

FILED: December 18, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Appellant,

v.

SHERRY DIANE GRANBERRY,
Defendant-Respondent.

Josephine County Circuit Court
05CR0959

A146638 (Control),
A146962

Pat Wolke, Judge.

Argued and submitted on July 31, 2012.

Jamie Contreras, Assistant Attorney General, argued the cause for appellant. With her on the brief were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

Anne Fujita Munsey, Senior Deputy Public Defender, argued the cause for respondent. With her on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Before Armstrong, Presiding Judge, and Duncan, Judge, and Brewer, Judge pro tempore.

ARMSTRONG, P. J.

Affirmed.

1 ARMSTRONG, P. J.

2 The state appeals a judgment dismissing a charge against defendant for
3 unlawful possession of a controlled substance. The trial court dismissed the charge
4 pursuant to a conditional-discharge agreement under which defendant had been placed on
5 probation. *See generally* ORS 475.245.¹ The state sought a court determination that
6 defendant had violated the terms of her probation and to have the court enter a conviction
7 on the drug-possession charge, but the court rejected the state's request on the ground that
8 the state had not sought that relief before defendant's probation had expired. The state
9 assigns error to the dismissal of the charge, and we affirm.

10 We summarize the facts, which are undisputed. The state charged
11 defendant with a single count of unlawful possession of marijuana, ORS 475.864.
12 Defendant pleaded guilty to the charge in February 2007 pursuant to a conditional-
13 discharge agreement. In accordance with the agreement, the court deferred the
14 proceedings and placed defendant on probation with Josephine County Community
15 Corrections for two years. The terms of defendant's probation required her to pay all of

¹ ORS 475.245 provides, as relevant:

"Whenever any person pleads guilty to or is found guilty of possession of a controlled substance * * *, the court, without entering a judgment of guilt and with the consent of the district attorney and the accused, may defer further proceedings and place the person on probation. Upon violation of a term or condition of probation, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against the person."

1 her court-ordered financial obligations, refrain from using or possessing controlled
2 substances without a prescription, and obey all laws. In conformity with ORS 475.245,
3 the court ordered that, on "fulfillment of the terms and conditions of [defendant's]
4 probation, the court shall discharge the defendant and dismiss the proceedings without an
5 adjudication of guilt." (Capitalization altered.)

6 Defendant's term of probation ended on February 6, 2009, but neither the
7 state nor defendant took action at that time. On March 19, 2009, in an apparent attempt
8 to resolve the proceedings, the trial court forwarded defendant's case register to the state.²
9 The following day, the state filed a motion for an order to show cause why the court
10 should not enter a conviction on the unlawful possession charge that was the subject of
11 the conditional-discharge agreement. The state's motion, and an accompanying affidavit,
12 alleged that defendant had failed to comply with the terms of her probation. Specifically,
13 it alleged that she had failed to pay her court-ordered financial obligations and had been
14 convicted in October 2008 of theft and of unlawful possession or use of a prescription
15 drug.

16 The court conducted a hearing on the show-cause order in August 2010.
17 There, defendant conceded that she had failed to comply with the terms of her probation,
18 but she contended that the court lacked authority to enter a judgment of conviction based
19 on her failure to comply. Defendant argued that, under Oregon's probationary scheme,

² That action was accompanied by a note in the register: "case register sent to DA for dismissal or s/c."

1 the state was required to file its show-cause motion--or take other action to establish a
2 violation--before the probationary term expired. Because the state had failed to do that,
3 defendant argued that the court was required to treat defendant as having fulfilled the
4 terms of her probation and, thus, to dismiss the drug-possession charge pursuant to ORS
5 475.245 and the conditional-discharge agreement.

