Filed 3/1/11

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JOSE LEIVA,<br><br>Defendant and Appellant. | B214397<br><br>(Los Angeles County<br>Super. Ct. No. PA035556) |

APPEALS from judgments of the Superior Court of Los Angeles County, Barbara M. Scheper, Judge. Affirmed.

Meredith J. Watts, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Stephanie A. Miyoshi and David C. Cook, Deputy Attorneys General, for Plaintiff and Respondent.

Michael P. Judge, Public Defender, Albert J. Menaster and Karen Nash, Deputy Public Defenders, for the Public Defender of Los Angeles County as Amicus Curiae.

Defendant Jose Leiva appeals from judgments entered following separate findings that he violated the terms and conditions of his grant of probation.[1] His principal contention is the trial court lacked jurisdiction to revoke probation on either occasion because probation had expired by operation of law. He also asserts there is insufficient evidence to support the court's findings and the court considered inadmissible evidence. We conclude that defendant's claims lack merit and affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

On March 28, 2000, defendant and another individual were jointly charged in a 10-count complaint that alleged they committed the crimes of grand theft from a vehicle, burglary and attempted burglary of a vehicle, and tampering with a vehicle. (Pen. Code, §§ 487, subd. (a), 459, 664/459, Veh. Code, § 10852.)[2] On that same day, defendant pled no contest to three counts of burglary of a vehicle. At sentencing on April 11, defendant was placed on probation for three years. Included in the terms and conditions of probation were orders that defendant: (1) serve 365 days in the county jail; (2) report to his probation officer within one business day of his release from custody; (3) not reenter the country illegally if deported; (4) report to the probation officer within 24 hours of his return to the country and present documentation proving that he was in the United States legally; and (5) pay restitution to all of the victims.

On September 21, 2001, due to defendant's failure to report to his probation officer and to make restitution payments, probation was summarily revoked and a bench warrant was issued for his arrest.

On November 10, 2008, defendant appeared in court after his arrest on the outstanding warrant. According to a supplemental probation report, defendant was the

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[1] Defendant filed an appeal after each hearing (B214397 & B220540). We ordered the appeals consolidated.

[2] All further statutory references are to the Penal Code.

subject of a traffic stop and a warrant check revealed the outstanding bench warrant. The probation officer also wrote that defendant had never reported to the probation department and had failed to pay court-ordered restitution. As a result of the November proceeding, the warrant for defendant's arrest was recalled, his probation remained revoked, and the case was set for a December 1 hearing.

On December 1, defendant's attorney asked that another probation report be prepared to determine whether defendant was deported after his release from custody. Counsel suggested that defendant may have failed to report to probation due to his deportation. Another supplemental report was ordered and the matter was continued several times. A probation violation hearing was conducted on February 13, 2009.

At the February 13 hearing, defendant's counsel argued that the court could not reinstate defendant's probation because the term had expired by operation of law. On the merits, counsel conceded the court could consider defendant's statement that he was deported to El Salvador after his release in 2001 and remained there until he returned to the United States in February 2007, but urged there was insufficient evidence establishing that any failure to report to probation was willful. The court found defendant in violation of probation for failing to report, relying on his statement that he had returned to the country in February 2007. Probation was reinstated on the original terms and conditions, with defendant receiving credit for time served. Defendant filed a timely appeal.

On May 14, 2009, defendant's case was called. He was not present, but was represented by the same attorney who previously had appeared on his behalf. According to the minute order, the court received a supplemental probation report stating that defendant had been deported to El Salvador and had not reported to his probation officer. The court was also provided with a letter defendant had written to the probation department, explaining that he was deported to El Salvador in March 2009 and was trying to contact his probation officer by telephone. On June 9, 2009, defendant's probation was revoked and a warrant for his arrest was issued.

On September 17, 2009, defendant appeared in court after being arrested on the warrant after his return to this state. His counsel again argued that the court had no

jurisdiction because defendant's probationary term had expired. This was so, she asserted, because the original three-year term began on April 11, 2000, and defendant did not willfully violate any of the terms and conditions of probation in the ensuing three years. Counsel stated that the prior court order extending probation was being appealed. Noting that it had to assume the prior order was valid pending appeal, the court ordered that probation remain revoked. Defendant was retained in custody, a supplemental report was ordered, and the case was continued.

