

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as 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 23.0 or 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

20-P-907

COMMONWEALTH

vs.

WILLIAM R. COOK.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant appeals from the denial of his motion for release from unlawful probation conditions. The Commonwealth agrees that the probation conditions, imposed after the plea was accepted and the sentence was announced, were unlawful. We also conclude that the conditions were unlawfully imposed, and therefore reverse the order denying defendant's motion, and remand to the Superior Court for entry of an order vacating the unlawful conditions.

The defendant pleaded guilty to driving under the influence of alcohol, fifth offense, see G. L. c. 90, § 24 (1) (a) (1), and to negligent operation of a motor vehicle, see G. L. c. 90, § 24 (2) (a). The judge imposed an agreed-upon sentence, that is, a term of incarceration on the first count and a probationary sentence with conditions on the second. The

conditions were (1) no alcohol use, (2) alcohol abuse treatment, and (3) a lifetime loss of license. The sentence was announced in open court and recorded on the docket.

Thereafter, the probation department prepared a form in which two additional special conditions of probation were checked. The conditions were "you shall not consume illegal drugs . . . and shall submit to random [drug]testing as directed by the probation officer." Neither of these conditions were part of the original agreed upon plea, and neither was announced in court. Nor were they recorded on the docket. The form was signed by the judge.

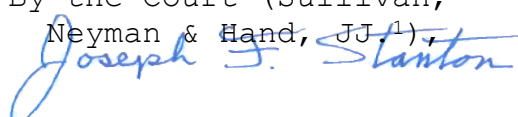
The defendant then filed a motion for relief from unlawful probation conditions. The motion judge, who was not the sentencing judge, denied the motion for relief, reasoning that the probation sheet controlled over the record, and that the sentencing judge must have intended the additional conditions.

Whatever the sentencing judge's intent may have been, due process requires that "the oral pronouncement of a sentence . . . generally controls over the written expression where there exists a material conflict between the two." Commonwealth v. Grundman, 479 Mass. 204, 206 (2018), quoting Commonwealth v. Williamson, 462 Mass. 676, 685 (2012). The defendant was entitled to actual notice of the terms of his sentence at the time it was imposed. See Commonwealth v. Pacheco, 477 Mass.

206, 215 (2017). "Where there is a direct conflict between an oral pronouncement of a sentence and the written judgment and commitment, the oral pronouncement, as correctly reported, must control. The only sentence that is legally cognizable is the actual oral pronouncement in the presence of the defendant" (quotation and citation omitted). Id. at 211. Moreover, the defendant is entitled to withdraw an agreed-upon plea if the sentence exceeds the recommended agreed-upon sentence. See Grundman, supra, at 207.

The order denying the motion for release from unlawful probation conditions is reversed, and the matter is remanded to the Superior Court for the entry of an order vacating the two drug-related conditions of probation.

So ordered.

By the Court (Sullivan,  
Neyman & Hand, JJ.<sup>1</sup>),  
  
Clerk

Entered: June 10, 2021.

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<sup>1</sup> The panelists are listed in order of seniority.