

NOTICE

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IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JEREMY LEE SMITH,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11706
Trial Court No. 3KO-12-432 CR

MEMORANDUM OPINION

No. 6375 — August 31, 2016

Appeal from the Superior Court, Third Judicial District, Kodiak,
Steve W. Cole, Judge.

Appearances: Barbara Dunham, Assistant Public Advocate, and
Richard Allen, Public Advocate, Anchorage, for the Appellant.
June Stein, Assistant Attorney General, Office of Criminal
Appeals, Anchorage, and Craig W. Richards, Attorney General,
Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock,
Superior Court Judge.*

Judge MANNHEIMER.

As part of their investigation of an assault, the Alaska State Troopers served
a search warrant at the residence of Jeremy Lee Smith. The troopers found a handgun

* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska
Constitution and Administrative Rule 24(d).

in Smith's motorcycle helmet. Smith was a felon, and he was ultimately convicted of third-degree weapons misconduct (residing in a dwelling, knowing that it contained a concealable firearm).¹

In this appeal, Smith challenges his conviction on a number of grounds.

Smith argues that the search warrant for his house was not supported by probable cause. For the reasons explained in this opinion, we conclude that the warrant was properly supported.

Smith argues that his indictment was flawed because the State presented irrelevant and prejudicial testimony to the grand jury. For the reasons explained in this opinion, we reject this claim as well.

Smith also raises an evidentiary claim. During the execution of the search warrant, Smith made several statements (at various times) to one of the troopers conducting the search. At Smith's trial, the prosecutor introduced some of Smith's statements to the trooper. But when Smith's attorney invoked the rule of completeness and asked the trial judge to admit some of Smith's later statements to the trooper, the judge rejected the defense attorney's request. On appeal, Smith claims that this ruling was error. But based on the record, the trial judge could reasonably conclude that Smith's later statements were made during a *separate* conversation sometime later (perhaps as much as an hour later). Accordingly, we uphold the judge's ruling.

On a related point, Smith claims that, during the State's summation, the prosecutor took unfair advantage of the judge's ruling by affirmatively mischaracterizing what Smith said to the trooper, knowing that the judge had excluded the portions of Smith's statements that would show the falsity of the prosecutor's characterization.

¹ AS 11.61.200(a)(10).

As we explain here, it appears that the prosecutor intended to comment on Smith's trial testimony, not on Smith's pre-trial statements to the trooper. Viewed as a comment on Smith's trial testimony, the prosecutor's argument was accurate. But the prosecutor worded his argument in such a way that the jurors might reasonably have concluded that the prosecutor was talking about Smith's statements to the trooper during the execution of the search warrant. And viewed as a comment on Smith's statements to the trooper, the prosecutor's argument was misleading. Nevertheless, we conclude that any error was harmless.

Smith also raises claims regarding his sentencing.

Smith contends that the superior court should have ruled in his favor on mitigating factor AS 12.55.155(d)(12) — that, throughout his criminal history, Smith's conduct has been consistently minor and not deserving of a term of imprisonment within the applicable presumptive range. For the reasons explained here, we uphold the superior court's rejection of this mitigator.

Smith also contends that his sentencing judge violated Alaska Criminal Rule 32.1(f)(5) by failing to completely strike or black out a number of disputed assertions in the pre-sentence report. The State agrees that these assertions need to be redacted.

Finally, Smith argues that the superior court's judgement should be amended to correct a clerical error: the judgement recites that Smith pleaded guilty to the weapons charge, when in fact Smith went to trial and was found guilty. The State agrees that this correction should be made. But while this appeal was pending, the superior court amended the judgement to correct this error — thus granting the relief that Smith seeks.

Facts relating to Smith's search warrant claim

On August 19, 2012, a man named Bradleigh Helenhouse reported to the Alaska State Troopers in Kodiak that he had been assaulted the previous day. Helenhouse claimed that a large group of men attacked him in a deserted baseball field with bats, clubs, and metal knuckles, and that one of them pointed a gun at him.

The trooper who took Helenhouse's report observed that Helenhouse had a bandage on his forehead, a chipped tooth, and red marks, bruising, and swollen spots on his head.

