

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.*

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

AARON L. LOCHRIDGE,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12258  
Trial Court No. 3AN-14-1870 CR

MEMORANDUM OPINION

No. 6349 — June 8, 2016

Appeal from the Superior Court, Third Judicial District,  
Anchorage, Michael L. Wolverton, Judge.

Appearances: Natasha Norris, Attorney at Law, Anchorage, for  
the Appellant. Jenna L. Gruenstein, Assistant District Attorney,  
Anchorage, and Craig W. Richards, Attorney General, Juneau,  
for the Appellee.

Before: Mannheimer, Chief Judge, and Allard, Judge.

Judge ALLARD.

Aaron L. Lochridge pled guilty to one consolidated count of second-degree sexual abuse of a minor. The court imposed a sentence of 15 years with 9 years suspended (6 years to serve). By statute, Lochridge is ineligible for discretionary parole.<sup>1</sup>

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<sup>1</sup> AS 33.16.090(b)(2).

On appeal, Lochridge challenges his sentence on four grounds. First, he argues that the superior court should have referred his case to the three-judge sentencing panel for consideration of whether the statutory prohibition on his eligibility for discretionary parole would result in manifest injustice in his case. Second, he argues that the sentencing court erred in finding that he did not have extraordinary potential for rehabilitation, and in refusing to refer his case to the three-judge sentencing panel on this basis. Third, he argues that the court erred in rejecting his proposed “least serious” mitigating factor. Fourth, he argues that the court erred in applying two aggravating factors in his case.

For the reasons explained here, we reject all of these claims except for the first one. The State concedes that the sentencing court erroneously failed to consider whether the prohibition on discretionary parole would result in manifest injustice in Lochridge’s case and this concession is well-founded.<sup>2</sup> Accordingly, we remand this case to the superior court for consideration of this issue. If the court concludes that manifest injustice would result, it must refer Lochridge’s case to the three-judge sentencing panel.

We otherwise affirm the judgment of the superior court.

### *Facts and proceedings*

In February 2014, Lochridge’s two stepdaughters reported to their mother that Lochridge had touched them sexually. Fifteen-year-old F.L. told her mother that when Lochridge was massaging her shoulders and neck, he moved his hands under her shirt and touched her breasts and nipples. She reported that another time Lochridge lay

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<sup>2</sup> See *Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972) (explaining that an appellate court must make its own determination that the state’s concessions of error are well-founded).

down next to her in bed and touched the side of her ribs. Seventeen-year-old B.L. reported that, on two separate occasions Lochridge touched her nipples underneath her shirt while giving her a massage. B.L. also said that once when she was naked in the bathroom, she believed Lochridge spied on her under the door using the camera in his smart phone.

The girls' mother contacted the police and agreed to surreptitiously record a conversation with Lochridge pursuant to a *Glass* warrant.<sup>3</sup> During that conversation, Lochridge admitted touching F.L.'s breasts on two occasions. In a later conversation with the police, Lochridge admitted placing his smart phone under the bathroom door in an attempt to see B.L. naked. (He claimed he only saw her neck and shoulders.) Lochridge denied ever touching B.L. in a sexual way.

A search of Lochridge's electronic devices revealed pornographic material, including multiple images of child pornography.

Lochridge was charged with three counts of second-degree sexual abuse of a minor for touching his stepdaughters' breasts, one count of indecent viewing or photography for putting his smart phone under the bathroom door, and eleven counts of possessing child pornography. These charges were resolved in a plea agreement in which Lochridge pled guilty to one consolidated count of second-degree sexual abuse of a minor<sup>4</sup> and the State dismissed the other fourteen counts. As part of that plea agreement, Lochridge admitted all the conduct alleged in the complaint. Sentencing was left open for the court.

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<sup>3</sup> See *State v. Glass*, 583 P.2d 872 (Alaska 1978).

<sup>4</sup> AS 11.41.436(a)(3).

As a first felony offender, Lochridge faced a presumptive sentencing range of 5 to 15 years and a maximum sentence of 99 years.<sup>5</sup> If Lochridge received a sentence within or below this presumptive range, he would be ineligible for discretionary parole under AS 33.16.090(b)(2).

