SJC-12987

COMMONWEALTH vs. VICTOR MEDINA.

Suffolk. January 8, 2021. - June 9, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Practice, Criminal, Sentence, Probation, Revocation of probation, Double jeopardy. Constitutional Law, Sentence, Double jeopardy, Sex offender. Due Process of Law, Sentence, Probation revocation, Sex offender. Sex Offender. Practice, Civil, Sex offender, Civil commitment.

Indictments found and returned in the Superior Court Department on April 20, 2006.

A motion to dismiss a notice of alleged probation violation, filed on April 24, 2018, was heard by William F. Sullivan, J., and a proceeding for revocation of probation was heard by Robert N. Tochka, J.

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

Jason M. Stelmack for the defendant.

Kathryn Sherman, Assistant District Attorney, for the Commonwealth.

BUDD, C.J. The defendant, Victor Medina, pleaded guilty to indecent assault and battery on a child and received a sentence that included two separate periods of incarceration, the latter of which was to be suspended for three years during which time the defendant would serve probation. After serving the first incarceration period, the defendant spent eight years confined to the Massachusetts Treatment Center (treatment center) as a sexually dangerous person (SDP). See G. L. c. 123A, §§ 1, 14. Upon his release from confinement, he began serving the probation phase of his sentence. Approximately one year later, he was found to have violated conditions of his probation. His probation was revoked, and he was required to serve the portion of his sentence that previously had been suspended.

The defendant now appeals from a denial of his motion to dismiss the revocation proceedings, arguing, as he did in his motion to dismiss, that his probationary term was meant to begin immediately upon the completion of the first incarceration phase of his sentence, during his confinement as a sexually dangerous person, and that it therefore should have terminated prior to the occurrence of the violations.[1] We affirm the denial of the defendant's motion.

[1] The defendant does not otherwise challenge the finding that he violated his probation.

Background. The defendant was indicted on four counts of rape of a child with force, in violation of G. L. c. 265, § 22A. Pursuant to a plea agreement, he pleaded guilty to four counts of the lesser included offense of indecent assault and battery on a child under fourteen, in violation of G. L. c. 265, § 13B.[2] In return, the Commonwealth agreed to join the defendant in making a sentencing recommendation to the judge as follows: on the first two counts, the defendant would serve concurrent two-year terms of imprisonment; and, on the third and fourth counts, the defendant would receive concurrent two-year terms of imprisonment to be suspended for three years, during which time he was to serve a term of probation pursuant to a series of special conditions largely focused on preventing his contact with children.[3]

At the change of plea and sentencing hearing, the judge reviewed the recommended sentence with the defendant. The judge

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[2] Certain portions of the record indicate that the defendant instead pleaded guilty to indecent assault and battery on a person fourteen years or older in violation of G. L. c. 265, § 13H. We assume that is an error; however, our decision does not hinge on the crimes to which he pleaded guilty.

[3] The special conditions prohibited the defendant from contacting his victims or their families, residing with children under the age of sixteen, being employed in a position where he would have contact with children under the age of sixteen, doing volunteer work or coming into contact with children under the age of sixteen, and having unsupervised contact with children under the age of sixteen. The defendant also was required to undergo counselling as directed by the probation department.

advised the defendant of the rights he would forgo by pleading guilty, and informed him of the potential consequences of his plea, including that the Commonwealth could petition to have him civilly committed to the treatment center as an SDP for an indeterminate period of time pursuant to G. L. c. 123A.[4] The judge accepted and imposed the disposition jointly recommended by the parties.

One month before the defendant was due to complete his sentences on the first two counts and be released from incarceration, the Commonwealth petitioned to have him declared to be an SDP. After a hearing, the defendant was found to be sexually dangerous and was committed to the treatment center. See G. L. c. 123A, § 14. During his time at the treatment center, the defendant consistently informed qualified examiners (i.e., psychiatrists or psychologists who periodically examined him for purposes of assessing his sexual dangerousness) that he expected, intended, and was preparing to serve his three-year probationary term upon his release to the community. Eight years after his initial SDP commitment, the defendant successfully petitioned for discharge from the treatment center. See G. L. c. 123A, § 9. Upon his release, he immediately

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[4] Indecent assault and battery on a child under fourteen, G. L. c. 265, § 13B, is a predicate "sexual offense" for purposes of the sexually dangerous person (SDP) statute. See G. L. c. 123A, § 1.

reported to the probation department and began serving his probationary term on the third and fourth counts.