On October 9, 2009, a probation violation hearing was held. Terrence Rachel, a deportation officer with Immigration and Customs Enforcement (ICE) testified. He had held different positions with that department (or its predecessor) since 2001. Over defendant's hearsay and Sixth Amendment objections, Rachel identified the following certified copies of documents: (1) a September 23, 2005 order issued by an immigration judge ordering the removal of "Jose Mario Leiva-Gomez" from the United States; (2) a warrant of removal for the same individual that also was issued on September 23, 2005, and stated that he was physically removed from the country and returned to El Salvador on October 26, 2005; (3) a warrant of removal for "Jose Mario Leiva-Gomez" issued on February 19, 2009, that stated he illegally entered the country in February 2007; and (4) a deportation order stating that "Jose Mario Leiva-Gomez" was removed from the country and returned to El Salvador on March 18, 2009. Rachel said there was no record in the immigration system that Jose Mario Leiva-Gomez had received a waiver allowing him to legally reenter the country following his deportation in 2005. Thus, the 2005 removal order barred Leiva-Gomez from legally reentering the country for 20 years.

The court found defendant violated his probation by entering the country illegally, and on November 9, 2009, he was sentenced to two years in prison. Defendant filed a timely appeal.

After defendant filed his opening briefs (he filed separate briefs prior to our consolidation order), we granted the Los Angeles County Public Defender's request to file a brief as amicus curiae.

## DISCUSSION

### I. The Trial Court Had Jurisdiction to Revoke Probation

Relying on *People v. Tapia* (2001) 91 Cal.App.4th 738 (*Tapia*) (disapproved on another ground in *People v. Wagner* (2009) 45 Cal.4th 1039, 1061, fn. 10), defendant contends the trial court lacked jurisdiction to find him in violation of probation at either the February 2009 or October 2009 hearing. He argues that due to the prosecution's failure to establish he violated a condition of probation during the original three-year probationary term that began in April 2000, probation expired in April 2003.

The facts in *Tapia* are virtually identical to those in the present case. In July 1996, Tapia pled guilty to one count of robbery and was placed on probation for three years. Among other conditions, he was ordered to report to the probation department within 24 hours of his release from custody, to not reenter the country illegally, and if he did return, to report to the probation officer within 24 hours of his return with documentation that he was in the country legally. (*Tapia*, *supra*, 91 Cal.App.4th at pp. 739-740.)

Upon his release from custody in late 1996, Tapia was deported to Mexico. In March 1997, the trial court was informed that he had failed to report to the probation department. Tapia's probation was summarily revoked and a bench warrant was issued. In September 2000, Tapia was arrested on the warrant after he returned to California. At the probation violation hearing, he admitted that he did not report to his probation officer upon his return and show proof that he was in the country legally. The court found Tapia in violation of probation, reinstated probation, and extended its term to March 2003. Tapia appealed, arguing the trial court lacked jurisdiction to extend the term of probation. (*Tapia*, *supra*, 91 Cal.App.4th at p. 740.)

The appellate court noted that the basis for the 1997 revocation of Tapia's probation, his alleged failure to report to the probation department upon his release from custody, was never proven. "Since that violation was not proved, the term of probation expired in July 1999—before Tapia reentered the United States. Since his probation had

expired by the time he did reenter in September 2000, the trial court had no jurisdiction to extend the period of probation." (*Tapia*, *supra*, 91 Cal.App.4th at p. 740.)

The Attorney General argued that the trial court's March 1997 summary revocation of Tapia's probation tolled the running of the probationary term, citing the language in Penal Code section 1203.2, subdivision (a). That provision states in relevant part: "The revocation, summary or otherwise, shall serve to toll the running of the probationary period." The *Tapia* court responded, "while we agree that the period is tolled by summary revocation, and that the period of tolling can be tacked onto the probationary period if probation is reinstated, we do not agree that these rules apply where, as here, there is no proof or admission of a violation during the period of probation." (*Tapia*, *supra*, 91 Cal.App.4th at p. 741.) The court concluded: "[I]t is clear that a summary revocation of probation suspends the running of the probation period and permits extension of the term of probation if, and only if, probation is reinstated based upon a violation that occurred during the unextended period of probation." (*Ibid.*) For the reasons set forth below, we find the reasoning of *Tapia* unpersuasive and decline to follow it.

