Circuit Court for Montgomery County
Case No. 112929

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 815

September Term, 2017

SEAN D. SCHWARTZ

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: January 7, 2020

In 2009, Sean D. Schwartz pleaded guilty to and was convicted of conspiracy to commit first-degree burglary in the Circuit Court for Montgomery County. On January 22, 2010, the circuit court sentenced Schwartz to 15 years in prison, with all but 15 months suspended, along with five years of probation upon his release. Schwartz was charged with violating his probation, and, on May 18, 2017, the circuit court revoked his probation and imposed a sentence of 11 years of executed prison time.

Schwartz filed an application for leave to appeal the revocation of his probation to this Court, which we granted. Schwartz asks us to consider whether the circuit court erred by ruling that his period of probation was tolled, when the applicable statute does not provide for tolling. For the reasons that follow, we hold that the circuit court did not err in finding that Schwartz's period of probation was tolled on several occasions and that, as a result, his term of probation was active when the circuit court found him to be in violation of his probation.

FACTS AND LEGAL PROCEEDINGS

In May 2009, Schwartz and two other men were indicted on charges of first-degree burglary, conspiracy to commit first-degree burglary, and theft. On October 30, 2009, Schwartz entered a guilty plea to the conspiracy charge, and the circuit court agreed to bind itself to a 15-month cap on executed jail time.

On January 22, 2010, the circuit court sentenced Schwartz to 15 years in prison, all but 15 months suspended, along with a five-year period of supervised probation, to begin upon his release from detention. The circuit court's order required Schwartz to, *inter alia:* (1) submit to, successfully complete, and pay required costs for alcohol and drug

evaluation, testing, treatment, and education; (2) attend 90 self-help group meetings in 90 days; (3) abstain from the use of alcohol and illegal drugs; (4) submit to a mental health evaluation, complete mental health treatment, and take any medications prescribed for psychological conditions; and (5) pay $10,000 restitution to the victim of the theft.

Schwartz was released from prison on August 17, 2010, beginning his period of probation. On August 31, 2011, the circuit court issued a bench warrant for Schwartz's arrest for violation of probation ("VOP"), based on the Division of Parole and Probation's assertions that Schwartz had been non-complaint with the conditions of his probation by refusing to submit to and complete an alcohol and drug treatment program. Upon being given a second chance to comply, Schwartz entered a treatment center but left after a short period of time without informing his parole officer or his addictions counselor. He had also failed to: (1) report to his probation officer; (2) attend 90 self-help group meetings within 90 days; and (3) make any payment toward the $10,000 restitution.

Schwartz's whereabouts remained unknown until he was arrested at his home on July 13, 2012. On July 16, 2012, Schwartz was released on bond pending his VOP hearing. At a September 24, 2012 hearing, Schwartz admitted to the circuit court that he had violated the terms of his probation. The circuit court deferred sentencing for three weeks, with the hope that Schwartz would, within that time period, be accepted to drug court.[1]

[1] By the October 25, 2012 sentencing hearing, Schwartz had been accepted to drug court, which the circuit court said is "essentially your last chance."

On October 25, 2012, the circuit court revoked Schwartz's probation and sentenced him to 13 years in the Montgomery County Department of Corrections ("MCDOC") as of September 24, 2012, with the balance suspended, along with three years' supervised probation upon release.[2] As "a condition of probation," Schwartz was to serve the remaining nine months of his original 15-year sentence at a correctional facility in Montgomery County, to be transferred to the Pre-Release Center. The Pre-Release Center recommended his transfer, and the circuit court approved the transfer on November 7, 2012. The order remanding Schwartz to the Pre-Release Center was suspended effective December 23, 2012, and Schwartz was released to live with his grandmother in Wheaton.

At a February 22, 2013 status hearing, the circuit court learned that Schwartz had tested positive for cocaine. The circuit court remanded Schwartz to the correctional facility to be transferred to the Pre-Release Center for a period of nine months "as a condition of probation which can be suspended at any time by order of Drug [court]." On March 4, 2013, Schwartz was transferred to the Work Release/Pre-Release Center. On March 15, 2013, the February 22, 2013 order was suspended, and Schwartz was released, effective March 16, 2013, to reside at Eaton Sober House.

Schwartz was again charged with a VOP on or about March 18, 2013, after testing positive for cocaine and alcohol use. A bench warrant was issued on April 26, 2013.

[2] The circuit court explained that the probationary period would end upon successful graduation from drug court, even if that occurred in less than three years.

