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IN THE
COURT OF APPEALS OF INDIANA

Jeramie M. Elston,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

September 1, 2022

Court of Appeals Case No.
22A-CR-316

Appeal from the
Jefferson Superior Court

The Honorable
Richard G. Striegel, Sr. Judge

Trial Court Cause Nos.
39D01-1711-CM-991
39D01-1805-F5-512

Vaidik, Judge.

Case Summary

[1] Jeramie M. Elston appeals the denial of his motion to dismiss the State's petition to revoke his probation. We affirm in part and reverse in part.

Facts and Procedural History

- [2] In November 2017, the State charged Elston with Class A misdemeanor domestic battery under cause number 39D01-1711-CM-991. In May 2018, while CM-991 was still pending, the State charged Elston with Level 5 felony obstruction of justice under cause number 39D01-1805-F5-512. On February 27, 2019, Elston and the State entered into a plea agreement covering both cases, under which Elston would plead guilty as charged in CM-991 and plead guilty to the lesser-included offense of Level 6 felony obstruction of justice, with judgment of conviction entered as a Class A misdemeanor, in F5-512. The agreement called for consecutive sentences of 180 days of jail, with credit for six days and the remaining 174 days suspended to probation, in CM-991 and 365 days in jail, with credit for fifty-six days and the remaining 309 days suspended to probation, in F5-512. The same day, the trial court accepted the plea agreement and sentenced Elston accordingly.
- [3] On August 9, 2019, the State brought a new criminal case against Elston, charging him with Level 5 felony battery for an incident on July 25. Then, on October 11, the State brought yet another case, charging Elston with Level 5 felony battery for an incident on October 10. Also on October 11, an initial hearing was held for the two new cases, during which the probation department requested and was granted “a 15 day hold for possible probation violation[.]” Appellant’s App. Vol. II pp. 50, 62. On October 22, the State filed a petition to revoke probation in both CM-991 and F5-512 based on the new battery cases.

However, no summons or warrant was issued, and neither the State nor the trial court took any action on the petition for nearly two years.

[4] On July 22, 2021, with the new battery cases still pending, the trial court set an August 31 hearing in the probation-revocation matter, and summonses were issued to Elston directing him to appear at that hearing. Elston then moved to dismiss the petition to revoke, arguing that he “has completed the term of probation under both cases and should be discharged from probation as successful.” *Id.* at 15. After a hearing, the trial court denied Elston’s motion.

[5] In November 2021, Elston pled guilty as charged in the new battery cases. A fact-finding hearing was then held in the probation-revocation matter. Elston did not dispute the alleged violations (having just pled guilty to the new battery charges) but renewed his motion to dismiss the petition. The trial court again denied that motion and ordered Elston to serve all his suspended time—174 days in CM-991 and 309 days in F5-512, for a total of 483 days.

[6] Elston now appeals.

Discussion and Decision

[7] Elston contends the trial court erred by denying his motion to dismiss the petition to revoke probation. “We review a trial court’s denial of a motion to dismiss for an abuse of discretion, and we reverse only where the trial court’s decision is clearly against the logic and effect of the facts and circumstances.” *Frink v. State*, 52 N.E.3d 842, 845 (Ind. Ct. App. 2016).

I. CM-991

[8] Elston argues the petition to revoke wasn't timely filed with regard to CM-991. He relies on Indiana Code section 35-38-2-3(a), which provides:

(a) The court may revoke a person's probation if:

(1) the person has violated a condition of probation during the probationary period; and

(2) the petition to revoke probation is filed during the probationary period or before the earlier of the following:

(A) One (1) year after the termination of probation.

(B) Forty-five (45) days after the state receives notice of the violation.

Elston contends: (1) the probationary period for CM-991 started the day he was sentenced, February 27, 2019, and ended 174 days later, on August 20, 2019; (2) the only violation that occurred during that period was the July 25 battery; (3) the State received notice of the July 25 battery no later than August 9, the day it charged Elston for that battery; (4) the State had forty-five days from August 9—until September 23—to file a petition to revoke; and (5) the October 22 petition to revoke was therefore untimely.

