

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,
Respondent on Review,

v.

MATTHEW EUGENE RICHARDS,

Defendant-Appellant,
Petitioner on Review.

Multnomah County Circuit
Court No. 120833582

CA A155895

SC S063979

BRIEF ON THE MERITS OF
RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Multnomah County
Honorable ANGEL LOPEZ, Judge

Opinion Filed: March 23, 2016
Author of Opinion: S. J. DE MUNIZ
Before: SERCOMBE, Presiding Judge, and DEHOOG, Judge,
and DE MUNIZ, Senior Judge.

Continued...

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BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

INTRODUCTION

Occasionally, one person will be on post-prison supervision (PPS) and probation at the same time. Though such a person generally will be supervised by the same supervising officer, they are in fact under the ultimate jurisdiction of separate bodies. That is, a probationer remains under the jurisdiction of the trial court, while an offender on PPS is placed under the jurisdiction of the parole board or the local supervisory authority. Furthermore, PPS and probation—and sanctions for PPS or probation violations—are governed by separate statutory schemes. If a probationer violates his or her probation, the supervising officer must notify the trial court, which may impose a sanction or revoke probation. But if an offender violates PPS, the supervising officer has no duty to notify the trial court, and may impose an administrative sanction. In that case, if the offender's underlying conduct also violates his or her probation, the trial court retains the authority to impose a probation sanction or revoke probation. Thus, a person may sometimes receive a sanction for a PPS violation as well as a sanction for a probation violation for the same conduct. ORS 137.593(3), which prevents a court from revoking probation or imposing sanctions if a probationer has already completed a *probation* violation sanction, does not prohibit that outcome.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question presented

When a defendant has completed a structured, intermediate sanction—imposed by the PPS authority—for conduct that violates his PPS conditions for one conviction, does ORS 137.593 (3) override a trial court’s authority to revoke the defendant’s probation on another conviction based on the same conduct?

Proposed rule of law

No. ORS 137.593(3) provides that a sentencing judge may not revoke a probationer’s probation or impose other or additional sanctions if the probationer has completed a structured, intermediate sanction imposed by the probation supervisory authority. Thus, by its terms, a trial court retains its authority to revoke probation or to impose other sanctions if the prior sanction was imposed by a different supervisory authority for PPS violations related to a different crime.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2012, defendant was convicted of first-degree burglary and first-degree theft. (SER 1-4, Judgment). On the burglary conviction, the trial court imposed a dispositional departure sentence of 36 months’ supervised probation. (SER 2). On the theft conviction, the court imposed an upward durational sentence of 36 months’ supervised probation. (*Id.*). Those probation

terms ran concurrently. ORS 137.123. The court imposed all general conditions of probation, including requirements that he obtain prior written permission before changing his residence and report as required to his supervising officer. (SER 2). The judgment also specified that defendant was “assigned to [the trial court] for judicial supervision of probation.” (SER 2, 3).

In March 2013, the court revoked defendant’s probation on the theft conviction based on his failure to notify his probation officer of a change of address and his failure to report to the officer, and imposed a 60-day jail sanction followed by 12 months of PPS. (SER 5, Judgment Revoking Probation/Continuing Probation). The court continued defendant’s probation on the burglary conviction. (*Id.*).

Shortly after being released from jail on the theft conviction, defendant violated two conditions of his PPS when he failed to notify his supervising officer of a change of address, and failed to report to the officer. (Tr 11). As a result, his supervising officer imposed a three-day incarceration sanction. (Tr 17). In November 2013, based on defendant’s failure to notify his supervising officer of his change of address, the trial court revoked his probation on the burglary conviction, and imposed a 17-month term of imprisonment followed by three years of PPS. (Tr 19, ER 1). In revoking probation, the court stated, “I revoked him last time on a 60-day sanction to get the idea into his head that he was gonna have no quarter with this Court. He—he took that sanction and he

just basically said, ‘So what? I’m gonna do [indiscernible] the way I wanna do ‘em.’” (Tr 18).

