Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

BRIAN R. CHASTAIN
Dillman, Chastain, Byrd, LLC
Corydon, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

FILED
Sep 09 2011, 9:13 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

CYRUS C. TURPIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 22A01-1012-CR-626
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FLOYD SUPERIOR COURT
The Honorable Susan L. Orth, Judge
Cause No. 22D01-0810-FD-707

September 9, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Cyrus Turpin appeals the revocation of his probation. He argues his probation should not have been revoked based on an event he alleges occurred after his probationary period ended.

We affirm.

FACTS AND PROCEDURAL HISTORY

On October 30, 2008, Turpin entered a guilty plea to possession of a controlled substance. He was sentenced to one year in the Floyd County jail, with fifty-two days incarcerated and ten months suspended to probation. On December 24, the probation department filed a notice of probation violation[1] and the trial court issued a summons to Turpin that day. The department alleged Turpin used alcohol or drugs not prescribed by a doctor, violated the law, and did not pay his fees and costs. At a hearing on May 27, 2009, Turpin stipulated to the violations and the trial court entered a "Modified Judgment of Conviction"[2] providing eighty-two days would be served and nine months would be suspended to probation.

In April of 2010, the probation department and the State alleged additional probation violations, including Turpin's arrest on March 27, 2010, for public intoxication. After a hearing on August 11, the trial court again modified the judgment of conviction. Turpin's

[1] The State petitioned to revoke Turpin's probation on March 26, 2009, alleging the same violations.

[2] "Modified Judgment of Conviction" is the term utilized by the trial court. Turpin does not challenge this "Modified Judgment of Conviction."

entire one year sentence would be served in the Floyd County Jail.[3] Turpin brought a motion to correct error, which was denied.

DISCUSSION AND DECISION

A probation revocation hearing is in the nature of a civil proceeding, and the decision to revoke is a matter within the sound discretion of the trial court. *Dawson v. State*, 751 N.E.2d 812, 813-14 (Ind. Ct. App. 2001). The State may prove the alleged violation by only a preponderance of the evidence. *Id*. at 814. We will affirm a decision to revoke probation if there is substantial evidence of probative value to support the conclusion a probationer has violated any condition of probation. *Id.*

A court may revoke a person's probation if "the person has violated a condition of probation *during the probationary period*" and the petition to revoke probation is filed during the probationary period or before the earlier of one year after the termination of probation or forty-five days after the State receives notice of the violation. Ind. Code Ann. § 35-38-2-3 (emphasis added). Revocation is therefore improper when it is based on a violation occurring after the expiration of the term of probation. *Dawson*, 751 N.E.2d at 814.

The issuance of a summons or warrant tolls the period of probation until the final determination of the charge. Ind. Code Ann. § 35-38-2-3(c).[4] Turpin does not challenge the

---

[3] Turpin presumably was entitled to some credit time for the days he served incarcerated, but neither party addresses credit time and Turpin does not argue on appeal he was deprived of credit time he earned.

[4] The purpose of Ind. Code § 35-38-2-3(c) is to grant a trial court power to revoke probation and order a person returned to jail when it determines that such person violated probation, even though the disposition regarding that violation occurs after the original term of probation has expired. *Slinkard v. State*, 625 N.E.2d

alleged violations, but instead argues he was no longer on probation on March 27, 2010, when he was arrested for public intoxication.

The State issued Turpin orders to appear with each notice of probation violation. Each such order was a "summons" for purposes of tolling the probationary period. *See Phillips v. State*, 611 N.E.2d 198, 199 (Ind. Ct. App. 1993) (document entitled "NOTICE OF HEARING" was a summons because it was addressed to Phillips, set forth the nature of the offense as a petition to revoke probation, commanded Phillips to appear in court, and warned Phillips that failure to appear at the hearing could result in a warrant for his arrest). Each summons tolled the probationary period, and the effect of the tolling was to extend the end date of that period.[5]

In *Phillips*, the trial court placed Phillips on one and one-half years probation, which period would end January 20, 1992. A petition to revoke Phillips' probation was filed on

---

1282, 1284 (Ind. Ct. App. 1993).

