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SJC-12814

COMMONWEALTH vs. DEVONAIRE X. BEVERLY.

Berkshire. January 7, 2020. - June 15, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Practice, Criminal, Continuance without a finding, Dismissal, Appeal by Commonwealth, Sentence. Moot Question.

Complaints received and sworn to in the Pittsfield Division of the District Court Department on December 21, 2016, and May 15, 2017.

A motion to revise or revoke sentence was considered by William A. Rota, J.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Megan L. Rose, Assistant District Attorney (Jeanne M. Kempthorne, Assistant District Attorney, also present) for the Commonwealth.

Cara M. Cheyette for the defendant.

KAFKER, J. At issue in the instant case is whether the entry of a continuance without a finding and immediate dismissal of a criminal case, without the imposition of terms and

conditions, or probation, constitutes an illegal sentence under G. L. c. 278, § 18, that may be challenged by way of a motion to revise or revoke, pursuant to Mass. R. Crim. P. 29, as appearing in 474 Mass. 1503 (2016) (rule 29). We conclude that a continuance without a finding that imposes no terms and conditions, or probation, violates the requirements of G. L. c. 278, § 18, and thus constitutes an illegal disposition. As an illegal disposition, such a continuance without a finding may be challenged pursuant to rule 29.

1. Background. The defendant was arrested after Pittsfield police identified him as the driver of a vehicle that had been reported stolen. Police subsequently discovered a bag of what appeared to be "crack" cocaine in the defendant's possession. The defendant told police that the substance was in fact baking soda that he intended to pass off as crack cocaine for sale. Police also discovered a third party's credit card in the defendant's possession that the defendant claimed he had found and intended to use to purchase cigarettes. The defendant was subsequently charged with counterfeit drug possession with intent to distribute, in violation of G. L. c. 94C, § 32G; receiving a lost credit card, in violation of G. L. c. 266,

§ 37B (c); and receiving a stolen motor vehicle, in violation of G. L. c. 266, § 28 (a).<sup>1</sup>

A plea hearing was held on May 15, 2017, in the District Court. The defendant admitted to sufficient facts as to the three crimes. The Commonwealth asked that the defendant be found guilty and sentenced to sixty days in a house of correction on each charge, to be served concurrently. Defense counsel asked for twenty days in a house of correction, highlighting that the defendant was nineteen years old and had no prior felonies in Massachusetts. Defense counsel also indicated that the defendant would not be able to afford to pay restitution or probationary fees.

As to the counterfeit drug charge, the sentencing judge found sufficient facts and entered a continuance without a finding, to be dismissed as of 4 P.M. the same day. At the plea hearing, the sentencing judge did not impose any terms and conditions on the dismissal, nor did the judge condition the dismissal on successful completion of probation. The criminal docket shows the sentencing disposition as "[s]ufficient facts found but continued without a finding until 4PM today." As to

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<sup>1</sup> The defendant was also initially charged with larceny of a motor vehicle, in violation of G. L. c. 266, § 28 (a); and unlicensed operation of a motor vehicle, in violation of G. L. c. 90, § 10. The Commonwealth agreed to the dismissal of both of these charges.

the charge for receiving a stolen credit card, the judge entered a guilty finding and sentenced the defendant to thirty days' incarceration in a house of correction with credit for time served. Finally, as to the charge for receiving a stolen motor vehicle, the judge initially stated that he would "spare [the defendant] the felony," and attempted to enter a continuance without a finding to be dismissed at 4 P.M., as he had done for the counterfeit drug possession charge. After being informed that he was statutorily proscribed<sup>2</sup> from entering a continuance without a finding on the charge of receiving a stolen motor vehicle, however, the judge instead entered a guilty finding and sentenced the defendant to thirty days' incarceration in a house of correction. He ordered that the latter sentence be nunc pro tunc to March 6, 2017, the date of incarceration for the credit card offense, in order for the two sentences to run concurrently.<sup>3</sup>

The Commonwealth did not object at the hearing to the judge's entry of a continuance without a finding for the

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<sup>2</sup> The motor vehicle theft statute explicitly prohibits a continuance without a finding disposition, stating that "[a] prosecution commenced under this subdivision shall not be placed on file or continued without a finding." G. L. c. 266, § 28 (a).

<sup>3</sup> The court also scheduled a dangerousness hearing for May 19, 2017, on new charges filed against the defendant, and the parties agreed that the defendant would be held without bail until the hearing.

counterfeit drug possession charge, although the judge's disposition differed from the Commonwealth's recommendation of sixty days in a house of correction. On June 12, 2017, the Commonwealth filed a motion under rule 29 (a) (1) (rule 29 motion), requesting that the sentencing judge revise or revoke the entry of the continuance without a finding. In the affidavit accompanying its motion, the Commonwealth asserted that the judge's order was an "illegal disposition" contrary to G. L. c. 278, § 18. The judge denied the Commonwealth's motion without a hearing, and the Commonwealth filed a timely appeal.

The Appeals Court consolidated this case for oral argument with Commonwealth v. Rossetti, 95 Mass. App. Ct. 552 (2019), which also involved the issue whether a judge may enter a continuance without a finding and dismiss a charge without imposing any terms and conditions, or a term of probation. Id. at 555-556. The Appeals Court concluded that a continuance without a finding is not a "sentence" and thus cannot be challenged by way of a rule 29 motion to revise or revoke a sentence. See id. at 556. We granted further appellate review, consolidating this case and Rossetti with a third case, Commonwealth v. Ellsworth, for which we had granted direct appellate review on the same issue. See Commonwealth v. Ellsworth, 485 Mass. (2020); Commonwealth v. Rossetti, 485 Mass. (2020).