Defendant appealed from that judgment and, in a written opinion, the Court of Appeals affirmed. *State v. Richards*, 277 Or App 128, 370 P3d 874 (2016). This court granted defendant’s petition for review on June 16, 2016.

SUMMARY OF ARGUMENT

ORS 137.593 prohibits a trial court from revoking probation for a “probationer” who has completed a “structured, intermediate sanction” for violations of conditions of probation. Here, the trial court revoked defendant’s probation for violating his probation conditions on a burglary conviction after defendant’s PPS supervising officer had previously imposed a three-day PPS violation sanction for the same conduct on a theft conviction. ORS 137.593 did not prohibit the trial court from revoking probation on the burglary conviction. Because the sanction imposed by defendant’s supervising officer was imposed for violations of his PPS for the theft conviction, the trial court remained free to revoke defendant’s probation on the burglary conviction—even for the same underlying conduct. Accordingly, this court should affirm the trial court’s judgment, as well as the Court of Appeals’ decision upholding that judgment.

ARGUMENT

Defendant challenges the revocation of his probation on his conviction for first-degree burglary. He argues that, under ORS 137.593(3), the trial court

lacked the authority to revoke his probation, because he had already completed a sanction for violating conditions of his PPS for the same conduct. But that statute unambiguously applies only to probationers who have completed a probation violation sanction. Thus, nothing prohibited the trial court from revoking defendant's probation once it found that he had violated a condition of his probation.

A. Probation violation sanctions and PPS sanctions are governed by separate statutory schemes.

In order to provide context for the discussion of ORS 137.593(3), below, the state first discusses the two statutory schemes that apply to probation sanctions and PPS sanctions, and how those schemes affect the trial court's authority to impose sanctions for probation violations.

1. Probation sanctions may be imposed by the trial court, the Department of Corrections, or a county community corrections agency.

When a court sentences a defendant to probation, the court may impose general probation conditions, as well as special conditions reasonably related to "the needs of the probationer for the protection of the public or reformation of the probationer, or both." ORS 137.540(2). The court may supervise the defendant's probation or it may order that the defendant's probation be supervised by the Department of Corrections or by a county community

corrections agency. ORS 137.540(2), (7), (8); ORS 137.593(1).¹ The type of supervision—court or agency—affects whether and how the court may sanction a probationer for violating the conditions of probation.

Generally, for felonies committed on or after November 1, 1989, the sentencing court “may revoke probation supervision and impose a sanction as provided by rules of the Oregon Criminal Justice Commission.”

ORS 137.545(5)(b). “The decision to revoke probation is discretionary and may be exercised upon a finding that the offender has violated one or more of the conditions of probation * * *.” OAR 213-010-0001. The court’s authority to revoke probation and impose a sanction, however, is limited when the court has placed the probationer under the supervision of a county community corrections agency. ORS 137.593 describes the respective roles of the county community corrections agency and the court in addressing violations of conditions of probation. First, when a probationer placed under the supervision of the Department of Corrections or a county community corrections agency violates a condition of probation, those entities are required to impose

¹ Defendant was convicted in Multnomah County, and the judgment specified that defendant was “assigned to [the trial court] for judicial supervision of probation.” (SER 2, 3). However, defendant was living in Deschutes County at the time of the convictions, and his supervision was transferred to the Deschutes County community corrections agency. *See Violation and Structured Sanction Reporting Form*, 10/29/13.

“structured, intermediate sanctions” in accordance with rules adopted by the Department of Corrections. ORS 137.593(1).² And, notwithstanding supervision by the Department of Corrections or a county community corrections agency, the sentencing court retains authority to revoke probation. ORS 137.593(2). That authority, however, is limited. Once a probationer has completed a structured, intermediate sanction imposed by the Department of Corrections or a county community corrections agency, the sentencing court may not revoke probation or impose additional sanctions. ORS 137.593(3). To ensure that a sentencing court is given the opportunity to address a probationer’s violation, OAR 291-058-0050(1) requires the supervising officer to notify the sentencing court and the district attorney “[w]hensoever administrative sanctions are imposed.”³ The sentencing court may revoke probation “prior to the imposition of any structured, intermediate sanctions or within four judicial days after receiving notice that a structured, intermediate sanction has been imposed on the probationer.” ORS 137.593(2)(c).