Schwartz was advised of the warrant that same day but failed to turn himself in until he was picked up on the bench warrant approximately two weeks later, on May 9, 2013.

On July 25, 2013, the circuit court entered an order that "as a condition of probation," Schwartz was sentenced to nine months in the MCDOC, with transfer to the Pre-Release Center, with the balance of an unserved portion of the sentence suspended by the drug court. On August 1, 2013, the circuit court approved a transfer to the Pre-Release Center for Schwartz to participate in the correctional program. On October 3, 2013, the order remanding Schwartz to the Pre-Release and Reentry Services Program was suspended, and Schwartz was released effective October 4, 2013 to reside at Moline Oxford House.[3]

Schwartz was again referred to the circuit court for a VOP on or about July 10, 2014, after testing positive for cocaine use on June 29, 2014. On July 2, 2014, the circuit court remanded Schwartz to the correctional facility to be held without bond until the VOP hearing on August 21, 2014.

At the August 21, 2014 VOP hearing, Schwartz again admitted to violating the terms of his probation by testing positive for cocaine. The circuit court revoked his probation and sentenced him to 13 years in prison with the MCDOC, with credit for 360 days served. the circuit court did not impose any period of probation. Schwartz moved for reconsideration of his sentence.

[3] An Oxford House is a "democratically run, self-supporting and drug free home" that aids residents in recovery from drug and alcohol addiction. *Oxford House*, https://perma.cc/VW5324FH (last visited Jan. 6, 2020).

After spending 190 days in prison, on February 26, 2015, Schwartz requested that he be returned to drug court, which the State did not oppose. The circuit court granted Schwartz's motion for reconsideration, suspended the balance of the 13-year sentence that had been imposed on August 21, 2014, and determined that the balance of the sentence was 11 years. The circuit court sentenced Schwartz to that 11 years, suspending all, with three years of supervised probation, on the condition that he return to drug court.

The circuit court imposed a sentence, "as a condition of probation," of nine months in the correctional facility to be served at the Pre-Release Center. On June 23, 2015, the order remanding Schwartz to the MCDOC was suspended and Schwartz was released, effective June 25, 2015, to reside at Moline Oxford House.

The Department of Motor Vehicles ordered Schwartz to install an ignition interlock on any vehicle he drove, but he was caught driving a rental vehicle without the device. Additionally, Schwartz had not been staying at Oxford House, instead spending nights at his mother's home without permission to do so.

On April 7, 2016, after engaging in what the circuit court deemed "dishonest behavior," Schwartz was arrested and held until a VOP hearing on May 12, 2016, at which point the court planned to consider whether to terminate Schwartz's participation in the drug court. At the May 12, 2016 hearing, Schwartz again admitted to violating the terms of his probation, by driving without an interlock device on his vehicle and by failing to obey all the rules of drug court. The circuit court deferred sentencing until July 21, 2016, remanding Schwartz to custody until he could be transferred to the Pre-Release Center.

By July 21, 2016, Schwartz had only been at the Pre-Release Center for ten days because he was "held in jail" on a pending charge of driving on a suspended license. The circuit court sentenced Schwartz to 11 years in the MCDOC, with credit for 216 days and the remaining days suspended, along with three years' probation, which, according to the circuit court, began on February 26, 2015. On October 14, 2016, the circuit court suspended the order returning Schwartz to the MCDOC, effective October 18, 2016, and released him to live at Rock Creek Oxford House.

On March 28, 2017, the circuit court noted that Schwartz had not been at Rock Creek Oxford House for four days and had missed a court-mandated urinalysis testing. His drug court case manager had been unable to locate him, so the court issued a bench warrant for Schwartz, who was to be held without bond. Schwartz's whereabouts were unknown until he was apprehended on April 25, 2017.

On May 12, 2017, Schwartz filed a written motion to dismiss the violation of probation for lack of jurisdiction, arguing that the April 18, 2017 VOP petition, relating to an alleged March 25, 2017 probation violation, was filed after his term of probation had expired by operation of law. "Even accounting for his incarceration on the violations of probation," the motion stated, Schwartz had served five years and 229 days on probation prior to the March 2017 violation, and his probation had therefore expired on September 5, 2016.

The State responded that Schwartz, in his calculation of time he was on probation, included time he was on warrant status and therefore not under probationary supervision. When only the time that Schwartz was under active supervision and actually reported to

probation was calculated, the State continued, he was only on probation for 1742 days, or 4.77 years, at the time of his most recent alleged violation.