2. Analysis. a. Mootness. As an initial matter, the defendant argues that because he has finished serving the sentence imposed, and the Commonwealth did not file a motion to stay the defendant's sentence pending appeal, the case against him is moot. See Commonwealth v. McCulloch, 450 Mass. 483, 486 (2008). In Rossetti, 95 Mass. App. Ct. at 555 n.7, the Commonwealth conceded the issue of mootness before the Appeals Court. In the instant case, the Commonwealth does not directly address the issue, but nonetheless requests resentencing. We need not decide whether the case is moot because, even if it is, the disposition at issue -- a continuance without a finding entered without terms and conditions, or probation, and dismissed after a few hours -- appears to be a not entirely uncommon occurrence in the District Court,<sup>4</sup> and presents a recurring question likely to evade review. See Commonwealth v. Pon, 469 Mass. 296, 299 (2014). We thus conclude that the issue

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<sup>4</sup> The defendant has highlighted a number of recent cases in the District Court wherein a judge has entered a continuance without a finding and immediately dismissed a charge. A number of these examples include instances where the Commonwealth assented to the disposition. We have not, however, been provided with statistics as to the precise number of dispositions of this nature that have been entered in the lower courts.

warrants our consideration. See McCulloch, supra at 486; Commonwealth v. Dotson, 462 Mass. 96, 98-99 (2012).<sup>5</sup>

b. Propriety of filing rule 29 motion to revise or revoke.  
We first consider the propriety of the procedure employed by the Commonwealth to challenge the entry of the continuance without a finding. In Commonwealth v. Galvin, 466 Mass. 286, 289 (2013), this court held that a petition pursuant to G. L. c. 211, § 3, was the "proper means by which the Commonwealth may seek review of the imposition of an allegedly illegal sentence." At the time, no other statutory provision or procedural rule existed authorizing the Commonwealth to appeal an illegal sentence, and thus, we concluded that the "Commonwealth would otherwise be left without a remedy if this court were not to exercise its superintendence powers" under G. L. c. 211, § 3. Galvin, supra. Subsequent to that decision, however, we determined that the Commonwealth should be "permitted to contest an invalid sentence

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<sup>5</sup> As discussed infra, we decline to consider the Commonwealth's request for resentencing in the instant case, as the Commonwealth has apparently conceded the issue of mootness and has not adequately briefed the double jeopardy issue. We do, however, address the issue of resentencing in one of the companion cases released today, Commonwealth v. Ellsworth, 485 Mass. (2020), concluding that resentencing would not be just, given that the Commonwealth did not move to stay the execution of the sentence, the sentence has been fully served, and the defendant in that case, as well as this one, should not be singled out for resentencing, as entry of this kind of sentence was apparently not an uncommon practice in the District Court.

by means of essentially the same mechanism for adjusting sentences that is available to the defendant and the sentencing judge," namely rule 29. Commonwealth v. Selavka, 469 Mass. 502, 508 (2014). Thereafter, rule 29 was rewritten to reflect our holding in Selavka.<sup>6</sup>

i. Rule 29. Rule 29 (a) (1) now provides that "[t]he trial judge, upon the judge's own motion, or the written motion of the prosecutor, filed within sixty days after imposition of a sentence, may revise or revoke such sentence if the judge determines that any part of the sentence was illegal."<sup>7</sup> The

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<sup>6</sup> The concurrence notes that, as an alternative to its preferred avenue for relief under Mass. R. Crim. P. 15 (a) (1), as amended, 476 Mass. 1501 (2017), the Commonwealth could seek relief under G. L. c. 211, § 3. Post at . This assertion is contrary to our well-settled jurisprudence. Relief pursuant to G. L. c. 211, § 3, is expressly reserved for instances where there is no other remedy available to the party seeking relief. See Commonwealth v. Fontanez, 482 Mass. 22, 25 (2019). Under the concurrence's own reasoning, the Commonwealth could obtain appellate review under Mass. R. Crim. P. 15. Thus, relief pursuant to G. L. c. 211, § 3, would be wholly inappropriate given this adequate alternative remedy. Indeed, and as discussed supra, we permitted the Commonwealth to proceed under G. L. c. 211, § 3, in Commonwealth v. Selavka, 469 Mass. 502, 508 (2014), precisely because the version of Mass. R. Crim. P. 29 then in effect did not permit the Commonwealth to appeal from an illegal sentence. The current version of Mass. R. Crim. P. 29, as appearing in 474 Mass. 1503 (2016) (rule 29), has been rewritten to allow the Commonwealth to do so.

<sup>7</sup> For context, Mass. R. Crim. P. 29 (a) (2), as appearing in 474 Mass. 1503 (2016), provides:

"(2) Unjust sentences. The trial judge, upon the judge's own motion, or the written motion of a defendant, filed



propriety of using rule 29 in the instant case thus turns on a determination whether a continuance without a finding constitutes a "sentence" within the meaning of this provision. For the reasons discussed infra, we conclude that it does.

ii. Continuances without a finding. Continuances without a finding have a long-standing history in the Commonwealth as an alternative to a traditional sentencing disposition. See Commonwealth v. Rotonda, 434 Mass. 211, 216 (2001). The procedure originated in the District Court, whereby a sentencing judge would continue a case without making a guilty finding. See Commonwealth v. Duquette, 386 Mass. 834, 837-838 (1982). The judge would instead impose certain conditions on the defendant for a designated period of time. Id. If the defendant abided by the conditions imposed, the judge would dismiss the case at the end of the period specified. Id.

Although the disposition originated as a matter of common law, continuances without a finding have since been codified

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within sixty days after the imposition of a sentence or within sixty days after issuance of a rescript by an appellate court on direct review, may, upon such terms and conditions as the judge shall order, revise or revoke such sentence if it appears that justice may not have been done."

into a statutory sentencing scheme.<sup>8</sup> See G. L. c. 278, § 18.

The statute provides in relevant part:

"[A] defendant with whom the Commonwealth cannot reach an agreement for a recommended disposition shall be allowed to tender a plea of guilty together with a request for a specific disposition. Such a request may include any disposition or dispositional terms within the court's jurisdiction, including, unless otherwise prohibited by law, a dispositional request that a guilty finding not be entered, but rather the case be continued without a finding to a specific date thereupon to be dismissed, such continuance conditioned upon compliance with specific terms and conditions or that the defendant be placed on probation . . . ."

Id.