6 The state disagreed. It acknowledged that, when a defendant is *sentenced*
7 to a term of probation, the state cannot initiate probation-violation proceedings after the
8 conclusion of the probationary period. However, it distinguished a sentence of probation,
9 which is imposed in a judgment of conviction, from probation imposed under a
10 conditional-discharge agreement, which defers the proceedings without the entry of a
11 judgment. The state contended that, because there is no judgment in the conditional-
12 discharge context, the trial court retained jurisdiction over defendant--and, consequently,
13 the authority to find defendant in violation of the terms of her probation--until the court
14 entered a judgment of conviction or dismissal. And the state contended that, because
15 defendant had not, in fact, complied with the terms of her probation, she was ineligible
16 for discharge and dismissal.

17 The trial court agreed with defendant. In a letter opinion, the court
18 explained that ORS 475.245 contemplates "two things that can happen" to a defendant
19 who enters into a conditional-discharge agreement: The defendant can either complete
20 the probationary term successfully, obligating the court to dismiss the charge, or the
21 defendant can violate the terms of probation, allowing the court to "enter an adjudication

1 of guilt and proceed as otherwise provided." ORS 475.245. The court reasoned that "the
2 [s]tate must proceed 'as otherwise provided' for a probation violation," which includes
3 initiating violation proceedings during the probationary term. Because the state had
4 failed to do that, the court concluded that it "retain[ed] jurisdiction" after the completion
5 of defendant's probationary term "only to dismiss the charge against defendant[] and not
6 to initiate probation violation proceedings." The court then entered a judgment
7 dismissing the charge against defendant, and the state appealed.

8 The parties' arguments on appeal emphasize different parts of ORS 475.245
9 and, therefore, must be understood in the context of the entire statute.³ Conceptually,
10 ORS 475.245 can be divided into two parts. The first half--contained in the statute's first
11 sentence--addresses the availability and creation of a conditional-discharge agreement:

12 "Whenever any person pleads guilty to or is found guilty of
13 possession of a controlled substance * * *, the court, without entering a
14 judgment of guilt and with the consent of the district attorney and the
15 accused, may defer further proceedings and place the person on probation."

16 ORS 475.245. The second--contained in the statute's second and third sentences--

³ We note that, although the parties tend to frame their arguments in terms of jurisdictional rules and limitations, this dispute is not jurisdictional in nature. No one disputes that the trial court had jurisdiction over defendant and the case at all times pertinent to this appeal. Instead, the parties' arguments center on the scope of the trial court's authority, under ORS 475.245, to enter an adjudication of guilt based on a violation of probation conditions under a conditional-discharge agreement. *See State v. O'Neal*, 24 Or App 423, 427, 545 P2d 910 (1976) (noting that Oregon has adopted "the general rule that the sentencing authority of a court exists solely by virtue of a statutory grant of power and therefore cannot be exercised in any manner not specifically authorized" (citing *State v. Cotton*, 240 Or 252, 400 P2d 1022 (1965))). Likewise, despite the use of the term "jurisdictional" in its letter opinion, the court's analysis and its ultimate conclusion rested, not on jurisdictional limitations, but on the scope of the court's statutory authority under ORS 475.245.

1 addresses the termination of a conditional-discharge agreement, due to either violation or
2 fulfillment of the terms of the defendant's probation:

3 "Upon violation of a term or condition of probation, the court may enter an
4 adjudication of guilt and proceed as otherwise provided. Upon fulfillment
5 of the terms and conditions, the court shall discharge the person and
6 dismiss the proceedings against the person."

7 ORS 475.245.

8 On appeal, both parties direct their arguments toward the second half of
9 ORS 475.245. The state focuses on the final sentence of the statute, contending that the
10 court's authority to dismiss the charges against defendant was conditioned on a showing
11 that defendant had "fulfill[ed] the terms and conditions" of her probation. Under the
12 state's reading, the onus of making that showing, and thereby demonstrating that she is
13 entitled to discharge, rests squarely on defendant. Furthermore, the state contends that
14 the temporal limitation that applies to a court's authority to enter a probation violation for
15 a defendant serving a *sentence* of probation--viz., the trial court's loss of authority to do
16 that if probation-violation proceedings have not been initiated before the expiration of the
17 defendant's sentence--does not apply in the conditional-discharge context. Thus, it
18 contends, ORS 475.245 did not require the state to take action to terminate the
19 conditional-discharge agreement before the end of defendant's term of probation.
20 Consequently, the state contends that it may seek to establish a probation violation and, if
21 established, the entry of a conviction on the charge that is the subject of a conditional-
22 discharge agreement, at any time until a defendant meets her burden to establish that she
23 is entitled to discharge--whether during, after, or years after a defendant's probationary

1 term.