In *Slinkard*, we determined the probationary period was not tolled during those periods after the State sought to revoke probation when Slinkard had not, in fact, violated probation. "[T]he trial court found Slinkard faultless during the original term of his probation. . . . Slinkard complied with his probation, cooperated in the hearings on the State's petitions, and was not responsible for the delays in the proceedings against him." *Id*. Therefore, "where no violations occur during the original period of probation, in the absence of misconduct in the hearing process or absconding from justice, the trial court may not revoke probation for events occurring after the original term of probation." *Id*.

Turpin, by contrast, was not "faultless" during the term of his probation. He stipulated to the first alleged violation; after a hearing on the second alleged violation, the trial court found Turpin violated probation; and in May of 2010 the trial court issued a bench warrant because Turpin had not appeared for a hearing.

[5] To "toll" is to "stop the running of; to abate [as in] toll the limitations period." Black's Law Dictionary 1495 (Seventh ed. 1999). As explained below, the effect of a tolling is to extend the period, even if the trial court takes no independent action to extend the probationary period, as it is authorized to do by Ind. Code § 35-38-2-3(g) (if the court finds that the person has violated a condition at any time before termination of the period, it may, as a sanction, "(2) Extend the person's probationary period for not more than one (1) year beyond the original probationary period.").

April 10, 1991. On April 25, 1991, the court held a hearing, at which Phillips was furnished with a copy of the petition to revoke probation. At the final hearing on May 22, 1991, Phillips admitted the violation and his probation was continued. He was admonished that another violation would result in the revocation of his probation. On July 2, 1991, Phillips was charged with battery. On September 25, 1991, Phillips failed to appear for a scheduled meeting with his probation officer. As a result of these two new probation violations, a second petition to revoke was filed on February 7, 1992 – after the original end date of his probationary period.

Phillips filed a motion to dismiss, contending the second petition to revoke probation was filed eighteen days after his probation had expired. We determined Phillips' probationary period was tolled for forty-two days -- from April 10, 1991, until May 22, 1991, -- and that tolling extended the ending date of the original probationary period: "The trial court correctly determined that Phillips was still on probation when the State filed its second petition to revoke his probation." *Id*. at 199. We could not have reached that conclusion had the end date of his probation not been extended by the time it was tolled.[6]

The modified judgment of conviction after the May 27, 2009, hearing provided Turpin

---

[6] Other courts have reached the same conclusion about the effect of tolling. *See, e.g., Castro v. Stanwood Sch. Dist. No. 401*, 86 P.3d 1166, 1168 (Wash. 2004) (addressing a statute that provided the "*period of limitations* . . . shall be tolled during the sixty-day period.") That Court noted the "dictionary definition of 'period' in this context is 'a temporal unit of measure,'" *id*. (quoting Webster's Third New International Dictionary at 1680 (1986)), and said "[w]hen a temporal unit of measure in the process of being measured out is temporarily stopped for a specific period of time, it resumes at the end of that specific period without a reduction in the remainder of the unit of measure." *Id*.

would serve eighty-two days in jail with nine months suspended to probation. His earliest release date from jail was June 10, 2009, so the probationary period would end nine months later, or March 7, 2010. An "Order to Appear" was filed on August 10, 2009, alleging Turpin had not paid user fees and costs and directing him to appear on September 8 "to admit or deny the allegation of probation violation." (App. at 24.) This tolled the probationary period until the hearing on September 8, 2009, and extended the period by twenty-nine days, such that it would end April 5, 2010. Turpin therefore was still on probation on March 27, 2010, when he was charged with public intoxication, and on April 5, 2010, when the next notice of probation violation was filed.

As the revocation was not based on a violation occurring after the expiration of the term of probation, we affirm.

Affirmed.

BAKER, J., and BRADFORD, J., concur.