The issue under rule 29 is not whether a continuance without a finding is a conviction, but whether it is a sentence. By definition, continuances without a finding are not considered convictions under Massachusetts law. Commonwealth v. Villalobos, 437 Mass. 797, 802 (2002). Indeed, the attractiveness of a continuance without a finding over a traditional sentencing disposition stems from this characteristic; a continuance without a finding may allow a

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<sup>8</sup> As the concurrence points out, the use of continuances without a finding originated as a practice within the now-defunct two-tier system of the District Court. See Commonwealth v. Duquette, 386 Mass. 834, 837 (1982). General Laws c. 278, § 18, was, however, "enacted in connection with the elimination of the two-tier trial de novo system" and is now the governing source of a judge's authority to impose a continuance without a finding. See Commonwealth v. Pyles, 423 Mass. 717, 721 (1996). Accordingly, continuances without a finding must be imposed in compliance with the statutory requirements of G. L. c. 278, § 18.

defendant to avoid many of the potential ramifications of a criminal conviction, such as the likely detrimental effects of a conviction on future employment opportunities. Id. See Duquette, 386 Mass. at 843. This does not, however, signify that continuances without a finding fall outside the scope of rule 29, as that rule is not a vehicle for challenging the validity of a conviction, but the legality of a sentence. See Commonwealth v. Gaumont, 53 Mass. App. Ct. 912, 912 (2002).

Although a continuance without a finding does not result in a conviction, it undoubtedly constitutes a "disposition" of the underlying criminal charge. Commonwealth v. Mosher, 455 Mass. 811, 821 (2010). The statutory language itself is replete with the use of the word "disposition." See G. L. c. 278, § 18 ("Such request may include any disposition or dispositional terms within the court's jurisdiction, including, unless otherwise prohibited by law, a dispositional request that a guilty finding not be entered, but rather the case be continued without a finding . . .") [emphases added]). Moreover, we have repeatedly characterized continuances without a finding as dispositions of criminal charges. See Mosher, supra at 821; Commonwealth v. Sebastian S., 444 Mass. 306, 313 (2005); Commonwealth v. Cheney, 440 Mass. 568, 570-571 (2003); Villalobos, 437 Mass. at 802; Commonwealth v. Tim T., 437 Mass. 592, 596-597 (2002); Commonwealth v. Pyles, 423 Mass. 717, 722

(1996). We have also, at times, referred to a continuance without a finding as a "sentence." See, e.g., Sebastian S., supra at 307 (ordering that "dockets are to be corrected to reflect the lawful sentences of 'continuance without a finding' conditioned on probation" [emphasis added]); Commonwealth v. Resende, 427 Mass. 1005, 1005 (1998). Indeed, the terms "disposition" and "sentence" are often used interchangeably in the context of criminal procedure. For example, Mass. R. Crim. P. 12, as amended, 482 Mass. 1499 (2019), uses the terms "disposition" and "sentence" interchangeably to refer to sentencing recommendations. Subsection (c) (4) (A) of rule 12 addresses instances where "there is no agreed-upon recommendation as to sentence," while subsection (c) (4) (B) addresses instances where "there is an agreed-upon recommendation as to disposition" (emphases added). The conflation of these terms elsewhere in the Massachusetts Rules of Criminal Procedure indicates that a continuance without a finding disposition may fairly be considered a sentence for the purposes of rule 29.<sup>9</sup>

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<sup>9</sup> The concurrence glosses over the conflation of these terms in our cases and in the rules of criminal procedure, arguing instead that these amount to "linguistic hiccups." Post at . In particular, the concurrence notes the complex history of Mass. R. Crim. P. 12, as amended, 482 Mass. 1499 (2019), and the "number of differing dispositions it continues to encompass today." Post at . A complex history, and applicability to a

In concluding that a continuance without a finding is not a sentence, the Appeals Court drew upon language in other contexts where it had opined that straight probation is not a sentence, but rather a deferral of a sentencing decision, and that continuances without a finding are comparable to straight probation. Rossetti, 95 Mass. App. Ct. at 556, quoting Mosher, 455 Mass. at 822 ("A continuance without a finding closely resembles a sentence of straight probation"), and Commonwealth v. Rodriguez, 52 Mass. App. Ct. 572, 576 (2001) ("imposing a term of straight probation is not a sentence even though such a disposition may be appealed"). But see Commonwealth v. Taylor, 428 Mass. 623, 626 (1999) ("Continuing the case subject to conditions is not the equivalent of probation . . ."). In the context of determining the propriety of a sentence pursuant to rule 29, however, the Appeals Court has reached the opposite conclusion as to straight probation. See Commonwealth v.

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number of different dispositions, is, however, true for many of our rules of criminal procedure, including rule 29. Indeed, rule 29 was revised as recently as 2016 in response to our holding in Selavka, 469 Mass. at 508. There is nothing sui generis about rule 12 for the purposes of distinguishing sentences from dispositions. Most importantly, the distinctions the concurrence attempts to draw between sentences and dispositions are of no practical import in this specific context. The key is to identify the rule best suited to challenge the issuance of an illegal continuance without a finding and expeditiously correct it. That rule is clearly rule 29 for the reasons that we explain in this decision.

Christian, 46 Mass. App. Ct. 477, 482, S.C., 429 Mass. 1022 (1999) (defendant received straight probation and court noted that "[a]cceptance of conditions of probation does not work a waiver of a probationer's right to move under [rule 29] for an amendment to the conditions of probation").<sup>10</sup>

The concurrence argues that Mass. R. Crim. P. 15 (a) (1), as amended, 476 Mass. 1501 (2017), is the appropriate avenue for review in the instant case, rather than rule 29. See post at . The analysis of the concurrence, however, contains scant discussion of its preferred vehicle for relief. Rule 15 (a) (1) provides the Commonwealth with a right of interlocutory appeal specifically where a judge has entered a decision "granting a motion to dismiss a complaint or indictment." Thus, the concurrence assumes that the entry of the continuance without a finding here may be deemed an allowance of a motion to dismiss for the purpose of determining the appropriate procedural vehicle. This assumption places the cart before the horse. It also unnecessarily raises constitutional issues.