2 Defendant, in turn, focuses on the second sentence of ORS 475.245, noting
3 that, although that sentence grants the court authority to enter a judgment of conviction
4 "[u]pon violation of a term or condition of probation," ORS 475.245 does not specify
5 how the court is to determine whether a violation has occurred. Emphasizing the use of
6 the term "probation" throughout ORS 475.245, defendant contends that, because the
7 legislature provided no other definition of probation in the context of a conditional-
8 discharge agreement, the standard rules and procedures for probation must apply.
9 Defendant contends, consequently, that a proceeding to establish a probation violation
10 must be commenced before the expiration of the probationary term. *See, e.g., State v.*
11 *Miller*, 224 Or App 642, 645, 199 P3d 329 (2008) (court lacks authority to revoke
12 probation if probation-violation proceeding is not initiated before expiration of
13 probationary term). Because the state did not initiate such a proceeding against defendant
14 before the expiration of defendant's probationary term, defendant argues that the trial
15 court lacked authority to determine that she had violated her probation and correctly
16 dismissed the charge against her.

17 As a starting point, we agree with defendant that "probation," as used in
18 ORS 475.245, is best understood in the context of the statutes and case law governing
19 probation that existed when the legislature enacted ORS 475.245 in 1977 as part of the
20 Uniform Controlled Substances Act, Or Laws 1977, ch 745, § 21. *Cf. Mastriano v.*
21 *Board of Parole*, 342 Or 684, 693, 159 P3d 1151 (2007) ("[W]e generally presume that

1 the legislature enacts statutes in light of existing judicial decisions that have a direct
2 bearing on those statutes."). Three aspects of ORS 475.245 lead us to that conclusion.

3 First, and primarily, is the legislature's use of the term probation. That
4 term, undefined in ORS 475.245 or the Uniform Controlled Substances Act, evokes the
5 court's well-delineated statutory authority to impose a term of supervised release in lieu
6 of or in addition to incarceration. *See generally* ORS 137.520 - 137.630; *see also State v.*
7 *Ludwig*, 218 Or 483, 492, 344 P2d 764 (1959) ("Probation is a statutory process * * *").
8 Thus, we assume that the legislature understood the term to have that well-understood
9 legal meaning. *See, e.g., Allen v. County of Jackson County*, 340 Or 146, 154-55, 129
10 P3d 694 (2006).

11 Second, the structure of ORS 475.245 supports our conclusion. As noted,
12 conceptually, the statute can be divided in half. The first half sets out, in detail, the
13 creation of a term of probation pursuant to a conditional-discharge agreement; the second
14 half sets out, in detail, the termination of such an agreement. *See* ___ Or App at ___ (slip
15 op at 4-5). However, notably absent are any provisions to guide the court or the parties
16 *during* the term of probation--that is, aside from legislature's decision to employ the term
17 probation. Thus, if the legislature did not intend to import the full features of probation
18 through its use of that term, ORS 475.245 contains a glaring omission--*viz.*, the lack of
19 direction on administering probation that is imposed under the statute. We do not believe
20 that the legislature intended to do that, especially assuming, as we do, that the legislature
21 enacted ORS 475.245 with full awareness of the probation statutes and case law in effect

1 at the time. *See, e.g., DeNucci v. Henningsen*, 248 Or App 59, 74, 273 P3d 148 (2012)
2 (court assumes that legislature enacts statutes in light of existing judicial decisions
3 relevant to the statutes).