Lochridge asked the sentencing judge to refer his case to the three-judge sentencing panel, arguing that he had extraordinary potential for rehabilitation and that manifest injustice would result if he received a sentence within the 5- to 15-year presumptive range with no eligibility for discretionary parole.<sup>6</sup> Lochridge also asked the sentencing judge to find the statutory mitigating factor AS 12.55.155(d)(9) — that his conduct was “among the least serious” within the definition of the offense of second-degree sexual abuse of a minor. Lastly, he asked the court not to find two of the three statutory aggravating factors the State proposed — (1) that he was more than ten years older than the victim, and (2) that the victim was a member of the same household — arguing that these characteristics should not aggravate his sentence because they are typical of defendants convicted under the subsection of the second-degree sexual abuse of a minor statute that applies to a stepparent who sexually abuses a minor stepchild.

The sentencing court found all three aggravating factors, though it did not rely on those aggravators to impose a sentence above the presumptive range. The court rejected Lochridge’s proposed “least serious” mitigating factor. The court also declined to refer the case to the three-judge sentencing panel, finding that Lochridge did not have extraordinary potential for rehabilitation. The judge did not assess whether manifest injustice would result from the statutory prohibition on discretionary parole; instead, the judge stated that he had no objection if Lochridge wanted “to make an application

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<sup>5</sup> AS 12.55.125(i)(3)(A).

<sup>6</sup> *See* AS 33.16.090(b)(2).

somehow, either on appeal or directly to the three-judge sentencing panel, for them to consider the issue of discretionary parole.” The superior court sentenced Lochridge to 15 years with 9 years suspended (6 years to serve).

Lochridge filed a motion for reconsideration, arguing that the superior court had to refer the case to the three-judge sentencing panel for consideration of whether the statutory prohibition on discretionary parole should be relaxed in his case; he could not appeal to the three-judge sentencing panel directly for this kind of relief. The State opposed the motion, mistakenly arguing that the three-judge sentencing panel only has authority to modify the defendant’s eligibility for discretionary parole if the defendant had exceptional potential for rehabilitation, which the superior court had already determined Lochridge did not have. The superior court denied the motion for reconsideration without comment.<sup>7</sup> Lochridge now appeals.

*Why we remand the case to the superior court to consider whether manifest injustice would result from the statutory bar on discretionary parole*

The State concedes that the sentencing court erred to the extent that it concluded that the three-judge sentencing panel had no authority to modify Lochridge’s eligibility for discretionary parole. This concession is well-founded.<sup>8</sup> Under AS 33.-16.090(b)(2), a defendant who is sentenced within or below the presumptive range for a sexual felony normally is not eligible for discretionary parole until he has served the sentence the court imposed, less any good time accrued. But that statute explicitly recognizes an exception for defendants who “[have] been allowed by the three-judge

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<sup>7</sup> See Alaska R. Crim. P. 42(k)(4).

<sup>8</sup> See *Marks*, 496 P.2d at 67-68 (explaining that an appellate court must make its own determination that the state’s concessions of error are well-founded).

sentencing panel under AS 12.55.175 to be considered for discretionary parole release.”<sup>9</sup> We held in *Luckart v. State* that under AS 12.55.175(c), the three-judge sentencing panel “has the authority to grant enhanced parole eligibility to defendants who are subject to presumptive sentencing.”<sup>10</sup>

Before a sentencing court may refer a case to the three-judge sentencing panel on this ground, however, the sentencing court must make its own assessment of whether the prohibition on discretionary parole would result in manifest injustice.<sup>11</sup> If the court concludes that manifest injustice would result, it must refer the case to the three-judge sentencing panel for consideration of this issue.

In Lochridge’s case, it appears that the sentencing court did not understand this procedure, and therefore never made its own assessment of this issue, instead inviting Lochridge to apply directly to the three-judge sentencing panel.

Lochridge urges us to interpret the sentencing court’s remark that it did not object to Lochridge bringing this issue directly to the three-judge sentencing panel as an implicit finding of manifest injustice. We reject this strained reading of the record and conclude that the superior court never considered whether the prohibition on discretionary parole would be manifestly unjust in Lochridge’s case. We therefore remand this case to the superior court for consideration of this issue. If the court concludes that manifest injustice would result from the statutory prohibition on discretionary parole, it must refer Lochridge’s case to the three-judge sentencing panel.

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<sup>9</sup> AS 33.16.090(b)(2).

<sup>10</sup> *Luckart v. State*, 314 P.3d 1226, 1232 (Alaska App. 2013); *see also Kirby v. State*, 748 P.2d 757, 765 (Alaska App. 1987); *State v. Ridgway*, 750 P.2d 362, 364 (Alaska App. 1988); *Sikeo v. State*, 258 P.3d 906, 909 (Alaska App. 2011).