We begin with the language of the tolling provision in section 1203.2, subdivision (a). It was added by a 1977 amendment that altered subdivision (a) in two respects. The first change allowed a trial court to revoke probation upon "the issuance of a warrant for rearrest." (Stats. 1977, c. 358, § 1, p. 1330.) The second change added the last sentence of the subdivision: "The revocation, summary or otherwise, shall serve to toll the running of the probationary period." (*Ibid*.) The language addresses a single aspect of the probationary term—its expiration date. As explained by the court in *People v. DePaul* (1982) 137 Cal.App.3d 409, 413 (*DePaul*), prior to the 1977 amendment, nothing in subdivision (a) prevented the probationary period from continuing to run despite revocation. The court interpreted the plain language of the tolling provision and said succinctly "that a revocation of probation suspends the running of the probationary period and if probation is reinstated the period of revocation cannot be counted in calculating the expiration date." (*Id.* at p. 415.)

Applying that rule here, the period between the September 21, 2001 summary revocation of defendant's probation and the trial court's February 13, 2009 reinstatement of his probation does not count in calculating the expiration date of his probation. Put simply, when defendant's probation was reinstated in February 2009, he had not completed the original three-year term of probation that began in April 2000. *Tapia's* conclusion that a revocation of probation leads to a temporary tolling of the probationary period that expires upon a failure to prove a violation during the original probationary term is not supported by the statutory language or the interpretation of the *DePaul* court. There is nothing in the statute to suggest the tolling provision operates under certain circumstances and does not under others.

Indeed, *Tapia's* interpretation of the tolling provision violates basic principles of statutory construction. "In construing a statute, our role is to ascertain the Legislature's intent so as to effectuate the purpose of the law. [Citation.] In determining intent, we must look first to the words of the statute because they are the most reliable indicator of legislative intent. [Citation.] If the statutory language is clear and unambiguous, the plain meaning of the statute governs. [Citation.]" (*People v. Lopez* (2003) 31 Cal.4th 1051, 1056.) "[I]n construing this, or any statute, we may not broaden or narrow the scope of the provision by reading into it language that does not appear in it or reading out of it language that does. 'Our office . . . "is simply to ascertain and declare" what is in the relevant statutes, "not to insert what has been omitted, or to omit what has been inserted."' [Citation.] """[A] court . . . may not rewrite the statute to conform to an assumed intention which does not appear from its language.'" [Citation.]" (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545.) The *Tapia* court's reading of section 1203.2, subdivision (a) adds language to the statute that is simply not there. If the *Tapia* panel is correct, the tolling provision should read: The revocation, summary or otherwise, shall serve to toll the running of the probationary period, *if, and only if, it is proven that the probationer violated the terms of his or her probation during the period of the original probationary term*. If the Legislature intended to restrict the application of the tolling provision to violations that occurred during the original probationary term, it knows how

to use language clearly expressing that intent. (See *People v. Jackson* (2005) 129 Cal.App.4th 129, 169.)[3]

In our view, the language of the tolling provision is clear. It states that a revocation of probation stops the running of the probationary period—nothing more, nothing less. The statute does not address the substantive issue presented in this appeal: When is a probationer relieved of his or her obligation to abide by the terms and conditions of the probationary grant? We have to look beyond the language of section 1203.2, subdivision (a) to find the answer.

Interestingly, the answer is located in a case relied on in *Tapia*, *People v. Lewis* (1992) 7 Cal.App.4th 1949 (*Lewis*). A close reading of the case, however, demonstrates that it does not support the *Tapia* holding. In *Lewis*, the defendant admitted a probation violation on March 1, 1991, sentencing on the violation was continued until April 1, and he was released from custody. On April 1, the court reinstated and extended probation. On May 1, 1991, the prosecution filed a petition seeking to revoke the defendant's probation based on a March 29, 1991 arrest. After the probation violation hearing, the defendant was found in violation and sentenced to state prison. On appeal, he argued that he was not subject to the terms of his probation between his March 1 admission and the April 1 sentencing hearing. (*Id.* at pp. 1951-1952.)

