

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-172

COMMONWEALTH

vs.

ROBERT J. MCMAHON.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Robert J. McMahon, appeals from an order of a District Court judge finding him in violation of his probation on a conviction for operating under the influence of intoxicating liquor, third offense, G. L. c. 90, § 24 (1) (a) (1), and sentencing him to serve the suspended portion of his split sentence. Concluding that the defendant was on probation at the time of the violation, we affirm.

According to the docket sheet, on September 25, 2017, the defendant was sentenced to two and one-half years in a house of correction, one year to serve, with the balance suspended for two years, until September 23, 2019. The order of probation, signed by the plea judge, states that the "probation start date" was September 25, 2017, and the "probation end date" was September 23, 2019. The order required the defendant to

"[r]eport to your probation officer within 48 hours after you are released from any incarceration," and prohibited him from leaving Massachusetts without obtaining "the express permission of [the] probation officer and sign[ing] a waiver of rendition." The defendant was released on parole on January 29, 2018. The defendant failed to report to the probation department and was arrested in Pennsylvania weeks later at his parents' apartment.¹

The only issue raised by the defendant on appeal is the claim that the defendant could not have been on probation, because he was on parole. Even if we ignored the fact that, at the violation hearing, the defendant stipulated that he was on probation, the defendant's argument fails.

Contrary to the defendant's argument, "[w]here a defendant is sentenced to both incarceration and probation, probation typically begins on the defendant's release from incarceration," Commonwealth v. Ruiz, 453 Mass. 474, 480 (2009), not upon the defendant's completion of parole. Accordingly, not only is it possible for a defendant to be on both probation and parole at the same time, the default is that a defendant released on parole with a probationary term will initially be supervised both by the probation department and the parole board.

¹ Because the violation occurred after the defendant's release from incarceration, we need not decide whether the probationary term coincided with the defendant's incarceration.

Furthermore, not only is such parallel supervision by the executive and judicial branches permissible, a judge may place a defendant on probation while the defendant is still incarcerated. See Ruiz, 453 Mass. at 480. ("the terms of probation may state explicitly . . . that probation and some or all of its attendant conditions are to commence during the period of incarceration"). See also Commonwealth v. Juzba, 44 Mass. App. Ct. 457, 459 (1998) ("A judge is not barred from placing a defendant on probation during the period of his incarceration"). Cf. Commonwealth v. Bunting, 458 Mass. 569, 573 (2010) (defendant may be subjected to probationary conditions even before probationary term commences, if so notified). Accordingly, there is no prohibition on parallel supervision.

As the defendant was on probation on January 29 to 31, 2018, and failed to comply with the probationary conditions that he report to the probation department and refrain from leaving Massachusetts without express permission, the judge properly

found him in violation of his probation.

Order revoking probation
affirmed.

By the Court (Kinder, Henry &
Ditkoff, JJ.²),



Clerk

Entered: February 10, 2020.

² The panelists are listed in order of seniority.