SJC-12905

COMMONWEALTH vs. RICARDO MONTARVO.

Worcester. November 2, 2020. - December 29, 2020.

Present: Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.[1]

Habitual Offender. Practice, Criminal, Sentence, Probation. Statute, Construction.

Indictments found and returned in the Superior Court Department on September 19, 2014.

The cases were tried before Richard T. Tucker, J.

The Supreme Judicial Court granted an application for direct appellate review.

Ines de Crombrugghe McGillion for the defendant.
Shayna L. Woodard, Assistant District Attorney, for the Commonwealth.

LOWY, J. Colloquially referred to as the "three strikes" law, the habitual offender statute, G. L. c. 279, § 25, enhances the penalty for a defendant who, after two prior convictions

[1] Justice Lenk participated in the deliberation on this case prior to her retirement.

resulting in State or Federal prison sentences of three or more years, receives a third felony conviction. This case requires us to determine whether § 25 (a) of the law allows sentencing judges to impose probation on defendants who fall within its ambit. We conclude that it does.

Background. In August 2017, the defendant, Ricardo Montarvo, was convicted by a jury of assault and battery with a dangerous weapon in violation of G. L. c. 265, § 15A (b), and armed assault with intent to murder in violation of G. L. c. 265, § 18 (b). Both convictions carried the possibility of habitual criminal sentencing enhancements under G. L. c. 279, § 25 (a). A jury-waived trial followed on whether the defendant had committed the predicate offenses for the enhancements to apply. The judge found that the defendant had twice previously been convicted of offenses for which he was sentenced to more than three years, and thus, § 25 (a)'s enhancements applied to him.

At sentencing, the defendant contended that § 25 (a) allowed the judge to impose probation. The judge disagreed with the defendant's interpretation of the statute and sentenced him to twenty years in prison for the conviction of armed assault with intent to murder and ten years to run concurrently for the conviction of assault and battery with a dangerous weapon. The

defendant appealed. We granted his application for direct appellate review.

Discussion. Because the issue whether a sentencing judge has discretion to impose probation under § 25 (a) is a matter of statutory interpretation, we review it de novo. Commonwealth v. Ruiz, 480 Mass. 683, 685 (2018). As will become apparent, the question admits no easy answers.

1. Section 25's text. The Commonwealth and the defendant appear to agree that § 25 (a)'s text is unambiguous. They disagree about what the text unambiguously says; the Commonwealth argues that § 25 (a) clearly bars a judge from imposing probation, and the defendant argues the opposite. We disagree with both -- the statute's text is ambiguous.

Legislative intent controls our interpretation of statutes. International Org. of Masters, Mates & Pilots v. Woods Hole, Martha's Vineyard & Nantucket S.S. Auth., 392 Mass. 811, 813 (1984). "To determine the Legislature's intent, we look to the words of the statute, construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished" (quotation and citation omitted). Commonwealth v. Garvey, 477 Mass. 59, 61 (2017). "We derive the words' usual and accepted meaning from sources presumably known to the statute's enactors, such as their use in

other legal contexts and dictionary definitions" (citation omitted). Id. at 61-62. "Where the statutory language is clear and unambiguous, our inquiry ends." Id. at 62.

a. Plain language. At first glance, G. L. c. 279, § 25 (a), seems to be unequivocal on the issue of sentencing discretion. The subsection reads:

> "Whoever is convicted of a felony and has been previously twice convicted and sentenced to state prison or state correctional facility or a federal corrections facility for a term not less than [three] years by the commonwealth, another state or the United States, and who does not show that the person has been pardoned for either crime on the ground that the person was innocent, shall be considered a habitual criminal and shall be punished by imprisonment in state prison or state correctional facility for such felony for the maximum term provided by law" (emphasis added).

Standing alone, the emphasized language (maximum term language) is clear: judges must sentence defendants convicted under § 25 (a) to the maximum term provided by the underlying offense. See Commonwealth v. Tuitt, 393 Mass. 801, 813 (1985) (construing phrase "the maximum term provided by law" found in § 25 [a]'s predecessor to "preclude[] the possibility that the judge could have suspended all or any portion of the defendant's life sentence"). Probation appears to be unavailable.

The Commonwealth would have us stop our analysis here. A juxtaposition of the habitual offender's subsections, however,

dispels the facial clarity of § 25 (a).[2] See Plymouth Retirement Bd. v. Contributory Retirement Appeal Bd., 483 Mass. 600, 605 (2019) ("Even clear statutory language is not read in isolation"). Under G. L. c. 279, § 25 (b), if a defendant has been convicted twice before of one or more of certain offenses, then the defendant

> "shall be considered a habitual offender and shall be imprisoned in the state prison or state correctional facility for the maximum term provided by law for the offense enumerated . . . . No sentence imposed under this subsection shall be reduced or suspended nor shall such person so sentenced be eligible for probation, parole, work release or furlough or receive any deduction from such person's sentence for good conduct."[3] (Emphasis added.)