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[3] The dissent contends we should not interpret the statutory language literally because it would lead to unreasonable consequences that the Legislature could not have intended. (Dis. opn., *post*, at p. 4.) It states the Assembly Committee on Criminal Justice's analysis of the 1977 amendment informs us of the Legislature's intent. (*Id*. at pp. 4-5.) The Committee wrote that the proponents of the bill concluded the tolling provision was necessary to allow trial courts to conduct a new probation violation hearing in the event a prior revocation order was reversed on appeal. Whatever the proponents of the bill may have intended, the language of the tolling provision makes it clear that the Legislature's intent was much broader. As we noted above, the court in *DePaul* concluded that a revocation of probation suspends the running of the probationary period in all cases, not simply those on appeal. In any event, the Assembly Committee's report offers little assistance in resolving the issue presented in this appeal as it did not address whether a probationer is obligated to comply with the terms and conditions of probation during the entire period of revocation.

In rejecting the defendant's contention, the *Lewis* court wrote: "There is no 'window' during the probation *term* which allows the probationer to be free from the terms and conditions originally imposed or later modified, nor during the interim period at issue in this case. Further, the trial court has the power over the defendant at all times during the *term* of probation until the defendant is discharged from probation or the court loses jurisdiction upon the defendant being sentenced to prison. . . . [¶] . . . [¶] Thus, the terms and conditions imposed upon the defendant placed on probation may be enforced at any time during the *term* of probation, and the procedures utilized to enforce the terms and conditions of probation do not toll or suspend for any period of time the terms and conditions of the probation grant. The defendant is not free of these restrictions until the probation period has terminated or he or she has been discharged by law from the probationary term. [Fn. omitted.]" (*Lewis*, *supra*, 7 Cal.App.4th at pp. 1954-1955.) The court then pointed out in a footnote that, "However, '[t]he revocation, summary or otherwise, shall serve to toll the running of the probationary *period*.' (§ 1203.2, subd. (a), italics added.)" (*Id.* at p. 1955, fn. 4.)

There is no dispute that the running of Leiva's probationary term was tolled when the court summarily revoked probation in September 2001. *Lewis* holds that the trial court "[had] the power" over defendant until he was "discharged from probation or the court [lost] jurisdiction upon [his] being sentenced to prison." (*Lewis*, *supra*, 7 Cal.App.4th at p. 1954.) Neither event occurred prior to defendant reentering the country in February 2007 and failing to report to his probation officer with documentation establishing he was here legally. Since defendant's probationary term had not expired because of the tolling provision, he was still bound by the conditions of probation.

Our interpretation of the tolling provision comports with another maxim of statutory construction. We are to construe a statute in a manner that is harmonious with its legislative purpose. (*Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 1436, 1449.) We must not lose sight of the fact that section 1203.2 is part of the statutory scheme setting forth the court's authority to grant probation in lieu of a harsher sentence. "A grant of probation is *intended* to afford the defendant an opportunity to demonstrate

over the prescribed probationary term that his or her conduct has reformed to the degree that punishment for the offense may be mitigated or waived." (*People v. Feyrer* (2010) 48 Cal.4th 426, 439.) Where, as here, a probationer is deported upon his release from custody, he cannot be found to be in willful violation of his probation for failing to report to the probation department. (*People v. Galvan* (2007) 155 Cal.App.4th 978, 984.) That being the case, if probation were to expire absent proof of a violation during the original probationary term, a probationer, such as defendant, who is deported, returns to this country illegally and is not caught until after the original term of probation expires, could potentially escape from ever having to comply with his or her probationary conditions. Concluding that defendant, who illegally reentered this country, chose not to report to his probation officer upon returning with proof that he was here legally, and failed to pay his financial obligations, has demonstrated that his conduct "has reformed to the degree that punishment for the offense may be mitigated or waived" flies in the face of common sense. Defendant, who committed a string of acts that violated the conditions of his probation, would receive the same benefit as one who complied with all the terms of his or her probationary grant—avoidance of a more severe sentence by *successfully* completing probation. Such a result is hardly consistent with the rehabilitative purpose of a grant of probation.

