IN THE COURT OF APPEALS OF THE STATE OF ALASKA

STANLEY JAMES EDENFIELD, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11962 Trial Court No. 3PA-13-102 CR MEMORANDUM OPINION No. 6490 — July 5, 2017

Appeal from the Superior Court, Third Judicial District, Palmer, Kari Kristiansen, Judge.

Appearances: Josie Garton, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Tamara E. de Lucia, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and James E. Cantor, Acting Attorney General, Juneau, for the Appellee.

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

Judge MANNHEIMER.

When Stanley James Edenfield was 43 years old, he engaged in a protracted sexual relationship with 15-year-old M.M., the daughter of a married couple who were

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

friends of his. Based on this sexual relationship, Edenfield was convicted of eleven counts of second-degree sexual abuse of a minor. [1]

In this appeal, Edenfield argues that he is entitled to a merger of his convictions on Counts 1 and 2, because these two acts of sexual penetration were essentially one continuing offense. Edenfield also challenges several of his probation conditions.

For the reasons explained here, we reject Edenfield's merger argument, but we agree with Edenfield that the superior court must re-examine the challenged conditions of probation.

Why we reject Edenfield's claim that his convictions on Counts 1 and 2 should merge

Counts 1, 2, and 3 of the indictment were all based on an incident that occurred at M.M.'s house in late October or early November 2012.

Edenfield and M.M. were watching a movie while M.M.'s mother was asleep on a nearby couch. Edenfield pulled down the girl's shorts and digitally penetrated her genitals. This act of digital penetration was charged in Count 1.

Edenfield then stood up and had M.M. perform fellatio on him. This act of fellatio was charged in Count 3. (Edenfield does not argue for merger of this count.)

After the act of fellatio, Edenfield walked to the hallway and beckoned M.M. to follow him. When M.M. came to the hallway (some 10 to 15 feet away, and out of sight of her sleeping mother), Edenfield removed the girl's shorts and penetrated her genitals with his penis. This act of penile penetration was charged in Count 2.

---

[1] AS 11.41.436(a)(1).

Edenfield argues that his convictions on Counts 1 and 2 should merge because they both involve sexual penetration of the same orifice, and because the act of digital penetration charged in Count 1 was preparatory to the act of penile penetration charged in Count 2. But as this Court explained in *Oswald v. State*, two acts of sexual penetration of the same orifice will support separate convictions if those acts of penetration are separated by a substantial break in time and circumstance. 715 P.2d 276, 280-81 (Alaska App. 1986).

In *Oswald*, the defendant engaged in an act of genital intercourse with the victim, and then, because she complained of discomfort, the defendant went to a store, purchased a lubricant, and returned to engage in a second act of genital intercourse with the victim.[2] This Court upheld separate convictions for these two acts of genital intercourse.[3]

The question in Edenfield's case is whether the two acts of genital penetration were likewise separated by a sufficient break in time and circumstance to support separate convictions. As we have explained, the act of digital penetration charged in Count 1 occurred first, followed by an act of fellatio. Then Edenfield moved to a different location in the house and beckoned M.M. to follow him — apparently, so that they would be out of sight if M.M.'s mother awakened. Edenfield then performed the act of penile penetration charged in Count 2.

Given this record, we conclude that Edenfield's two acts of genital penetration were sufficiently separated in time and circumstance to support two convictions under *Oswald*. We therefore reject Edenfield's argument that his convictions on Counts 1 and 2 should merge.

---

[2] *Oswald*, 715 P.2d 276 at 281.

[3] *Ibid.*

The five challenged conditions of probation

At Edenfield's sentencing, the superior court imposed all of the probation conditions proposed by the Department of Corrections without making any findings as to how those probation conditions were justified under *Roman v. State*[4] — *i.e.*, without making any findings as to how those probation conditions either promoted Edenfield's rehabilitation or protected the public, and without considering whether those conditions might be unduly restrictive of Edenfield's liberty.

Edenfield now challenges five of these conditions of probation.

One of Edenfield's probation conditions (Special Condition 8) prohibits him from having any contact with minors unless he is in the presence of a supervising adult who (1) has been pre-approved by Edenfield's probation officer and who (2) knows the circumstances of Edenfield's crimes. The State concedes that this Court should require the superior court to re-examine this probation condition, because it restricts Edenfield's contact with his own children.

Three other conditions of Edenfield's probation (Special Conditions 10, 11, and 12) prohibit him from possessing "sexually explicit materials"; require him to submit to searches of his residence, his vehicle(s), and his computer(s) for "sexually explicit materials"; and prohibit him from entering any establishment "whose primary business is the sale of sexually explicit material".

The State concedes that the superior court must re-examine these three probation conditions because, in *Diorec v. State*, this Court held that the phrase "sexually explicit material" is unconstitutionally vague.[5]

---

[4] 570 P.2d 1235, 1240 (Alaska 1977).

[5] 295 P.3d 409, 417-18 (Alaska App. 2013).

Finally, one of Edenfield's probation conditions (Special Condition 18) requires him to disclose his history of sexual abuse to any persons with whom he maintains a "significant relationship", and to any persons "with whom he is closely affiliated".

The State acknowledges that, in an unpublished decision, this Court has already indicated that the phrases "significant relationship" and "closely affiliated" are impermissibly vague and could lead to arbitrary enforcement.[6] Thus, the State concedes that the superior court must also re-examine this probation condition.

The State's concessions of error are well-founded, and we accept them.[7]

Conclusion

The superior court correctly refused to merge Edenfield's convictions on Counts 1 and 2. The record supports the entry of separate convictions for these two acts of genital penetration. However, for the reasons explained in the preceding section of this opinion, we direct the superior court to re-examine special probation conditions 8, 10, 11, 12, and 18.

---

[6] *See Whiting v. State*, unpublished, 2014 WL 706268 at *2-3 (Alaska App. 2014).

[7] *See Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972) (requiring an appellate court to independently assess any concession of error by the State in a criminal case).