IN THE COURT OF APPEALS OF THE STATE OF ALASKA

MICHAEL MENDENHALL, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12343 Trial Court No. 3AN-12-11862 CR MEMORANDUM OPINION No. 6498 — July 26, 2017

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

Appearances: Michael Mendenhall, *in propria persona*, Anchorage, for the Appellant. Lindsey M. Burton, Assistant District Attorney, Palmer, and Jahna M. Lindemuth, Attorney General, Juneau, for the Appellee.

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

Judge MANNHEIMER.

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

In 2013, Michael Mendenhall was convicted of four counts of distributing indecent materials to minors.[1] Mendenhall's offense was a class C felony,[2] and he was a second felony offender for purposes of presumptive sentencing (based on a prior conviction for attempted murder). Mendenhall therefore faced a presumptive sentencing range of 2 to 4 years' imprisonment on each count.[3]

The superior court sentenced Mendenhall to four concurrent terms of 4 years' imprisonment with 2 years suspended — *i.e.*, a composite 2 years to serve, with an additional 2 years suspended. As part of his conditions of probation, Mendenhall was prohibited from residing with a child under the age of 16 unless he obtained his probation officer's approval.

In April 2014 (about a month after Mendenhall was released from prison and began serving his probation), the Department of Corrections petitioned the superior court to revoke Mendenhall's probation. The Department alleged that Mendenhall was living in a hotel with a woman and her one-year-old child. The superior court ultimately found that Mendenhall was in violation of his probation, and the court imposed 30 days of Mendenhall's previously suspended sentence.

One year later, in April 2015, the Department again petitioned the superior court to revoke Mendenhall's probation. The Department alleged that Mendenhall had repeatedly failed to report to his probation officer, and that Mendenhall was again residing with a child under the age 16 — this time, a woman and her two-year-old daughter.

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[1] AS 11.61.128(a).

[2] *See* AS 11.61.128(d)-(e).

[3] AS 12.55.125(e)(2) (pre-2016 version).

(In the superior court, Mendenhall claimed to be the father of this girl, but the girl's birth certificate apparently lists a different father, and the record currently before us does not resolve the question of the girl's paternity.)

On June 2, 2015, the court found Mendenhall to be in violation of his probation. When the court took up the issue of what sentence was appropriate, Mendenhall began to read aloud a 20-page memorandum that he had personally written. The sentencing judge decided that it would be more expedient to continue the disposition hearing until the next day, and to have Mendenhall provide his memorandum to the court so that the judge could read the memorandum before the disposition hearing resumed.

In his memorandum, Mendenhall expressed his disagreement with many of the factual allegations contained in the petition to revoke his probation, as well as his disagreement with various aspects of the probation officer's testimony at the revocation hearing. The memorandum also contained Mendenhall's arguments as to why the superior court had no jurisdiction over him, and why the court proceedings against him violated the Uniform Commercial Code.

When court convened the next day, the sentencing judge stated that she had read Mendenhall's memorandum. Based on that memorandum, the judge concluded that Mendenhall "appears to still be in denial about the underlying case[, and] he doesn't admit ... any of the violations [of probation]." The judge declared that she viewed Mendenhall's violations of probation as serious "because they concern [his] continued contact with young children". She concluded that Mendenhall was still not rehabilitated and that he posed a danger to the safety of the community. The judge then imposed 9 months of Mendenhall's previously suspended sentence.

In this appeal, Mendenhall (who is now representing himself) contends that the sentencing judge violated her oath of office, that she exceeded her jurisdiction, that she was biased against Mendenhall, and that she failed to protect his rights under the

Uniform Commercial Code and the "Cesta Que Trust" of which he purportedly is the beneficiary.[4] The record of the proceedings does not support any of these claims.

Mendenhall also claims that the probation officer who testified at the revocation hearing gave perjured testimony, and that officers of the Department of Corrections kidnapped him (apparently, by taking him into custody). He further contends that he received ineffective assistance of counsel from the attorney who represented him during the probation revocation proceedings, and that the two prosecutors in his case committed misconduct when they pursued the petition to revoke his probation (because, according to Mendenhall, the petition was clearly baseless).

These claims can not be resolved on the existing record. Accordingly, if Mendenhall wishes to pursue these claims, he must file a petition for post-conviction relief. See our discussion in *Barry v. State*[5] and *Sharp v. State*[6] as to why claims of ineffective assistance of counsel that rely on matters outside the existing record can not be raised for the first time on appeal.

Mendenhall also claims that the superior court imposed an excessive sentence when the court ordered Mendenhall to serve 9 months of his previously suspended term of imprisonment. Mendenhall asserts that "it is well documented" that the sentence for a first violation of probation is 30 days, that the sentence for a second violation is 60 days, and that the sentence for a third violation is 90 days. Thus,

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[4] Mendenhall's phrase "cesta que trust" appears to be a modification of the phrase "cestui que trust". This is a phrase that was used in Law French; it referred to a person who did not own a particular piece of real property, but who had equitable rights in the property — usually, the right to receive the rents or other profits from the land. See the entry for "cestui que trust" in *Black's Law Dictionary* (10th ed. 2014).

[5] 675 P.2d 1292, 1295-96 (Alaska App. 1984).

[6] 837 P.2d 718, 722 (Alaska App. 1992).

Mendenhall argues, his sentence of 9 months for a second violation of probation is clearly mistaken.

But Mendenhall is mistaken: there is no rule establishing 30 days, 60 days, and 90 days as the sentences for a defendant's first, second, and third violations of probation. Instead, the sentencing court has the discretion to impose some or all of the defendant's previously suspended jail time. In exercising that discretion, the court must evaluate all of the circumstances of the case in light of the *Chaney* sentencing criteria.[7] For this purpose, the "relevant circumstances" of the defendant's case include the defendant's original offense(s), the defendant's conduct on probation, and the sentences imposed on similar defendants committing similar crimes.[8]

In Mendenhall's case, the record supports the sentencing judge's findings that Mendenhall continued to pose a danger to the community because he had again taken up residence with a child under the age of 16, and because he refused to acknowledge that he had done anything wrong. Given the circumstances of Mendenhall's case, we conclude that the superior court was not clearly mistaken when it imposed 9 months of Mendenhall's previously suspended term of imprisonment.[9]

The judgement of the superior court is AFFIRMED.

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[7] *See Crouse v. State*, 736 P.2d 783, 786-87 (Alaska App. 1987), applying *State v. Chaney*, 477 P.2d 441, 443-44 (Alaska 1970). *See also Moya v. State*, 769 P.2d 447, 448 (Alaska App. 1989).

[8] *Harris v. State*, 980 P.2d 482, 487 (Alaska App. 1999).

[9] *See McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974) (an appellate court is to affirm a sentencing decision unless the decision is clearly mistaken).