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<sup>10</sup> It is worth noting that the concurrence's observation that a continuance without a finding is not "final" because it may be revoked for failure to comply with its conditions is similarly true of a term of straight probation. Post at . See Commonwealth v. Mosher, 455 Mass. 811, 822 (2010) (for both continuance without finding and term of straight probation, "a defendant may be sentenced to jail or prison if he should commit a new crime or otherwise violate a condition of probation during the probationary term").

The question whether the disposition in the instant case effectively amounted to a dismissal is one of substance, not procedure. The substantive legal questions at the heart of this case are (1) whether the disposition violated the statutory requirements of G. L. c. 278, § 18, by failing to include terms and conditions or probation; and (2) whether the disposition amounted to an outright dismissal in violation of the separation of powers. Because we conclude herein that the disposition violates the requirements of § 18, we do not reach the constitutional issue of separation of powers. Indeed, as we explain infra, the statutory requirement that continuances without a finding be accompanied by terms and conditions or probation is designed to obviate possible separation of powers concerns. Yet the concurrence's reasoning as to the appropriate procedure for appeal is predicated on a substantive characterization of the disposition as a dismissal. Thus, the concurrence would have us reach the merits of the substantive separation of powers issue, essentially requiring us to make a preliminary determination that a trial judge acted unconstitutionally, in order to determine the appropriate procedural vehicle for appeal. There is little justification for adopting such a Byzantine approach to a threshold procedural question.

In sum, where the sentencing disposition of the criminal case is claimed to be illegal, whether it be a conviction, straight probation, or a continuance without a finding, it is subject to challenge pursuant to a rule 29 motion to revise or revoke.<sup>11</sup> Cf. Sebastian S., 444 Mass. at 312 (emphasizing that "uniformity, accuracy, and consistency in the description of dispositions is of systemic importance").

Our holding is also in keeping with the important objectives of rule 29 -- to allow a sentencing judge to review the propriety of his or her sentence in the first instance, and to do so expeditiously. As we have previously stated, where a party contends that an illegal sentence has been imposed, it is "far preferable that such matters be addressed in the first instance by a judge of the trial court, particularly where the sentencing judge is available." Selavka, 469 Mass. at 507 n.6. Proceeding by way of a rule 29 motion allows the sentencing judge to review the propriety of the continuance without a

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<sup>11</sup> We do not purport to hold that rule 29 may be employed only to challenge the continuance without a finding itself and not a term of incarceration imposed in response to a violation of the terms and conditions of the continuance without a finding. Rather, for purposes of rule 29, we conclude that the initial entry of a continuance without a finding may be considered a sentence, and that, if the terms of the continuance without a finding are violated, a judge's subsequent disposition may separately be considered a sentence for the purposes of rule 29 as well. Cf. Commonwealth v. Doucette, 81 Mass. App. Ct. 740, 745 (2012) ("the imposition of sentence after revocation of straight probation is, in effect, sentencing 'anew'").



finding in the first instance, and to do so within a short time frame. Permitting this avenue of relief provides a crucial advantage over the approach advocated by the concurrence. If the Commonwealth were to proceed by way of rule 15, as the concurrence insists is appropriate, the sentencing judge would not have the opportunity to "take appropriate action to rectify the error" in the first instance. Id. at 507. The ability to seek prompt judicial action by way of rule 29 is better suited to continuances without a finding, which, as this case demonstrates, are often very time-sensitive dispositions.

c. Legality of continuance without a finding sentence.

Having concluded that the Commonwealth employed the proper procedure for challenging the entry of the continuance without a finding, we now examine the merits of the Commonwealth's argument: that a continuance without a finding constitutes an illegal sentence when it is unaccompanied by terms and conditions, or probation, prior to its dismissal. An illegal sentence is one that is "in some way contrary to the applicable statute" (quotation and citation omitted). Goetzendanner v. Superintendent, Mass. Correctional Inst., Norfolk, 71 Mass. App. Ct. 533, 537 (2008). Because the question is one of statutory interpretation, our review is de novo. See Commonwealth v. Wimer, 480 Mass. 1, 4 (2018).

i. Statutory requirements of a continuance without a finding. "[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." Commonwealth v. Soto, 476 Mass. 436, 438 (2017), quoting Commonwealth v. Dalton, 467 Mass. 555, 557 (2014). As mentioned, the applicable statute governing the entry of a continuance without a finding in the District Court is G. L. c. 278, § 18. See Cheney, 440 Mass. at 570-571. Section 18 provides that a defendant may tender a guilty plea together with a dispositional request that

"the case be continued without a finding to a specific date thereupon to be dismissed, such continuance conditioned upon compliance with specific terms and conditions or that the defendant be placed on probation pursuant to the provisions of [G. L. c. 276, § 87]."

G. L. c. 278, § 18. We have previously recognized the requirement that terms and conditions accompany a continuance without a finding. See Commonwealth v. Powell, 453 Mass. 320, 324 (2009) (§ 18 provides for "the disposition of criminal cases by means of a [continuance without a finding], the imposition of conditions, and dismissal" [emphasis added]). Our descriptions of continuances without a finding have in fact consistently made reference to the imposition of terms and conditions or probation. See also Commonwealth v. Plasse, 481 Mass. 199, 200 n.3 (2019); Commonwealth v. Doe, 473 Mass. 76, 81-82 (2015);

Duquette, 386 Mass. at 843. Thus, we conclude that G. L. c. 278, § 18, expressly requires the imposition of terms and conditions or probation where there is an entry of a continuance without a finding.<sup>12</sup>

Having reached the relatively straightforward conclusion that the statute requires a sentencing judge to impose terms and conditions, or probation, we face the much more difficult task of determining the contours of that requirement. Section 18 "does not enumerate, define, or limit the scope of the terms and conditions that the District Court may impose." Rotonda, 434 Mass. at 220. Contrast G. L. c. 209A, § 7 (specifying completion of certified batterer's intervention program as condition of continuance without finding); G. L. c. 265, § 13M (d) (same). We are cognizant of the need to provide sentencing

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<sup>12</sup> We also note that, as we have previously observed:

"The Legislature . . . has enacted other statutes that either permit or mandate analogous forms of disposition by means of pretrial diversion. See e.g., G. L. c. 94C, § 34 (1994 ed.) (dismissal of case mandated for first offense possession of marihuana, or Class E controlled substance, following successful completion of probation); G. L. c. 111E, § 10 (1994 ed.) (allowing certain drug dependent defendants to have case continued and charges dismissed following successful completion of drug treatment program) . . . . See also G. L. c. 276, § 87 (1994 ed.) ( . . . allowing for pretrial probation); G. L. c. 276, § 42A (1994 ed.) (authorizing pretrial probation in charges arising out of troubled family situations)."

