

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONY OLIVER WARREN,

Defendant-Appellant.

UNPUBLISHED

July 29, 2010

No. 291652

Ingham Circuit Court

LC No. 03-000514-FH

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted the circuit court's order revoking his probation and status under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq.*, and sentencing him to serve seven months of jail incarceration. We remand for further factual development. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In 2003, defendant, then 19 years old, pleaded guilty to unlawful assembly, MCL 752.543, and preparing to burn personal property worth less than \$200, MCL 750.77(1)(a). At the plea proceeding, defendant admitted that in March 2003, he joined an unruly crowd in the streets of East Lansing, and there participated in the burning of some newspaper. The presentence investigation report described the melee at issue as a riot, and reports that it followed an athletic event involving Michigan State University. On September 10, 2003, the trial court imposed a sentence of nine days' jail incarceration plus three years' probation, ordered defendant to pay restitution, and granted defendant HYTA status.

Defendant admits that several violations followed, resulting in several proceedings and several short periods of jail incarceration. On February 23, 2005, the trial court extended the probationary period by two years. Most recently, on January 7, 2009, defendant, appearing in court without counsel, admitted that he failed to report to his probation agent in August and September of 2008. Defendant waived a contested hearing and pleaded guilty to violating probation. The trial court accepted the plea, and stated, "His probation is revoked. [HYTA] status is revoked. He is sentenced to seven months in [jail]."

Defendant has already served his term of jail incarceration, but nonetheless wishes to have his HYTA status restored in order to gain the attendant benefits of expungement or confidentiality in connection with this matter. Defendant argues that the trial court revoked his probation and HYTA status at a time when it no longer had jurisdiction to do so.

Defendant concedes that he did not raise this issue below. However, “subject-matter jurisdiction may not be waived and may be raised at any time.” *People v Richards*, 205 Mich App 438, 444; 517 NW2d 823 (1994). The existence of subject-matter jurisdiction is a question of law that this Court reviews de novo. See *In re Investigative Subpoenas*, 286 Mich App 201, 205; 779 NW2d 277 (2009).

The parties present competing interpretations of the record concerning the extent to which defendant’s probationary period was tolled by defendant’s alleged interruptions in his cooperation with his probation requirements. In short, defendant insists that the trial court revoked his HYTA status and probation after the specific three-year limit on probation under the HYTA, see MCL 762.13(1)(b), and, alternatively, after the general five-year limitation on probationary periods, see MCL 771.2(1). Plaintiff insists defendant had absconded from probation, thus tolling his probation, for three periods totaling 1,107 days, and therefore, that the trial court was within the three-year HYTA limit at the time of the challenged actions.

This Court has held that “a defendant’s period of probation is tolled when he absconds from probationary supervision.” *People v Ritter*, 186 Mich App 701, 711; 464 NW2d 919 (1991). Accordingly, “the period of probation ceases to run from the time a warrant is issued until the time the defendant is returned to the court’s supervision.” *Id.*

Defendant concedes that he might be considered an absconder for one 68-day period, but disputes that he can be considered to have absconded on the other two occasions. The parties agree that bench warrants were issued on December 16, 2004, June 1, 2005, and September 24, 2008, and that the December 16, 2004, warrant resulted in an arraignment on February 22, 2005. This is the period during which defendant does not dispute that he might be deemed to have absconded. However, as concerns the June 1, 2005, warrant, the register of actions lists a bench warrant hearing on February 8, 2006, but indicates no disposition. The court reporter attested by affidavit that no hearing for defendant “was scheduled or took place on February 8, 2006.” The next hearing identified in the register of actions is the January 9, 2008 proceeding at which defendant admitted violations and at which the trial court extended defendant’s probation to five years. Defendant states that nothing in the record ties this proceeding to the June 1, 2005, bench warrant, but offers no other explanation for how it came about. Defendant also suggests that the long time between the warrant and the hearing (952 days, by plaintiff’s count) indicates a lack of the required reasonable diligence in executing the warrant. See *Ritter*, 186 Mich App at 709.

With respect to the June 1, 2005 warrant, the record leaves questions concerning whether a bench warrant hearing was scheduled for February 8, 2006, and, if so, whether it took place or why it did not, and also whether the January 9, 2008, proceeding related directly to the June 1, 2005 warrant, and, if so, why over two years passed between those events. As concerns the September 24, 2008, warrant, the register of actions lists a bench warrant hearing as the event following that warrant, on December 30, 2008, but again no disposition is indicated. Then followed the proceedings of January 2009 that resulted in the revocation of probation and HYTA status. Defendant offers no argument concerning this latter period, but plaintiff asserts that defendant’s probationary period was thus tolled by 87 days. The trial court must determine

precisely for what periods defendant had in fact absconded from probation.¹ We remand this case to the trial court for further factual development as to whether defendant absconded from probation during the contested periods of time.

There may also be some concerns relating to the extension of defendant's probationary period. MCL 771.2(1) provides that, but for an exception not here at issue, "if the defendant is convicted of a felony, the probation period shall not exceed 5 years." MCL 762.13(1)(b), however, authorizes a court to impose a term of probation on a person assigned to the status of a youthful trainee "for not more than 3 years." The parties agree that on February 22, 2005, less than three years after defendant's probation and HYTA status began, the trial court extended the period of probation by two years.² The court evidently did not intend at that time to revoke HYTA status, given its statement on January 7, 2009, that HYTA had not been revoked, and its decision then to do so. In any event, upon remand the trial court should provide some explanation of the legal and factual basis for extending probation beyond the limit set forth in MCL 762.13(1)(b) while continuing HYTA status.

We remand. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck

¹ We do not necessarily deem the date of an arraignment following a bench warrant as terminating a period where a probationer was a fugitive from the system; where an arraignment is delayed for reasons attributable to the court, or to other probation authorities, but while the defendant has returned to a state of cooperation with those authorities, the delay should not be attributed to that defendant.

² The register of actions reiterates this extension in its listing for January 9, 2008.