NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law, although it may be cited for whatever persuasive value it may have. See McCoy v. State, 80 P.3d 757, 764 (Alaska App. 2002).

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DAVID C. NORDLUND, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13783 Trial Court No. 1KE-06-01246 CR MEMORANDUM OPINION No. 7006 — May 25, 2022

Appeal from the Superior Court, Third Judicial District, Palmer, John C. Cagle, Judge.

Appearances: David C. Nordlund, *in propria persona*, Wasilla, Appellant. Kenneth M. Rosenstein, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Harbison and Terrell, Judges.

Judge HARBISON, writing for the Court.
Judge TERRELL, concurring.

After finding that David C. Nordlund had committed a new criminal offense — specifically, third-degree criminal mischief[1] — the superior court revoked Nordlund's probation. Nordlund, representing himself, appeals. Although his briefing is often

[1] AS 11.46.482(a)(1).

difficult to understand, he essentially contends that the superior court erred when it revoked his probation.[2] For the reasons explained in this decision, we affirm the judgment of the superior court.

Background

In 2007, Nordlund entered a Criminal Rule 11 plea agreement to one count of second-degree sexual abuse of a minor. In exchange, the State dismissed a number of other serious offenses, including other sexual assault and sexual abuse charges. He was sentenced to 20 years with 10 suspended, and given 7 years of probation following his release from custody.

On April 17, 2019, while Nordlund was on probation, he was arrested for failing to register as a sex offender and his bail was set at a $1,000 cash performance bond. On that same day, the State filed a petition to revoke Nordlund's probation. On April 24, Nordlund posted bond and was released from custody. On April 29, Nordlund was arrested for breaking several windows at a hotel and charged with third-degree criminal mischief. The State then filed a supplemental petition to revoke his probation.

After these petitions were filed, a jury found Nordlund guilty of third-degree criminal mischief. A judgment of conviction was entered on January 28, 2020. The superior court subsequently conducted an adjudication hearing on the petitions to revoke Nordlund's probation.[3]

---

[2] We note that Nordlund represented himself in the superior court. His superior court pleadings are also often difficult to understand.

[3] Nordlund did not provide this Court with a transcript of the adjudication hearing.

Following the adjudication hearing, the superior court found that Nordlund had violated his probation by committing the offense of third-degree criminal mischief.[4] The court imposed 12 months of Nordlund's previously suspended time. This appeal followed.

Nordlund's claims that the superior court lacked authority to revoke his probation

On appeal, Nordlund first contends that because his probation was automatically "tolled" by the filing of the April 17, 2019 petition, he was no longer under probation supervision when the petition was adjudicated. Thus, according to Nordlund, the superior court had no authority to revoke his probation. We reject this contention.

In *Gage v. State*, we established that a defendant's term of probation is tolled during the period between the filing of a petition to revoke the defendant's probation and the adjudication of that petition (if the probation violation is proved).[5] Our chief concern was to ensure that probationers do not receive credit for periods of time when they are not under probation supervision, and we accordingly held that a defendant will not receive probation credit for the time that elapses in order to adjudicate an allegation that the defendant violated probation.[6]

However, a court has the authority to revoke a defendant's probation at any time prior to the end of the maximum period of probation specified in AS 12.55.090, even when the defendant is not formally being supervised on probation (as long as the

---

[4] The State initially alleged three additional probation violations, but two of these allegations were withdrawn before the adjudication hearing, and the superior court found that the State had not proved the other.

[5] *Gage v. State*, 702 P.2d 646, 647-48 (Alaska App. 1985).

[6] *Id.*

violation itself occurs during — or, in some cases, prior to — the probationary period).[7] Thus, even when the *running* of probation is tolled, the court continues to have the authority to revoke the defendant's probation.[8]

Nordlund also generally claims that the superior court lacked the authority to revoke his probation. According to Nordlund, he did not receive an agreed-upon benefit of his original Rule 11 plea agreement — specifically, eligibility for discretionary parole — and this invalidates his conviction and the sentence imposed pursuant to it.

Nordlund raised this argument as part of his response to the petition to revoke his probation, and the superior court treated this argument as a request to withdraw his 2007 plea. It then rejected the argument, ruling that Nordlund could only make such a request in an application for post-conviction relief.

The superior court was correct. Alaska Rule of Criminal Procedure 11(h)(3) provides that, after imposition of sentence, the withdrawal of a plea may be

---

[7] *See Gant v. State*, 654 P.2d 1325, 1327 (Alaska App. 1982) (explaining that probation may be revoked for crimes committed prior to the technical commencement of the probationary period); *Galaktionoff v. State*, 733 P.2d 628, 629 (Alaska App. 1987) (holding that a sentencing court has the authority to retrospectively revoke a defendant's probation at any time within the maximum period of probation — even after the defendant has completed probation supervision — if it is later discovered that the defendant committed a crime while on probation).