At a VOP hearing on May 18, 2017, the circuit court heard argument on Schwartz's motion to dismiss the violation of probation for lack of jurisdiction. Schwartz argued that the circuit court had no jurisdiction to enter a VOP finding because he could not have violated a probation that he calculated to have ended on September 5, 2016, when the actions leading to the VOP occurred in March 2017.

Schwartz referenced a chart that showed the dates he was allegedly on probation, but the State disagreed with his calculation of whether and how long he was on probation. Schwartz argued that the probationary period was not tolled when he absconded from supervision or failed to report because "[t]here is no statutory exemption for that distinction . . . within the probationary statute . . . [n]or is there any case law that supports the proposition that, even if [the State] were able to prove an absconsion or lack of reporting, that that tolls the probationary period." In his view, his original period of probation began upon his release from prison on August 17, 2010, so the probationary period would have ended on August 17, 2015. After he violated his probation, the circuit court imposed a new sentence of three years' probation on October 25, 2012, which ended on October 25, 2015. So, even assuming tolling was proper, he continued, the circuit court could only properly count 67 days that should not apply to his probation, which would have

caused the probationary period to end in November 2016—still well before the alleged March 2017 VOP.[4]

The State countered that Schwartz, upon being sentenced on a VOP, signed a new probation contract on July 21, 2016, and it was that contract, which extended the probation period beyond November 2016, that had brought everyone to court that day. In addition, the State argued, the tolling should include the time Schwartz was on warrant status in 2011 because he had had no contact with the Department of Parole and Probation and was not under its supervision. Schwartz replied that the new probation contract in July 2016 was "immaterial" because a probationer cannot consent to the extension of probation beyond the five-year statutory maximum, absent a judicial exception. In his view, any tolling of his probation outside of time he spent incarcerated was not authorized by controlling law and would lead to results the legislature did not intend.

The circuit court cited *United States v. Workman* for the proposition that a probationer cannot obtain credit against the five-year period for any period of time he was not under probationary supervision by virtue of his own wrongful act. 617 F.2d 48 (4th Cir.1980). The circuit court found that, when Schwartz was on warrant status during his period of probation, his own wrongful conduct removed him from probationary supervision, and the period of probation could not be counted against the time he was on

[4] Schwartz's logic appears to be that the original probationary period, which began on August 17, 2010, would have ended on August 17, 2015. When he was found in violation of probation and sentenced on October 25, 2012, the circuit court imposed three years' probation, until October 25, 2015, which extended his probation beyond the five-year maximum by 67 days.

bench warrant status. The circuit court therefore denied Schwartz's motion to dismiss, found him in violation of probation for the fourth time, revoked his probation, terminated him from drug court, and ordered him to serve 11 years of executed prison time, with credit for 328 days served. Thereafter, Schwartz filed a timely application for leave to appeal. We granted his application for leave to appeal on December 13, 2017.

Because a review of the record and briefs did not make clear to us "during which periods the circuit court found tolling to apply or why," by order dated January 9, 2019, we remanded the matter to that court "to state individually for each period of time from August 2010 to May 2017 where Schwartz was located, under whose supervision, the circuit court's finding of whether Schwartz's probationary period was or was not tolled, and any legal or factual support for those findings."

The circuit court found, generally, that Schwartz's period of probation was tolled whenever he was incarcerated and whenever he absconded from probationary supervision by "evad[ing] law enforcement." The circuit court further found that the period of probation did not toll during Schwartz's incarceration at the Pre-Release Center "as a condition of his probation." The court concluded that, at the time of his May 18, 2017 sentencing to 11 years in prison, Schwartz had been on probation for 1,696 days, or 4.66 years.[5] Both parties filed supplemental memoranda in response.

[5] This panel thanks the circuit court for its efforts.

DISCUSSION

Schwartz contends that the circuit court erred by finding that his probation tolled on several occasions, such that, as of the alleged March 25, 2017 VOP, he had served less than the imposed five years of probation (he avers that his probationary period expired by operation of law on September 5, 2016). Although he agrees with the circuit court's conclusion that his probation did not toll when he was incarcerated in the Pre-Release Center "as a condition of his probation," in his view, the circuit court's finding that his probation tolled whenever he was on "active warrant status" and "absconding" from supervision has no foundation in Maryland law, because there is no evidence that he intentionally evaded law enforcement to avoid the execution of arrest warrants. He concedes, however, that the time he spent incarcerated "does not count toward his time on probation."

