

MASSACHUSETTS SUPREME JUDICIAL COURT

Commonwealth v. MacDonald

435 Mass. 1005 (2001) · Decided November 5, 2001

SUMMARY

The Supreme Judicial Court of Massachusetts held that a probationer is bound by the conditions imposed by the sentencing judge, not by conflicting conditions written on a probation form by a probation officer. A docket entry requiring the defendant to “stay away” from the victim was not equivalent to a “no contact” order, and the probation form was not a contract. The court vacated the order denying the defendant’s motion to dismiss and remanded for findings regarding the conditions actually imposed by the sentencing judge.

CASE DETAILS

COURT	Massachusetts Supreme Judicial Court
JURISDICTION	Massachusetts
DECIDED	November 5, 2001
DISPOSITION	vacated
PROCEDURAL POSTURE	The defendant sought review of a District Court probation-surrender ruling that denied his motion to dismiss, found him in violation of probation, revoked probation, and imposed a house-of-correction sentence. The Supreme Judicial Court vacated the order and remanded for findings concerning the conditions imposed by the sentencing judge.
STANDARD OF REVIEW	The court reviewed whether the probation surrender proceedings could rest on a condition appearing only on the probation form and whether remand was required for findings regarding the sentencing judge's imposed conditions.
PRECEDENTIAL VALUE	published and precedential
PARTIES	MacDonald v. Commonwealth

TOPICS

- probation
- criminal procedure
- evidence

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether a no-contact condition written on a probation officer's form, but not imposed or recorded by the sentencing judge, could support a probation-violation finding.
2. Whether the probation form signed by the defendant constituted a contract controlling over the conditions imposed by the sentencing judge.
3. Whether remand was required because the second probation surrender judge made no findings identifying the conditions imposed by the sentencing judge.

HOLDINGS

1. A defendant violates probation only by disobeying conditions imposed by the sentencing judge; where the probation form and docket differ, the conditions written by the probation officer do not independently establish the operative probation conditions.
2. The probation form is not a contract, and the conditions signed by the defendant do not control over the conditions imposed by the sentencing judge.
3. Remand was necessary because the second probation surrender judge made no findings identifying the conditions imposed by the sentencing judge.

KEY QUOTATIONS

“An order to “stay away” (the term entered on the docket) is not the equivalent of an order of “no contact” (the term on the probation forms).” (1006)

“The probation form is not a contract.” (1007)

“The defendant is in violation of his probation only if he disobeys the conditions of probation imposed by the sentencing judge.” (1007)

FACTUAL BACKGROUND

The sentencing judge's docket entries required the defendant to stay away from the victim, but the probation forms prepared by a probation officer required that he have no contact with the victim. The defendant was repeatedly surrendered for alleged violations of the no-contact condition. At the second surrender proceeding, the judge treated the signed probation form as a contract controlling over the docket, found the defendant in violation, revoked probation, and imposed a house-of-correction sentence.

PROCEDURAL HISTORY

The sentencing judge initially placed the defendant on probation with a docketed condition that he stay away from the victim, while the probation form prepared by a probation officer added a no-contact condition. After an initial probation violation and extension of probation, the docket again reflected a stay-away condition while the signed form included no contact. The second probation surrender judge denied the defendant's motion to dismiss, treated the signed probation form as a controlling contract, found a violation, revoked probation, and

imposed a house-of-correction sentence. The Supreme Judicial Court vacated that order and remanded because the second judge made no findings about the conditions actually imposed by the sentencing judge.

DISPOSITION

vacated

REMAND INSTRUCTIONS

The order denying the defendant's motion to dismiss the probation surrender proceedings is vacated. The matter is remanded for the second probation surrender judge to determine the conditions imposed by the sentencing judge, based on the existing record or, in the judge's discretion, further evidence.

CASES CITED

- Commonwealth v. Finase, ante 310, 314 (2001)
- Commonwealth v. MacDonald, supra at 224
- Commonwealth v. Mattos, 404 Mass. 672, 677 (1989)
- Barry v. Commonwealth, 390 Mass. 285, 289 (1983)

OPINION

PER CURIAM.