Pyles, 423 Mass. at 722-723.

judges with maximum flexibility in order to perform their roles effectively. Cf. Commonwealth v. Goodwin, 458 Mass. 11, 16 (2010) ("The success of probation as a correctional tool depends on judges having the flexibility at sentencing to tailor probation conditions to the circumstances of the individual defendant and the crime that he committed").

We also recognize that the responsibility of sentencing a defendant is one of the most difficult aspects of a trial judge's role within the legal system, requiring the judge to consider the different correctional needs of each individual defendant along with the "just demands of a wronged society." Commonwealth v. Rodriguez, 461 Mass. 256, 259 (2012), quoting Graham v. Florida, 560 U.S. 48, 77 (2010). This implicates a number of complex, often competing considerations,

"including, but not limited to, the severity of the crime, the circumstances of the crime, the role of the defendant in the crime, the need for general deterrence (detering others from committing comparable crimes) and specific deterrence (detering the defendant from committing future crimes), the defendant's prior criminal record, the protection of the victim, the defendant's risk of recidivism, and the extent to which a particular sentence will increase or diminish the risk of recidivism."

Rodriguez, supra. We recognize the enormity of this task, and reiterate that sentencing judges have "great discretion . . . to fashion an appropriate individualized sentence" (quotation and citation omitted). Commonwealth v. Cole, 468 Mass. 294, 302 (2014).

Their discretion is, however, statutorily proscribed. See Goodwin, 414 Mass. at 92 ("A judge has considerable latitude within the framework of the applicable statute to determine the appropriate individualized sentence" [emphasis added]). Thus, a judge cannot enter a continuance without a finding pursuant to G. L. c. 278, § 18, without imposing terms and conditions, or probation. Notably, the plain language of the statute indicates that this requirement is specific to the entry of dispositions wherein the Commonwealth and the defendant cannot agree on a recommended resolution. The required imposition of terms and conditions, or probation, thus serves to distinguish continuances without a finding from outright dismissals over the Commonwealth's objection, which are not authorized by G. L. c. 278, § 18. Moreover, if a sentencing judge were to enter a continuance without a finding over the Commonwealth's objection, and without the imposition of terms and conditions, or probation, the close resemblance of such a continuance without a finding to a dismissal would intrude on prosecutorial discretion and raise constitutional concerns about the separation of powers. See Pyles, 423 Mass. at 719-720; Commonwealth v. Gordon, 410 Mass. 498, 500 (1991), S.C., 422 Mass. 816 (1996) ("the decision to nol pros a criminal case is within the discretion of the executive branch of government, free from judicial intervention"). Also, as we have previously explained,

continuances without a finding are premised on the idea of a defendant "earning" a dismissal of his or her criminal case by abiding by terms and conditions imposed by the sentencing judge. See Duquette, 386 Mass. at 843. A sentencing judge who orders the immediate dismissal of a criminal charge, without imposing any requirements on the defendant whatsoever, cannot be said to have afforded a defendant the opportunity to earn his dismissal. While we recognize the broad judicial discretion afforded to sentencing judges, we cannot ignore the plain terms of a statute that was intended to "codif[y], regularize[], and place[] limits on a disposition practice that had previously been one of judicial creation." Sebastian S., 444 Mass. at 313.<sup>13</sup>

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<sup>13</sup> We also note that while a sentencing judge's broad discretion includes wide latitude as to the appropriate length of a defendant's probation, a sentencing judge may not subvert the statutory requirements of G. L. c. 278, § 18, by imposing a probationary term that effectively amounts to an outright dismissal. Although there is no general statutory requirement as to the minimum duration of a probationary period, a sentencing judge must impose probation for a length of time that is reasonable in light of the circumstances of the offense and the offender. See Boston Municipal Court and District Court Sentencing Best Practice Principles, Principle 6 ("The duration of probation should be tailored to address the particular characteristics of the defendant and the circumstances of the crime"). Indeed, the very purpose of providing sentencing judges with flexibility is to "tailor probation conditions to the circumstances of the individual defendant and the crime that he [or she] committed." Commonwealth v. Goodwin, 458 Mass. 11, 16 (2010). See G. L. c. 276, § 87. A dismissal in the guise of an unreasonably brief probation, ill-suited to the crime and the offender, will not satisfy the statutory requirements of G. L. c. 278, § 18.

ii. Legality of disposition entered here. Turning to the instant case, it was well within the judge's discretion to choose to enter a continuance without a finding as to the counterfeit drug possession charge, provided that such a continuance without a finding was accompanied by terms and conditions, or probation. As explained, continuances without a finding are common occurrences for first time offenders, and the defendant here did not appear to have a prior felony record in Massachusetts. See Duquette, 386 Mass. at 843 (advantages of continuance without finding "would be especially appealing to a first offender or a defendant whose job security or family situation might be threatened by a conviction").