<sup>11</sup> AS 12.55.165(a).

*Why we conclude that Lochridge's other claims have no merit*

Lochridge argues that the sentencing court also erred in finding that he did not establish the non-statutory mitigating factor of extraordinary potential for rehabilitation, and in refusing to refer his case to the three-judge sentencing panel on this basis. To support this claim, Lochridge relies on his relative youth (thirty-two years old), his lack of criminal record, his cooperation with the police, his remorse, the steps he took prior to sentencing to address the psychological issues that led him to offend, and the favorable findings in the presentence report, which predicted that he had a low risk of recidivism.

To establish “extraordinary potential for rehabilitation,” a defendant must prove by clear and convincing evidence that he can “adequately be treated in the community and need not be incarcerated for the full presumptive term in order to prevent future criminal activity.”<sup>12</sup> After considering Lochridge’s arguments and reviewing the presentence report, the superior court recognized that Lochridge had rehabilitative potential. But the court concluded that this potential was not sufficiently extraordinary that a sentence within the presumptive range would be manifestly unjust. The court noted, in particular, the “deep-seated and not fully understood” psychological issues underlying Lochridge’s addiction to pornography and his decision to act on his sexual impulses with his own stepdaughters. The court found that Lochridge’s conduct did not involve a one-time event that could be considered out of character for him. The court ultimately concluded that “there is no indication that I can see that [Lochridge] would be rehabilitated sooner than the lowest presumptive term.”

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<sup>12</sup> *Beltz v. State*, 980 P.2d 474, 481 (Alaska App. 1999) (quoting *Lepley v. State*, 807 P.2d 1095, 1100 (Alaska App. 1991)).

The court’s factual findings are supported by the record and are not clearly erroneous. To predict rehabilitation with any degree of confidence, a sentencing court must be “reasonably satisfied that it knows why a particular crime was committed.”<sup>13</sup> On this record, the superior court reasonably concluded that it was not clear whether Lochridge’s criminal behavior was readily correctable or attributable to “unusual environmental stresses unlikely to ever reoccur.”<sup>14</sup>

Lochridge argues in the alternative that the sentencing court erred in rejecting his proposed statutory mitigating factor that his conduct was “among the least serious” within the definition of the offense of second-degree sexual abuse of a minor.<sup>15</sup> Under Alaska’s presumptive sentencing laws, a sentencing court is authorized to impose a sentence below the applicable presumptive sentencing range, without referring the case to the three-judge sentencing panel, if the court finds any of the statutory mitigating factors listed in AS 12.55.155(d).<sup>16</sup>

Lochridge argues that his conduct in sexually abusing his stepdaughters was “least serious” because he did not engage in violence or sexual penetration and did not touch their genitals, make them touch his genitals, or remove their clothes.

The sentencing court rejected this argument, concluding that Lochridge’s offense was not “least serious” given his admission to all the conduct charged in the

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<sup>13</sup> *Kirby*, 748 P.2d at 766.

<sup>14</sup> *Id.*

<sup>15</sup> AS 12.55.155(d)(9).

<sup>16</sup> *See Garner v. State*, 266 P.3d 1045, 1050 (Alaska App. 2011) (Mannheimer, J., concurring, joined by Bolger, J.).

complaint, including the sexual abuse of two different victims. We agree that Lochridge failed to establish that his offense was among the “least serious.”<sup>17</sup>

Lastly, Lochridge argues that the court erred in finding two aggravating factors. Because the sentencing court did not rely on those aggravating factors to impose a sentence above the presumptive range, and because those aggravating factors did not play a significant role in the judge’s sentencing analysis, Lochridge’s challenges to the aggravating factors are moot.<sup>18</sup>

### *Conclusion*

We REMAND this case to the superior court for consideration of whether Lochridge’s statutory ineligibility for discretionary parole would result in manifest injustice. If the superior court determines that manifest injustice would result, it must refer Lochridge’s case to the three-judge sentencing panel for consideration of this issue. In all other respects, the judgment of the superior court is AFFIRMED.

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<sup>17</sup> See *Michael v. State*, 115 P.3d 517, 519-520 (Alaska) (requiring *de novo* review of statutory mitigating factor).

<sup>18</sup> See *Allen v. State*, 56 P.3d 683, 685 (Alaska App. 2002); *Cook v. State*, 36 P.3d 710, 730 (Alaska App. 2001).