4 Third, the way in which ORS 475.245 provides for the termination of a
5 conditional-discharge agreement supports the idea that the full procedures and structure
6 of probation apply in the conditional-discharge context. That is because the statute does
7 not contemplate competing, strictly binary outcomes. When a defendant satisfactorily
8 completes a term of probation, the court is obligated to "discharge the person and dismiss
9 the proceedings." However, the converse is not true: "Upon violation of a term or
10 condition of probation," the court "*may* enter an adjudication of guilt." ORS 475.245
11 (emphasis added).

12 Implicit in that formulation is that the court may also *not* enter an
13 adjudication of guilt based on a probation violation. The court's discretion in that respect
14 makes sense only if other, alternative features of probation are available to the court. For
15 example, applying the procedures attendant to probation, the court could instead opt to
16 modify the conditions of probation. See ORS 137.540(6) ("Failure to abide by all general
17 and special conditions [of probation] may result in arrest, modification of conditions,
18 revocation of probation or imposition of structured, intermediate sanctions * * *").
19 Likewise, the term of probation could, "in the discretion of the court, be continued or
20 extended." ORS 137.545(1)(a).

21 For those reasons, we conclude that the legislature intended probation

1 pursuant to ORS 475.245 to mirror probation under ORS chapter 137.⁴ The thrust of the
2 state's argument on appeal is aimed, not at that broad conclusion, but specifically at the
3 requirement that proceedings to establish a probation violation must commence before
4 the probationary term has expired. That requirement is rooted in *Ludwig*, 218 Or 483.
5 There, the defendant had been sentenced to a two-year term of imprisonment, which was
6 suspended while the defendant was placed on a two-year term of probation.⁵ Just before
7 the end of the defendant's probationary term, the trial court issued a bench warrant and an
8 order to show cause why the defendant's probation should not be revoked. The court
9 ultimately revoked the defendant's probation, but the revocation hearing was held after
10 the termination of the defendant's probationary term.

11 On review, the Supreme Court concluded that the statutes governing
12 probation in Oregon at that time authorized each of the trial court's actions. As relevant
13 here, the court relied on *former* ORS 137.550 (1957), *renumbered as* ORS 137.545
14 (1999), which provided, as relevant:

15 "At any time during the probation period, the court may issue a
16 warrant and cause a defendant to be arrested for violating any of the
17 conditions of probation. * * * Thereupon the court, after summary hearing,

⁴ We acknowledge that some provisions in ORS chapter 137 refer expressly to a sentence of probation. *See, e.g.*, ORS 137.523(1) ("judge sentences the defendant to confinement in a county jail as a condition of probation"); ORS 137.520(2) ("having sentenced a defendant to probation and having confined the defendant as a condition of that probation"). We need not and do not decide whether those provisions apply in the context of probations imposed under ORS 475.245.

⁵ At the time that the court decided *Ludwig*, probation was not a sentence, but "a release by the court before sentence has commenced." 218 Or at 486-87.

1 may revoke the probation and suspension of sentence and cause the
2 sentence imposed to be executed * * *."

3 The court concluded that, because the court had issued the order to show cause and the
4 bench warrant within the defendant's probationary period, the court "had jurisdiction" to
5 conduct the revocation proceedings. *Ludwig*, 218 Or at 492.

6 Much like the parties before us, it appears that the court in *Ludwig* used the
7 terms "jurisdiction" and "authority" loosely. *See id.* at 488 (*former* "ORS 137.510[,
8 *repealed by* Or Laws 1971, c. 743, § 43,] is the source of the authority and jurisdiction
9 for the court to grant probation"). As we have noted above, ___ Or App at ___ n 3 (slip
10 op at 4 n 3), the proper inquiry in this case, as it was in *Ludwig*, is whether the trial court
11 had statutory authority to impose or revoke probation. *See State v. O'Neal*, 24 Or App
12 423, 427, 545 P2d 910 (1976) (noting that Oregon has adopted "the general rule that the
13 sentencing authority of a court exists solely by virtue of a statutory grant of power and
14 therefore cannot be exercised in any manner not specifically authorized"). That statutory
15 inquiry is not a jurisdictional one.