According to Helenhouse, he went to the baseball field with his friend, Edwin Cagaoan, in Cagaoan's truck, because they had received information that a friend, Crystal Delacruz, needed help with her car. But when Helenhouse and Cagaoan arrived, their truck was surrounded by four other vehicles, and then Helenhouse was attacked by over a dozen people. Among the assailants named by Helenhouse was the defendant in this case, Jeremy Smith. Helenhouse claimed that Smith hit him six times with a halibut club.

Trooper Boyd Branch (the trooper who took Helenhouse's report) followed up by interviewing several other people.

Branch first interviewed Crystal Delacruz (the woman who purportedly needed help with her car). Delacruz denied being present at the assault, and she also denied asking Helenhouse for help with her car.

Branch also contacted Edwin Cagaoan, Helenhouse's friend who was present with him during the assault. Cagaoan largely corroborated Helenhouse's story, although he stated that Helenhouse was attacked by no more than six to eight people. Cagaoan identified many of the same assailants as Helenhouse — including Jeremy Smith.

Branch next contacted Christian Delacruz, Crystal's cousin, because Helenhouse claimed that it was Christian who called him seeking help with Crystal's car, and that Christian was present during the assault. When Branch spoke to Christian Delacruz, he denied any involvement in the assault and he claimed that he was elsewhere at the time.

Finally, Branch contacted Josias Luna, because Helenhouse had named Luna as one of the participants in the assault — the one who pointed a pistol at him. Luna denied participating in the assault, but he did tell Trooper Branch that there had been a large gathering of people by the baseball field, and that he knew that Helenhouse had been beaten up.

Branch was apparently unable to contact Jeremy Smith.

On the basis of this information, Branch obtained a warrant to search the trailer where Jeremy Smith lived.

The troopers executed this search warrant on September 5, 2012. While searching a bedroom closet in Smith's trailer, the troopers found a pistol wrapped in a bandana inside a motorcycle helmet.

Following his indictment for weapons misconduct, Smith's attorney asked the superior court to suppress all of the evidence obtained during the execution of the search warrant. The defense attorney argued that Helenhouse was a "criminal informant" or "police informant" whose information should be viewed with distrust — and that the other information obtained by Trooper Branch failed to adequately corroborate Helenhouse's account for purposes of the *Aguilar-Spinelli* test.²

² *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). See *State v. Jones*, 706 P.2d 317, 324-25 (Alaska 1985) (holding that, as a matter of state law, the *Aguilar-Spinelli* (continued...))

The State conceded (mistakenly) that Helenhouse was a police informant, and the superior court accepted this concession. But the superior court found that there was sufficient information to corroborate Helenhouse’s report. The court therefore denied Smith’s suppression motion — and Smith now renews his arguments on appeal.

Why we conclude that the search warrant application satisfied the Aguilar-Spinelli test

We begin our analysis by noting that the prosecutor and the superior court were wrong when they characterized Helenhouse as a “criminal informant” or “police informant” for purposes of the *Aguilar-Spinelli* analysis.

The *Aguilar-Spinelli* test divides informants into two groups. “Citizen informants” are people whose primary motivation for providing information to the police is “concern for society or for [their] own safety”, and who act without “expect[ing] any gain or concession in exchange for [their] information.” *Gustafson v. State*, 854 P.2d 751, 756-57 (Alaska App. 1993). “Police informants”, on the other hand, offer their information “in exchange for some concession [or] payment, or simply out of revenge against the subject.” *Erickson v. State*, 507 P.2d 508, 517 (Alaska 1973), quoting *State v. Paszek*, 184 N.W.2d 836, 842 (1971).

In the superior court, the State conceded that Helenhouse was a police informant from the “criminal milieu”. Indeed, Helenhouse was apparently on felony probation at the time of these events (for stealing a police car). But as this Court explained in *Gustafson*, “[t]he distinction between a citizen informant and a criminal informant does not turn on the bare facts of the informant’s past.” Rather, “[an]

² (...continued)
test continues to govern the evaluation of hearsay information offered to support a search or seizure).

informant's status turns on the nature of the informant's involvement with the incident being investigated and his or her motivation for coming to the authorities[.]” *Gustafson*, 854 P.2d at 756-57.