We conclude, as *Lewis* did, that until a probationary term expires or probation is terminated, a defendant is required to comply with the conditions of probation. Pursuant to section 1203.2, subdivision (a), the court's September 2001 revocation of defendant's probation continued his probationary term until the court took further action either discharging him from the obligations of his probationary grant or sentencing him to prison. This interpretation gives full effect to the plain language of the tolling provision. Of course, the Legislature may limit a court's authority to modify or terminate probation to cases where a violation occurs during the original unexpired probationary period. As of yet, it has chosen not to do so. As a result, the trial court had jurisdiction to modify defendant's probation at the violation hearing in February 2009 and to terminate probation in October 2009.

## II. Sufficient Evidence Supports the February 13, 2009 Finding

Defendant contends the single hearsay statement from the supplemental probation report upon which the court relied is insufficient to prove that he failed to report to probation or reentered the country illegally. We are not persuaded.

The court found "that Mr. Leiva is in violation of probation for [failing] to report to probation. I am relying on his statement that he has been back in the United States since February of 2007, and not his citizenship status since I think more would be required to establish that." Thus, the court determined that defendant violated his probation by reentering the country and failing to report to his probation officer within 24 hours of his return with proof that he was here legally.

The court considered information contained in the supplemental probation report. Defendant did not challenge the admissibility of the information in that report during the hearing and does not do so on appeal. The report included defendant's admission that he returned to this country in 2007 and also informed the court that defendant had never reported to his probation officer, a fact that is not in dispute. In the face of nothing to the contrary, the probation report contained sufficient evidence supporting the court's finding that defendant reentered the country and did not report to the probation department within 24 hours of his return, an express condition of his grant of probation.

The case defendant cites, *People v. Smith* (1970) 12 Cal.App.3d 621, does not alter our conclusion. Contrary to defendant's contention, the case does not hold that a court may not rely on information contained in a probation report to find a probationer in violation. Instead, the *Smith* court stated, "We fail to find in the special report any allegation of *fact* from which the court could reasonably find that the appellant had violated the terms of his probation." (*Id.* at p. 627.) In other words, the report contained insufficient evidence establishing a violation. That is not the case here.

Defendant claims the court's reliance on his uncorroborated statement to the probation officer violated his right to due process. He is incorrect. In the context of a probation violation hearing, a probationer must be provided counsel, written notice of the

alleged violation of probation, and an opportunity to be heard in person, including the right to present evidence and cross-examine adverse witnesses. (*People v. Vickers* (1972) 8 Cal.3d 451, 457-462.) Defendant had an opportunity to contest the accuracy of the statement in the report that was attributed to him. He declined to do so. Due process requires no more.

### III. The Evidence Underlying the October 2009 Finding Was Admissible

As discussed, in October 2009, the prosecution alleged defendant had violated his probation by reentering the country illegally. A deportation officer employed by ICE was shown various documents and testified they established that defendant had been removed from the country in October 2005 and March 2009 and did not have a right to return. Defendant contends the documentary evidence received by the court violated his right to confrontation as interpreted by the United States Supreme Court in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [174 L.Ed.2d 314, 129 S.Ct. 2527]. The principles set forth in that case do not apply here.

"Revocation of probation is not part of a criminal prosecution, and therefore the full panoply of rights due in a criminal trial does not apply to probation revocations." (*People v. Stanphill* (2009) 170 Cal.App.4th 61, 72.) The cases of the United States Supreme Court, most recently *Melendez-Diaz*, which bar testimonial hearsay in criminal prosecutions where the declarant is unavailable and the defendant did not have a prior opportunity to cross-examine the declarant are inapplicable to probation revocation proceedings. This is so "because the Sixth Amendment confrontation clause applies only to 'criminal prosecutions,' and a probation revocation hearing is not a 'criminal prosecution.' [Citations.]" (*Id.* at p. 78; *People v. Gomez* (2010) 181 Cal.App.4th 1028, 1039 ["[T]he confrontation clause is inapplicable to the probation revocation context."].)