Approximately one year later, a notice of surrender was filed, alleging that the defendant had violated conditions of his probation, including by contacting one of his victims and that victim's family members. Several months after the initial surrender hearing, the defendant filed the subject motion to dismiss the probation violation proceedings, wherein he took the position for the first time that his probation actually was supposed to have commenced upon the completion of his term of imprisonment on the first two counts and that it therefore should have terminated during his confinement at the treatment center, well before the time of the alleged violations. The motion was denied. After a subsequent hearing, the defendant was found to have violated his probation and was ordered to serve the previously suspended period of incarceration on the third and fourth counts. The defendant appealed from the denial of his motion to dismiss, and we granted his application for direct appellate review.

Discussion. 1. Commencement of probationary term. "When construing a sentencing order we look to the intent of the judge." Commonwealth v. Bruzzese, 437 Mass. 606, 615 (2002). Where, as here, the record consists entirely of documentary

evidence, our review of the motion judge's decision is de novo. See Commonwealth v. Mazza, 484 Mass. 539, 547 (2020).

The Appeals Court has had occasion to consider an appeal that similarly involved a defendant's claim that his sentence of probation, imposed "from and after any sentence [he] is now serving," commenced immediately upon the completion of his incarceration, even though he remained civilly committed to the treatment center as an SDP. See Commonwealth v. Sheridan, 51 Mass. App. Ct. 74, 75 (2001). The court concluded that the sentencing judge intended for the defendant's probation to commence upon the defendant's release into the community, i.e., after his civil confinement, rather than immediately upon his release from incarceration. Id. at 77.

In Sheridan, the Appeals Court emphasized that probation has a dual purpose: "rehabilitation of the probationer and protection of the public." Id. at 76, quoting Commonwealth v. Power, 420 Mass. 410, 414 (1995), cert. denied, 516 U.S. 1042 (1996). The court observed that probation "allows a criminal offender to remain in the community subject to certain conditions and under the supervision of the court." Sheridan, supra, quoting Commonwealth v. Durling, 407 Mass. 108, 111 (1990). It further noted that the ultimate goal is for the probationer to "rehabilitate himself or herself under the

supervision of the probation officer." Sheridan, supra at 77, quoting Commonwealth v. Olsen, 405 Mass. 491, 493 (1989).

The Appeals Court went on to conclude that because the sentencing judge imposed the probation to follow the defendant's incarceration, the judge "clear[ly] . . . intended the defendant to be supervised by a probation officer at the time he was released from custody and returned to the community." Sheridan, supra. The court further concluded that "the fact that the defendant's release to the community was delayed because of an intervening civil commitment did not change the sentencing judge's intent to have the defendant supervised upon his release from custody." Id. Ultimately, the court concluded that serving probation while confined in a secure facility nullifies the goals of probation, i.e., "rehabilitation under the supervision of a probation officer" and "protection of society." Id.

We cited Sheridan with approval over a decade ago, see Commonwealth v. Bunting, 458 Mass. 569, 570 n.3, 571 n.5 (2010), and continue to find its reasoning persuasive. By its nature, probation is meant to be served while a probationer is living in the community. See Durling, 407 Mass. at 111. Thus, absent a clear indication to the contrary, we assume that when a judge sentences a defendant to probation following (e.g., "from and after" or "on and after") a term of incarceration, he or she

intends that the probationary term be served upon the defendant's release into the community.[5] See Bunting, supra at 573 ("when a defendant has been sentenced to incarceration to be followed 'from and after' by a sentence of probation, if the defendant is to be held accountable for compliance with any of the conditions of the probationary sentence during the period of incarceration and before the probationary term has commenced, he must be so notified").

The defendant argues that, here, the sentencing judge made his intention clear regarding the timing of the probationary period because the judge was aware of the possibility that the

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[5] In Commonwealth v. Pacheco, 96 Mass. App. Ct. 664 (2019), which addressed this same issue, the Appeals Court came to a different conclusion. Focusing solely on the language used at sentencing, the court determined that because the defendant was ordered to begin his probation "from and after the release from incarceration on [a particular offense]," the judge intended that the defendant begin probation upon his release from incarceration rather than upon his release from the treatment center (which was approximately ten years later). Id. at 665-668. The court suggested that the result might have been different if the sentencing judge "had said explicitly that probation did not commence until release to the community." Id. at 668 n.6.