Thus, when a sentencing court supervises the offender’s probation, it has discretion to revoke probation if it finds that the offender violated one or more

² Those rules are contained in OAR 291-058-0010 through OAR 291-058-0070.

³ “Administrative sanctions” mean “[l]ocal structured, intermediate sanctions * * *.” OAR 291-058-0020.

of the conditions of probation. On the other hand, when the Department of Corrections or a county community corrections agency supervises the offender's probation, those entities must notify the trial court of any violation, and the court may revoke probation only if the offender has not yet completed a structured, intermediate sanction.

Here, neither the Department of Corrections nor the county community corrections agency imposed a structured, intermediate probation sanction on defendant for a *probation* violation. Thus, the trial court could properly revoke his probation for his conduct.

2. In contrast, a trial court has no authority to impose sanctions for PPS violations.

When a court imposes a term of PPS to follow a term of imprisonment of 12 months or less, the local supervisory authority⁴ has jurisdiction over the imposition of conditions of PPS and sanctions for violations of those conditions. ORS 144.101(2).⁵ The supervisory authority uses “a continuum of

⁴ The “local supervisory authority” means the “local corrections agency or official designated in each county by that county’s board of county commissioners or county court to operate corrections supervision services, custodial facilities or both.” ORS 144.087(1).

⁵ ORS 144.101(2) provides:

Except as provided in subsection (1) of this section [containing exceptions that do not apply in this case], a local supervisory authority has jurisdiction over the imposition of conditions of post-prison supervision and sanctions for violations

Footnote continued...

administrative sanctions” for violations of conditions of PPS. ORS 144.106.

The Department of Corrections has no authority to impose sanctions for violations of PPS. *See* ORS 144.101(1) (providing State Board of Parole and Post-Prison Supervision jurisdiction over the imposition of conditions of PPS and sanctions for PPS sanctions for persons convicted of a felony in specified circumstances). However, the Department of Corrections established rules governing the application of those administrative sanctions. *See generally*, OAR 291-058-0010 through OAR 291-058-0070. Those rules, as discussed above, also govern the application of structured intermediate sanctions for violations of conditions of probation. But unlike in cases involving structured, intermediate sanctions for probation violations, nothing requires the supervising officer to notify the court or the district attorney when the officer imposes an administrative sanction for a PPS violation. Rather, in the event of sanctions for a PPS violation, notice is sent to the supervisory authority or the Board of Parole and Post-Prison Supervision. OAR 291-058-0060. Moreover, there is no provision giving authority to a trial court to impose any sanction for a defendant’s PPS violations.

(...continued)

of those conditions for a person sentenced to a term of imprisonment of 12 months or less.

B. Statutory text and context demonstrate that ORS 137.593(3) prohibits multiple sanctions for a single probation violation, not multiple sanctions for a probation violation for one crime and a PPS violation for another crime.

The trial court revoked defendant’s probation on his burglary conviction based on his failure to notify his probation officer of his change of address, and imposed a 17-month term of imprisonment followed by three years of PPS. ORS 137.593(3) did not prohibit the trial court from doing so, because defendant had not been assessed—let alone completed—a “structured, intermediate sanction” for the probation violation.

When construing a statute, this court’s “paramount goal” is to discern the legislature’s intent by examining the text of the statute in context, relevant legislative history, and, if necessary, canons of construction. *State v. Gaines*, 346 Or 160, 171-73, 206 P3d 1042 (2009). “[T]here is no more persuasive evidence of the intent of the legislature than the words by which the legislature undertook to give expression to its wishes.” *Id.* (internal quotation marks omitted). As a result, the first step in analyzing a statute is to examine the statutory text, giving terms of common usage their “plain, natural, and ordinary meaning.” *Id.* at 171, 175. The court also “considers the context of the statutory provision at issue, which includes other provisions of the same statute and other related statutes.” *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993).