Defendant repeats his due process argument. Again, we reject it. During the October 2009 hearing, defendant had an opportunity to cross-examine the witness against him and the evidence presented consisted of certified copies of official government records, the type of reliable documents that may serve as substitutes for live testimony at

probation violation hearings. (See *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 782, fn. 5; *People v. Maki* (1985) 39 Cal.3d 707, 716-717.) Defendant was afforded the due process protection to which he was entitled.

## DISPOSITION

The judgments are affirmed.

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SUZUKAWA, J.

I concur:

WILLHITE, J.

EPSTEIN, P. J.

I respectfully dissent.

Penal Code section 1203.2, subdivision (a),[1] provides for revocation of probation at any time during the probationary period. The statute also provides that revocation of probation, whether summary or otherwise, tolls the running of the probationary period. The issue in this case is whether the tolling provision allows the trial court to revoke probation based on a violation occurring *after* the original period of probation if there had been a summary revocation during that period. I would hold that it does not. And for the reasons that follow, I do not believe the case of *People v. Tapia* (2001) 91 Cal.App.4th 738, was wrongly decided on this issue.

As recounted in the majority opinion, after a car burglary crime spree, defendants Jose Mario Leiva and Yashi Valmir Lima were charged on March 31, 2000 with 10 felony counts of vehicle burglary and related crimes. Defendant pled nolo contendere to three counts of second degree burglary of a vehicle in violation of section 459. He told the probation officer that he had emigrated from El Salvador and was in the United States legally on a temporary work permit. On April 11, 2000, imposition of sentence was suspended, and defendant was placed on formal probation for three years on each count, to run concurrently, under the condition that he serve 365 days in county jail, make restitution to the victims, and pay a restitution fine. The remaining counts were dismissed. Defendant's conditions of probation included reporting to his probation officer within one business day after release from custody, and, if he left the country voluntarily or was deported, that he "not return unless legally entitled to do so." The court further ordered that, if he did return, he was to report to the probation department within one business day and present documentation proving that he was in the country legally.

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[1] All statutory references are to the Penal Code.

On September 21, 2001, the case was called for a probation violation hearing based on an allegation that defendant failed to report to his probation officer as required. The court summarily revoked probation and issued a bench warrant.

In November 2008, defendant was stopped for talking on a cell phone while driving. A warrant check revealed the September 2001 warrant, and defendant was arrested. At the November 10, 2008 hearing, the court continued the matter to December 1 for a supplemental probation report.

According to the supplemental report, defendant had failed to report to his probation officer and failed to make any restitution payments. Expressing the hope that defendant would respond to admonishment from the court, the report recommended finding a probation violation and continuing probation on the same terms and conditions. At the December 1, 2008 hearing, the court noted that defendant had not suffered any new arrests or convictions since being placed on probation. Defense counsel argued the reason defendant did not report might be that he was deported. The court ordered another supplemental probation report to address the circumstances of defendant's arrest and determine whether defendant was deported after his release from custody.

According to the second supplemental report, dated December 12, 2008, defendant told the probation officer that he had been deported to El Salvador upon his release from jail. He remained in El Salvador from 2001 to 2007, when he returned to the United States illegally.

Section 1203.2, subdivision (a), provides that "[a]t any time during the probationary period of a person released on probation . . . if any probation officer or peace officer has probable cause to believe that the probationer is violating any term or condition of his or her probation or conditional sentence, the officer may, without warrant or other process and at any time until the final disposition of the case, rearrest the person and bring him or her before the court or the court may, in its discretion, issue a warrant for his or her rearrest. Upon such rearrest, or upon the issuance of a warrant for rearrest the court may revoke and terminate such probation if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation

officer or otherwise that the person has violated any of the conditions of his or her probation, has become abandoned to improper associates or a vicious life, or has subsequently committed other offenses, regardless whether he or she has been prosecuted for such offenses. . . . *The revocation, summary or otherwise, shall serve to toll the running of the probationary period.*" (Italics added.) Does this mean that where there is no proof at the formal revocation hearing that a probation violation occurred during the original probationary period, the court may rely on conduct which occurred after that time to find a violation?