We take the opposite view; that is, given the purpose and goals of probation, we presume that if a judge intends for a term of probation to be served regardless of whether the defendant has been released into the community, he or she would make that clear. Cf. Commonwealth v. Ruiz, 453 Mass. 474, 480 (2009), quoting Commonwealth v. Juzba, 44 Mass. App. Ct. 457, 459 (1998) (although judges are "'not barred from placing a defendant on probation during the period of his incarceration,' there must be evidence that the judge in fact did so").

defendant could be committed as an SDP, yet did not order that the probationary term be stayed during any such commitment. The defendant points to the docket and clerk's log, both of which indicate that the probationary term was to be served "from and after" the "sentence" on the first count, as unambiguous evidence of that intent. We are not convinced.

First, the transcript reveals that the issue was not raised by either of the parties at the change of plea and sentencing hearing, nor was it referenced by the judge at the time of sentencing. At the outset, the prosecutor described the joint recommendation, stating, "The first two indictments the Commonwealth recommends two years direct to the house, and with regard to the latter two indictments, we are recommending two years to the house of correction, suspended for three years with six special conditions." The judge then reviewed that recommendation with the defendant:

> Q.: "So two years in the house of correction to serve?"
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> A.: "Yes, sir."
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> Q.: "And then . . . on [the third and fourth counts], two years in the house of correction, suspended for a period of three years, and that you be placed on probation for that period of time with the conditions of probation."
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> A.: "Yes."

At the conclusion of the hearing, the clerk pronounced the sentences on the third and fourth counts as follows: "[Y]ou are

sentenced to the [house of correction] for two years on each case. That two years is suspended, and you are ordered on probation for three years."

The potential for civil commitment was raised by the judge, but only in the context of making sure the defendant understood that that was one of the possible consequences of his guilty plea.[6] See Mass. R. Crim. P. 12 (c) (3) (A) (ii) (b), 12 (d) (3) (A) (ii) (b), 378 Mass. 866 (1979). In addition, the special conditions attached to the probationary term were of the sort that are usually imposed to regulate the behavior of a probationer who is living in the community. See Commonwealth v. Howard, 81 Mass. App. Ct. 757, 761 (2012) (conditions of probation imposed by sentencing judge, including prohibiting unsupervised contact with minors, further evidenced judge's intention for defendant to be subject to probation upon release from treatment center into community). Regardless, as discussed supra, if the intent had been for any of those conditions to apply before the defendant was released to the community, due process would have required that to be explicitly stated for the

[6] Importantly, at the time of sentencing in this case, SDP proceedings had not been initiated against the defendant and, thus, were not a certainty. See Commonwealth v. Roberts, 472 Mass. 355, 363 (2015) ("Civil confinement as a sexually dangerous person, although tangentially connected to the criminal process, is not a 'virtually mandatory' consequence of a sexual offense conviction").

defendant's own benefit. See Bunting, 458 Mass. at 573. See also Commonwealth v. Ruiz, 453 Mass. 474, 475, 484 (2009) (defendant sentenced to "from and after" term of probation could not be held to have violated condition prohibiting contact with victim during incarceration phase of sentence where defendant did not receive "clear notice" that condition was in effect at that time).

Sentencing judges understand the purposes of probation. See Sheridan, 51 Mass. App. Ct. at 76-77. We see no indication in the record that the judge here had any other intention than for the defendant's three-year probationary term to commence upon his release to the community, whenever that release occurred. See id. at 77 (release delayed by intervening SDP commitment found not to alter judge's intent regarding probationary supervision in community).

We also are mindful of the defendant's own acts and omissions, which are relevant given that his sentence was imposed pursuant to a joint recommendation. Despite being aware of the potential for an SDP commitment, the defendant did not insist as part of the joint recommendation that his probation run during any subsequent civil commitment.[7] In addition, at no

[7] The Sheridan decision had been issued approximately six years prior to the defendant's change of plea. Thus, if he truly wanted his probation to run immediately upon his release

point during his civil commitment did he report to the probation department or insist that his probation commence. To the contrary, he repeatedly stated during his time at the treatment center that he would be serving three years of probation upon his release to the community. Accordingly, upon his release from the treatment center, the defendant reported to the probation department and began to serve his probationary term. It would not be until months after he was charged with violating conditions of his probation that the defendant would take the position he now espouses. In short, the defendant's words and conduct reflect his own understanding of the terms of his sentence, i.e., that his probation was intended to commence upon his release to the community.[8]

2. Legality of delay. The defendant contends that for multiple reasons, regardless of the intention of the sentencing

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from incarceration, the defendant was on notice that he should have raised the issue with the court.