Here, Helenhouse went to the authorities because he was the victim of a crime. He did not offer his information in exchange for reward, lenient treatment, or any other benefit from law enforcement. Thus, despite the State's concession in the superior court, Helenhouse was a “citizen informant” for *Aguilar-Spinelli* purposes.

That being said, we agree with the superior court that the search warrant application satisfied the *Aguilar-Spinelli* test even if Helenhouse had been a police informant whose credibility needed to be independently established. Helenhouse's report of the assault was corroborated by the fact that he bore visible injuries, and by the fact that both Edwin Cagaoan and Josias Luna confirmed that Helenhouse had been beaten up by a group of men. And Helenhouse's assertion that Jeremy Smith was one of his attackers was corroborated by Cagaoan.

The superior court therefore correctly rejected Smith's challenge to the search warrant.

Smith's attack on his indictment

Smith attacks the validity of his indictment on two bases.

First, Smith argues that large portions of Trooper Branch's grand jury testimony were inadmissible because they were the fruit of an unlawful search warrant. But as we have just explained, the search warrant was lawful. Accordingly, Trooper Branch's grand jury testimony was proper.

Next, Smith argues that the State should not have presented the testimony of Smith's friend, Stephanie Sullivan.

Sullivan was called to testify at the grand jury because the handgun found in Smith's residence was stolen, and Sullivan was the owner of the gun. Sullivan told the grand jury that, earlier, she had shown the gun to Smith's girlfriend, Kacidi Barton, and Smith testified that both Barton and Smith had been visitors to her house during the week before the gun was stolen.

Thus, when the handgun disappeared, Sullivan suspected that Smith had stolen it, so Sullivan confronted him (through text messaging). Smith responded to Sullivan's accusation by telling her "not to show [her] face". Smith also told her, "Go ahead and go to the cops", because the police would never "find [the gun] in his house."

Smith argues that Sullivan's testimony was irrelevant and substantially prejudicial, since he was never charged with burglarizing Sullivan's house or stealing her gun. But Smith's threat to Sullivan (warning her not to show her face) was relevant because it suggested that Smith was involved in the theft of the gun. And Smith's other statement to Sullivan — that it was fine if she reported her suspicions to the authorities, because the police would never find the gun in his house — suggested that Smith knew where the gun was, and that he had control over the stolen weapon.

For these reasons, we conclude that it was proper for the prosecutor to present Sullivan's testimony to the grand jury.

Smith's argument that, under the rule of completeness, he was entitled to introduce his out-of-court statements to Trooper Branch

Smith contends that the trial judge committed error by not allowing his attorney to introduce certain exculpatory statements that Smith made to Trooper Branch while the troopers were executing the search warrant at Smith's residence.

Because Smith wished to introduce these out-of-court statements for the truth of the matters asserted in them, the evidence was hearsay and it would normally be barred by the hearsay rule. As we explained in *Kelly v. State*, 116 P.3d 602, 604 (Alaska App. 2005), “A defendant’s out-of-court assertions of innocence are hearsay if they are offered by the defendant to prove the defendant’s innocence.” Such statements are inadmissible unless they fall within an exception to the hearsay rule. *Ibid.*

Smith argues that his exculpatory statements were admissible under the rule of completeness, because the State introduced other statements that Smith made to Trooper Branch during the execution of the warrant. For the reasons we are about to explain, we conclude the facts of this case do not support Smith’s argument.

While the state troopers were executing the search warrant at Smith’s residence, Trooper Branch interviewed Smith (and recorded this interview). However, this was not a continuous interview. Rather, Trooper Branch engaged in two different conversations with Smith, separated by a period of time when the trooper ceased his questioning and turned off the audio recorder.

As described in the trial court record, Branch’s first conversation with Smith (about 17 minutes in length) took place soon after the search began. Then Branch ceased his questioning and turned off the recorder. Sometime later — the prosecutor told the court that it was about an hour later — Trooper Branch again spoke to Smith.

As part of the State’s case at Smith’s trial, the prosecutor introduced some of the statements that Smith made to Trooper Branch during the initial 17-minute conversation. These statements were elicited after the troopers found the pistol wrapped in a bandana inside the motorcycle helmet. Here is the relevant portion of what the prosecutor introduced:

Tpr. Branch: You have a motorcycle, right?

Smith: Yeah.

Branch: Okay. Do you have a motorcycle helmet?

