶ 12} On April 24, 2008, the probation department filed another notice of noncompliance. The notice stated that it had determined Mack had failed to pay restitution as ordered. The department requested the court to set a hearing where the probation department would show cause why the court should order appellant serve the remaining 20 days of his suspended sentence due to the failure.

{¶ 13} The court set the matter for hearing on May 21, 2008, and issued summons for appellant to appear. Service was unsuccessful. On May 30, 2008, the trial court issued a bench warrant for appellant's arrest. Appellant turned himself in on June 9, 2008. The court set a new hearing date of July 23, 2008.

{¶ 14} Appellant failed to appear for the hearing on July 23, 2008. The trial court issued another bench warrant for appellant's arrest. Appellant failed to appear for hearings scheduled for October 15, 2008, and November 12, 2008, and failed to appear

until after he was incarcerated due to other criminal proceedings on November 15, 2008. Under R.C. 2951.07, the period from July 23, 2008, through November 14, 2008 (84 days) is tolled for failure to appear.

{¶ 15} The record reflects that appellant was incarcerated from November 15, 2008, until May 6, 2009 (173 days). Appellant served a prison term on a burglary conviction during the period. The 173-day period of incarceration on other criminal matters tolls the probation time under R.C. 2951.07.

{¶ 16} After release from prison, the trial court scheduled the probation revocation hearing for September 22, 2009. Appellant failed to appear on September 22, 2009, and the court issued another bench warrant for appellant's arrest. For the period from March 11 until March 29, 2010, appellant was incarcerated at the Corrections Center of Northwest Ohio. The period from September 22, 2009, through March 29, 2010 totals 195 days, all of which is tolled either for failure to appear or as a period of confinement due to other criminal charges or convictions.

{¶ 17} On March 24, 2009, the trial court rescheduled the hearing on probation violation for May 19, 2010. Appellant failed to appear on May 19, 2010. The court issued another bench warrant for appellant's arrest. The record reflects that appellant was in custody from December 10 until December 15, 2010, on criminal charges pending against him in Toledo Municipal Court. The period from May 19, 2010, through December 15, 2010, totals 210 days, all of which are tolled either for failure to appear or as a period of confinement due to other criminal charges or convictions.

{¶ 18} After a series of continuances, the probation hearing proceeded on March 16, 2011. The evidence in the record demonstrates that the running of appellant's period of probation was tolled under R.C. 2951.07 for at least 684 days due to appellant's repeated failure to appear at probation revocation hearings or confinement in jail or prison on unrelated criminal charges or convictions. The tolling acted to extend the term of appellant's probation for more than five months beyond March 16, 2011.

{¶ 19} We find appellant's potential assignment of error not well-taken.

{¶ 20} This court, as required under *Anders*, has undertaken its own examination of the record to determine whether any issue of arguable merit is presented for appeal. We have found none. Accordingly, we grant the motion of appellant's counsel to withdraw as counsel in this appeal. We affirm the judgment of the Sylvania Municipal Court. Appellant is ordered to pay the costs of the appeal pursuant to App.R. 24. The clerk is ordered to serve all parties, including Larelle Mack, with notice of this decision. The clerk shall use the address of 1448 Ingomere Street, Toledo, Ohio 43609, for service of notice of this decision on Larelle Mack, unless notified of a change of address.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.