Here, however, the sentencing judge entered a continuance without a finding that was unaccompanied by any terms and conditions, or probation. He did not inform the defendant of any specific preconditions by which the defendant would be required to abide prior to dismissal of the charge. Rather, the record simply reflects that the judge "[found] facts sufficient to dismiss [the counterfeit drug charge] at four o'clock." Without the imposition of terms and conditions, or probation, this disposition violated the statute, and closely approximated an outright dismissal, thereby raising separation of powers concerns. See Taylor, 428 Mass. at 630 (holding that continuance without finding entered "for no other purpose than

to obtain a dismissal . . . interfered with the district attorney's wide discretion to decide whether to prosecute the case" and amounted to violation of art. 30). Contrast Powell, 453 Mass. at 323 ("The disposition of a criminal case after a trial or a guilty plea by a dismissal contingent on conditions does not constitute the improper entry of a nolle prosequi, and does not infringe on the powers of the executive branch, at least where the disposition imposed by the judge is one that is recognized by the Legislature"). It was therefore an illegal disposition.<sup>14</sup>

We note that defense counsel told the judge that the defendant would be unable to satisfy any financial conditions imposed due to lack of funds. On this basis, the sentencing judge would certainly have been warranted in declining to impose financial conditions, provided that he imposed other,

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<sup>14</sup> If the sentencing judge had entered the disposition at issue in the instant case -- a continuance without a finding to be dismissed at 4 P.M. -- under the guise of placing the defendant on probation until that time, this would similarly approximate an outright dismissal. Imposing "probation" in name only, without the attendant conditions that characterize such a disposition, including a reasonable duration, cannot be used to effectively avoid the statutory requirement that continuances without a finding be subject to terms and conditions, or probation. See note 13, supra. See generally, Commonwealth v. Powers, 73 Mass. App. Ct. 186, 188 (2008) ("Probation obliges a defendant, under the oversight of a probation officer, to comply with the general conditions of probation --including the obligation to obey all laws, to report to a probation officer, and to notify the officer of a change of address -- as well as any special conditions of probation tailored to the defendant").



nonmonetary conditions. Such terms and conditions could include, for example, attendance at educational programs, performance of community service, provision of an apology to the victim, or other restorative justice measures. See, e.g., Plasse, 481 Mass. at 200-201 (continuance without finding conditioned on successful completion of course to prevent shoplifting recidivism and intensive supervision program); Rotonda, 434 Mass. at 215 (continuance without finding conditioned in part on public apology to victim); Commonwealth v. Hector H., 69 Mass. App. Ct. 43, 44 (2007) (continuance without finding conditioned in part on completion of community service). As discussed, the statute provides sentencing judges with broad flexibility as to the nature of the conditions they choose to impose precisely to account for this kind of fact-specific limitation on a defendant's ability to meet a potential condition of a continuance without a finding. Nonetheless, as mentioned, the record indicates that the sentencing judge did not impose any conditions on the record, financial or otherwise.

d. Resentencing. In its claim for relief in the instant case, the Commonwealth requests resentencing. It does so even though it has previously conceded mootness in a companion case, did not brief the double jeopardy issue presented here, and did not move to stay the defendant's sentence. Additionally, the sentence at issue has been fully served. We therefore decline

to consider the Commonwealth's request for resentencing in the instant case, as its briefing on this issue does not rise to the level of appellate argument. See Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019). See also Adjartey v. Central Div. of the Hous. Court Dep't, 481 Mass. 830, 848 n.26 (2019). We do, however, address and resolve the issue in Ellsworth, 485 Mass. at , one of the companion cases decided today, in which the Commonwealth did not concede mootness and did argue the double jeopardy issue. For the reasons discussed in Ellsworth, we conclude that our holding -- that the entry of a continuance without a finding, absent terms and conditions, or probation, constitutes an illegal sentence -- shall apply prospectively from the date of this decision, and that resentencing would be unjust in the circumstances of that case.<sup>15</sup> Accordingly, all defendants who have been sentenced to continuances without a finding absent any terms and conditions or probation, prior to the issuance of this opinion, will be

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<sup>15</sup> The Commonwealth also intimates that the entry of the continuance without a finding in this case was improper because the sentencing judge did not "make [his] reasons known [for continuing and dismissing the charge over the Commonwealth's objection] in the record of the case so as to permit a determination on appeal that the judge properly exercised discretion in the best interests of justice" (quotation and citation omitted). Cheney, 440 Mass. at 571 n.7. As we conclude that the sentence was illegal, we need not address the adequacy of the reasons given for the illegal sentence.

"allowed to retain those dispositions." See Commonwealth v. Norrell, 423 Mass. 725, 730 (1996).

3. Conclusion. For the reasons discussed, we conclude that the continuance without a finding entered in the instant case constituted an illegal sentence, as it contained no terms and conditions. We further conclude, however, that vacating the disposition and ordering that the defendant be resentenced is not just in the circumstances of this case. Rather, for the reasons discussed in Ellsworth, 485 Mass. at , our holding shall apply prospectively from the date of this decision. Accordingly, the continuance without a finding disposition in the instant case may be retained, and is thus affirmed, but cannot be imposed in any such future case.

So ordered.

LENK, J. (concurring). I agree with the court that G. L. c. 278, § 18, requires that a continuance without a finding include terms and conditions or a period of probation, and, accordingly, that the continuances without a finding at issue here were illegal. I also agree with the court's resolution of this case and its two companion cases, Commonwealth v. Rossetti, 485 Mass. (2020), and Commonwealth v. Ellsworth, 485 Mass. (2020). I write separately because I do not agree that a continuance without a finding is a "sentence" subject to challenge pursuant to Mass R. Crim. P. 29 (a) (1), as appearing in 474 Mass. 1503 (2016). In my view, it is unwise to blur the distinction between a continuance without a finding and a sentence. It is also unnecessary to do so in order to allow the Commonwealth a means by which to challenge an illegality in a disposition ordered pursuant to G. L. c. 278, § 18.

The practice of entering a "continuance without a finding" has a lengthy history in the Commonwealth, and, whether with or without an admission to sufficient facts, consistently has been viewed as distinct from a sentence. The statutory continuance without a finding derives from a then-common practice in the two-tiered system of the District Court, at that time often used in the first (bench trial) stage of the proceedings; after being granted a continuance, a defendant could move quickly to a de novo jury trial (or a trial before a different judge if the

defendant again waived the right to a jury trial). See Commonwealth v. Duquette, 386 Mass. 834, 837-839 (1982), and cases cited. See also id. at 838, quoting Mass. R. Crim. P. 12(a)(3), 378 Mass. 866 (1979) ("In a District Court jury-waived session a defendant may, after a plea of not guilty, admit to sufficient facts to warrant a finding of guilty").