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[2] The Commonwealth and the defendant suggest that our past cases control our interpretation of § 25 (a). They do not. In Commonwealth v. Ruiz, 480 Mass. 683, 688 (2018), and Commonwealth v. Garvey, 477 Mass. 59, 66 (2017), we noted that assumptions about G. L. c. 279, § 25, prior to its amendment in 2012, see St. 2012, c. 192, § 47, govern our interpretations of § 25 (a). Yet these assumptions were issue specific. See Ruiz, supra at 688 n.9 ("the prior assumption here is that the Legislature did not require predicate offenses to be separately brought and tried"); Garvey, supra at 65-66 (assumption about G. L. c. 279, § 25, that prior convictions relate to distinct occurrences controlled interpretation of § 25 [a]). We also noted in Commonwealth v. Billingslea, 484 Mass. 606, 624 n.24 (2020), that among the habitual offender statute's subsections, "probation, parole, work release, or good conduct deductions . . . are only available under § 25 (a)." This comment, however, was clearly dicta.

[3] As the two subsections' nomenclature indicates, "certain individuals statutorily identified as 'habitual criminals' are subject to the provisions of subsection (a) and certain individuals statutorily identified as 'habitual offenders' are subject to the provisions of subsection (b)." Ruiz, 480 Mass. at 688 n.8.

Section 25 (a) makes no mention of disallowing probation, whereas § 25 (b) does. These are not two independent statutes, but rather two subsections of the same statute that were enacted simultaneously. When the Legislature includes a phrase in one subsection of a statute but not in another, this invites the "negative implication" that the phrase was purposefully excluded. See Halebian v. Berv, 457 Mass. 620, 628 (2010) (maxim of negative implication teaches "that the express inclusion of one thing implies the exclusion of another"). See also Field v. Mans, 516 U.S. 59, 75 (1995) (when "contrasting statutory sections [were] originally enacted simultaneously in relevant respects," then negative implication is "more apparently deliberate"). Examined in this light, the absence in § 25 (a) of any prohibition on probation leads to a straightforward conclusion: § 25 (b) bars a judge from imposing probation, whereas § 25 (a) does not.

The maxim of negative implication requires cautious application. See Garvey, 477 Mass. at 65 ("We have generally been wary of the maxim of negative implication"). See also Halebian, 457 Mass. at 628 (discussing maxim's limitations). Cautious application, however, does not mean no application. Mans, 516 U.S. at 75 (maxim "is not illegitimate, but merely limited"). Context determines the maxim's application. A. Scalia & B.A. Garner, Reading Law: The Interpretation of Legal

Texts 107 (2012) ("Context establishes the conditions for applying the [maxim], but where those conditions exist, the [maxim] . . . validly describes how people express themselves and understand verbal expression"). The context here is how to address what would otherwise appear to be surplusage in the statute.[4] See Ropes & Gray LLP v. Jalbert, 454 Mass. 407, 412 (2009) ("A statute should be construed so as to give effect to each word, and no word shall be regarded as surplusage").

b. Surplusage. We cannot ignore that the same maximum term language that the Commonwealth contends eliminates sentencing discretion in § 25 (a) also appears in § 25 (b) alongside an explicit prohibition on probation. See G. L. c. 279, § 25 (b) ("nor shall such person so sentenced be eligible for probation"). If the Legislature intended the maximum term language in § 25 (a) alone to bar probation, then it would not have needed anything more than this maximum term language in § 25 (b) in order to prohibit probation under that subsection.[5]

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[4] Although we voiced hesitation over the maxim of negative implication in Garvey, there was no issue of surplusage in that case. Section 25 (b)'s "explicit references to the need for separate incidences" did not render any of the other language in that subsection superfluous. See Garvey, 477 Mass. at 65.

[5] Against this surplusage problem, the Commonwealth argues that the main difference between the subsections is that § 25 (a) allows parole whereas § 25 (b) denies it. This is indeed a difference between the two subsections, one recognized as such by the parole statute. See G. L. c. 127, § 133B. It does not, however, solve the surplusage problem. If the

The addition of the words "nor should such person be so sentenced be eligible for probation" to § 25 (b) would have been unnecessary to achieve the intended meaning.