[9] The State responds that the probation department did not learn of the July 25 battery until the initial hearing for that crime on October 11, just eleven days before the petition to revoke was filed. Even if that is true, though, the forty-

five-day period under Section 35-38-2-3(a)(2)(B) begins to run when “the state” receives notice of the violation, not when the probation department receives notice. We agree with Elston that “the state” received notice of the July 25 battery no later than August 9, when it charged Elston for that battery. Therefore, the petition to revoke filed on October 22—seventy-four days after August 9—was untimely with regard to CM-991 and should have been dismissed as to that case.¹

II. F5-512

[10] Regarding F5-512, Elston does not dispute that the October 22, 2019 petition was timely filed during the probationary period, which started August 20, 2019, and ended 309 days later, on June 24, 2020. Rather, he contends the trial court “lost jurisdiction” over him when that period ended because the court did not issue a summons on the petition until July 2021. Appellant’s Br. p. 13. He relies on Section 35-38-2-3(b) and (c), which provide:

(b) When a petition is filed charging a violation of a condition of probation, the court may:

¹ Alternatively, the State contends that while the probationary period for CM-991 began when Elston pled and was sentenced on February 27, 2019, the period had not yet ended when the petition to revoke was filed on October 22, 2019, because the plea agreement provided that Elston would “be placed on probation for 483 days supervised by the Jefferson County Probation Department.” Appellant’s App. Vol. II p. 2. But the maximum period of probation for a misdemeanor is one year unless “the use or abuse of alcohol, drugs, or harmful substances is a contributing factor or a material element of the offense,” I.C. § 35-50-3-1, which the State does not allege as to CM-991. Therefore, Elston could not have been “placed on probation for 483 days” for his single misdemeanor conviction in CM-991. Rather, Elston was on probation for 174 days (February 27 to August 20) in CM-991 and then started 309 days of probation in F5-512—for a **total** of 483 days. The probation officer said as much at the fact-finding hearing. Tr. p. 14.

(1) order a summons to be issued to the person to appear;
or

(2) order a warrant for the person's arrest if there is a risk of the person's fleeing the jurisdiction or causing harm to others.

(c) The issuance of a summons or warrant tolls the period of probation until the final determination of the charge.

Elston argues that because the trial court didn't issue a summons before June 24, 2020, his probation was not "extended or tolled" beyond that date and the court lacked authority to adjudicate the petition after that date. Appellant's Br. p. 11.

[11] This argument fails because a defendant's probation does not need to be "extended or tolled" for a court to have the authority to adjudicate a petition to revoke after the original probation expiration date. As noted in the previous section, Section 35-38-2-3(a) provides:

(a) The court may revoke a person's probation if:

(1) the person has violated a condition of probation during the probationary period; and

(2) the petition to revoke probation is filed during the probationary period **or before the earlier of the following:**

(A) One (1) year after the termination of probation.

(B) Forty-five (45) days after the state receives notice of the violation.

(Emphasis added). The emphasized language makes clear that a petition to revoke doesn't even have to be filed, let alone adjudicated, before the expiration of the probationary period.

[12] It is true, as Elston notes, that in *Hayes v. State* a panel of this Court said that “once a probationer’s term of probation has expired, the court loses jurisdiction over that person.” 590 N.E.2d 1116, 1118 (Ind. Ct. App. 1992), *trans. denied*; see also *Murphy v. State*, 113 N.E.3d 776, 781 (Ind. Ct. App. 2018) (citing *Hayes* for the same proposition). The panel cited *White v. State*, a 1990 decision in which our Supreme Court held that “once the term of probation has expired, the court loses all jurisdiction over the defendant and is powerless to enforce any conditions set even though it is aware the defendant has failed to meet any of them.” 560 N.E.2d 45, 46 (Ind. 1990). But as another panel of this Court explained just two weeks after *Hayes*, Section 35-38-2-3(a) was amended in 1990 and 1991 to include the language explicitly allowing revocation proceedings after the probationary period ends, and *White* was decided “[u]nder the old statutory provisions governing probation revocation[.]” See *Preston v. State*, 591 N.E.2d 597, 598 (Ind. Ct. App. 1992). Under the current statute, as long as the alleged violation(s) occurred during the probationary period, and the petition to revoke is timely filed, the court has the authority to adjudicate the petition after

the expiration of the probationary period. *See Trammell v. State*, 45 N.E.3d 1212, 1215 (Ind. Ct. App. 2015) (“The disposition regarding a violation of probation may occur after the probationary period has ended, but the violation must have occurred within the probationary period.”). Here, there is no dispute that the petition was timely filed during the probationary period for F5-512, so the trial court did not abuse its discretion by denying Elston’s motion to dismiss as to that case.

[13] Affirmed in part and reversed in part.

Crone, J., and Altice, J., concur.