[8] In opposition to the defendant's motion to dismiss, the Commonwealth argued that the defendant was estopped from arguing that his probationary term was intended to run during his SDP commitment because he had taken the opposite position before the jury at the trial on his petition for discharge from the treatment center. See G. L. c. 123A, § 9. The motion judge noted the inconsistencies in the positions the defendant adopted, but did not conclude expressly that judicial estoppel should apply. On appeal, the parties agree that there is an insufficient basis for determining what position the defendant took at that trial and whether judicial estoppel should apply because the transcript from that trial has not been included in the record. We therefore need not reach this issue.

judge, the delay in the start of his probation due to his civil commitment for an indeterminate period of time resulted in an illegal sentence. We do not agree.

a. Double jeopardy. The defendant first contends that a failure to commence his probation once he was committed as an SDP for an indeterminate period of time violated the prohibition against double jeopardy by increasing the severity of his original sentence[9] and interfering with his right to finality.[10] This argument fails.

We begin by noting that the guarantee against double jeopardy applies only to criminal punishment. See Hill, petitioner, 422 Mass. 147, 152, cert. denied, 519 U.S. 867 (1996). Commitment to the treatment center is meant to rehabilitate one who has been declared to be sexually dangerous, not to punish him or her. See Commonwealth v. Curran, 478 Mass. 630, 637 (2018) (Kafker, J., concurring). Because civil commitment for sexual dangerousness occurs as a result of, not punishment for, certain sexual offenses, the principles of

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[9] In addition to protecting against a second prosecution for the same offense, the prohibition against double jeopardy protects against multiple punishments for the same offense. Luk v. Commonwealth, 421 Mass. 415, 419 (1995).

[10] "The constitutional prohibition against placing a defendant twice in jeopardy represents a constitutional policy of finality for the defendant's benefit in criminal proceedings" (quotation and citation omitted). Aldoupolis v. Commonwealth, 386 Mass. 260, 274, cert. denied, 459 U.S. 864 (1982).

double jeopardy do not apply. Hill, petitioner, supra at 151-154. See Luk v. Commonwealth, 421 Mass. 415, 422 (1995) ("Double jeopardy is not implicated if the sanctions can be entirely explained by a nonpunitive purpose"). Thus, the fact that the defendant was declared to be sexually dangerous and consequently civilly committed to the treatment center, thereby delaying the probationary portion of his criminal sentence, does not implicate his double jeopardy rights.

In any case, contrary to the defendant's claim, the delay in the start of his probation did not amount to an "eight-year extension" of his original probationary sentence.[11] As discussed supra, the three-year probationary portion of his sentence was intended to, and did, commence upon his release into the community. Although the defendant's probation was delayed by his SDP commitment, he nevertheless received the same punishment that he and the Commonwealth jointly recommended, and that the sentencing judge imposed. No additional conditions, severe or otherwise, were added after the fact. See Commonwealth v. Goodwin, 458 Mass. 11, 12 (2010) (absent violation of condition, judge may add or modify conditions that increase scope of

[11] The defendant also refers, at times, to the probationary period as having been "stayed" during his civil commitment. This, too, is inaccurate, as no judge affirmatively intervened to adjust the defendant's sentence when he was committed to the treatment center.

original probation only where there has been material change in probationer's circumstances and added or modified conditions are not so punitive as to significantly increase severity of original probation). The defendant, therefore, was not subjected to a punishment more severe than that for which he bargained.[12]

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[12] The defendant also argues that because there was no mention at the time of sentencing of the potential for a delay in the commencement of his probation due to any subsequent SDP commitment, he was somehow deprived of the right to withdraw his guilty plea, see Mass. R. Crim. P. 12 (c) (4) (B), 378 Mass. 866 (1979) (judge must give defendant notice and opportunity to withdraw change of plea if sentence will exceed terms of joint recommendation), or subsequently to file a motion to revise or revoke his sentence on those grounds, see Mass. R. Crim. P. 29 (a), 378 Mass. 899 (1979) (motion to revise or revoke must be filed within sixty days after imposition of sentence). This argument ignores the fact that the defendant, jointly with the Commonwealth, recommended the sentence he received, and that he was apprised of the possibility of being declared an SDP and being committed to the treatment center for an indeterminate period of time. Prior to his guilty pleas, therefore, the defendant possessed the information he needed to question whether commitment as an SDP would affect the commencement of the probationary portion of his sentence and to take any resulting action, be it withdrawing his guilty pleas or otherwise.

