

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

GREGORY LEE FULLING,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12000
Trial Court No. 3AN-11-10710 CR

MEMORANDUM OPINION

No. 6399 — November 9, 2016

Appeal from the Superior Court, Third Judicial District,
Anchorage, Jack Smith, Judge.

Appearances: Lindsay Van Gorkom (opening brief), and Megan Webb (reply brief), Assistant Public Defenders, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Ann B. Black, 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.*

PER CURIAM.

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

On September 23, 2011, at around 1:45 a.m., an intoxicated Gregory Lee Fulling drove for fourteen miles on the wrong side of the Glenn Highway near Anchorage. He ran several cars off the road and ultimately crashed into a patrol car, causing severe and career-ending injuries to a police officer. A blood test revealed that Fulling had a blood-alcohol level of .22, nearly three times the legal limit of .08.¹

Fulling was charged with first-degree assault (for injuring the police officer)², three counts of third-degree assault (for running three cars off the road)³, and misdemeanor driving under the influence.⁴ These charges were ultimately resolved in a plea agreement. Under the plea agreement, Fulling agreed to plead guilty to first-degree assault and driving under the influence, and, in exchange, the State agreed to dismiss the other assault charges and to not seek statutory aggravating factors that would have otherwise applied. The plea agreement called for the mandatory minimum of 3 days to serve for the misdemeanor driving under the influence conviction, but left sentencing for the first-degree assault conviction open to the discretion of the sentencing judge.

As a first felony offender, Fulling faced a presumptive sentencing range of 7 to 11 years for his first-degree assault conviction.⁵ At the time of sentencing, Fulling was fifty-three years old. He was an Air Force veteran with a Ph.D. in marine biology who worked as a consultant in his field. Fulling's prior criminal history consisted of a

¹ AS 28.35.030(a)(1).

² AS 11.41.200(a)(1).

³ AS 11.41.220(a)(1)(A).

⁴ AS 28.35.030(a)(1).

⁵ AS 12.55.125(c)(2)(A).

2007 misdemeanor assault, based on an incident in which he attempted to punch a police officer while intoxicated.

Prior to sentencing, Fulling filed a motion asking the sentencing court to refer his case to the statewide three-judge sentencing panel.⁶ Fulling argued that he had demonstrated extraordinary potential for rehabilitation and that manifest injustice would result if he were sentenced within the presumptive range.

As part of his request, Fulling provided the court with documentation establishing that he had completed both a residential alcohol treatment program and an outpatient substance abuse treatment program while on pretrial release for this case. Fulling had also seen a psychiatrist, attended a weekly veterans' group, and become a leader in Alcoholics Anonymous. Based on these achievements, the author of the presentence report concluded that Fulling had "very good" prospects for rehabilitation, noting that he was "remorseful, accepted responsibility for his actions, and addressed his depression and PTSD with openness not often seen or heard."

At sentencing, the superior court acknowledged Fulling's "minimal criminal history and positive efforts at treatment and work." The court also agreed with the presentence report author that Fulling had "very good" prospects for rehabilitation. The court did not, however, find "extraordinary" potential for rehabilitation, primarily because of Fulling's history of alcohol abuse and the fact that his prior criminal offense had also been alcohol related. The court noted that, because of this history and the

⁶ A sentencing judge may refer a defendant's case to a three-judge panel if the defendant proves by clear and convincing evidence that: (1) manifest injustice would result from imposition of a sentence within the presumptive range; or (2) manifest injustice would result from failure to consider a relevant non-statutory mitigating factor. AS 12.55.165(a). The three-judge panel is then authorized to sentence the defendant to a term below the presumptive range if, after its own inquiry, it finds manifest injustice would result from a sentence in the presumptive range. *See* AS 12.55.175.