The State counters that, unless inherently incredible and unreliable, we must accept the circuit court's factual findings that Schwartz had absconded from probationary supervision to avoid execution of arrest warrants on several occasions during his probationary period. In doing so, the State argues that the circuit court properly tolled Schwartz's probationary period for 399 days when he was incarcerated and for 332 days when he was on active warrant status and absconded from probationary supervision. Based on this, the State concludes that Schwartz was still on probation when the court denied his motion to dismiss violation of probation for lack of jurisdiction. Should we hold that his probationary period did not toll when he had absconded from supervision, the State proposes the alternate position that, despite the circuit court's finding to the contrary,

Schwartz's probationary period tolled during the time he was in the Pre-Release Center as a condition of his probation, which would also result in a conclusion that he was still on probation when the circuit court denied his motion to dismiss.

As we see it, Schwartz's status between his August 2010 release from prison and his May 2017 sentencing to executed time as a result of his violations of probation falls into four categories: time periods during which he was (1) on supervised probation; (2) incarcerated in prison; (3) detained in the Pre-Release Center, as a condition of his probation; and (4) fugitive status, that is, subject to an outstanding arrest warrant or otherwise not under probationary supervision, with his whereabouts unknown. Obviously, when he was on supervised probation, Schwartz's period of probation continued to run. Neither Schwartz nor the State disputes the fact that the period of probation was properly tolled during the time that Schwartz was in prison. Schwartz agrees with the circuit court that his probationary period was not tolled while he was detained in the Pre-Release Center as a condition of his probation,[6] and the State does not make a strenuous argument otherwise, suggesting that we should so hold only if we disagree with the circuit court's conclusion that the probationary period did toll each time Schwartz was outside of probationary supervision, on warrant status or absconding from supervision.

We, therefore, turn our attention to a determination of whether Schwartz's fugitive status—subject to an open arrest warrant and/or failing to make himself available for

[6] Whether the periods Schwartz spent in the Pre-Release Center are the functional equivalent of being incarcerated is a factual determination. We defer to the circuit court's resolution of that issue.

probationary supervision—tolled his period of probation such that he was still on probation at the time that the circuit court found him in violation of his probation in March 2017 and imposed an executed prison term of 11 years in May 2017. Based on the particular facts of this matter, we hold that the circuit court did not err in finding that Schwartz's removal of himself from probationary supervision tolled his period of probation and, as a result, the circuit court properly denied his motion to dismiss the violation of probation for lack of jurisdiction.[7]

Our determination that the circuit court *can* toll the probationary period under this circumstance, however, should not be misconstrued to mean that we believe that it *must* or even *should* extend the probationary period in this or any other case. Moreover, we make no comment about the appropriate punishment for Schwartz's violation of his probation, either under the law applicable at the time of his violation or under the subsequently-enacted Justice Reinvestment Act of 2016.[8]

[7] The parties differ slightly in their calculations of the number of days Schwartz spent in a particular category of status. Because there appears to be no dispute that, if we find his probation was tolled when he was not subject to probationary supervision, he was still on probation at the time he was subject to a VOP in March 2017, we need not parse with specificity the number of days he spent in each category.

[8] The Justice Reinvestment Act, effective October 1, 2017, created a progressive discipline scheme that limits sentences for "technical" violations of probation, in an effort "to reduce selectively Maryland's prison population and use the resultant monetary savings to provide treatment to offenders before, during, and after incarceration." *Conaway v. State*, 464 Md. 505, 519 (2019); MD. CODE, CRIMINAL PROCEDURE ("CP") § 6-223(d). The statute distinguishes "technical violations" from full-blown violations, which can still result in a sentence up to the sentence that might originally have been imposed.

Section 6-222(a)(3)(i)(1) of the Criminal Procedure Article permits a circuit court to impose up to five years of probation when a portion of a criminal sentence is suspended.[9] MD. CODE, CRIMINAL PROCEDURE ("CP") § 6-222(a)(3)(i)(1). Probation may be extended beyond that five years only "[f]or the purpose of making restitution." CP § 6-222(b)(1)(i). "[T]he legislature placed a definite limit on the maximum period of probation which a defendant may be compelled to undergo. The statute provides for no exceptions or extensions of this period." *Kupfer v. State*, 287 Md. 540, 543-44 (1980).