Smith: Yeah.

Branch: Okay. [And] all the items associated with the motorcycle, [those are] yours?

Smith: Yeah.

Branch: Okay. There's ... a gun in there, okay? And you know that, right?

Smith: Yeah, that's my girlfriend's.

Branch: It's your girlfriend's pistol?

Smith: Yes.

. . .

Branch: So you knew this pistol was there?

Smith: I knew it was in the house, but I didn't know where.

When the prosecutor declared his intention to introduce these statements, Smith's attorney told the trial judge that the prosecutor should not be allowed to choose which of Smith's statements to introduce. The defense attorney took the position that the court should either admit all or none of Smith's statements to Branch (during both of the conversations).

However, after further discussion of this matter, the trial judge perceived that the defense attorney's main goal was to introduce certain statements that Smith made to Trooper Branch during their *second* conversation — statements in which Smith denied

knowing that the handgun was in his house, and in which Smith declared that he thought the gun was at his girlfriend's brother's house. When the judge suggested that these were the statements that the defense attorney wished to introduce, the defense attorney agreed.

The defense attorney then addressed the prosecutor's contention that Branch's interview with Smith occurred in two discrete segments, and that Smith did not make these exculpatory statements until the second portion of the interview. The defense attorney suggested that there had not been much of an interval between the first 17-minute portion of the interview and the second portion. But the trial judge concluded that the two segments of the interview were, in fact, discrete conversations. For this reason, the judge ruled that Smith made his exculpatory remarks in a different conversation at a later time — and that, therefore, the exculpatory remarks were not admissible under the rule of completeness.

On appeal, Smith again contends that, under the rule of completeness, the trial judge should have allowed him to introduce the exculpatory statements that he made during the second segment of the interview. But Smith fails to address the crucial aspect of the trial judge's ruling — the judge's conclusion that the second segment of Smith's interview with Branch was a discrete conversation, separated from Smith's initial inculpatory statements by a significant length of time.

The rule of completeness does not apply to situations where the defendant's purported clarifying or explanatory statement arises from “a separate incident generated by events that occurred after [the defendant's initial] statement ended.” *Wagner v. State*, 74 A.3d 765, 792 (Md. App. 2013). *See State v. Lopez*, 937 A.2d 905, 909-910 (N.H. 2007) (holding that, for purposes of the rule of completeness, the defendant's statements to his aunt constituted a different conversation from the statements he made to his mother when she later arrived at the house).

For instance, in *State v. Neibauer*, 2009 WL 1758217 (Wis. App. 2009), a deputy sheriff observed a vehicle lying about 10 yards off the road in a snow-covered field. The only occupant was Neibauer. When the deputy asked Neibauer what he was doing there, Neibauer responded that he was “trying to get his vehicle turned around and back onto the road.” When the deputy asked Neibauer how he had gotten there, Neibauer replied that he went off the road. *Id.* at *1.

Some 30 minutes later, while sitting in the deputy’s squad car, Neibauer told the deputy that he (the deputy) must have misunderstood what Neibauer said earlier. Neibauer now claimed that a friend named Larson had been driving the car when it went off the road — and that Neibauer had only driven the car to try to get it out of the field and back on the road, and to stay warm by operating the heater. *Ibid.*

At trial, Neibauer invoked the rule of completeness to try to introduce his recantation (his story that Larson had been driving when the car went off the road). The trial judge ruled against Neibauer, and the Wisconsin Court of Appeals affirmed the trial judge’s ruling:

Neibauer’s recantation and his claim that Larson drove the car off the road do not fall under the rule of completeness because they are not a part of the same statement. Statements made at a different time and a different place do not complete the thought[;] they must be admissible on their own basis. The State introduced Neibauer’s entire initial conversation with [the deputy sheriff]. ... [Neibauer’s] subsequent statements are properly viewed as separate statements.

Neibauer at *1.

In Smith’s case, as in *Neibauer*, the trial judge concluded that the rule of completeness did not apply because the defense attorney was seeking to introduce

statements that Smith made at a later time. Smith does not address this aspect of the trial judge's ruling, nor has he shown that the trial judge's view of this matter was incorrect. Accordingly, we uphold the trial judge's ruling.

