

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-317

COMMONWEALTH

vs.

JOSEPH GREEN.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Having been found in violation of his probation by a judge of the Superior Court, Joseph Green appeals from the judge's denial of his motion to dismiss the probation violation proceedings and from the order revoking his probation.¹ Because, in the circumstances of this case, we are not persuaded that the four-year delay between the initiation of the probation surrender proceedings and the final surrender hearing violated the probationer's due process rights, we affirm.

Background. In 2009, the probationer pleaded guilty in Superior Court to indictments charging him with home invasion, armed assault in a dwelling, assault and battery with a

¹ For the purposes of our discussion, we consider the terms "probation surrender proceedings" and "probation surrender hearing" to be synonymous with "probation violation proceedings" and "probation violation hearing."

dangerous weapon, and assault and battery (underlying offenses); his sentence included concurrent five-year terms of probation on his convictions of home invasion and armed assault in a dwelling. In 2013, after the probationer was found in violation for reasons unrelated to this appeal, his probation end date was extended to July 10, 2016.

On March 16, 2015, the probationer was charged with new criminal offenses in the District Court (new charges).² On the same day, and based on the new charges, the probation department obtained a warrant in the Superior Court for the probationer's arrest. When he presented himself in court on March 17, 2015, the probationer was detained. He remained in custody on the probation matter until he was found in violation of his probation, four years later.³

² The probationer was subsequently indicted and arraigned in the Superior Court.

³ We note that in addition to being detained on the probation matter, the probationer has been held on a cash bail on the new charges since at least the date of his arraignment in the Superior Court in May 2015. Where the Commonwealth does not argue that the bail, rather than the probation detainer, was the reason for the probationer's loss of liberty here, however, we do not consider whether the probationer's bail status impacts his due process claim. Cf. Commonwealth v. Milton, 427 Mass. 18, 22 (1998) (where defendant held on bail, but not detained on probation matter, no due process violation where surrender notice withdrawn and defendant denied opportunity to be heard on alleged violation); Commonwealth v. Odoardi, 397 Mass. 28, 33-34 (1986) (probationer already incarcerated on other charges at time of probation surrender proceedings not deprived of liberty by virtue of probation surrender proceedings).

On March 9, 2018, the probationer filed a motion to dismiss the probation violation proceedings, arguing that he was not afforded a surrender hearing within a reasonable time after his probation end date.⁴ On May 24, 2019, after an evidentiary hearing, the judge denied the probationer's motion to dismiss and found him in violation of his probation based on the new charges. This appeal followed.

Discussion. A judge may, for a reasonable time after the expiration of a probationary term, revoke probation based on a violation committed during that term.⁵ See Commonwealth v. Sawicki, 369 Mass. 377, 384-385 (1975). Any delay in the revocation proceedings must be reasonable, in light of all the circumstances. See Commonwealth v. Ward, 15 Mass. App. Ct. 388, 391-392 (1983). The question whether a given delay is reasonable is assessed on a case-by-case basis. See Sawicki, supra at 385.

We discern no abuse of discretion in the judge's decision, set forth in a thoughtful and detailed memorandum. The judge's

⁴ Additionally, the probationer contended that the probation department violated his due process rights by failing to serve him with written notice of the alleged probation violation. He does not press this alternative argument on appeal.

⁵ The probationer's contention that the failure to resolve an allegation of an in-term violation results in an extension of the probationary terms is incorrect. See Commonwealth v. Aquino, 445 Mass. 446, 450 (2005) (fact that violation remained pending after probation end date could not extend probation).

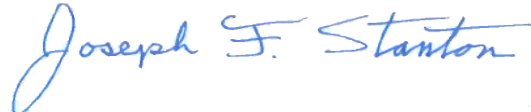
finding that the probationer "has participated in the continued delay in the hope of resolving both [the probation matter and the new charges] at the same time" is amply supported by the record; indeed, the probationer does not challenge it. Where the probationer either requested or assented to the great majority of the forty-one continuances of the surrender hearing between 2015 and 2019, he cannot be heard to complain that he was prejudiced by the resulting delay.⁶ See Commonwealth v. Baillargeon, 28 Mass. App. Ct. 16, 20 (1989) (no prejudice from delay "of [probationer's] own making"). Further, where the continuances in the case were usually, if not exclusively, for the purpose of allowing the parties to attempt to reach a global resolution of the probation violation and the new charges, "the delay could have inured only to the [probationer's] benefit," and so did not prejudice him. Commonwealth v. Odoardi, 397 Mass. 28, 36 (1986). See Sawicki, 369 Mass. at 386. We discern no error in the judge's conclusion that the four-year period between the initiation and resolution of the probation surrender proceedings was reasonable under the circumstances and that it did not violate the probationer's right to due process.

⁶ Some additional delay was also attributable to the probationer's unsuccessful efforts to obtain dismissal of the new charges in 2016 and 2018, and to the serial withdrawal of two of the probationer's three appointed attorneys.

Conclusion. The order denying the motion to dismiss the probation violation proceedings is affirmed. The order revoking probation and imposing sentence is affirmed.

So ordered.

By the Court (Shin, Hand &
Brennan, JJ.⁷),



Clerk

Entered: September 23, 2022.

⁷ The panelists are listed in order of seniority.