COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-941

COMMONWEALTH

vs.

NATHANIEL SIMMONS, JR.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant appeals from an order of the Superior Court that denied his motion to terminate probation. The defendant argues that his term of probation commenced, and ended, after he was released from incarceration but while he was civilly committed as a sexually dangerous person. This past month, in Commonwealth v. Medina, 487 Mass. 616 (2021), the Supreme Judicial Court held that a criminal defendant's probation sentence commences upon the defendant's release into the community, unless the judge clearly indicates otherwise. If a defendant has been sentenced to a term of probation following a term of incarceration, but instead is civilly committed before being released into the community, under Medina the presumption is that the term of probation does not begin until the defendant has been released from civil confinement as well. Id. at 620

n.5. The instant case presents facts and circumstances that are substantially the same as those in Medina, and Medina thus requires the conclusion that the defendant's probation did not commence until his release from civil confinement as a sexually dangerous person. We accordingly affirm the order denying the motion to terminate probation, although for reasons different than those of the Superior Court judge.

Background. The defendant pleaded guilty in 1999 to several crimes, including multiple counts of rape and multiple counts of assault and battery, as well as assault and battery with a dangerous weapon. The judge sentenced him to eight to ten years in state prison on the rape counts (to run concurrently), and to three years of probation on the assault and battery with a dangerous weapon charge, "to commence from and after release from incarceration" on the rape charges.[1]

The defendant completed the prison sentence in June of 2007. Prior to his release from prison, in May of 2007, the Commonwealth petitioned to have the defendant committed as a sexually dangerous person under G. L. c. 123A, and following a trial, the defendant was committed to the treatment center upon his release from prison.

[1] The defendant was also sentenced to three years of probation on several of the other charges, to run concurrently with the above probation sentence.

The defendant remained in the treatment center for seven more years, until October of 2014, when a jury found that he was no longer sexually dangerous. At his jury trial, the defendant presented two expert witnesses who testified that if released, the defendant would remain on supervised probation for three more years. The Commonwealth's witnesses also testified that the defendant would remain on probation. Upon his release from the treatment center, the defendant in fact reported to the probation department.

In 2016, two years after his release, the defendant was charged with violating the conditions of his probation. He responded by moving to terminate probation, arguing that his term of probation had commenced, and ended, while he was committed to the treatment center. A judge of the Superior Court agreed with the defendant that based on the plain language of the defendant's sentence, his probation had begun when he was released from prison in 2007, and should have ended in 2010. The motion judge, who did not have the benefit of Medina, declined to dismiss the probation violation charges, however, because she held that the defendant was judicially estopped from claiming that his probation had terminated, as a result of the

arguments he had presented to the jury at his sexually dangerous person (SDP) trial in 2014.[2,3] The defendant appeals.

Discussion. The defendant argues that his probation began when he was released from prison in 2007, and ended three years later, based on the language the judge used in his sentence. However, this argument fails in light of the Supreme Judicial Court's recent decision in Medina. In Medina, the defendant was sentenced to a term of incarceration, as well as to a term of probation to be served "from and after" the term of incarceration. Id. at 617. The defendant in Medina also was civilly committed as a sexually dangerous person upon completion of his criminal sentence, and after being released from civil confinement he similarly argued, in response to a notice of an

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[2] The defendant had previously taken the position, in the SDP trial, that because the term of probation would commence upon his release from the treatment center, it "would act as a protective factor, reducing the risk to the community."

Because we affirm the denial of the defendant's motion on other grounds, we need not reach the question whether the defendant was judicially estopped from arguing that his term of probation had already expired. The Supreme Judicial Court in Medina also declined to address whether judicial estoppel could bar a defendant from pursuing the argument that his probation had terminated while civilly committed. See 487 Mass. at 622.

[3] The defendant was initially charged with violating probation based upon drug use, but in 2017 the Commonwealth amended its charges to include new allegations of rape and assault. The defendant was subsequently tried and convicted of these new charges and sentenced to thirty years in state prison.

alleged probation violation, that his probation had commenced, and ended, during his civil confinement. Id. at 616-617.

The court concluded that the defendant's probation had not run during his civil confinement. The court held that "absent a clear indication to the contrary, we assume that when a judge sentences a defendant to probation following . . . a term of incarceration, he or she intends that the probationary term be served upon the defendant's release into the community." Medina, 487 Mass. at 619-620. The Court reasoned that the "purposes and goals of probation" -- supervised rehabilitation in a community setting -- are not served by construing a probation sentence as commencing when a person is released from incarceration into another form of confinement, rather than into the community. See id. at 619, 626 ("By its nature, probation is meant to be served while a probationer is living in the community"). Accordingly, a term of probation that follows a term of incarceration does not commence until release into the community, and is tolled during an intervening period of civil commitment, unless the judge clearly indicates otherwise -- that is, if the sentencing judge "ma[d]e it clear" that the term of probation was to commence "regardless of whether the defendant has been released into the community." See id. at 620 n.5.

For these reasons, here the defendant's probation must be construed to have commenced upon the defendant's release into

the community, and so the defendant's probation had not expired at the time of the alleged violations. We note that in this case, as in Medina, the terms of the defendant's probation -- including an order "to stay away from the victim, to attend counseling at [the defendant's] own expense, to submit to random urine screening and to pay probation fees" -- support the conclusion that the sentencing judge contemplated that the defendant "would serve his probation [while] in the community." These conditions would be largely ineffectual for a probationer who remains confined to the treatment center. See id. at 621 ("[C]onditions attached to the probationary term . . . of the sort that are usually imposed to regulate the behavior of a probationer who is living in the community" suggest that the sentencing judge intended that the term be served upon release into the community). The defendant argues that the phrasing used by the sentencing judge, as a matter of plain language, indicated that the term of probation should begin to run on the defendant's release from prison. However, the language of the defendant's sentence is functionally identical to the sentence in Medina, and is not in itself a "clear indication" that the term of probation was to commence "regardless of whether [the

defendant] had been released into the community." See id. at 620 n.5.[4]

Order denying motion to terminate probation affirmed.

By the Court (Vuono, Sullivan & Englander, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: July 26, 2021.

[4] In ruling that the term of probation should have commenced in 2007, the motion judge relied upon the fact that Chapter 123A was inoperative at the time of sentencing in 1999, reasoning that therefore the sentencing judge "could not have anticipated the possibility that [the defendant] might be committed as a sexually dangerous person while serving his sentence." The reasoning of Medina, however, does not turn on a judge's specific contemplation of possible civil commitment, but rather turns on the assumption, rooted in the policies and goals of probation, that a judge intends probation to be served while in the community unless he or she clearly states otherwise. See id. at 620 n.5.

[5] The panelists are listed in order of seniority.