Three additional textual indications demonstrate that the Legislature intended the punishment imposed on the "habitual violent offenders" sentenced under § 25 (b) to be both more limited in its application and harsher once imposed than the penalties imposed under § 25 (a). Garvey, 477 Mass. at 66. First, whereas § 25 (b) "provides for enhanced penalties without parole for violent offenders who have two prior convictions from a list of nearly forty violent crimes," the predicate offenses for § 25 (a) have no violence requirement (emphasis added).[6] Garvey, supra at 65 n.7. Second, whereas the predicate offenses under § 25 (b) must have been separately prosecuted, the

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Legislature had not intended the maximum term language to allow probation, then the following word choice in § 25 (b) would have sufficed: a habitual offender shall be punished "for the maximum term provided by law without the possibility of parole." Analogous constructions can be found elsewhere. See G. L. c. 127, § 133 ("no prisoner sentenced to the state prison shall be eligible for [a parole] permit until such prisoner shall have served the minimum term of sentence"). Although the Legislature is not restricted to using the same expression to achieve the same result across statutes, see Commonwealth v. Brown, 431 Mass. 772, 776 (2000), its awareness of a possible construction is indicative of a legislative intent not to have the availability of parole be the main difference between sentences under § 25 (a) and § 25 (b).

[6] Predicate offenses under both subsections, however, must "arise from separate incidents or episodes of criminal behavior." Garvey, 477 Mass. at 59. See id. at 66.

predicate offenses for § 25 (a) have no separate prosecution requirement. See Ruiz, 480 Mass. at 688-689. Third, whereas § 25 (d) requires that a judge warn a defendant who is either pleading or sentenced to one of § 25 (b)'s predicate offenses that this implicates § 25 (b)'s bar on probation, § 25 (a) has no analogous notice requirement.[7] See G. L. c. 279, § 25 (d).

The defendant would have us end our inquiry here, but the matter is not so simple. The question remains: If the maximum term language does not bar probation in § 25 (a), then what does it do? Just as the Commonwealth creates a surplusage problem in § 25 (b) by insisting that the maximum term language prohibits probation in § 25 (a), the defendant's argument that § 25 (a) allows for probation also renders a different part of § 25 (b) superfluous. For example, a judge may not impose a reduced sentence under § 25 (b). G. L. c. 279, § 25 (b) ("No sentence imposed under this subsection shall be reduced or suspended . . ."). The maximum term language present in both § 25 (a) and § 25 (b), however, already appears to prohibit reduced sentences. See G. L. c. 279, § 25 (a)-(b). See also Tuitt, 393 Mass. at 813. Either the maximum term language does not mean

[7] Additionally, whereas plenary review under G. L. c. 278, § 33E, is available to a defendant sentenced under § 25 (b), it is not for a defendant sentenced under § 25 (a). See Billingslea, 484 Mass. at 615-616, 624 n.24.

what it says, or the prohibition on reduced sentences language in § 25 (b) is superfluous. Neither outcome is satisfactory.

Consequently, whichever way the plain language of G. L. c. 279, § 25, is read, some aspect of it is superfluous. Thus, we are left to conclude that the text of G. L. c. 279, § 25 (a), is ambiguous on the matter of probation.

2. Legislative history. Because the text of G. L. c. 279, § 25, is ambiguous, we turn next to the statute's legislative history. See Commonwealth v. Hamilton, 459 Mass. 422, 433 (2011).

The relevant history begins not in the halls of the Legislature but within our own case law. We held in Commonwealth v. Zapata, 455 Mass. 530, 535 (2009), that the Legislature's failure to include an express prohibition on probation in the home invasion statute, G. L. c. 265, § 18C, meant that judges retained discretion to impose probation on defendants sentenced under the statute.[8] After surveying other statutes that prevent judges from imposing probation, we noted that "when the Legislature intends to bar probation, it knows how to say so explicitly." Id. at 534.

[8] Specifically, we noted in Zapata, 455 Mass. at 535, that the ambiguities created by the legislative history of G. L. c. 265, § 18C, compelled us to apply the rule of lenity.

In 2012, the Legislature amended G. L. c. 279, § 25. See St. 2012, c. 192, § 47. Prior to being amended, G. L. c. 279, § 25, read in its entirety:

> "Whoever has been twice convicted of crime and sentenced and committed to prison in this or another state, or once in this and once or more in another state, for terms of not less than three years each, and does not show that he has been pardoned for either crime on the ground that he was innocent, shall, upon conviction of a felony, be considered an habitual criminal and be punished by imprisonment in the state prison for the maximum term provided by law as a penalty for the felony for which he is then to be sentenced."

When the Legislature amended the law, it assigned, with minor linguistic changes, what once constituted the whole of the statute to § 25 (a).[9] See G. L. c. 279, § 25 (a). The Legislature also added three other new subsections, G. L. c. 279, § 25 (b)-(d).[10] As already detailed, the Legislature

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[9] Additionally, the Legislature broadened the newly created § 25 (a) to include Federal sentences as qualifying predicate offenses. See Garvey, 477 Mass. at 66.