Defendant's three-year probationary period was set to expire in April 2003. Probation was summarily revoked and a bench warrant issued in September 2001. Defendant was not arrested on the warrant until November 2008. At the formal revocation hearing in February 2009, no proof was presented that a violation of probation had occurred during the original three-year probationary period. Instead, the court relied on defendant's statement to his probation officer that he reentered the country in February 2007, and found defendant in violation for failure to report to his probation officer within 48 hours of his return.

Defendant argues that absent proof that he violated probation *during* the original probationary period, his probation expired by operation of law in April 2003. Direct support for this conclusion is found in *People v. Tapia, supra*, 91 Cal.App.4th 738, a case in which, as stated by the majority, the facts are similar to those presented here. On appeal, the People argued that under the language of section 1203.2, subdivision (a), the summary revocation tolled the running of the probationary period and preserved the court's jurisdiction over the defendant. Thus, they claimed, the trial court had jurisdiction to find a violation based on the defendant's proven violation, committed after what would otherwise have been the natural expiration of probation. The appellate court rejected that argument: "While the summary revocation of probation does suspend the running of the probationary period so that the court retains jurisdiction to determine at a formal revocation hearing whether there has, in fact, been a violation, an unproved violation cannot support the conclusion that, after the date on which probation expired

under its original terms, a violation occurred upon Tapia's failure to report to the probation department when he later returned to the United States. . . . [W]hile we agree that the period is tolled by summary revocation, and that the period of tolling can be tacked onto the probationary period if probation is reinstated, we do not agree that these rules apply where, as here, there is no proof or admission of a violation during the period of probation." (*Tapia*, *supra*, 91 Cal.App.4th at p. 741.)

The majority here concludes that *Tapia* was wrongly decided because it is inconsistent with the plain language of the statute. Generally, where the language of a statute is clear and unambiguous, there is no need for construction or resort to indicia of legislative intent, but "courts will not give statutory language a literal meaning if doing so would result in absurd consequences that the Legislature could not have intended." (*In re J.W.* (2002) 29 Cal.4th 200, 210.) If the tolling language were applied literally, once a defendant's probation was summarily revoked, the probationary period would *never* expire until the formal revocation hearing is conducted, even though it turned out there had been no violation during the probationary period set by the court.

Unreasonable consequences would flow from this interpretation. Consider a defendant who is placed on three years probation, which is summarily revoked during this time period for an alleged but mistaken claim of violation. Twenty years later, the defendant is stopped for a traffic violation, and a warrant check reveals the bench warrant from the summary revocation. The basis of the summary revocation is not sound, and there is no proof of any other probation violation during the three-year probationary period. But if the tolling language is read as the majority would read it, the defendant's probationary period never ends. With the benefit of the legislative materials, I would reach a different conclusion from that reached by the majority in this case.

There is no indication the Legislature intended the tolling provision to subject a probationer to possible revocation for conduct occurring after the conclusion of the probationary period. Instead it appears from the analysis of the measure, which amended section 1203.2, subdivision (a) adding this tolling provision (Stats. 1977, ch. 358, p. 1330, §1), that the provision was necessary to address an insular problem which could

arise when a revocation decision is reversed on appeal. The Assembly Committee on Criminal Justice stated in its analysis of the bill:[2] "Should the probationary period be tolled upon revocation of probation? What does this mean? Upon revocation, the period is terminated. The proponents of this bill indicate that this 'tolling' language is necessary in cases where the revocation proceedings were conducted in an illegal manner and the decision is reversed upon appeal. Without the tolling language, the period may have expired and the court would be powerless to act in conducting a new probation revocation hearing." (Assem. Com. on Criminal Justice, Rep. on Sen. Bill No. 426 (1977-1978 Reg. Sess.) as amended May 19, 1977.) The enrolled bill report submitted to the Governor by the Secretary of Legal Affairs stated that the bill was "basically a cleanup measure" and "[t]he State Public Defender has no objection." If the tolling provision had the literal meaning now claimed for it by the majority, it would have been far more than a mere cleanup measure, and would most certainly have been opposed by the State Public Defender. But what is significant about these reports is that they focus on the problem the bill was designed to solve.