Applying that methodology here, ORS 137.593(3), by its terms, does not limit judicial authority to revoke probation or to impose other sanctions if a prior sanction was imposed by a different supervisory authority for PPS violations for a different crime. Again, ORS 137.593(3) provides:

In no case may the sentencing judge cause a probationer to be brought before the court for a hearing and revoke probation or impose other or additional sanctions after the probationer has completed a structured, intermediate sanction imposed by the Department of Corrections or a county community corrections agency pursuant to rules adopted under ORS 137.595.

As an initial matter, the plain text of ORS 137.593(3) unambiguously provides that it applies only to situations where the probationer's supervision is handled by the Department of Corrections or by a county community corrections agency and, even then, only when the sanction is imposed for a probation violation. ORS 137.593(3) twice uses the term "probationer." Although that term is not defined by ORS chapter 137, it undoubtedly refers to a person serving a term of probation. That the legislature used the word "offender" in other statutes is of no moment. *See, e.g.*, ORS 137.592(2) (discussing "[d]ecisions to incarcerate offenders in state prisons for violation of the conditions of probation"); ORS 137.593(2)(d) (authorizing a court to "require an offender to serve a period of incarceration not to exceed 180 days as a sanction for revocation of probation"); and ORS 137.595(1) (providing that DOC's rules for probation sanctions should consider "the criminal history of the

offender”). The use of “offender” in those statutes does not indicate an intent to apply probation statutes to persons other than probationers. First, those statutes instruct the supervising authority regarding appropriate sanctions when it has revoked a person’s probation; because that person is no longer on probation, he or she is appropriately described as an “offender.”

Second, had the legislature in fact intended ORS 137.593(3) to limit the sanctions available for both probationers and also those subject to other supervision, it would have used a word other than “probationer.”⁶ But ORS 137.593(3) prohibits the revocation of probation “after *the probationer* has completed a structured, intermediate sanction.” Thus, the “structured intermediate sanction” referred to is one that was imposed on “the probationer” as a result of a probation violation.

Finally, ORS 137.593(3) describes—and limits—the “structured, intermediate sanction” as one “imposed by the Department of Corrections or a

⁶ And, notably, the legislature does not use the term “probationer” to describe individuals on PPS. Rather, statutes governing PPS use the terms “person” or “offender,” and a person who violates a condition of PPS is referred to as a “violate.” See, e.g., ORS 144.106(3) (“An *offender* may not be confined in a restitution center, work release center or jail for more than 15 days for a violation of conditions of PPS unless [certain conditions are met].”) (emphasis added); and ORS 144.106(1) (“Except as otherwise provided by rules of the Department of Corrections and the State Board of Parole and Post-Prison Supervision concerning parole and post-prison supervision *violators*, the supervisory authority shall use a continuum of administrative sanctions for violations of the conditions of post-prison supervision.”) (emphasis added).

county community corrections agency * * *.” ORS 137.593(3). As noted above, the Department of Corrections has no authority to impose sanctions for violations of PPS. Rather, for most felony cases, the Board of Parole and Post-Prison Supervision “has jurisdiction over the conditions of post-prison supervision and sanctions for violations of those conditions * * *.”

ORS 144.101(1). For other felonies, the “local supervisory authority has jurisdiction over the imposition of conditions of post-prison supervision and sanctions for violations of those conditions.” ORS 144.101(2). Therefore, structured, intermediate sanctions “imposed by the Department of Corrections or a county community corrections agency” must mean sanctions imposed for probation violations.

In sum, ORS 137.593(3) applies only when the supervising officer has imposed structured, intermediate sanctions for a *probation* violation, and places no limits on a trial court’s authority to revoke probation or to impose other sanctions if the prior sanction was imposed by a different supervisory authority for PPS violations for a different crime

Notwithstanding the plain meaning of the statutory text, defendant argues that the legislature directed the Department of Corrections to adopt administrative rules governing administrative probation sanctions and that those rules deprived the trial court of its authority to revoke his probation. (Pet Br 26-29). But the context of ORS 137.593(3) supports the state’s textual analysis.