Although the law regarding extending a probation term beyond five years is clear, if the accused is incarcerated during his or her term of probation, this intermediate incarceration may have a tolling effect, which pauses the probation until the accused's release from prison, whereupon probation once again commences.[10] "[T]he legislature did not intend that a term of imprisonment and a term of probation be simultaneously served" because it can hardly be said "that the underlying principles of probation would be served during the time when a probationer is incarcerated and beyond the reach of probationary supervision." *Catlin v. State*, 81 Md. App. 634, 642 (1990). The total probation term served, however, still must not exceed the five-year statutory maximum. The *Catlin* Court

[9] "[P]robation is a matter of grace," *Bryant v. State*, 71 Md. App. 143, 145 (1987). The main purpose of which "'is to promote the reformation and rehabilitation of the criminal.'" *Christian v. State*, 62 Md. App. 296, 304 (1985) (quoting *Note: "Legal Aspects of Probation Revocation*" 59 COLUM. L. REV. 311, 312 (1959)). The policy behind Maryland's probation statutes is that rehabilitation, if it is to be achieved at all, will be achieved within a five-year period. *Id.* at 305.

[10] We expressly noted in *Christian* that the tolling of probation by incarceration "if recognized, may produce a *chronological* period of probation in excess of the statutory maximum." 62 Md. App. at 306 n. 5. (Emphasis added).

held that, under the circumstances of the case before it, "the periods of time during which appellant was imprisoned for having violated his probation tolled the probationary term to the extent of the duration of the imprisonment." *Id*. at 640. *See also Connor v. State*, 223 Md. App. 1, 15-16 (2015) (discussing whether an obligation to register as a sex offender was tolled, we held that the defendant's registration requirement "has been tolled by the period of time that he spent in confinement after his release from incarceration in 1999").

It is clear that, pursuant to *Catlin*, incarceration during an accused's term of probation may toll the probationary period, even in the absence of express statutory authorization, and the parties here do not assert otherwise. The remaining inquiry, then, is whether tolling of a probationary period is permitted during time periods when the accused is on open warrant status for a VOP, when he may be considered to have absconded from probationary supervision.

Although the *Catlin* Court did not go so far in its holding, it did discuss how the federal courts interpret extending a probationary period beyond the maximum term prescribed by the federal statute to CP § 6-222. The Court explained that "the rule in the federal courts was best articulated by the Fourth Circuit in *Workman"*:

> The calculation of the five-year limitation period has been the subject of considerable litigation. The unifying principle implicit in the resulting decisions is that a probationer can not obtain credit against the five-year period for any period of time during which he was not, in fact, under probationary supervision by virtue of his own wrongful act. The focus has been on whether the probationer's wrongful act resulted in the termination of probationary supervision, rather than on a simple, mathematical computation of five years from the date the probationary term began. Consequently, in computing the five year period courts have excluded the time period during

> which a probationer is imprisoned on an unrelated offense . . ., is in jail for another offense and for a violation of probation, . . . or is outside the jurisdiction of the court voluntarily and not under the supervision of a probation officer.
>
> This appears to us to be the rule in a majority of the federal courts, as well as in a majority of the State courts which have considered the issue.

81 Md. App. at 641-42 (quoting *Workman*, 617 F.2d at 51) (internal citations omitted).

In *Boone v. State*, the State suggested that "appellant's evasion of probationary supervision tolled the probationary term." 55 Md. App. 663, 668 (1983). Acknowledging that "federal decisions have held that the running of the probationary term is suspended when the probationer's wrongful act results in termination of probationary supervision," we nonetheless declined to adopt such a holding because it was "unnecessary to our disposition of [the] case." *Id*. at 668-69. Our updated review of federal decisions, as well as those of our sister states, supports a finding that a probationer's wrongful acts that remove him from probationary supervision may toll the period of probation.

The Third Circuit explained "fugitive tolling" in *United States v. Island*:

> Congress designed supervised release . . . to be "a form of postconfinement monitoring overseen by the sentencing court." "[T]he supervised release term constitutes part of the original sentence, and the congressional intent is for defendants to serve their full release term." As the Supreme Court has explained, "Congress intended supervised release to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends," providing "individuals with postconfinement assistance" through the supervision of the court. The court can provide such assistance because, "[w]hile on supervised release, the offender [is] required to abide by certain conditions," such as regularly reporting to a probation officer, pursuing schooling or work, and refraining from further criminal activity[.] Congress authorized

supervising courts to revoke supervised release and order reimprisonment when defendants fail to meet their release conditions.