Under this system, a defendant could admit to sufficient facts at both tiers of the proceedings (after initially having pleaded not guilty), while not explicitly waiving his or her right to a jury trial at either tier. Duquette, 386 Mass. at 839-840. A defendant who failed to comply with one of the conditions could not then be found guilty and sentenced; rather, the case would have to be returned to the trial list. Id. at 837-838. The court in Duquette clearly distinguished between an initial continuance without a finding and a subsequent finding of guilt and sentencing. See Duquette, supra at 839-843. See also id. at 843 ("continuance without a finding" allows "[the] Commonwealth [to] avoid[] the more time-consuming process of trial and sentencing"). As the court explained in Commonwealth v. Norrell, 423 Mass. 725, 727 (1996):

"The practice in a criminal bench trial of withholding a finding of guilty (where the prosecution has proved the defendant's guilt) and continuing the case for a fixed period of time, eventually to be dismissed (based on finding that sufficient facts to establish guilt have been shown) apparently has crept into the culture to justify a result that falls somewhere between guilt and complete

innocence. Part of the disposition (finding of sufficient facts) suggests the defendant's guilt, while the remaining part (continuance without formal finding of guilt for eventual dismissal) allows the defendant to have the entire slate wiped clean if there is compliance with any terms imposed in connection with the continuance and no other criminal misconduct. The disposition might aptly be described as making the criminal charge 'evanescent' -- here today, but gone in the future."

The statute defining the disposition of a continuance without a finding, derived from this District Court practice, uses the word "disposition" throughout, without mention of a "sentence." See G. L. c. 278, 18, inserted by St. 1992, c. 379, § 193(court reform act).<sup>1</sup> See also Commonwealth v. Pyles, 423 Mass. 717, 722 (1996), citing Commonwealth v. Jackson, 369 Mass. 904, 920 (1976) ("Legislature has power to regulate judicial authority to make disposition prior to imposition of sentence. . . . Section 18 represents the delineation by the Legislature of a dispositional option, similar to that offered by a pretrial diversion program").

Since then, our jurisprudence consistently has reinforced the distinction between the disposition of a continuance without a finding and a sentence. "Pursuant to G. L. c. 278, § 18, a defendant may tender 'an admission of facts sufficient for finding of guilt,' and 'such admission shall be deemed a tender

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<sup>1</sup> In 1996, this statute was amended to apply to a District Court sitting in a juvenile session or to a Juvenile Court. See G. L. c. 278, § 18, as amended by St. 1996, c. 200, § 37.

of a plea of guilty for purposes of the procedures set forth in this section.'" Commonwealth v. Villalobos, 437 Mass. 797, 801 (2002). "[I]n the event of a violation of those conditions, the 'admission' remains and may ripen into an adjudication of guilt and imposition of sentence. . . . [A]n admission to sufficient facts may lead to either an immediate conviction and sentence, or may do so during the continuance period in the event of a violation of the continuance terms" (emphasis supplied; citations omitted). Id. See Commonwealth v. Powell, 453 Mass. 320, 327 (2009) ("continuance without a finding under G. L. c. 278, § 18, . . . [obtains], in advance of the continuance, the defendant's admission, so that any violation of the probationary terms may lead directly to an adjudication of guilt and imposition of sentence" [citation omitted]); Commonwealth v. Tim T., 437 Mass. 592, 596 (2002) (violation of terms of continuance without finding "may lead directly to an adjudication of guilt and imposition of sentence").

The distinction drawn in these cases is identical to those in common legal definitions. According to Black's Law Dictionary, a disposition is a "final settlement or determination." See Black's Law Dictionary 484 (7th ed. 1999). A sentence, more narrowly, is "[t]he judgment that a court formally pronounces after finding a criminal defendant guilty" (emphasis supplied). Id. at 1367. Thus, a sentence is a subset

of all types of dispositions, and one that requires a finding of guilt.

A number of treatises and practice guides also have defined a "sentence" in a similar manner, as distinct from the broader "disposition" of a case. "Ordinarily, a sentence is a final judgment in a criminal case, but it is subject to a limited power of the judge to revise or revoke it within sixty days." R.W. Bishop, *Prima Facie Case* § 53.152 (5th ed. 2005 & Supp. 2020). A continuance without a finding, on the other hand, may lead either to a dismissal of the original charges -- if the defendant complies with its terms -- or, should the defendant fail to comply, could lead to a finding of guilt and the imposition of a sentence. Thus, a continuance without a finding lacks the finality of a traditional sentence. See, e.g. J.A. Iglehart, *Plea Negotiations and Sentencing* § 16.3.2(d) (Mass. Cont. Legal Educ. 5th ed. 2019); Jane Larmon White, *Sentencing Advocacy: Dispositions and Probation Surrenders* § 14-F (Mass. Cont. Legal Educ. 2010); Kaplan, *Sentencing Advocacy in the Massachusetts District Courts*, 80 *Mass. L. Rev.* 22, 30-31 (1995). Cf. E.B. Cypher, *Criminal Practice and Procedure* § 65:30 (4th ed. 2014 & Supp. 2020).

As the court points out, Mass. R. Crim. P. 12, as amended, 482 Mass. 1499 (2019), governing pleas and withdrawals of pleas, indeed does use both "sentence" and "disposition" in



approximately equal measure. In light of its history, and the number of differing dispositions it continues to encompass today, this is not surprising. Nor is it suggestive of an intent that both terms be used interchangeably, as the rule covers both sentences and other dispositions. Given that, in the same sections, rule 12 concerns guilty pleas, pleas of not guilty, pleas of nolo contendere, and continuances without a finding, with or without admissions to sufficient facts, and given its history of modification since the two-tier system in the District Court, see discussion infra, it would be somewhat surprising if the rule did not contain some uses of the word "sentence" when a "disposition" was at issue. Mass. R. Crim. P. 12 (a), (b), (c).