[10] Section (c) excludes "any offense for which such person was adjudicated a youthful offender, a delinquent child, or a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority for which a person was treated as a juvenile" from being predicate offenses under § 25 (b). G. L. c. 279, § 25 (c). Section (d), as noted supra, requires that a judge sentencing under one of § 25 (b)'s enumerated offenses warn that "(1) the defendant may be imprisoned in the state prison for the maximum term provided by law for such third or subsequent offense; (2) no sentence may be reduced or suspended; and (3) the defendant may be ineligible for probation, parole, work release or furlough, or to receive any deduction in sentence for good conduct." G. L. c. 279, § 25 (d).

included in § 25 (b), but not in § 25 (a), an express prohibition of probation.

"The Legislature is presumed to be aware of the prior state of the law as explicated by the decisions of this court." Commonwealth v. Vega, 449 Mass. 227, 231 (2007). It is therefore not unreasonable to conclude that in amending the habitual offender statute, the Legislature added the express prohibition on probation and other sentencing options to § 25 (b) in response to the Zapata decision. In other words, despite the redundancy of including a prohibition on reduced sentences alongside the maximum term language in § 25 (b), the Legislature intended to foreclose the possibility of suspended sentences, probation, parole, work release, furlough, and deductions for good conduct under § 25 (b) while leaving these options available under § 25 (a).[11]

Examination of a report from the amendment's conference committee further supports this conclusion. After the bill was reported out of the conference committee, members noticed that some of the language in § 25 (b) had been "incorrectly reported." The passage wrongly stated: "No sentence imposed under this section shall be reduced or suspended nor shall such

[11] Before the 2012 amendments, G. L. c. 279, § 25, barred probation. See Tuitt, 393 Mass. at 813. Nothing in our opinion alters that fact.

person so sentenced be eligible for probation, parole, work release or furlough or receive any deduction from such person's sentence for good conduct" (emphasis added). The committee asked that "section" be changed to "subsection," which, as the final language of § 25 (b) shows, it was. See G. L. c. 279, § 25 (b). Although the Legislature had an opportunity to apply the prohibition on probation to the entirety of G. L. c. 279, § 25, the Legislature deliberately chose to limit that prohibition to § 25 (b). Cf. Commonwealth v. Hines, 449 Mass. 183, 190-191 (2007) ("By using the words 'this section,' the prohibition against the imposition of probation applies to the entire statutory provision . . ."). We are bound by this choice.

3. Rule of lenity. Although the legislative history of G. L. c. 279, § 25, supports the defendant's interpretation that probation is available under § 25 (a), the redundancy of adding all the express prohibitions to § 25 (b) remains. We thus conclude that G. L. c. 279, § 25, is ambiguous, and despite our tools of statutory interpretation, we are unable to resolve this ambiguity. "Under the rule of lenity, 'if we find that the statute is ambiguous or are unable to ascertain the intent of the Legislature, the defendant is entitled to the benefit of any rational doubt.'" Commonwealth v. Richardson, 469 Mass. 248, 254 (2014), quoting Commonwealth v. Constantino, 443 Mass. 521,

524 (2005). "This principle applies to sentencing as well as substantive provisions." Richardson, supra, quoting Commonwealth v. Gagnon, 387 Mass. 567, 569 (1982), cert. denied, 464 U.S. 815 and 464 U.S. 921 (1983). Thus, we must read § 25 (a) to provide sentencing judges with the discretion to impose probation.

We acknowledge that this result, which has the effect of offering a sentencing judge in some cases a Hobson's choice between probation and a mandatory term of twenty years in prison, may appear "contrary to common sense."[12] Zapata, 455 Mass. at 535. Yet if this choice sounds familiar, that is because it is. In Zapata, we reached the same result. See id. Despite the facial clarity of G. L. c. 265, § 18C, which proscribed that home invasion "shall be punished by imprisonment . . . for life or for any term of not less than twenty years," we held that probation was nonetheless available under the statute. Zapata, supra. We invited the Legislature to amend the law if we misinterpreted its intent -- an invitation that,

[12] That said, closer inspection of the facts in this case indicate some sense behind the result as applied here. The defendant could have been sentenced to the maximum term on the conviction of assault and battery with a dangerous weapon (ten years) and given probation on the conviction of armed assault with intent to murder (which carries a twenty-year maximum term), or vice versa. Indeed, public safety may be well served by having a habitual offender on probation once released from his committed sentence, as he or she transitions back into the community.

to this date, the Legislature has declined. Id. at 536. Should the Legislature decide to do so, it may amend § 25 (a) to bar a judge from imposing probation. It need not look far for how to accomplish this goal. See G. L. c. 279, § 25 (b).

Conclusion. The defendant's sentence is vacated, and the case is remanded for resentencing in accordance with this opinion.

So ordered.