“nature of the disease [*i.e.*, alcoholism],” it could not say with certainty that this conduct would not occur again.⁷

The court also emphasized the extreme circumstances of Fulling’s conduct — his high level of intoxication and the fact that he drove fourteen miles in the wrong direction on the highway:

The facts of this case, the danger to the public, the impact on all of the drivers who were forced to evade the defendant, as well as the life-altering injuries to Officer Hughes, are major considerations for this court.

The court therefore concluded that the sentencing goals of specific and general deterrence, community condemnation, and reaffirmation of societal norms should take precedence over rehabilitation in sentencing Fulling.

Based on these considerations, the judge found that manifest injustice would not result from a sentence within the presumptive range and further found that it would be manifestly unjust to not sentence Fulling to a sentence within the presumptive range.⁸ The judge therefore denied Fulling’s request for a referral to the three-judge panel, ultimately sentencing Fulling to 8 years with no time suspended on the first-degree assault, for a composite sentence of 8 years and 3 days to serve on both convictions.

Fulling now appeals, arguing that the sentence was excessive and that the court erred in failing to refer his case to the statewide three-judge sentencing panel.

We review sentencing decisions under the “clearly mistaken” standard of review, which is founded on two concepts: “first, that reasonable judges, confronted with identical facts, can and will differ on what constitutes an appropriate sentence; [and]

⁷ See *Beltz v. State*, 980 P.2d 474, 481 (Alaska App. 1999); *Lepley v. State*, 807 P.2d 1095, 1100 (Alaska App. 1991).

⁸ See *Daniels v. State*, 339 P.3d 1027, 1031-32 (Alaska App. 2014); *Bossie v. State*, 835 P.2d 1257, 1260 (Alaska App. 1992).

second, that society is willing to accept these sentencing discrepancies, so long as a judge’s sentencing decision falls within a permissible range of reasonable sentences.”⁹ The clearly mistaken standard is thus a deferential test that “implies a permissible range of reasonable sentences which a reviewing court, after an independent review of the record, will not modify.”¹⁰

On appeal, Fulling argues that the superior court erred in failing to consider whether referral to the three-judge sentencing panel was appropriate so that the panel could modify the restriction on Fulling’s discretionary parole that otherwise applies under former AS 33.16.090(b)(2) (2014). But the record indicates that the sentencing judge was aware of the restrictions on Fulling’s discretionary parole and understood that Fulling would not be eligible for any parole until he had served two-thirds of his sentence. In his sentencing remarks, the judge noted that Fulling would be eligible for parole after he served 64 months. The judge also indicated that he believed the time on parole supervision would be “important” for Fulling’s rehabilitation, but that additional time on probation supervision was unnecessary given Fulling’s good prospects for rehabilitation.

Fulling also argues that the court erred in finding his prospects for rehabilitation were only “very good” rather than “extraordinary.” But the record indicates that the judge had specific reasons for being cautious about Fulling’s prospects for rehabilitation given his history and his high level of intoxication at the time of the offense.¹¹ Moreover, even if the judge had found extraordinary potential for

⁹ *Erickson v. State*, 950 P.2d 580, 586 (Alaska App. 1997) (internal quotations omitted).

¹⁰ *McClain v. State*, 519 P.2d 811, 813 (Alaska 1974).

¹¹ *See Beltz v. State*, 980 P.2d 474, 481 (Alaska App. 1999); *Lepley v. State*, 807 P.2d 1095, 1100 (Alaska App. 1991).

rehabilitation, the record is clear that referral to the three-judge panel would not have followed given the judge's finding that any sentence lower than the presumptive range would violate the *Chaney* sentencing goals of specific and general deterrence, community condemnation, and reaffirmation of societal norms.¹²

We have independently reviewed the sentencing record in this case. Although we note that other judges may have structured Fulling's sentence differently, we conclude that the sentence imposed here was within the permissible range of sentences that a reasonable judge would impose under these circumstances and is not clearly mistaken.¹³

Accordingly, we AFFIRM the judgment of the superior court.

¹² *See Bossie*, 835 P.2d at 1259-60.

¹³ *McClain*, 519 P.2d at 813.