IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DAVID ALAN LINDEN, Appellant, v. MUNICIPALITY OF ANCHORAGE, Appellee.	Court of Appeals No. A-13038 Trial Court No. 3AN-14-07089 CR MEMORANDUM OPINION No. 6827 — September 25, 2019

Appeal from the District Court, Third Judicial District, Anchorage, Brian Clark, Judge.

Appearances: Richard K. Payne, Denali Law Group, Anchorage, for the Appellant. Sarah E. Stanley, Assistant Municipal Prosecutor, and Rebecca A. Windt Pearson, Municipal Attorney, Anchorage, for the Appellee.

Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges.

Judge WOLLENBERG.

David Alan Linden appeals the district court's decision to revoke his probation and impose a portion of his previously suspended time based on his commission of new criminal offenses. Linden argues that he was unaware that he was

on probation when he committed the offenses. For the reasons explained in this opinion, we affirm the district court's ruling.

Factual background

In 2015, Linden was convicted of misdemeanor assault.[1] The district court imposed a sentence of 365 days with 215 days suspended and a 5-year term of probation. Linden appealed his conviction and sentence to the superior court.

Linden asked the district court to stay the execution of his sentence until the completion of his appeal. The court granted Linden's motion to stay his sentence.

Subsequently, the superior court affirmed Linden's conviction and sentence. There is no indication in the record that the district court held a status or remand hearing once the appeal was decided.

Linden then filed a post-conviction relief application in the district court, along with another motion to stay the execution of his sentence — this time during the pendency of his post-conviction relief application. The court never granted or denied Linden's second motion to stay. Instead, Linden's motion — which was submitted on a court form — was marked as "not used."[2]

Later that year, the Municipality of Anchorage filed a petition to revoke Linden's probation, alleging that he had committed new jailable offenses. Linden was

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[1] AMC 08.10.010(B)(1).

[2] Neither party addresses whether the court actually had the authority to grant a stay under these circumstances. *See* AS 12.30.040(c) ("A person who has been convicted of an offense and who has filed an application for post-conviction relief may not be released under this section until the court enters an order vacating all convictions against the person.").

separately charged with, and ultimately convicted of, domestic violence assault and family violence.[3]

At Linden's probation revocation hearing, which was held in conjunction with sentencing on Linden's new criminal convictions, Linden's attorney argued that Linden was not on probation at the time he committed the new offenses because the district court never lifted the stay of his sentence after the superior court denied his direct appeal.[4]

The district court rejected this claim and concluded that Linden was on probation beginning when the superior court denied his direct appeal. The court subsequently ordered Linden to serve 60 days of his suspended time.

Why we reject Linden's claim on appeal

On appeal, Linden argues that the district court erred when it penalized him for violating the conditions of his probation because he did not have notice that he was on probation. But we need not decide this question. Regardless of whether Linden's probation had commenced, or whether he had notice of its commencement, the district court had the authority to anticipatorily revoke Linden's probation because Linden committed new criminal offenses.

We have previously held that "under Alaska law, a sentencing court is . . . empowered to prospectively revoke a defendant's probation if the defendant commits a

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[3] AMC 08.10.010(B)(1); AMC 08.10.050(B). The Municipality added the charge of tampering with official proceedings after it filed its petition to revoke probation, and Linden was also convicted of that offense. He was acquitted of child abuse, AMC 08.10.030(B).

[4] Linden addressed the court personally and told the court that he had received a note, along with his returned motion for a second stay, indicating that his motion was unnecessary because the stay pending appeal was still in effect. Linden did not submit a copy of this note to the court.

new crime before the defendant begins probation supervision."[5] Thus, even if Linden is correct that he lacked proper notice that his probation had commenced at the time he committed a new offense, the district court was authorized to anticipatorily revoke his probation.

We examined a similar issue in the parole context in an unpublished case, *Jordan v. State*.[6] In *Jordan*, the defendant was released from prison and subsequently charged with a series of unlawful acts.[7] The Department of Corrections had failed to inform him he was being released on mandatory parole, and Jordan argued it was fundamentally unfair to revoke his parole for conduct he committed before anyone informed him he was on parole and before anyone informed him of the conditions governing his parole.[8]

We held that even if Jordan did not know he had been released as a parolee, or even if his status as a parolee did not commence until later, this would not affect the parole board's authority to anticipatorily revoke his parole based on his acts of criminal

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[5] *Jackson v. State*, 926 P.2d 1180, 1188 (Alaska App. 1996); *see also Enriquez v. State*, 781 P.2d 578, 579-80 (Alaska App. 1989) ("In Alaska, when the accused has engaged in 'criminal practices,' the sentencing court has the authority to revoke probation, even when the probationary term has not yet commenced." (quoting AS 12.55.085(b)); *Benboe v. State*, 738 P.2d 356, 359-60 (Alaska App. 1987) ("[W]here the accused is shown to have committed a new crime, both this court and the Alaska Supreme Court have found 'good cause' for revocation of probation, even when the accused's probationary term had not yet commenced and when compliance with the law had not expressly been made a condition of probation in the original judgment." (citing *Wozniak v. State*, 584 P.2d 1147, 1148 (Alaska 1978); *Gant v. State*, 654 P.2d 1325 (Alaska App. 1982))).

[6] *Jordan v. State*, 2010 WL 4148508 (Alaska App. Oct. 20, 2010) (unpublished).

[7] *Id.* at *1.

[8] *Id.*

misconduct.[9] We noted that it might have been fundamentally unfair to revoke Jordan's parole based on his failure to live up to unannounced special requirements of conduct; however, the parole board revoked Jordan's parole because he had committed new violations of the law.[10]

The same is true here. Had Linden's probation been revoked for failing to meet with his probation officer, for example, his arguments on appeal about the lack of notice might have merit.[11] But the Municipality presented the district court with evidence that Linden had committed new crimes, and the court was therefore authorized to revoke Linden's probation and impose a portion of his suspended time even if Linden lacked proper notice of the commencement of his probationary term, or if his probationary term was still stayed.

Conclusion

The decision of the district court is AFFIRMED.

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[9] *Id.* at *2.

[10] *Id.*

[11] *See Starkey v. State*, 382 P.3d 1209, 1215 (Alaska App. 2016) ("At oral argument, the State acknowledged that it would violate due process to revoke a defendant's probation for failing to report to his probation officer when there was no duty to report because the probation was either stayed as a matter of law or because the probation appeared to have been terminated by court order.").