IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DANIEL SAM KASHATOK, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12429 Trial Court No. 4BE-12-87 CR MEMORANDUM OPINION No. 6508 — August 9, 2017

Appeal from the Superior Court, Fourth Judicial District, Bethel, Charles W. Ray Jr., Judge.

Appearances: Heather O'Brien, Gazewood & Weiner, Anchorage, for the Appellant. J. Michael Gray, District Attorney, Bethel, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

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

Judge WOLLENBERG.

Daniel Sam Kashatok was charged with sexually abusing twelve girls, most of them under thirteen years of age, over a period of several years. Many of the incidents occurred either at the Bethel Native Corporation building, where Kashatok worked as a janitor, or at his home, when the girls were visiting Kashatok's daughters. Kashatok

engaged in sexual contact and attempted sexual contact by touching, or attempting to touch, the girls on their breasts, buttocks, and vaginal area, both over and under clothing.

The State indicted Kashatok on fifteen counts of second-degree sexual abuse of a minor,[1] three counts of attempted second-degree sexual abuse of a minor,[2] two counts of third-degree sexual abuse of a minor,[3] one count of attempted third-degree sexual abuse of a minor,[4] and one count of first-degree harassment.[5]

To resolve these charges, Kashatok entered into a plea agreement with the State. Pursuant to the agreement, Kashatok pleaded guilty to one consolidated count of second-degree sexual abuse of a minor and one consolidated count of attempted second-degree sexual abuse of a minor, and the State dismissed the remaining charges. Kashatok agreed that, for purposes of presumptive sentencing, he had two prior felony convictions. He also agreed to open sentencing.

Kashatok stipulated to four aggravating factors under AS 12.55.155 — (c)(8) (Kashatok's criminal history involved aggravated or repeated instances of assaultive behavior); (c)(9) (Kashatok knew the offense involved more than one victim); (c)(18)(E) (Kashatok was ten or more years older than the victims); and (c)(31) (Kashatok's prior convictions included five or more class A misdemeanors).

By virtue of his prior felony convictions, Kashatok faced a presumptive sentencing range of 20 to 35 years on the second-degree sexual abuse of a minor conviction and 15 to 25 years on the attempted second-degree sexual abuse of a minor

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[1] AS 11.41.436(a)(2).

[2] AS 11.41.436(a)(2) & AS 11.31.100.

[3] AS 11.41.438(a).

[4] AS 11.41.438(a) & AS 11.31.100.

[5] AS 11.61.118(a)(2).

conviction.[6] Each conviction carried a maximum sentence of 99 years.[7] Additionally, because Kashatok was being sentenced for two crimes against a person under AS 11.41, the court was required to impose at least some portion of the sentences consecutively.[8] The court was also required to suspend at least 3 years of Kashatok's sentence on the second-degree sexual abuse of a minor conviction and at least 2 years of his sentence on the attempted second-degree sexual abuse of a minor conviction.[9]

At sentencing, Superior Court Judge Charles W. Ray Jr. found that the stipulated aggravating factors were supported by sufficient evidence. After weighing the *Chaney* criteria,[10] the judge imposed a sentence of 40 years with 5 years suspended (35 years to serve) on the second-degree sexual abuse of a minor conviction, consecutive to a sentence of 25 years with 5 years suspended (20 years to serve) on the attempted second-degree sexual abuse of a minor conviction — for a composite sentence of 55 years to serve and an additional 10 years suspended.

Kashatok now challenges his sentence as excessive.

At the time of sentencing in October 2015, Kashatok was sixty-seven years old. He had two prior felony convictions — a prior sexual abuse of a minor conviction from the early 1980s and a more recent conviction for selling alcohol without a license. He had over twenty misdemeanor or minor offense convictions stretching back to the 1970s, including four prior convictions for assault.

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[6] AS 12.55.125(i)(3)(D); AS 12.55.125(i)(4)(D).

[7] AS 12.55.125(i)(3); AS 12.55.125(i)(4).

[8] AS 12.55.127(c)(2)(F).

[9] Former AS 12.55.125(o)(2)-(3) (pre-July 2016).

[10] *See State v. Chaney*, 477 P.2d 441, 444 (Alaska 1970).