[8] Nordlund also argues that "a person cannot be under probation supervision pursuant to Title 33, while released [on bail] under Title 12." Although his argument is confusing, he seems to suggest that punishing a person for both a violation of probation and a violation of bail release conditions would violate the prohibition against double jeopardy. We reject this argument. The fact that Nordlund was subject to possible penalties for violating his conditions of release while on bail awaiting the adjudication of a petition to revoke probation does not implicate double jeopardy. Punishment imposed for a new criminal offense of violating conditions of release is distinct from punishment imposed for the probation violation. *See, e.g.*, *United States v. Grisanti*, 4 F.3d 173, 175-76 (2d Cir. 1993) (collecting cases).

sought only in an action for post-conviction relief. We accordingly conclude that the superior court did not err by rejecting Nordlund's effort to challenge his 2007 plea agreement in the probation revocation proceedings.

Nordlund's claim that the superior court failed to review all of the evidence

On appeal, Nordlund contends that his conviction for criminal mischief was not valid, and that the superior court erred by relying on the judgment of conviction rather than independently determining whether there was sufficient evidence to support this conviction.

As an initial matter, the superior court could have relied on the judgment of conviction to establish that Nordlund committed the offense of third-degree criminal mischief. At the time of his probation revocation proceedings, a jury had already found Nordlund guilty of third-degree criminal mischief. And under the doctrine of collateral estoppel, which prohibits a litigant from relitigating an issue that was resolved in a previous case, a defendant is prohibited from arguing in the subsequent probation revocation proceeding that they did not commit the crime for which they were convicted.[9]

But in this case, the record shows that the superior court nevertheless independently assessed Nordlund's challenge to his criminal mischief conviction. In its written findings, the superior court stated that it had considered all of Nordlund's evidence and arguments. The court explained that it had previously reviewed the discovery provided on a compact disc from Nordlund's criminal mischief case in order to resolve certain motions Nordlund had filed requesting evidence from the trial. Based

[9] *See Aceveda v. State*, 571 P.2d 1013, 1014-15 (Alaska 1977) (holding that a conviction based on a guilty plea is res judicata for purposes of a probation revocation hearing and forms a solid basis for probation revocation).

on that material, which included a videorecording of Nordlund's actions on April 29, 2019, the superior court found, by a preponderance of the evidence, that Nordlund had violated his probation by committing the offense of third-degree criminal mischief. Accordingly, we reject Nordlund's claim of error.

Nordlund's claim that the superior court violated his right to compulsory process

Nordlund subpoenaed three witnesses who did not appear at the adjudication hearing — a witness to his criminal mischief offense, his defense attorney, and a witness from the Anchorage Police Department. On appeal, Nordlund contends that the superior court violated his right to compulsory process by not requiring these witnesses to testify at the hearing.

But the record shows that, when these witnesses did not appear, the superior court issued orders directing them to appear and explain why they should not be held in contempt of court for failing to respond to Nordlund's subpoenas. At the show cause hearing, Nordlund asked questions of the witness from the criminal mischief case and then declined the superior court's offer to set a date to allow the witness to appear in person to testify.[10] Nordlund also agreed that he had received the discovery he requested from the Anchorage Police Department and said he was willing to let the court rule on the evidence that had already been submitted rather than hearing from the police department witness. Finally, the superior court explained that Nordlund's defense attorney had provided the court with a compact disc containing discovery materials Nordlund had requested from his criminal mischief trial. And after the court informed

[10] Because Nordlund did not have this hearing transcribed, the Court reviewed the audio recording.

Nordlund that it had reviewed these materials, Nordlund indicated that he did not seek any further information from the defense attorney.

Based on this record, we conclude the superior court committed no error.

Nordlund's claim that the sentence imposed for the revocation was excessive

At his disposition hearing, the superior court imposed 12 months of Nordlund's suspended time. Nordlund contends that this sentence is excessive.

But Nordlund does not argue that the superior court sentenced him to an impermissibly lengthy term of imprisonment. Instead, he contends that because his probation had been tolled by the filing of the petition to revoke, the superior court had no authority to impose any jail time at all for his probation violation. In other words, Nordlund is not claiming that his sentence to serve for the probation revocation was excessive, but that the sentence was illegal.

But as we explained earlier, the superior court had the authority to revoke Nordlund's probation. And because Nordlund did not brief the question of whether the superior court's disposition order was clearly mistaken, he has waived any excessive sentence claim.[11]

Other potential claims

Nordlund also argues that the State has made statements that support his claim that he was not under probation supervision when he committed criminal mischief. Nordlund contends that the State filed a brief in Case No. A-13053 in which (according

[11] *See Berezyuk v. State*, 282 P.3d 386, 392 (Alaska App. 2012) (holding that a single-sentence "argument," with no reference to the evidence presented in the superior court, or to the judge's findings, is insufficient to preserve a point on appeal).

to Nordlund) it asserted that Nordlund had served his full sentence for the second-degree sexual abuse of a minor conviction and there was no further time to impose. Nordlund contends that if he had no time left to serve in that case, then he could not have been under probation supervision in 2019.

