

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

JASON ALLEN McFERRIN,
Defendant-Appellant.

Jackson County Circuit Court
13CR09373; A158880

Patricia Crain, Judge.

Argued and submitted October 27, 2016.

Anne Fujita Munsey, Deputy Public Defender, argued the cause for appellant. With her on the brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Timothy A. Sylwester, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Armstrong, Presiding Judge, and Tookey, Judge, and Shorr, Judge.

TOOKEY, J.

Affirmed.

TOOKEY, J.

Following guilty pleas, defendant was convicted of four counts of identity theft, ORS 165.800, and one count of second-degree theft, ORS 164.045. The court imposed sentences of supervised probation for a period of 18 months for each of the identity theft convictions and a 30-day jail term for the second-degree theft conviction. While defendant was on probation, the court issued an order to show cause why defendant's probation should not be revoked for changing employment or residency without permission, and for failing to report as required by the terms of his probation and abide by the directions of the supervising officer. At the show cause hearing, defendant admitted that he had committed those two separate supervision violations.

As a result of those supervision violations, the sentencing court revoked defendant's four separate terms of probationary supervision and imposed 20-month incarceration sanctions on each of the four counts of identity theft. The court ordered three of the incarceration sanctions to be served consecutively, and ordered the fourth incarceration sanction to be served concurrently with the other incarceration sanctions, for a total of 60 months' incarceration. On appeal, defendant challenges the court's imposition of three consecutive terms of incarceration. As explained below, we conclude that the sentencing court acted within its authority under OAR 213-012-0040(2)(b)¹ in imposing three consecutive incarceration sanctions. Accordingly, we affirm.

A lengthy recitation of facts in this case would not benefit the parties, the bench, the bar, or the public. Therefore, we begin our discussion with the parties' contentions on appeal. Defendant argues that it was error for the sentencing court to impose three consecutive incarceration

¹ OAR 213-012-0040(2)(b) provides:

"When an offender is serving multiple terms of probationary supervision the sentencing judge may impose revocation sanctions for supervision violations as provided by OAR 213-010-0002 for the violation of each separate term of probationary supervision.

"(b) If more than one term of probationary supervision is revoked for separate supervision violations, the sentencing judge may impose the incarceration sanctions concurrently or consecutively."

sanctions when it revoked four terms of probationary supervision because he committed only two separate supervision violations. Defendant contends that, under OAR 213-012-0040(2)(b), “each consecutive sanction requires a ‘separate supervision violation.’” The state responds that defendant’s “claim of error has merit only if he is correct [that] the rule requires a one-for-one match between the violations of probation found and the consecutive sentences imposed.” The state asserts that the rule sets up a simple test: “if the court revokes multiple probationary sentences ‘for a single supervision violation,’ then all the sentences imposed must be concurrent, but if the revocation is based on ‘separate supervision violations,’ then the court has discretion to impose either concurrent or consecutive sentences” for each term of probationary supervision that is revoked. The issue on appeal is whether the sentencing court had the authority under OAR 213-012-0040(2)(b) to impose three consecutive incarceration sanctions based on two separate supervision violations.²

That issue presents a question of law, which we review for legal error. See *State v. Lewis*, 257 Or App 641, 643, 307 P3d 560 (2013) (“Whether a sentencing court exceeded its authority in imposing consecutive sanctions for probation violations is a question of law, which we review for errors of law.”); *Johnson v. Employment Dept.*, 189 Or App 243, 248, 74 P3d 1159, *adh’d to as modified on recons*, 191 Or App 222, 81 P3d 730 (2003) (“The interpretation of rules is a legal question that we review for errors of law.”). “In construing an administrative rule, we apply the same analytical framework that applies to the construction of statutes.” *State v. Hogevoll*, 348 Or 104, 109, 228 P3d 569 (2010).³ Thus, “[w]e

² To the extent that defendant argues in a footnote in his opening brief that, in light of the Supreme Court’s decision in *State v. Lane*, 357 Or 619, 355 P3d 914 (2015), “the trial court erred in imposing consecutive sentences without making necessary findings under ORS 137.123(2) or 137.123(5),” that argument was not presented to the trial court or assigned as plain error on appeal and, therefore, we do not address it. We also reject the state’s arguments regarding invited error and the reviewability of defendant’s claim of error.

³ We observe, however, that when

“an agency’s interpretation of its own rule is challenged, we accord significant deference to that interpretation. We are required to affirm that interpretation if it is ‘plausible,’ that is, if it is not ‘inconsistent with the wording of the rule itself, or with the rule’s context, or with any other source of law.’

ascertain the legislature’s intentions by examining the text *** in its context, along with any relevant legislative history, and, if necessary, canons of construction.” [State v. Cloutier](#), 351 Or 68, 75, 261 P3d 1234 (2011).

OAR 213-012-0040(2) controls the imposition of consecutive incarceration sanctions when multiple terms of probationary supervision are revoked. We start with the text of OAR 213-012-0040(2) because it is “the best evidence of the legislature’s intent.” *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993). As noted, OAR 213-012-0040(2) provides:

“When an offender is serving multiple terms of probationary supervision the sentencing judge may impose revocation sanctions for supervision violations as provided by OAR 213-010-0002 for the violation of each separate term of probationary supervision.