16 Thus, notwithstanding the Supreme Court's occasional use of the term
17 "jurisdiction," the issue in *Ludwig* reduced to whether the probation statutes in effect at
18 the time gave the trial court the statutory authority *to conduct* a probation-violation
19 proceeding *after* the defendant's term of probation had expired. Building on *Ludwig*, we
20 addressed in *O'Neal* whether a trial court has the authority *to initiate* a probation-
21 violation proceeding *after* a defendant's term of probation has expired--a question that the
22 court in *Ludwig* expressly declined to address. Relying on the same set of statutes, we

1 held that

2 "a court is without authority to revoke probation for a crime committed
3 during the probationary period when revocation proceedings have not been
4 initiated before the probationary period has expired."

5 24 Or App at 427. Stated another way, taken together, *Ludwig* and *O'Neal* stand for the
6 proposition that, "*unless [a] defendant's probation was extended either by the court or by*
7 *operation of law beyond [its original term], the court commit[s] error by initiating*
8 *revocation proceedings * * * and revoking probation at a later time.*" *Miller*, 224 Or App
9 at 645-46 (emphasis added).⁶

10 Returning to the state's argument on appeal, we see no basis for the
11 distinction that the state advances between finding a probation violation for a probation
12 imposed as a sentence and doing that for a probation imposed under ORS 475.245. As
13 *Ludwig*, *O'Neal*, and *Miller* demonstrate, a court's authority to initiate probation-violation
14 proceedings is expressly limited to "any time during the probation period." ORS
15 137.545(2). The salutary effect of that rule is that, where, as here, the state fails to
16 initiate proceedings during the probationary period, it cannot establish a probation
17 violation on which the court can act in the case in which the violation determination is
18 sought.

19 That brings us, finally, to the state's characterization of the respective

⁶ Additionally, *Miller* was predicated on a trial court's authority under ORS 137.545, which remains in effect. In contrast, both *Ludwig* and *O'Neal* were decided under *former* ORS 137.550. In any event, the operative language has remained unchanged since *Ludwig*.

1 obligations of the state, the court, and defendant on the termination of probation under
2 ORS 475.245, which, again, provides:

3 "Upon violation of a term or condition of probation, the court may enter an
4 adjudication of guilt and proceed as otherwise provided. Upon fulfillment
5 of the terms and conditions, the court shall discharge the person and
6 dismiss the proceedings against the person."

7 As noted, the state contends that the court's authority to dismiss a charge against a
8 defendant is conditioned on a showing that the terms of probation have been satisfied and
9 that, unless and until the defendant makes that showing, the court cannot take action. The
10 state does not point to, and we cannot find, that requirement in the text of ORS 475.245.
11 Nor are we inclined to believe that the legislature intended a system in which the trial
12 court is without authority--and the state without obligation--to take any action with
13 respect to a defendant's charge. To the contrary, by its terms, ORS 475.245 requires the
14 court to dismiss the charges against a defendant on the successful completion of the
15 probationary term, which, for these purposes, is the completion of the term without the
16 state having initiated a probation-violation proceeding against the defendant.⁷

17 Here, defendant's probationary term expired without the state having

⁷ As we noted earlier, ___ Or App at ___ (slip op at 8), a court has authority to continue or extend probation imposed under ORS 475.245 notwithstanding a finding that the defendant has violated the terms of the defendant's probation. In that circumstance--viz., when the court continues or extends probation notwithstanding a probation violation--the defendant will not, strictly speaking, have fulfilled the terms of the defendant's probation, but the defendant will nonetheless be entitled to discharge under the conditional-discharge agreement if the defendant otherwise successfully completes the probationary term. The same principle will apply to a defendant who violates the terms of the defendant's probation but who, because the state did not initiate a probation-violation proceeding before the expiration of the probationary term, will be entitled to discharge and dismissal.

1 initiated a probation-violation proceeding against her. Hence, the trial court lacked
2 authority to find defendant in violation of the terms of her probation and, accordingly, the
3 trial court correctly dismissed the drug-possession charge against defendant.

4 Affirmed.