IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
HUMBERTO ARRELLANO RAMIREZ,
Defendant-Appellant.

Marion County Circuit Court
16CR64672; A166424

Daniel J. Wren, Judge pro tempore.

Submitted May 30, 2019.

Ernest G. Lannet, Chief Defender, Criminal Appellate Section, and Laura E. Coffin, Deputy Public Defender, Office of Public Defense Services, filed the brief for appellant.

Ellen F. Rosenblum, Attorney General, Benjamin Gutman, Solicitor General, and Keith L. Kutler, Assistant Attorney General, filed the brief for respondent.

Before Hadlock, Presiding Judge, and DeHoog, Judge, and Aoyagi, Judge.

HADLOCK, P. J.

Reversed and remanded.

HADLOCK, P. J.

Defendant appeals from a judgment finding him in violation of his probation, extending the period of probation, and imposing a probation-violation fee and court-appointed attorney fees. He assigns error to the court's finding that he violated his probation by failing to appear in court on a specific date, contending that the court erred because the court appearance was not a condition of his probation stated in the judgment. The state responds that the trial court ruled correctly because the requirement to appear was ordered by the sentencing court and it was "directly related" to one of defendant's stated probation conditions. As explained below, we reverse and remand.

Defendant was convicted of fourth-degree assault constituting domestic violence and sentenced to 18 months' bench probation. The resulting judgment (the underlying judgment) imposed several special conditions of probation, including that defendant "[e]nter and successfully complete Anger Management Program." On the same date that the underlying judgment was entered, the court also signed and entered a form order referring defendant to Corrections Associates, Ltd. (CAL), for an anger management assessment and directing defendant to "show proof of completion" at the courthouse on October 10, 2017, at 10:00 a.m. (Capitalization altered.)

The state subsequently moved the court to revoke defendant's probation, alleging that defendant failed to appear on October 10 as ordered.[1] The state did not allege that defendant had failed to enter or successfully complete an anger management program, as specified in his special condition of probation. At the hearing on the state's motion, defendant did not dispute that he had failed to appear in court on October 10; rather, he argued that he was not in violation of his probation because the conditions of his probation specified in the underlying judgment did not require him to do so. The court acknowledged that the underlying judgment did not include the requirement to appear, but noted that the CAL referral order did, and that defendant

[1] The state alleged other violations in its motion, but, at the hearing, confirmed that it was proceeding only on the failure to appear allegation.

had notice of that requirement. Consequently, the court found that defendant was in violation of his probation for "Failure to Appear in Court," and it entered a judgment extending defendant's probation, re-referring him to CAL, and ordering him to pay a $25 probation-violation fee and $221 in court-appointed attorney fees.

Defendant appeals, assigning error to the trial court's finding that he violated his probation. Citing ORS 137.540, he argues that the court erred in finding that he violated his probation when he failed to appear in court on October 10, 2017, because that requirement was not a general or special condition of his probation included in the underlying judgment. The state responds that, because the court's order to appear was "directly related" to defendant's special probation condition that he enter and complete an anger management program, defendant violated *that* condition when he failed to appear. We agree with defendant.

Although the parties do not discuss it, we begin by observing that the trial court has discretionary authority under ORS 137.545(1)[2] to *extend* probation without finding that the probationer has violated his or her probation. *State v. Laizure*, 246 Or App 747, 752, 268 P3d 680 (2011), *rev den*, 352 Or 33 (2012) (so holding); *State v. Stanford*, 100 Or App 303, 306, 786 P2d 225 (1990) (same).[3] *See also State v. Kelemen,* 296 Or App 184, 193, 437 P3d 1225 (2019) (recognizing that, although the trial court erred in *revoking* the defendant's probation for conduct that was not a condition of probation, it retained discretionary authority under ORS 137.545(1) to extend the probationary period). In exercising its discretion to extend probation, the court must, however, determine that "the purposes of probation are not being

[2] ORS 137.545(1)(a) provides that (subject to ORS 137.010 and Oregon Criminal Justice Commission rules for felonies committed after November 1, 1989) "[t]he period of probation shall be as the court determines and may, in the discretion of the court, be continued or extended." ORS 137.010(4), which applies here because defendant was convicted of a misdemeanor, authorizes the court to impose probation for a period of not more than five years.

[3] The court also has discretion to *modify* the conditions of a defendant's probation in the absence of a violation. ORS 137.540(9)(a) (providing that "[t]he court may at any time modify the conditions of probation"); *State v. Kelemen,* 296 Or App 184, 193, 437 P3d 1225 (2019) (so recognizing); *Stanford*, 100 Or App at 306 (same).

served," balancing considerations of public safety and the rehabilitation of the probationer. *Laizure,* 246 Or App at 752. If—as was the case in *Laizure* and *Stanford*—the record demonstrates a permissible exercise of the court's discretion under those principles, we need not decide whether the court erred in finding a probation violation. *Laizure*, 246 Or App at 753-54 (unnecessary to address whether violation finding was legally correct where record reflected permissible exercise of court's limited discretion to extend the defendant's probation); *Stanford*, 100 Or App at 306-07 (unnecessary to determine whether court erred in finding probation violation, where record reflected that court's modification and extension of probation was directed toward the defendant's rehabilitation).

Here, however, in addition to extending defendant's probationary period, the trial court also imposed a probation-violation fee, which hinges on the court's finding of a probation violation. ORS 137.540(12)(a) ("If the court determines that a defendant has violated the terms of probation, the court shall collect a $25 fee from the defendant ***. The fees imposed under this subsection become part of the judgment and may be collected in the same manner as a fine.").[4] Consequently, in this case, we must answer the question raised by the parties—whether the court erred in finding a probation violation based on a court order not included as a general or special condition of probation. *Cf. State v. Daves*, 145 Or App 443, 445, 930 P2d 265, *rev den*, 337 Or 83 (1996) (affirming judgment continuing probation with modified conditions, even though asserted violation was not based on condition of probation, because, in those circumstances, the defendant "has identified no adverse consequences about which he may complain").