The language of rule 12, and its history, are complex. See Reporters' Notes (2004) to Rule 12, Mass. Ann. Laws Court Rules, Rules of Criminal Procedure, at 1565 (LexisNexis 2018); id. at 1577 (Reporters' Notes to 2015 revision).<sup>2</sup> Rule 12 discusses multiple sets of procedures, in separate sections, depending in part on whether there is agreement as to disposition, agreement to reduce or drop a part of the original charge, no agreement and no proposed disposition, or a dispositional request by the

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<sup>2</sup> The rule was amended on June 12, 1986, effective January 1, 1987; March 8, 2004, effective September 7, 2004; January 29, 2015, effective May 11, 2015; July 17, 2019, effective September 1, 2019.

defendant alone. See Mass. R. Crim. P. 12 (a), (b), (c). Rule 12 originally was put in place in 1979, at the time of the two-tier system in the District Court, such that an initial plea and a finding of guilt, or a plea and a continuance, were not necessarily final. See Reporter's Notes, supra (rev. 2004). Similarly, at that time, dispositions of "straight" probation were not considered sentences. See, e.g., Commonwealth v. Bruzzese, 437 Mass. 606, 617 (2002) ("When a defendant receives straight probation, he faces a disposition that, by its nature lacks an element of finality. There is an aspect of continuing, not double, jeopardy" [quotation and citation omitted]); Commonwealth v. Rodriguez, 52 Mass. App. Ct. 572, 576 (2001) ("a term of straight probation is not a sentence even though such a disposition may be appealed"). See Commonwealth v. Wilcox, 446 Mass. 61, 65 & n.8 (2006), and cases cited. Simply put, rule 12 has long included, and continues to include, a variety of procedures, some of which are dispositions and some of which are sentences, as well as pleas of not guilty.

In support of its view that the terms at times have been used interchangeably, the court also points out two cases where it previously has described a continuance without a finding as a sentence. See Commonwealth v. Sebastian S., 444 Mass. 306 (2005); Commonwealth v. Resende, 427 Mass. 1005 (1998). Neither case can bear the weight of the court's analysis. In Resende,

supra at 1005, for example, the issue before the court was whether a judge could order a continuance without a finding after witnesses had been called and testified at a bench trial; the Commonwealth argued that the judge could not, and urged that the defendant be found guilty and sentenced. That a trial had been underway could have led the court to its single passing reference to the continuances at issue in that case as a sentence, id. at 1006, in a discussion otherwise using only the term "disposition." Likewise, in Sebastian S., supra at 313-315, the court discussed the defendant's "dispositional request" of a continuance without a finding, and the conditions under which a "disposition of a continuance without a finding" were permissible. The court then stated, consistent with the procedures discussed supra, that a violation of the terms of the continuance "may lead to . . . an immediate conviction and sentence" (citation omitted). Id. at 313. Accordingly, these isolated references are better regarded as linguistic hiccups, and provide little basis to depart from our otherwise consistent characterization of a continuance without a finding as a disposition.

In this case, the court also draws guidance from Commonwealth v. Selavka, 469 Mass. 502, 508 (2014), which held that Mass. R. Crim. P. 29 is an appropriate means by which the Commonwealth could challenge an invalid sentence. See ante

at . There, however, unlike the situation here, the defendant had pleaded guilty and had been sentenced to "a period of incarceration," followed by a "term of probation," and the Commonwealth contested the legality of the probationary term. See Selavka, supra at 502-503. There was no question that the term of probation at issue was a "sentence," because it was imposed after a formal finding of guilt. Concluding that rule 29 was the appropriate vehicle to correct an illegal sentence was wholly consistent with the existing scope of the rule. Here, by contrast, the court shoehorns continuances without a finding into the ill-fitting "sentence" category, for the apparent purpose of providing the Commonwealth the procedural remedy of rule 29. This truly puts the proverbial cart before the horse.

The conclusion that a continuance without a finding is not a sentence, and therefore cannot be challenged under rule 29, does not, however, deprive the Commonwealth of a means by which to seek relief where the absence of conditions, or some other error, create an allegedly illegal disposition. Where the conditions imposed, or the absence of conditions, render a continuance without a finding in effect a dismissal, ante at , the Commonwealth may challenge the entry of a continuance without a finding by filing an appeal pursuant to Mass R. Crim. P. 15 (a) (1), as amended, 476 Mass. 1501 (2017), and G. L.

c. 278, § 28E. See Norrell, 423 Mass. at 726 & n.2 (treating Commonwealth's appeal from continuance without finding, originally filed in Appeals Court, "as one taken under G. L. c. 278, § 28E").

In the alternative, if the Commonwealth were uncertain how to proceed, as it has done in previous cases, and as this court has approved, the Commonwealth could seek relief in the county court pursuant to G. L. c. 211, § 3. See Commonwealth v. Rotonda, 434 Mass. 211, 211-212 & n.1 (2001) (lawfulness of entry of continuance without finding was within purview of this court's power of general superintendence). Under particularly compelling circumstances, this court has exercised its superintendence power notwithstanding the availability of an alternate remedy. See Commonwealth v. Quispe, 433 Mass. 508, 510 (2001) (where similarly situated defendants likely to receive unlawful dispositions, G. L. c. 211, § 3, was appropriate avenue by which to seek relief, despite availability of alternate appellate remedy). In addition, by elucidating the requirements of G. L. c. 278, § 18, in the instant case, we provide guidance to courts that will, presumably, reduce the number of instances where the Commonwealth must resort to G. L. c. 211, § 3, for relief.

In any event, we need not rely upon rule 29 to resolve the merits in the instant case. In light of the systemic importance

of this issue, which has been fully briefed by the parties, I would consider the matter as properly before us pursuant to our general superintendence power under G. L. c. 211, § 3. See Rotonda, 434 Mass at 212 n.1, quoting Commonwealth v. Amirault, 415 Mass. 112, 115 n.4 (1993) ("the public has a right to expect the Supreme Judicial Court to correct any abuse of judicial power . . . at least under its superintendence powers").

In sum, it is unnecessary to stretch the meaning of the term "sentence" to the extent of applying it to someone who has not been convicted and whose case will be dismissed, in order to protect the Commonwealth's ability to seek relief from an illegal disposition following a continuance without a finding. The court's unnecessary departure from established principles in search of an expedient resolution to a nonexistent problem is hardly a well-considered approach to the interpretation of legal concepts. Nonetheless, because I agree with the court that entry of a continuance without a finding, without terms and conditions of probation, is an illegal disposition, I concur in the judgment.