

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

19-P-1231

COMMONWEALTH

vs.

GLENN CHRISTIE.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant appeals from orders of a Superior Court judge finding him in violation of conditions of probation, revoking his probation, and denying his motion to reconsider. He argues that he did not willfully violate any of the conditions of his probation. We affirm.

Background. For purposes of this appeal, we need not recite the entire lengthy procedural history of this case. See Commonwealth v. Christie, 89 Mass. App. Ct. 665 (2016). See also Christie v. Commonwealth, 484 Mass. 397 (2020). Relevant here, in June 2018, on convictions of rape of a child (two counts) and indecent assault and battery on a child, the plea judge sentenced the defendant to six years in State prison, deemed served. In addition, on convictions of one count of rape of a child and disseminating material harmful to a minor, the

judge imposed ten years' probation, to be served from and after the committed terms. As conditions, the judge ordered that the defendant report to probation "at such time and place as directed," undergo sex offender evaluation and treatment "as deemed appropriate," and wear a global positioning system (GPS) device to provide electronic monitoring (ELMO) of his whereabouts.

In March and April 2019, the probation department issued notices alleging that the defendant committed the following violations of probation:

"Failure to comply with Sex Offender Treatment: Suspended from treatment since April 1, 2019."

"Failure to report to Probation as scheduled 2/26/19."

"Failure to comply with GPS monitoring: Strap violation 3/17/19 at 10:51 A.M."

On April 29, 2019, at a final surrender hearing before another judge, both the probation officer and the defendant testified. The judge found that the defendant had committed all three violations of probation, noting that his lack of compliance was "dismal" and in a "pattern . . . evidenced by three separate organizations and individuals." The judge revoked the defendant's probation on the conviction of disseminating material harmful to a minor, and sentenced him to one to two years in State prison; on one conviction of rape of a child, the judge imposed a term of eight years' probation, from

and after his release. The defendant moved for reconsideration, which was denied.

Discussion. At a probation revocation hearing, the "probationer is entitled to an opportunity to show not only that he did not violate the conditions [of his probation], but also that there was a justifiable excuse for any violation . . . ." Commonwealth v. Pena, 462 Mass. 183, 188 (2012), quoting Black v. Romano, 471 U.S. 606, 612 (1985). In this case, as to each alleged violation, the defendant testified to excuses: medical issues, transportation troubles, or miscommunications. However, "the judge was not required to accept any of the exculpatory reasons offered by the defendant." Commonwealth v. Morse, 50 Mass. App. Ct. 582, 592 n.13 (2000), quoting Commonwealth v. Tate, 34 Mass. App. Ct. 446, 449-450 (1993). "The question is whether the record discloses evidence sufficient to warrant the finding by the judge" that the defendant violated his probation conditions. Tate, supra. We review to determine whether the judge abused her discretion in finding, by a preponderance of the evidence, that the defendant violated his probation. See Commonwealth v. Nunez, 446 Mass. 54, 59 (2006).

1. Sex offender treatment. The defendant argues that he did not violate the condition requiring him to "complete" sex offender treatment by being "briefly suspended" from the treatment program. The judge heard evidence that, over a six-

month period, the defendant failed to attend twelve out of thirty treatment sessions, and as a result was suspended from treatment on April 1, 2019. The judge explicitly credited the determination of the sex offender treatment program's clinician that the defendant had "not been participating in a fashion that is up to the requirements of that program."<sup>1</sup>

The defendant maintains that he did not violate the requirement that he undergo sex offender treatment by repeatedly being absent from the program, because (1) he was merely "suspended" rather than "discharged" from the program, and so his absences did not make it impossible for him to complete it; and (2) he was undergoing a separate course of treatment which satisfied the condition.

"When no specific date is established by the sentencing judge by which time a probationer must complete a treatment program, the defendant's obligation is to act with reasonable promptness to comply with the schedule established by his

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<sup>1</sup> We are unpersuaded by the defendant's argument that the revocation violated his due process rights because it was partly based on his inability to pay fees for the sex offender treatment program. The judge based her finding of violation on the defendant's repeated absences from the treatment program, not his failure to pay fees. At the surrender hearing, the defendant presented no evidence that he was unable to afford the fees; in fact, he paid the full amount outstanding. Moreover, even if he had been unable to pay the fees, his remedy would have been to seek modification of the condition, not to violate it. Cf. Commonwealth v. Pereira, 93 Mass. App. Ct. 146, 151 (2018) (inability to pay restitution).