At sentencing, the court engaged in a thorough analysis of the *Chaney* criteria, noting the "immeasurable" impact of Kashatok's conduct on the victims and the Bethel community as a whole. The court found that Kashatok's offenses were very serious in relation to other cases and that the community needed to be protected from Kashatok. The court also found that Kashatok had a low likelihood of rehabilitation and that community condemnation was a significant consideration. The court repeatedly noted the number of victims and the length of Kashatok's conduct.

We have independently reviewed the record and conclude that the judge's findings are supported by the record. We note that the consolidated count for second-degree sexual abuse of a minor includes fifteen different acts with eight different victims over a period of nearly five years. The consolidated count for attempted second-degree sexual abuse of a minor includes acts with three additional victims during that time.

Kashatok notes that he did not stipulate to the "most serious" aggravator and argues that many of the sexual or attempted sexual contacts were of brief duration, over the victims' clothing, and did not involve the use of force. But the fact that Kashatok's conduct might not qualify as "among the most serious" within the definition of the offense does not mean that his conduct qualified as "among the least serious." Rather, the absence of the "most serious" aggravator means only that Kashatok's conduct fell within the broad middle range of conduct for which the legislature crafted the presumptive sentencing ranges.[11]

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[11] *See* Letter of Intent for Senate Bill 218, *The Purposes and Rationale Underlying the Increase in Sentencing Ranges for Felony Sex Crimes in Alaska*, 2006 Senate Journal 2210 (Feb. 16, 2006) (declaring that the increased sentencing ranges for sexual offenses were "large enough to accommodate the wide-ranging types of conduct contained within [the sexual offense] statutes — particularly in the [class] B and C felony range"). *See also Knight v. State*, 855 P.2d 1347, 1349 (Alaska App. 1993) (noting that the presumptive term — which (continued...)

Kashatok also argues that the court gave too much weight to the aggravating factors. He maintains that the (c)(8) and (c)(31) aggravating factors were already "largely taken into account" in establishing a higher sentencing range, and that the (c)(18)(E) aggravator — that Kashatok was ten or more years older than the victims — was already accounted for in the level of offense. But Kashatok's prior felony convictions, together with the level of his current offenses, dictated the applicable sentencing ranges; in contrast, Kashatok's prior misdemeanor convictions separately established the (c)(8) and (c)(31) aggravators. And the second-degree sexual abuse of a minor conviction required an age difference of four or more years,[12] not the ten years required to satisfy the aggravator.

In any event, the court only exceeded the high end of the presumptive range for the second-degree sexual abuse of a minor conviction by 5 suspended years and did not exceed the presumptive range on the second count. Although we must consider an entire sentence in determining whether it is excessive, we do not treat suspended imprisonment as the equivalent of time to serve.[13]

Finally, Kashatok argues that, given his age, a sentence of 55 years to serve is not necessary to protect society and that the superior court should have imposed concurrent or partially concurrent sentences. But while the judge recognized that imposition of the minimum presumptive sentence would likely be sufficient to protect

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[11] (...continued)
pre-dated the legislature's enactment of presumptive ranges in 2005 — represented the "appropriate sentence for . . . a relatively broad category into which most cases will fall").

[12] *See* AS 11.41.436(a)(2) (a person commits second-degree sexual abuse of a minor if, being 16 years of age or older, the person engages in sexual contact with another person who is under 13 years of age).

[13] *See Heavyrunner v. State*, 172 P.3d 819, 821 (Alaska App. 2007) (citing *Jimmy v. State*, 689 P.2d 504, 505 (Alaska App. 1984)).

the community in light of Kashatok's age, it is clear from the judge's comments that he concluded that a lesser sentence would be insufficient to meet the other goals of sentencing.

When reviewing an excessive sentence claim, we independently examine the record to determine whether the sentence is clearly mistaken.[14] The "clearly mistaken" standard contemplates that different judges, confronted with identical facts, will differ on what constitutes an appropriate sentence and that a reviewing court will not modify a sentence that falls within a permissible range of reasonable sentences.[15] Given the facts of this case and Kashatok's criminal history, we cannot say that the sentence imposed by the superior court is clearly mistaken.

We AFFIRM the sentence imposed by the superior court.

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[14] *McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974).

[15] *Erickson v. State*, 950 P.2d 580, 586 (Alaska App. 1997).