We conclude that Nordlund mischaracterizes the State's briefing. The State did not argue that Nordlund had served his entire sentence in the sexual abuse of a minor case, nor that there was no further time to impose. We accordingly reject this claim.

We acknowledge that Nordlund's briefing is sometimes difficult to understand, and he may have intended to raise other claims besides the ones we have discussed here. However, to the extent that Nordlund may be attempting to raise other claims, we conclude that these claims are inadequately briefed.[12]

Conclusion

The judgment of the superior court is AFFIRMED.

[12] *See Petersen v. Mut. Life Ins. Co. of New York*, 803 P.2d 406, 410 (Alaska 1990) (holding that issues that are only cursorily briefed are deemed abandoned); *A.H. v. W.P.*, 896 P.2d 240, 243-44 (Alaska 1995) (concluding that inadequate briefing resulted in waiver of most of the fifty-six arguments raised by the pro se appellant).

Judge TERRELL, concurring.

One of Nordlund's claims in this appeal is that the superior court erred by relying on his judgment of conviction for third-degree criminal mischief as the basis for concluding that he had violated his probation. He argues that the court was required to independently determine whether there was sufficient evidence to support this conviction. The majority correctly rejects this argument, both because the superior court could have relied on the judgment of conviction to establish that Nordlund violated the law, and because the superior court independently reviewed the evidence and determined that Nordlund had, in fact, committed the crime of third-degree criminal mischief.

I write separately to remind trial judges to be cognizant of the issue of collateral estoppel. Among other benefits, a timely and proper application of collateral estoppel saves scarce judicial resources by avoiding the costly relitigation of issues that have already been decided, and it prevents the entry of inconsistent judgments that can undermine trust in the judicial system.

I briefly note one other point, regarding the purposes for which a probationer may provide clarifying information about the conduct underlying a new criminal conviction that is the basis for a petition to revoke probation. It is clear that a probationer is not entitled to assert their innocence as to the new conviction.[1] Nonetheless, the probationer should be permitted to address the facts underlying the conviction insofar as they bear on the decision of whether probation should be revoked,

[1] *Morrissey v. Brewer*, 408 U.S. 471, 490 (1972) ("Obviously a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime."); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (extending *Morrissey* to probation revocation actions).

and, if so, what the proper probation revocation disposition should be.[2] But the precise scope of a right to present mitigating evidence is a subject of debate in appellate courts of other jurisdictions.[3]

This point of law has not been resolved by Alaska's appellate courts. I believe that the West Virginia Supreme Court best described what can still be contested when the government asserts, in a probation revocation action, the collateral estoppel effect of a new criminal conviction: "that [the probationer] was not the person convicted, that the offense of which [the probationer] was convicted was other than the one specified as a probation violation, and that the probation violation report or petition is inaccurate or contains misinformation."[4] The probationer should be permitted to introduce evidence or argument regarding reasons for committing (or circumstances surrounding the commission of) the offense which, while not technically a defense to criminal culpability, nonetheless bear on whether there is good cause to revoke probation or on the proper disposition of the probation action. The amount of evidence and

---

[2] *Morrissey*, 408 U.S. at 488; *Gagnon*, 411 U.S. at 786-90.

[3] *See, e.g.*, *United States v. Williams*, 558 F.2d 224, 228 (5th Cir. 1977) (noting that, in a case where the defendant's probation was revoked based in part on a new robbery conviction, "we are unpersuaded that [the defendant] was entitled to offer any alibi evidence with respect to the robbery"); *State ex rel. Thomas v. Ohio Adult Parole Auth.*, 738 N.E. 2d 794, 795 (Ohio 2000) (holding that the parole authority did not violate the defendant's due process rights by precluding him from raising the defense of entrapment, in reference to his cocaine trafficking conviction, during his revocation hearing); *State v. Holcomb*, 360 S.E. 2d 232, 237-38 (W.Va. 1987) (holding that the court presiding over the defendant's revocation proceedings did not violate the defendant's due process rights by denying his motion for a transcript of his criminal proceedings); *In re Akridge*, 581 P.2d 1051, 1052 (Wash. 1978) (holding that a parolee must have the "opportunity to explain why a subsequent conviction should not result in parole revocation").

[4] *Holcomb*, 360 S.E.2d at 237.

number of witnesses should be subject to the discretion of the trial court, to avoid turning the probation revocation action into a full re-trial of the criminal case.[5] But the observations in this paragraph do not represent a definitive resolution of Alaska law on this point, which must await the occurrence of a case where the issue is preserved in the trial court and squarely presented to this Court.

With this addendum in mind, I concur in all respects with the opinion of the Court.

---

[5] *See, e.g.*, *Carson v. State*, 751 P.2d 1317, 1318 (Wyo. 1988).