“(a) If more than one term of probationary supervision is revoked for a single supervision violation, the sentencing judge shall impose the incarceration sanctions concurrently.

“(b) *If more than one term of probationary supervision is revoked for separate supervision violations, the sentencing judge may impose the incarceration sanctions concurrently or consecutively.*”

(Emphasis added.)

We agree with the state that “paragraph (b) does not, by its express terms, prescribe the one-for-one rule that defendant contends that it does.” Instead, by its terms, paragraph (b) gives the sentencing court the authority to impose either consecutive or concurrent incarceration sanctions any

Don’t Waste Oregon Com. v. Energy Facility Siting, 320 Or 132, 142, 881 P2d 119 (1994).”

[Noble v. Dept. of Fish and Wildlife](#), 355 Or 435, 448-49, 326 P3d 589 (2014). That principle does not apply in these circumstances, where the rules at issue are sentencing guidelines that have been approved by the legislature. “Because *** the legislature approved the sentencing guidelines adopted by the Criminal Justice Commission, their interpretation is a question of the legislature’s intent that we resolve by applying the familiar principals of statutory construction[.]” [Houston v. Brown](#), 221 Or App 208, 222 n 10, 190 P3d 427 (2008) (Wollheim, J., dissenting); see ORS 137.667(2) (requiring the commission to submit amendments to the sentencing guidelines to the Legislative Assembly for its approval).

time that “more than one term of probationary supervision is revoked for separate supervision violations.” To impose the limitation on the court’s authority that defendant suggests, we would need to insert words of limitation into the rule that are not there. The rule does not limit the sentencing court to imposing only as many consecutive sentences as there are separate supervision violations and, in the construction of a rule, we do not “insert what has been omitted.” ORS 174.010.

The text in context reveals that there is one limitation to a sentencing court’s authority to impose consecutive incarceration sanctions. OAR 213-012-0040(2)(a) provides that the court must impose concurrent sentences when there is only a “single supervision violation.”⁴ On the other hand, OAR 213-012-0040(2)(b) applies when there are “separate supervision violations.” The different scenarios posited by OAR 213-012-0040(2)(a) and OAR 213-012-0040(2)(b) set forth the distinction that limits the sentencing court’s authority to impose consecutive incarceration sanctions. See *Lewis*, 257 Or App at 644 (concluding that it was error for the court to impose consecutive sentences under OAR 213-012-0040(2)(a), “[b]ecause defendant committed a single probation violation”). We decline to impose an additional limitation on the sentencing court’s authority to impose consecutive incarceration sanctions that is based on the corresponding number of supervision violations. As long as the multiple supervision violations are truly “separate” under the rule, the sentencing court may impose consecutive sentences for each term of probationary supervision that is revoked.

In *State v. Newell*, 238 Or App 385, 387, 242 P3d 709 (2010), the defendant admitted that he had committed five separate probation violations, and the sentencing court revoked defendant’s probation on the four underlying convictions. The court imposed the following revocation sanctions: on the first conviction, a six-month incarceration sanction; on the second conviction, a 12-month incarceration sanction,

⁴ We note that in *Lane*, 357 Or at 639, the court concluded that Article I, section 44(1)(b), of the Oregon Constitution, invalidated OAR 213-012-0040(2)(a) to the extent that it limited the sentencing court’s authority to sentence a defendant consecutively for crimes against different victims.

to be served consecutively to the term imposed on the first conviction; on the third conviction, a 14-month incarceration sanction, to be served consecutively to the term imposed on the second conviction; and on the fourth conviction, a 16-month incarceration sanction, to be served consecutively to the term imposed on the third conviction. *Id.* The total period of incarceration was 48 months. *Id.* We affirmed the court's imposition of four consecutive incarceration sanctions and concluded that "*the sole criterion*" under OAR 213-012-0040(2) for whether a court can impose consecutive incarceration sanctions is "whether there had been multiple probation violations." *Id.* at 395 (emphasis added).⁵

If a court revokes multiple probationary sentences for "separate supervision violations," OAR 213-012-0040(2)(b), then the court has the authority to impose concurrent or consecutive incarceration sanctions for each term of probationary supervision that is revoked. In this case, the court revoked four terms of probationary supervision based on two "separate supervision violations" and ordered three of the incarceration sanctions to be served consecutively. That sanction was within the court's authority under OAR 213-012-0040(2)(b) because defendant committed more than a single supervision violation. Thus, the court did not exceed its authority in imposing three consecutive sentences for defendant's two "separate supervision violations" of four terms of probationary supervision. OAR 213-012-0040(2)(b).

Affirmed.

⁵ In *Newell*, we also noted that the commentary to OAR 213-012-0040(2) provides:

"Section 2. A different rule applies to revocation sanctions associated with multiple terms of probation which may result in revocation sanctions for each term of probation. *The prison term associated with the revocation sanction will be served concurrently or consecutively depending on the nature of the supervision violation.* Under subsection (a), if the basis for multiple revocations is a single supervision violation, the incarceration-term sanctions must be served concurrently. Under subsection (b), if multiple probationary terms are revoked for separate and distinct supervision violation[s], the incarceration-term sanctions may be imposed consecutively."

238 Or App at 394 (quoting *Oregon Sentencing Guidelines Implementation Manual* 118 (1989) (emphasis and brackets in *Newell*)).