*1006The defendant was originally placed on probation by a District Court judge (sentencing judge). The conditions of probation on the probation form signed by the defendant do not mirror those on the docket. The docket indicates that a condition of probation imposed by the sentencing judge was that the defendant “stay away.” The form the defendant signed contained written conditions of probation prepared by a probation officer and included the requirement that he “stay away from [the victim], no contact.” Thus, the probation form included a “no contact” requirement, whereas the docket required only that the defendant “stay away.” Later, notices of surrender and hearings for alleged violations of probation were served on the defendant.

Each of these notices included as an alleged violation of probation, inter alia, “failure to have no contact with victim,” and stated dates and places of each such violation (emphasis supplied). The sentencing judge presided over this first probation surrender hearing, found the defendant in violation of his probation, and extended the defendant’s probation for an additional five years, subject to certain conditions.

For a second time, the conditions of probation on the probation form signed by the defendant are not the same as those on the docket. The docket entry reflects three conditions, including, “stay away from victim.” Once again, the defendant signed a form containing conditions of probation prepared by a probation officer, which include, inter alia, a provision that the defendant have “[n]o contact” with the victim.

The defendant was later surrendered yet another time; again “failure to comply with no contact order” was one of the alleged violations of probation. Prior to the probation surrender proceeding, the defendant filed a motion to dismiss based, in part, on the ground that the sentencing judge had ordered him to “stay away” from the victim but had not imposed a “no contact” order.

A second District Court judge (second probation surrender judge) denied the motion to dismiss. Although the docket did not contain the “no contact” provision, she concluded that the conditions of probation signed by the defendant constituted a contract and that the contract “controlled.” Accordingly, she found the defendant in violation of his probation, revoked the probation, and imposed a sentence to a house of correction.

An order to “stay away” (the term entered on the docket) is not the equivalent of an order of “no contact” (the term on the probation forms). “Pursuant to a ‘stay away’ order, the defendant may not come within a specified distance of the protected party, usually stated in the order, but written or oral contact between the parties is not prohibited. By contrast, a ‘no contact’ order mandates that the defendant not communicate by any means with the protected party, in addition to remaining physically separated.

Thus, a ‘no contact’ order is broader than a ‘stay away’ order.” *Commonwealth v. Finase*, ante 310, 314 (2001). Here, where there is a difference between the probation conditions entered on the docket and those on the probation form prepared by the probation officer, the case turns not on the conditions the probation officer wrote on the form, but instead on the conditions of probation the sentencing judge imposed.

As the Appeals Court correctly concluded, the defendant was in no position to bargain with the probation officer and the conditions of probation signed by the defendant had no viability apart from the court order that created them. *1007The probation form is not a contract. See *Commonwealth v. MacDonald*, supra at 224.

The defendant is in violation of his probation only if he disobeys the conditions of probation imposed by the sentencing judge. Bridget Norton Middleton, Assistant District Attorney, for the Commonwealth. Donald K. Freyleue for the defendant. Docket entries are prima facie evidence of the facts recorded therein. See *Commonwealth v. Mattos*, 404 Mass. 672, 677 (1989), quoting *Barry v. Commonwealth*, 390 Mass. 285, 289 (1983).

However, there may be other evidence that may rebut the prima facie effect of the docket. For example, one of the reasons that the defendant was originally surrendered for a violation of probation was “failure to have no contact with victim.” Neither party disputes that that surrender proceeding was presided over by the sentencing judge and, after the defendant was found in violation of probation, according to the docket, the “stay away” condition was reimposed.

It is unlikely that the sentencing judge would impose less severe conditions after a violation of probation than those he had originally imposed. The entry in the docket (after the original sentencing and after the first probation surrender hearing) reflecting only “stay away” in contrast to the alleged probation violation for failure to comply with a “no contact” order is some evidence that the docket entry did not accurately reflect the conditions imposed by the sentencing judge.

Nevertheless, there are no findings by the second probation surrender judge. The defendant is in violation of his probation only if he disobeys the conditions of probation imposed by the sentencing judge. Thus, remand is necessary because of the absence of findings by the second probation surrender judge regarding the conditions of probation imposed by the sentencing judge!

It is possible that the record before the second probation surrender judge provides sufficient evidence for her to make the determination of the conditions imposed by the sentencing judge or that further evidence is necessary. That is a matter left to the discretion of the second probation surrender judge.

The order denying the defendant’s motion to dismiss probation surrender proceedings is vacated, and the matter is remanded for further proceedings consistent with this opinion. So ordered.