The plain language of the supervised release statutory provisions is … silent on how a defendant's failure to comply with release terms effects [sic] the running of his sentence. Though those provisions do not expressly provide for tolling when a defendant absconds from supervision, fugitive tolling furthers the purposes of the supervised release scheme. When a defendant under supervised release fails to meet release conditions by absconding from supervision, a court cannot effectively oversee his transition to the community. The majority of Courts of Appeals to address this question have accordingly determined a defendant's term of supervised release is tolled during the period he is of "fugitive" status, *i.e.*, fails to report and comply with the terms of his postrelease sentence.

The fugitive tolling doctrine reflects two key principles that align with the purposes of supervised release. *First*, the rehabilitative goals of supervised release are served only when defendants abide by the terms of their supervision—those goals are not served simply by the passage of time during the release term. "Mere lapse of time without imprisonment or other restraint contemplated by the law does not constitute service of sentence." A supervising court cannot offer postconfinement assistance or ensure compliance with the terms of release while a defendant is truant.

Second, the fugitive tolling doctrine reflects the settled principle that defendants are not generally credited for misdeeds, such as failing to comply with the terms of supervised release. As the Second Circuit noted, the fugitive tolling doctrine corresponds to a variety of procedural doctrines that prevent rewarding fugitive defendants for misconduct: fugitive defendants are barred from invoking statutes of limitations[.]

Because the fugitive tolling doctrine helps realize the design and purpose of supervised release, we join the majority of circuits to have considered the question and recognize a supervised release term tolls while a defendant is of fugitive

> status. A defendant cannot count toward his sentence time spent out of the court's supervision as a consequence of his own doing. At the same time, the defendant's absence does not free him to violate the terms of his supervised release without consequence; the defendant remains responsible for his violating conduct. Fugitive tolling does not lift the conditions of a defendant's supervised release, but instead recognizes the goals of supervised release are not served when defendants deliberately fail to follow its conditions.

916 F.3d 249, 252-54 (3d Cir. 2019) (internal citations omitted), *cert. denied*, No. 19-5891, 2019 WL 5150715 (U.S. Oct. 15, 2019). *See also United States v. Thompson*, 924 F.3d 122, 128-29 (4th Cir. 2019) (finding that a probationer may be considered a fugitive for tolling purposes when he absconds from supervision, even when no warrant against him has been issued); *United States v. Ignacio Juarez*, 601 F.3d 885, 890 (9th Cir. 2010) (stating that "[f]ugitive tolling begins when the defendant absconds from supervision—making it impossible for the Probation Office to supervise his actions—and ends when federal authorities are capable of resuming supervision."); *Mantor v. State*, 359 P.3d 985, 987-88 (Alaska Ct. App. 2015) (stating that when probationary supervision is interrupted because of the defendant's misconduct, the defendant's period of probation tolls; this principle applies regardless of whether the interruption occurs because the defendant absconds from supervision or because the defendant is incarcerated for misconduct); *Alexander v. United States*, 116 A.3d 444, 447-48 (D.C. 2015) (holding that when a defendant absconds and court issues bench warrant for his arrest, the defendant's fugitive status begins and tolls the probationary period until authorities are capable of resuming supervision); *Canchola v. State*, 255 So. 3d 442, 446 (Fla. Dist. Ct. App. 2018) (stating that "our court and sister courts of appeal have recognized the automatic tolling of a probationary term for a

probationer who absconds during his probationary term."); *State v. Hackett*, 363 S.C. 177, 182 (Ct. App. 2005) (discussing that "[t]o allow a probationer who is initially spared from revocation of probation to then abscond from supervision and to escape any further punishment, free and clear of all consequences, as long as he manages to elude apprehension for a set amount of time would lead to an absurd result.").

We find the discussion in *Island* and the other cases persuasive. We hold that the circuit court did not err as a matter of law in tolling Schwartz's probation during the time periods that he was either subject to open arrest warrants or made himself unavailable for probationary supervision, i.e., when he was on fugitive status. On several occasions Schwartz failed to report to his probation officer, who was unable to locate him. Schwartz further failed to report for scheduled appointments and drug tests. And, he did not turn himself in when advised of a warrant for his arrest. The months Schwartz spent outside the court's supervision (failing to complete the express terms of his probation) are not required to count toward his probationary term. Considering the tolled time periods he was on warrant status and out of the circuit court's supervision, the circuit court did not err by finding that the March 25, 2017 VOP occurred while Schwartz was still on probation. We, therefore, affirm the circuit court's denial of his motion to dismiss the violation of probation for lack of jurisdiction.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

The correction notice for this opinion can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0815s17cn.pdf