This argument also ignores the fact that once the defendant realized that his probation had not commenced during his commitment to the treatment center, he failed to move to correct his sentence on the basis that it violated double jeopardy principles. See Mass. R. Crim. P. 30 (a), as appearing in 435 Mass. 1501 (2001) (allowing for filing of motion to correct sentence then being served upon ground it was imposed in violation of Constitution or laws of United States or Commonwealth). See also Commonwealth v. Azar, 444 Mass. 72, 76-77 (2005) (defendant serving probation on suspended sentence can file rule 30 [a] motion to challenge legality of sentence). We note that doing so would have allowed the sentencing judge to

Similarly, the finality of the defendant's sentence was not affected by his civil commitment. The defendant was sentenced to probation for a period of three years; the length of his probation never changed. Had he adhered to its terms, his probation would have terminated three years from the time it commenced, regardless of when it commenced. Compare Commonwealth v. Selavka, 469 Mass. 502, 506 (2014) (although judge may correct sentence by imposing statutorily required global positioning system monitoring, he or she may not do so one year after sentence was imposed where defendant already had served entire period of incarceration and had legitimate expectation of finality in sentence as initially imposed).

b. Due process. The defendant contends (for the first time on appeal) that the eight-year delay in the commencement of his probation also violated his constitutional rights to due process and fundamental fairness. This argument fairs no better. The cases to which he cites to support his claim,

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vacate any illegal portions of the sentence (had there been any) and restructure the entire sentencing scheme on the third and fourth counts. See Commonwealth v. Sallop, 472 Mass. 568, 570 (2015) (judge not merely obligated to vacate illegal portion of sentence, but also permitted to restructure over-all sentence, provided new sentence does not violate double jeopardy). See also Commonwealth v. Cumming, 466 Mass. 467, 471 (2013) (defendant "does not have a reasonable expectation of finality in any one part or element of [an interdependent] bundle of sentences, but rather, in the entirety of the scheme" [citation omitted]).

Commonwealth v. Vith Ly, 450 Mass. 16 (2007), and Commonwealth v. McLaughlin, 431 Mass. 506 (2000), are inapposite.

In Vith Ly, 450 Mass. at 16, a defendant's State prison sentences had been stayed pending an appeal that the defendant ultimately lost. Due to an error, the stay was not lifted following the appeal, and the Commonwealth did not seek to execute the sentences until sixteen years later. Id. at 16-17. After reviewing "the totality of the defendant's circumstances over [those] sixteen years," id. at 21, this court "conclude[d] that requiring the defendant to serve his sentences, at [that] point in time and on [those] facts, would violate the concept of fundamental fairness that is at the core of due process," Id. at 22. In so doing, the court noted that "[i]t is a basic principle that a defendant sentenced to incarceration has a due process right to serve the sentence promptly and continuously." Id. (execution of sentence must be "pursued with reasonable diligence").

In McLaughlin, 431 Mass. at 507, the defendant was found guilty of involuntary manslaughter and arson, but not criminally responsible of murder in the first degree. At sentencing, the judge stayed the defendant's State prison sentences on the involuntary manslaughter and arson convictions until his release from his civil commitment to Bridgewater State Hospital. Id. at 514. Without addressing any constitutional questions, this

court held that the "stay was unwarranted" because there were no "exceptional" circumstances to justify straying from the "basic rule" that "[s]entences are to be executed forthwith" (citation omitted). Id. at 514, 520.

In contrast to both Vith Ly and McLaughlin, here, as discussed supra, the defendant's sentence was delayed by an intervening event that was unrelated to his criminal sentence in order to realize the intent of the sentencing judge. See Sheridan, 51 Mass. App. Ct. at 77-78 ("The defendant did not suffer any adverse consequence with respect to his liberty due to the delayed commencement of his probation sentence, because [during the delay] he was still committed to the treatment center as a sexually dangerous person"). In addition, unlike in Vith Ly and McLaughlin, the portion of the defendant's sentence that is at issue here is probation, not incarceration. The question is whether, in the totality of the circumstances, it was fundamentally unfair to delay the commencement of the defendant's probationary term until he was released from the treatment center to the community. Having considered the purposes and goals of probation, as well as the "special" probation conditions the defendant bargained for, all as discussed supra, we conclude that it was not.[13]

[13] The defendant also asserts that permitting a period of probation to commence after his release from his SDP confinement

Conclusion. The order denying the defendant's motion to dismiss, and the finding that he violated conditions of his probation, are affirmed.

So ordered.

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violates the equal protection clause because he was treated differently, on the basis of his mental condition (i.e., his sexual dangerousness), from defendants who receive similar sentences for similar crimes, but are not committed to the treatment center. This claim, raised for the first time on appeal, is contained in a single, short, conclusory paragraph that lacks legal analysis and thus presents no more than a "bald assertion[] of error" (citation omitted). See Commonwealth v. Cassidy, 470 Mass. 201, 209 n.9 (2014). We therefore decline to consider it. See Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019).