Smith also argues (again, invoking the rule of completeness) that the trial judge should have allowed him to introduce certain statements he made about an injury to his shoulder and his need to take pain medication. Smith's attorney never directed the trial judge's attention to these statements when the parties were litigating the rule of completeness issue. This claim is therefore waived.

Smith's claim that, during the State's summation, the prosecutor took unfair advantage of the trial judge's decision on the rule of completeness

Smith took the stand at his trial and testified concerning his awareness that there was a pistol in his house.

On direct examination, Smith testified that he and his girlfriend Kacidi Barton traveled to Anchorage, and that while they were there, Barton told him that the gun was in their trailer in Kodiak, but "that it would be removed when [they] got back [from Anchorage]." Later, Smith's attorney asked him to explain his statement to Trooper Branch, "I knew the gun was in the house, but I didn't know where." Here is Smith's answer to his attorney's question:

Smith: When we were in Anchorage, Kacidi did tell me [that the pistol] was in the house, but she didn't tell me where it was. So when [the troopers] told me that they found it, I guess, yes, I did know it was in the house. It was supposed to be gone, but I did know it was there while we were in Anchorage, and I didn't know where it was.

On cross-examination, the prosecutor asked Smith, “You weren’t surprised that the gun was in the home?”, and Smith responded, “Not at all.”

The next day, during closing arguments, the prosecutor played the audio of Trooper Branch asking Smith, “So you knew this pistol was there?”, and Smith replying, “I knew it was in the house, but I didn’t know where.” After playing this question and answer, the prosecutor made an argument that Smith now contends was improper. We have italicized the portion that Smith attacks on appeal:

Prosecutor: [Smith] admits, “I knew [the pistol] was in the house.” [And with regard to the culpable mental state of] “knowingly”: knowledge [of a circumstance] is established if a person is aware of a substantial probability of [the circumstance’s] existence, unless the person actually believes that it does not exist. [Smith] doesn’t believe it doesn’t exist. He told Trooper Branch that it existed. He said, “I knew it was in the house.” *He didn’t say, “She [i.e., his girlfriend, Kacidi Barton] was moving it in and out, and I was surprised that it was in there.”*

The defense attorney immediately objected that the prosecutor was mischaracterizing Smith’s statements to Trooper Branch — unfairly taking advantage of the fact that the trial judge had excluded Smith’s exculpatory statements to the trooper (*i.e.*, Smith’s statements that he did *not* know that the pistol was in his house, and that he thought the weapon was at Kacidi’s brother’s house).

The prosecutor responded that he had simply stated that Smith “didn’t say he was surprised that [the pistol] was in [his house] — which was his exact [testimony] on the stand yesterday.” The prosecutor asserted that his comment “was a direct [quote]”, and he again noted that Smith “testified ... yesterday that he ... wasn’t surprised [that] it was in the house.”

But the defense attorney suggested that even if the prosecutor *intended* to merely quote or paraphrase Smith’s trial testimony, the prosecutor had actually said something different to the jurors — because the prosecutor had not directed the jurors’ attention to Smith’s trial testimony, but rather to the statements that Smith made to Trooper Branch during the execution of the search warrant. And in that context, the defense attorney argued, it was misleading to say that Smith had *never said to Branch* that (1) his girlfriend was moving the gun back and forth, and that (2) he was surprised to learn that the gun was in his house.

The trial judge concluded that the true underlying issue was “whether or not [Smith] was surprised to hear that the gun was in the house.” And based on Smith’s trial testimony that he was “not at all” surprised when the troopers found the gun in his house, the trial judge denied the defense motion for a mistrial.

It appears that the prosecutor intended to comment on Smith’s trial testimony, not on Smith’s pre-trial statements to the trooper. And viewed as a comment on Smith’s trial testimony, the prosecutor’s argument was accurate. But we agree with Smith that, even though the prosecutor may have intended to simply quote or paraphrase Smith’s trial testimony on this subject, the prosecutor’s words suggested something different. The prosecutor worded his argument in such a way that the jurors might reasonably have concluded that the prosecutor was talking about Smith’s statements during the execution of the search warrant — *i.e.*, what Smith said (or did not say) to Trooper Branch, and not what Smith said on the stand.

