

FILED: July 24, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

AUSTIN CALLAHAN BRAND,
Defendant-Appellant.

Polk County Circuit Court
09P3143

A148891

William M. Horner, Judge.

Argued and submitted on January 30, 2013.

Erik Blumenthal, Deputy Public Defender, argued the cause for appellant. With him on the briefs was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Timothy A. Sylwester, Assistant Attorney General, argued the cause for respondent. With him on the brief were John R. Kroger, Attorney General, and Anna M. Joyce, Solicitor General.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Duncan, Judge.

DUNCAN, J.

Reversed and remanded for further proceedings.

1 DUNCAN, J.

2 Defendant appeals the trial court's judgment revoking the terms of his
3 probationary supervision and imposing consecutive incarceration sanctions. He argues
4 that, because he committed a single probation violation, the court was required, by OAR
5 213-012-0040(2), to impose concurrent sanctions. We agree and, therefore, we reverse
6 and remand for further proceedings.

7 The relevant facts are procedural. On September 24, 2009, pursuant to a
8 plea agreement, defendant pleaded guilty to Counts 1 and 2, unlawful delivery of a
9 controlled substance to a minor, ORS 465.906, and Count 4 of the indictment, sexual
10 abuse in the second degree, ORS 163.425. Counts 1 and 2 were based on incidents in
11 which defendant delivered controlled substances to two different minors. As provided by
12 the plea agreement, the court imposed downward dispositional departure sentences on
13 Counts 1 and 2 and a downward durational departure sentence on Count 4. On Counts 1
14 and 2, the court imposed 60 months' probation, subject to general and special conditions,
15 including a condition forbidding defendant from consuming alcohol. On Count 4, the
16 court imposed 10 months' incarceration and 36 months' post-prison supervision.

17 On March 23, 2011, police arrested defendant for an incident in a store;
18 defendant's blood alcohol content was 0.15 percent. The court granted the state's motions
19 for an arrest warrant and an order to show cause why defendant's probation should not be
20 revoked. At the subsequent probation violation hearing, defendant admitted that he had
21 violated the conditions of his probation by consuming alcohol. The court accepted

1 defendant's admission, revoked defendant's probation, and imposed consecutive
2 incarceration sanctions of 27 months on Count 1 and 29 months on Count 2. Defendant
3 objected, contending that the court could not impose consecutive incarceration sanctions
4 because there was "only one violation, which was the use of alcohol." The state made no
5 argument. The court overruled defendant's objection, stating, with respect to the victims
6 of Counts 1 and 2, "They're two different minors; two different girls."

7 On appeal, defendant renews his argument that the court erred in imposing
8 consecutive incarceration sanctions after finding only one probation violation. Whether a
9 sentencing court exceeded its authority in imposing consecutive incarceration sanctions
10 for probation violations is a question of law, which we review for errors of law. *State v.*
11 *Stokes*, 133 Or App 355, 357-58, 891 P2d 13 (1995).

12 We begin with an overview of the relevant rule. When an offender is
13 sentenced to multiple terms of post-prison supervision or is serving multiple terms of
14 probationary supervision at the time of a violation, OAR 213-012-0040 governs the
15 court's authority to impose revocation sanctions. That rule provides:

16 "(1) If the offender has been sentenced to multiple terms of post-
17 prison supervision, the terms of post-prison supervision shall be served as a
18 single term. The maximum sanction for a post-prison supervision violation
19 in such a case shall be limited as provided by OAR 213-011-0004 for a
20 single term of post-prison supervision.

21 "(2) When an offender is serving multiple terms of probationary
22 supervision, the sentencing judge may impose revocation sanctions for
23 supervision violations as provided by OAR 213-010-0002 for the violation
24 of each separate term of probationary supervision.

1 "(a) *If more than one term of probationary supervision is revoked*
2 *for a single supervision violation, the sentencing judge shall impose the*
3 *incarceration sanctions concurrently.*

4 "(b) If more than one term of probationary supervision is revoked
5 for separate supervision violations, the sentencing judge may impose the
6 incarceration sanctions concurrently or consecutively."