probation officer." Commonwealth v. Bynoe, 85 Mass. App. Ct. 13, 19-20 (2014). The probation officer informed the judge that "with the severity of the charges that [the defendant] is being supervised for, it's important and imperative that he maintain consistent attendance at the sex offender treatment and not just participate the days he shows, but attend all sessions . . . ." See id. at 21-22 (probation officer establishes identity of service provider and date by which evaluation must be completed). It was well within the judge's discretion to find that the defendant violated the condition that he undergo sex offender treatment by failing to attend twelve out of thirty sessions and by being suspended from the program. See L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

The defendant also argues that he had inadequate notice that his habitual absences and suspension from sex offender treatment would trigger a violation of his probation condition. "Due process requires that a probationer receive fair warning of conduct that may result in revocation of probation." Commonwealth v. Riz, 90 Mass. App. Ct. 10, 13 (2016), quoting Commonwealth v. Kendrick, 446 Mass. 72, 75 (2006). "This notice requirement can be satisfied by 'an imprecise but comprehensible normative standard so that [people] of common intelligence will know its meaning'" (citation omitted). Riz, supra. The judge heard evidence that on February 11, 2019, nearly two months

before the defendant's suspension, the sex offender treatment program sent an e-mail to his probation officer expressing concerns about his lack of participation. After that, the defendant missed three more meetings in March 2019, after which he was suspended for "breach of his treatment contract." We conclude the defendant had fair warning that repeatedly missing classes and being suspended would result in a violation of the judge's order. Indeed, it was clear that his attending the sex offender treatment sessions, and remaining enrolled in the program, was necessary for him to comply with the probation condition that he "undergo sex offender evaluation and treatment as deemed appropriate."

2. Missed meeting with probation. The defendant maintains that he did not willfully fail to meet with his probation officer on February 25, 2019, because he had been recently hospitalized and tried to call his probation officer that morning.

At the hearing, the probation officer testified that the defendant was supposed to meet with her in person on February 25, 2019, but he missed the appointment "without notice, no call and indicated after the fact that it was due to . . . feeling unwell."<sup>2</sup>

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<sup>2</sup> Asked on cross-examination if she recalled receiving any voicemails from the defendant on February 25, the probation

The defendant introduced medical records documenting that, two days before that scheduled meeting, he was hospitalized as a result of an adverse reaction to his anxiety medication. On direct examination, he testified that he could not attend the February 25, 2019 meeting because that morning he was having "issues, if [he] stood up, [he] would lose consciousness." On cross-examination, he admitted that he did not lose consciousness, and in fact attended his sex offender treatment session later that day. He testified that he telephoned the probation department twice that morning, but never said who he spoke to or that anyone excused him from appearing at the scheduled meeting. The defendant also testified that he had provided defense counsel with a photograph depicting a cell phone call log of two dialed telephone calls to the probation department at 10:28 A.M. on February 25, but did not state whether either telephone call connected, or for how long.<sup>3</sup> The

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officer testified that she did not recall. Asked if she spoke to the defendant's "significant other" that day, she testified that she was not sure. Her lack of memory of any voicemail or conversation with the defendant's partner did not amount to any evidence that those events happened.

<sup>3</sup> This photograph was not formally entered into evidence as an exhibit at the hearing, but was provided in support of the defendant's motion to reconsider. It shows one telephone call to the probation department's phone number at 10:19 A.M., and two telephone calls to a different number saved as "Probation Suffolk [sic]" at 10:48 A.M., but does not indicate whether the telephone calls connected and, if so, their duration.

defendant admitted that for two weeks after February 25, he did not contact his probation officer.

"Probation may be revoked if the evidence at a probation surrender hearing establishes, 'at least to a reasonable degree of certainty, that the defendant had violated a condition or conditions of his probation.'" Commonwealth v. Arroyo, 451 Mass. 1010, 1011 (2008), quoting Commonwealth v. Maggio, 414 Mass. 193, 198 (1993). Here, the judge could credit the testimony of the probation officer that the defendant failed to attend the February 25, 2019 meeting "without notice, no call," and afterwards she did not hear from him for two weeks. The judge was not required to credit the defendant's excuses for not attending that meeting, including that he had been in the hospital two days before, he thought he would lose consciousness if he stood up, and he supposedly tried to call probation that morning. See Morse, 50 Mass. App. Ct. at 592 n.13 (judge entitled to determine credibility of witnesses at hearing). Cf. Commonwealth v. Al Saud, 459 Mass. 221, 231 (2011) (finding violation of probation where defendant did not make a good faith effort to comply with requirement). Contrast Commonwealth v. Poirier, 458 Mass. 1014, 1016 (2010) (no violation where defendant acted "reasonably and in good faith to comply" with requirement, but was unable to do so due to probation department's inability to fit him with GPS device).