Nevertheless, we uphold the trial judge’s decision to deny a mistrial. Regardless of what Smith said to Trooper Branch, the fact remains that Smith took the stand at his trial. On the stand, Smith had the chance to clarify his position regarding his awareness or lack of awareness that the gun was in his house. For instance, he might have repeated his earlier assertion that he thought the gun was at his girlfriend’s brother’s

house. But as we have explained, when the prosecutor asked Smith whether he was “surprised that the gun was in the home”, Smith replied, “Not at all.” Smith thus implicitly disavowed his earlier statement to Trooper Branch.

Accordingly, we conclude that any error in the prosecutor’s argument was harmless, and that the trial judge did not abuse his discretion when he denied Smith’s request for a mistrial.

*Smith’s argument that the superior court should have found mitigator
(d)(12) — consistently minor harm*

Smith’s offense, third-degree weapons misconduct, is a class C felony.³ As a third felony offender, Smith faced a presumptive sentencing range of 3 to 5 years’ imprisonment.⁴ The State proved one aggravating factor: that Smith had a history of committing similar weapons offenses (*i.e.*, possessing concealable firearms as a felon). AS 12.55.155(c)(21).

In connection with his sentencing, Smith proposed the mitigating factor codified in AS 12.55.155(d)(12): that the facts surrounding the commission of Smith’s present offense and his previous offenses “establish that the harm caused by [his] conduct is consistently minor and inconsistent with the imposition of a substantial period of imprisonment.” The sentencing judge declared that it was a close case, but he rejected the proposed mitigator.

Ultimately, the judge imposed a sentence toward the lower end of the applicable presumptive range: he sentenced Smith to serve 3½ years.

³ AS 11.61.200(i).

⁴ AS 12.55.125(e)(3).

On appeal, Smith concedes that he has several prior criminal convictions, as well as several prior probation violations that did not involve new crimes. But he points out that none of his offenses has caused significant harm to anyone else. The State in fact conceded that there was no indication that the handgun was used for criminal purposes. Based on this, Smith argues that the superior court erred when it ruled that he had failed to prove mitigator (d)(12).

But when mitigator (d)(12) speaks of “harm”, this term encompasses more than physical or financial harm inflicted on other people. As this Court held in *Ison v. State*, 941 P.2d 195, 198 (Alaska App. 1997), and as we reiterated in *Joseph v. State*, 315 P.3d 678, 685 (Alaska App. 2013), the term “harm” (as used in mitigator (d)(12)) includes not only the actual physical injuries or property losses caused by the defendant’s criminal conduct, but also “the risks [and the] disruption of the social fabric” that the defendant’s criminal conduct entailed.

As the sentencing judge noted, Smith was a repeat weapons offender. The judge also found it significant that Smith had not been deterred by the 2-year term of imprisonment that he received for his prior weapons offense. (“You got two years on the last weapons charge, and one would think that you would be all [the] more aware of the laws on felons having weapons.”)

Given these circumstances, the superior court could justifiably conclude that Smith had failed to prove mitigator (d)(12).

The redaction of Smith’s pre-sentence report

At Smith’s sentencing hearing, Smith disputed a number of assertions in his pre-sentence report. Pursuant to Alaska Criminal Rule 32.1(f)(5), the sentencing

judge struck these disputed portions from the report. But the judge simply struck through the relevant text with a pen — leaving it completely legible.

The State concedes that deleted assertions in a pre-sentence report must be entirely removed or at least thoroughly blacked out so that they are no longer legible. *See Packard v. State*, unpublished, 2014 WL 2526118 at *5 (Alaska App. 2014). We therefore direct the superior court to perform full redactions of the disputed portions of the pre-sentence report.

The clerical error in the superior court's judgement

As originally issued, the judgement in this case incorrectly stated that Smith *pleaded* guilty, when in fact he went to trial and was found guilty by a jury. In his opening brief, Smith asked this Court to direct the superior court to correct this aspect of the judgement. But while this appeal was pending, the Kodiak District Attorney's Office filed a motion asking the superior court to make this correction, and Smith (in his reply brief) states that the superior court has already granted this motion to amend the judgement.

Thus, no action is required on our part.

Conclusion

The judgement of the superior court is AFFIRMED. However, the superior court is directed to amend Smith's pre-sentence report by deleting or blacking out the disputed assertions in the report.