7 (Emphasis added.)

8
9 Thus, as we explain in *State v. Lewis*, __ Or App __, __, __ P3d __

10 (decided this date) (slip op at 3):

11 "[I]f an offender is serving multiple terms of probationary
12 supervision and the offender commits a single probation violation, the
13 sentencing judge may impose revocation sanctions for the violation of each
14 separate term of probationary supervision. However, if the judge revokes
15 more than one term of probationary supervision for a single violation, the
16 judge must impose the incarceration sanctions concurrently."

17 *See also Stokes*, 139 Or App at 359 (holding that, because the sentencing court found
18 only one probation violation, the court was required to impose the revocation sanctions
19 concurrently under *former* OAR 253-12-040(2) (9/1/1989), *renumbered as* OAR 213-
20 012-0040(2) (3/8/1996)).

21 The state argues that OAR 213-012-0040(2)(a) does not prohibit the
22 imposition of consecutive sanctions in this case for two reasons. First, the state asserts, in
23 a footnote, "It is the state's position that the limitation in OAR 213-012-0040(2)(a)
24 applies only to revocation sanctions imposed on multiple convictions entered in the same
25 case that are based on crimes that the defendant committed during a single criminal
26 episode." However, the state does not point to anything in the text of OAR 213-012-

1 0040(2)(a) that supports its proffered interpretation.¹ We therefore reject the state's
2 argument without further discussion.

3 Second, the state argues, for the first time on appeal, that, even if OAR 213-
4 012-0040(2)(a) prohibits the imposition of consecutive sanctions for a single probation
5 violation, the trial court did not err in imposing consecutive sanctions in this case
6 because, to the extent that OAR 213-012-0040(2)(a) prohibits the imposition of
7 consecutive sanctions for crimes committed against different victims, it violates Article I,
8 section 44(1)(b), of the Oregon Constitution, which provides:

9 "No law shall limit a court's authority to sentence a criminal
10 defendant consecutively for crimes against different victims."

11 We decline, as a prudential matter, to address the state's constitutional
12 claim. The state presents no argument as to why we should interpret "to *sentence*" in
13 Article I, section 44, as encompassing "revocation *sanctions*" or "incarceration *sanctions*"
14 under OAR 213-012-0040 (emphases added). *Cf. State v. Newell*, 238 Or App 385, 393-
15 95, 242 P3d 709 (2010) (the imposition of probation revocation sanctions pursuant to
16 OAR 213-012-0040(2) does not constitute the imposition of a "sentence" under ORS
17 137.123); *Stokes*, 133 Or App at 358 (noting different requirements for imposition of
18 consecutive sentences under ORS 137.123 and for imposition of consecutive revocation
19 sanctions under *former* OAR 253-12-040(2) (9/1/1989)). "[I]t is not this court's function
20 to speculate as to what a party's argument might be. Nor is it our proper function to make

¹ In addition, there is no indication in the record that Counts 1 and 2 were not part of the same criminal episode.

1 or develop a party's argument when that party has not endeavored to do so itself." *Beall*
2 *Transport Equipment Co. v. Southern Pacific*, 186 Or App 696, 700 n 2, 64 P3d 1193,
3 *adh'd to on recons*, 187 Or App 472, 68 P3d 259 (2003); *accord Badrick v. Farmers Ins.*
4 *Co.*, 238 Or App 320, 328, 242 P3d 685 (2010) (declining to address potential alternative
5 basis for affirmance because, *inter alia*, the argument was not made below and was made
6 in a "cursory" fashion on appeal).

7 Pursuant to our decisions in *Lewis* and *Stokes*, we hold that, because the
8 court found that defendant committed a single probation violation and revoked multiple
9 terms of probationary supervision for that violation, OAR 213-012-0040(2)(a) required
10 the court to impose the resulting incarceration sanctions concurrently.

11 Reversed and remanded for further proceedings.