ORS 137.540 describes the general parameters of the trial court's authority when imposing a probationary sentence. In particular, ORS 137.540(1) authorizes the court to sentence a defendant to probation "subject to" a list of "general conditions," unless those conditions are "specifically

[4] ORS 137.540 was amended after judgment was entered in this case. *See* Or Laws 2017, ch 670, § 3; Or Laws 2017 ch 689, § 1; Or Laws 2018, ch 120, §10. However, because those amendments do not affect our analysis, we cite the current version in this opinion.

deleted by the court." Under ORS 137.540(2), the court, in addition, "may impose any special conditions of probation" that meet the requirements of that subsection, and other subsections set out additional special conditions that the court may or must include in particular circumstances. ORS 137.540(3), (4), (5). As noted earlier, the statute also specifies that the court may modify the "conditions of probation" at any time. ORS 137.540(9)(a).

Further—and significantly—ORS 137.540(7) provides that a probationer's "*[f]ailure to abide by all general and special conditions of probation* may result in arrest, modification of conditions, revocation of probation or imposition of structured, intermediate sanctions in accordance with rules adopted under ORS 137.595." (Emphasis added.) In turn, under ORS 137.545(2), "[a]t any time during the probation period, the court may issue a warrant and cause a defendant to be arrested for *violating any of the conditions of probation*." (Emphasis added.) Thus, the statutory scheme established by the legislature contemplates that a defendant violates probation by violating a general or special condition of probation lawfully imposed by the court pursuant to ORS 137.540.[5]

In arguing to the contrary, the state asserts only that, although "ORS 137.540(7) provides that probation may be revoked for violation of a probation condition, *** that statute does not define all ways in which a defendant may violate a probation condition," relying on *State v. Hardges*,

[5] Although not typical, we do not attach any particular significance to the legislature's use of the phrase "*terms* of probation," rather than "*conditions* of probation," in authorizing the imposition of a probation-violation fee in ORS 137.540(12)(a). (Emphases added.) That is so because, as used in this context, the words have similar meaning and it appears that the legislature used them interchangeably in that provision. The full text of the relevant sentence states, "If the court determines that a defendant has violated the *terms* of probation, the court shall collect a $25 fee from the defendant and may impose a fee for the costs of extraditing the defendant to this state for the probation violation proceeding if the defendant left the state in violation of the *conditions* of the defendant's probation." (Emphases added.) *See also Webster's Third New Int'l Dictionary* 2358 (unabridged ed 2002) (defining "terms" to mean, as relevant, "propositions, limitations, or provisions stated or offered for the acceptance of another and determining (as in a contract) the nature and scope of the agreement : CONDITIONS" (boldface omitted)); *id*. at 473 (defining the noun "condition," as relevant, to mean "something established or agreed upon as a requisite to the doing or taking effect of something else : STIPULATION, PROVISION" (boldface omitted)).

294 Or App 445, 432 P3d 268 (2018). In the state's view, *Hardges* suggests that violation of a court order—as long as it is "directly related" to a general or special probation condition—may itself be the basis for a probation violation. We disagree.

In *Hardges*, the trial court revoked the defendant's probation for violating the general probation condition that he "[r]eport as required and abide by the direction of the supervising officer," ORS 137.540(1)(m), after the defendant failed to abide by an action plan prepared by his probation officer that directed him to stay each night in a particular place (the Medford Building). *Id.* at 446-47. We concluded that a defendant may violate probation for failing to comply with an officer's directive under that provision "*only* when the officer's direction relates to the requirement that the probationer '[r]eport as required.'" *Id.* at 452 (emphasis added). Because the directive that the defendant stay at the Medford Building did not relate to that reporting requirement, we concluded that it "was not an enforceable condition under ORS 137.540(1)(m)," and, "accordingly, the trial court erred when it concluded that the defendant's failure to comply with the action plan constituted a violation of his probation." *Id.* at 453. Necessarily implicit in that conclusion is the requirement that a finding of a probation violation must be predicated on the violation of a lawfully imposed *condition of probation*—in that case, the general condition specified in ORS 137.540(1)(m). Thus, in *Hardges*—unlike in this case—the requirement that the defendant comply with an order was not simply "related" to a probation condition—it *was* the probation condition.[6] Thus, we reject the state's argument that violation of a court order, if it "directly relates" to a condition of probation, can form the basis for a probation-violation finding.

In sum, we conclude that the court erred in finding that defendant violated his probation by failing to appear in court on October 10, because that requirement was not a general or special condition of probation imposed

[6] The state does not argue that the court order was a lawful *modification* of the defendant's conditions of probation under ORS 137.540(9)(a), which the defendant subsequently violated, and we express no opinion on the potential viability of such an argument.

on defendant by the court. Although, as explained above, it may have been within the court's discretion to extend defendant's probation as it did—assuming the record would support a proper exercise of that discretion[7]—the court was not authorized to impose a probation-violation fee in the absence of a valid finding of a probation violation. Perhaps the state could also have sought to establish that defendant's failure to appear on October 10 as directed in the court's order was a violation of a court order for which defendant could have been held in contempt. But the failure to appear was not, as a matter of law, a violation of defendant's probation.

Reversed and remanded.

[7] We do not resolve that question here because, in any event, the extension of defendant's probation has expired. That circumstance, however, does not render this appeal moot, because of the assessment of the fee.