See, e.g., Lane County v. LCDC, 325 Or 569, 578, 942 P2d 278 (1997) (“[W]e do not look at one subsection of a statute in a vacuum; rather, we construe each part together with the other parts in an attempt to produce a harmonious whole.”). First, ORS 137.593(1) defines the supervising agency’s authority: the agency must impose structured, intermediate sanctions for violations of conditions of probation, but it *may not* revoke probation. Second, ORS 137.593(2) defines the court’s authority when it has placed a defendant under the supervision of an agency: the court may revoke probation, determine if the probationer has violated conditions of probation, cause the probationer to be brought before the court for a probation violation hearing, and—in the event of revocation—require the offender to serve an incarceration sanction. ORS 137.593(2)(a) -(d).

Third, following from the divisions of authority set out in subsections (1) and (2), ORS 137.593(3) explains how the respective authorities of the court and the agency intersect. That is, subsection (3) explains that the court’s authority to revoke probation is limited when the supervising agency has already imposed a sanction pursuant to rules adopted under ORS 137.595. That statute provides, in part, that the Department of Corrections shall adopt rules establishing a system of structured, intermediate probation violation sanctions that may be imposed by the Department of Corrections or a county community corrections agency. ORS 137.595(1). More importantly, ORS 137.595(2)(f)

provides that the Department of Corrections shall establish rules providing for notification to district attorneys and the courts regarding probation violations and sanctions imposed by the Department of Corrections or county community corrections agencies.

Read in concert, the three subsections of ORS 137.593 establish that the “structured, intermediate sanctions” that can affect a court’s authority to revoke probation are the sanctions that the supervising agency imposes “for the violations of conditions of probation,” and for which it must notify the trial court. ORS 137.593(1), ORS 137.595, OAR 291-058-0050(1). That interpretation, which the trial court implicitly applied here, harmonizes the three subsections of ORS 137.593, as well as ORS 137.595. Wherever possible, this court construes statutes to be consistent with one another and to give effect to all. ORS 174.010; *Force v. Dept. of Rev.*, 350 Or 179, 190, 350 P3d 139 (2011) (“Statutory provisions * * * must be construed, if possible, in a manner that will give effect to all of them.” (Internal quotation marks omitted.)).⁷

⁷ Defendant cites legislative history that he contends reflects the intent to give the Department of Corrections a “significant amount of authority” over probation violation sanction rules and to reduce the authority of judges to revoke probation. (Pet Br 29-32). While that may be true as far as it goes, defendant cites nothing to indicate that the legislature intended to limit a trial court’s authority to revoke probation or to impose other sanctions in addition to the limitations explicitly provided by ORS 137.593(3).

Defendant argues that the state's interpretation of ORS 137.593(3) undermines the legislature's goals of ensuring systematic probation revocation decisions and reserving prison space for offenders who constitute serious threats to the public. He posits that two offenders, both on probation and PPS, could be treated differently if their supervising officer imposed a PPS sanction on one, and a probation sanction on the other—the one who receives a PPS sanction could have his or her probation revoked, and other could not. But nothing prohibits such an outcome. In any event, as noted above, when a supervising officer intends to impose a structured, intermediate probation sanction, the officer is required to notify the sentencing court and the district attorney. ORS 137.595(2)(f), OAR 291-058-0050(1). At that point, the sentencing court could revoke the offender's probation. ORS 137.593(2)(b). Thus, the two offenders are in essentially the same position. That is, once the second offender's supervising officer notified the sentencing court of the sanction, the court could cause the offender to be brought before the court for a hearing, and could "revoke probation or impose such other of additional sanction(s) or modify the conditions of probation as authorized by law." OAR 291-058-0050(3).

In sum, because the court supervised defendant's probation, it had the discretion to revoke his probation upon a finding of violation. The PPS sanction imposed by defendant's supervising officer was not a "structured,

intermediate sanction” as that term is used in ORS 137.593(3), and the court therefore properly revoked defendant’s probation.

CONCLUSION

This court should affirm the trial court’s judgment and the Court of Appeals’ decision affirming that judgment.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 10, 2016, I directed the original Brief on the Merits of Respondent on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Kyle Krohn, attorneys for respondent, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 3,672 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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