In its comments to the proposed amendment to section 1203.2, the Assembly Committee on Criminal Justice explained: "The principles of *Morrissey* [*Morrisey v. Brewer* (1972) 408 U.S. 471, 480] and *Vickers* [*People v. Vickers* (1972) 8 Cal.3d 451, 458] . . . apply to revocation of probation hearings. The probationer must be afforded the opportunity to confront adverse witnesses and to present testimony. However, there may be a 'summary' revocation by the court with later allowance for the full hearing. Section 1203.2 deals with the revocation of probation procedure. However, it does not provide for the 'summary' revocation as is required in decisional law. Should this section be amended to provide more detail?" (Assem. Com. on Criminal Justice, Rep. on Sen. Bill No. 426 (1977-1978 Reg. Sess.) as amended May 19, 1977.) The Legislature provided statutory authority for the summary revocation procedure approved by the courts.

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[2] Legislative Committee reports and analyses and enrolled bill reports are proper subjects of judicial notice. (See *People v. Epps* (2001) 25 Cal.4th 19, 24 & fn. 2, 25; *Elsner v. Uveges* (2004) 34 Cal.4th 915, 934, fn. 19.)

I agree with the observation that we should consider whether the "literal application of the words of the statute comports with its purpose. [Citation.]" (*People v. Meyer* (2010) 186 Cal.App4th 1279, 1283.) What the Legislature intended, and what the *Tapia* court understood, is that when probation is summarily revoked, the probationary period is tolled so that the court can proceed with a formal revocation hearing even though the original period of probation has expired. Despite the imprecise language, the statute cannot reasonably be read to mean that conduct occurring after the expiration of that original period can be the basis of a probation revocation. This is particularly true when, as in this case, the basis for summary revocation is ultimately unproven.

As "[T]he language of the cases and statutes is not always as precise as could be desired, requiring us to examine closely the actual effects of a court's probation orders rather than simply relying on the court's language. As the court noted in *People v. Pipitone* (1984) 152 Cal.App.3d 1112 [parallel citation omitted], summary 'revocation' of probation following the filing of a petition 'cannot affect a grant of probation or its conditions, . . .' (*Id.,* at p. 1117.) Rather, '. . . it is simply a device by which the defendant may be brought before the court and jurisdiction retained before formal revocation proceedings commence. [Citation.] If probation is restored there has been in effect, no revocation at all.' (*Ibid.*) Thus, in the context of the statutory scheme governing probation, the term 'revocation' has a meaning quite different from other contexts. The term 'reinstatement of probation' suffers from this same misunderstanding of the context in which this phrase is used." (*People v. Lewis* (1992) 7 Cal.App.4th 1949, 1955.) In that regard, the term is different from "termination" of probation, or a "discharge" from probation, acts which require that judgment be pronounced if no sentence was imposed when probation was granted. (*Ibid.*) Summary probation is, thus, in the nature of a placeholder by which the court retains jurisdiction to adjudicate a claim that the defendant had violated a term of probation.

The majority opinion argues that unless its construction of the statutory scheme is accepted, "a probationer, such as defendant, who is deported, returns to this country illegally and is not caught until after the original term of probation expires, could

potentially escape from ever having to comply with his or her probation conditions." (Maj. opn. *ante*, at p. 9.) To the contrary, if the defendant committed a new offense during the original probation period – such as willfully failing to report to a probation officer, failing to pay a fine or restitution, or illegally entering the United States – he or she would be subject to revocation of probation at any time. And if he or she committed a new crime during or after that period, he or she would be subject to prosecution for that crime, like anyone else.

It is undisputed that defendant's probation was revoked in June 2009 and in October 2009, but that neither revocation was based on a violation within the original period of probation. The court lacked jurisdiction to revoke probation based on conduct occurring after probation expired, and its orders doing so should therefore be reversed.

EPSTEIN, P.J.