3. GPS strap violation. The defendant argues that the judge did not hear sufficient evidence to prove that he willfully violated his probation by failing to have his GPS monitor strap replaced on March 17, 2019, as instructed by probation.

The defendant testified that on Saturday evening, March 16, 2019, his GPS strap broke when his "he[e]l started to go in" an open vent. The judge heard evidence that, as a result of the broken strap alert, ELMO personnel instructed the defendant at about 11 P.M. on March 16 to go to the Quincy police station to have the strap replaced. Records submitted with the defendant's motion to reconsider indicate that the defendant stated he would go to the Quincy police station at 7 P.M. on the next day, March 17. At 7:15 P.M. on March 17, about twenty-one hours after his strap had broken, ELMO personnel called the defendant, and he said he was having trouble getting to Quincy because he was disabled and could not walk there, the Massachusetts Bay Transportation Authority (MBTA) Blue Line was not in service, and he had not yet found a ride. At 7:42 P.M., ELMO personnel called him again, and he admitted that he still had not left home, but was "about to leave," and it would take him about one and one-half hours to get to Quincy by public transportation. After ELMO personnel consulted probation, a warrant issued for the defendant. At the probation revocation hearing, the

defendant testified that he was told to report to the Quincy police station between 7:00 and 10:00 P.M., and that when ELMO personnel called him twice that evening and he explained his transportation problems, both times ELMO personnel said, "okay."

It was within the judge's discretion to determine whether the evidence demonstrated that the probation condition could not be met despite a diligent effort to comply, see Poirier, 458 Mass. at 1016, or if the defendant failed to make a concerted effort to meet it. Cf. Commonwealth v. Canadyan, 458 Mass. 574, 576-579 (2010) (defendant met burden of proving failure to comply with probation condition was through no fault of his own, where evidence showed he did not have access to technical support necessary to fulfill it). From evidence at the hearing, the judge found that the defendant's failure to get his GPS re-strapped was "not accidental, but actual willful refusal to comply," and that he violated the GPS requirement of his probation terms by remaining unmonitored for approximately thirty-six hours. See L.L., 470 Mass at 185 n.27.<sup>4</sup>

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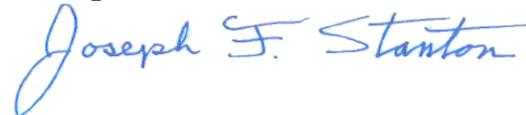
<sup>4</sup> The defendant's argument that the GPS condition was unconstitutional as applied to him is unavailing. At sentencing, the defendant and the judge understood that imposition of GPS was a matter of the judge's discretion, and that G. L. c. 265, § 47, did not apply because it was enacted after the defendant committed these crimes. See Commonwealth v. Cory, 454 Mass. 559, 560 (2009). Thus Commonwealth v. Feliz, 481 Mass. 689 (2019), is inapposite; it held § 47 unconstitutional because it mandated GPS as a probation condition for certain crimes. The GPS condition was imposed in

Conclusion. Sufficient evidence supported the judge's findings that the defendant committed each of the three alleged probation violations, and so we discern no abuse of discretion. We further decline to order that the remaining portion of the defendant's sentence be deemed served. See Commonwealth v. Hogan, 17 Mass. App. Ct. 186, 187 (1983) ("Appellate courts have no general power to review the severity or leniency of an otherwise lawful sentence which is within the limits permitted by statute").

Order revoking probation and imposing sentence affirmed.

Order denying motion to reconsider affirmed.

By the Court (Green, C.J.,  
Neyman & Grant, JJ.<sup>5</sup>),



Clerk

Entered: September 1, 2021.

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the discretion of the sentencing judge. See Commonwealth v. Johnson, 481 Mass. 710, 719 (2019) (upholding GPS monitoring order that predated Feliz, based on facts in record that showed "legitimate probationary purposes" for condition).

<sup>5</sup> The panelists are listed in order of seniority.