IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DOUGLAS JOHN EVANS,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12405
Trial Court No. 3VA-14-40 CR

MEMORANDUM OPINION

No. 6515 — August 23, 2017

Appeal from the Superior Court, Third Judicial District, Valdez, Eric Smith, Judge.

Appearances: Michael Horowitz, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Brittany L. Dunlop, Assistant District Attorney, Palmer, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

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

Judge SUDDOCK.

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

In March of 2014, the State of Alaska indicted Douglas John Evans on seven counts of first-degree sexual abuse of a minor,[1] all involving his stepdaughter, J.F. The State alleged that Evans engaged in a sexual relationship with J.F. while she was between the ages of fourteen and seventeen.

Evans accepted an offer from the State to plead guilty to one count of first-degree sexual abuse of a minor for conduct occurring in February of 2014, and the State dismissed the remaining counts. Evans also agreed to waive a jury trial on seven alleged aggravators. Following an evidentiary hearing, Superior Court Judge Eric Smith found that three of those aggravators applied. The judge sentenced Evans to 50 years' imprisonment with 20 years suspended (30 years to serve) and 15 years of probation.

Evans appeals his sentence and several of his probation conditions. We affirm his sentence, but we vacate some of his probation conditions and remand the case to the superior court for reconsideration of these conditions.

Background facts

In February of 2014, seventeen-year-old J.F. told two classmates that her stepfather was sexually abusing her. The classmates reported J.F.'s disclosure to the authorities. A Valdez police officer then interviewed J.F. J.F. related that Evans began touching her breasts over and under her clothing when she was fourteen or fifteen years old. Evans started having sexual intercourse with J.F. when she was fifteen. This continued for two years, and generally took place every week or two.

A sexual assault examination revealed traces of sperm on J.F.'s external genitalia. During a subsequent police interview, Evans did not confirm or deny having sexual contact or intercourse with J.F. But after DNA testing confirmed that the sperm

[1] AS 11.41.434(a)(2).

found on J.F.'s body came from Evans, he accepted a plea offer from the State. He agreed to plead guilty to one count of first-degree sexual abuse of a minor. Evans also agreed to waive his right to a jury trial on seven aggravators alleged by the State.

At sentencing, the State alleged that Evans had also abused his biological sister M.G., who is two years younger than him, during M.G.'s childhood. Evans denied under oath that he abused M.G.

M.G. testified at Evans's sentencing. She related that Evans began physically abusing her when she was three years old, pushing her down stairs, twisting her arm, and hitting, slapping, and kicking her. She stated that Evans began abusing her sexually when she was seven years old, and that he continued this sexual abuse until she was sixteen years old. She described digital and penile sexual penetration by Evans, as well as forced fellatio. She testified that during her teenage years, Evans would compel her to choose between physical and sexual abuse. Some of Evans's physical assaults on her required her to seek treatment at a hospital.

Judge Smith found M.G. to be credible and concluded that the abuse she described had in fact occurred. Based on M.G.'s testimony, the judge found that the State had proved the aggravator that Evans had a prior criminal history of aggravated or repeated assaultive behavior.[2] The judge also found that the State had proved three additional aggravators, because Evans committed his crime against a household member, engaged in similar conduct involving the same or another victim, and was more than ten years older than J.F.[3] Based on the length and orchestrated nature of Evans's abuse of J.F., the court also found that his crime was among the most serious conduct included in

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[2] AS 12.55.155(c)(8).

[3] AS 12.55.155(c)(18)(A); AS 12.55.155(c)(18)(B); AS 12.55.155(c)(18)(E), respectively.

the definition of the offense.[4] While the presumptive range for first-degree sexual abuse of a minor, an unclassified felony, is 20 to 30 years,[5] the aggravators increased Evans's potential sentence to a maximum of 99 years' imprisonment.[6]

At the sentencing hearing, J.F.'s mother read a statement written by J.F. In her statement, J.F. wrote that she had feared that if she divulged Evans's abuse, her mother might kill herself. She said that she felt traumatized by her ordeal, and that she worried she might be unable to form healthy sexual relationships as an adult. She feared that no potential partner aware of her past would accept her.

The State advocated a sentence of 60 years with 10 years suspended (50 years to serve) and 15 years of probation. Evans's defense attorney recommended a sentence of 20 years to serve. Relying on social science studies, several of which Evans attached to his sentencing memorandum, the defense attorney argued that Evans posed a low risk of re-offending. Evans compared his case to others where defendants received lesser sentences for conduct Evans believed to be similar to his.[7] Evans characterized his relationship with J.F. as "quasi-consensual," and contended that his conduct was less culpable than abuse of toddlers and very young children.

The judge sentenced Evans to 50 years' imprisonment with 20 years suspended (30 years to serve) and 15 years of probation.

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[4] AS 12.55.155(c)(10).

[5] AS 11.41.434(b) and AS 12.55.125(i)(1)(A)(ii).

[6] AS 12.55.125(i)(1).

[7] The cases that Evans cited to were mostly decided prior to the legislature's decision to increase the presumptive range for sexual offenses. *See, e.g.*, *Polly v. State*, 706 P.2d 700, 701 (Alaska App. 1985) (reversing a sentence of 40 years with 20 years suspended when the appropriate aggravated range was 10 to 15 years).

Evans's challenge that his sentence is excessive

On appeal, Evans contends that the sentencing judge failed to make sufficient findings to justify the sentence and failed to afford sufficient weight to Evans's potential for rehabilitation.

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] 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.'"[8] The clearly mistaken standard is thus a deferential standard that "implies a permissible range of reasonable sentences, which a reviewing court will not modify after an independent review of the record."[9]

Judge Smith discussed Evans's prospects for rehabilitation. The judge acknowledged "some hope" for Evans's rehabilitation should he participate in sex offender treatment.

The judge stated that he found M.G.'s testimony at the sentencing hearing credible. She testified to many years of severe sexual and physical abuse during her childhood by Evans, her brother. And the judge noted that "the sheer length and extent of the abuse [of J.F.], the nature of the abuse, to me differentiates this from a more standard case ... ."

As to the sentencing criteria of isolation, general deterrence, and reaffirmation of societal norms,[10] the judge stated that these would be satisfied by

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[8] *Erickson v. State*, 950 P.2d 580, 586 (Alaska App. 1997) (internal citations omitted).

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

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

imposition of a sentence between 20 and 30 years to serve. The judge stated that he viewed the aggravators applicable to Evans's case as a justification to impose substantial suspended time beyond this 20- to 30-year sentence.

These sentencing remarks demonstrate that Judge Smith considered Evans's prospects for rehabilitation as well as the sentencing considerations of isolation, general deterrence, and reaffirmation of societal norms. Having independently reviewed the record, we conclude that the sentence imposed was not clearly mistaken.

The judge's advisement to Evans about his eligibility for parole

Immediately after the judge imposed this sentence, the prosecutor reminded him that under the "truth in sentencing" provisions of AS 12.55.025(a)(3)(B) and Alaska Criminal Rule 32.2(c)(2)(B), a sentencing court must inform the defendant of the approximate minimum term of imprisonment the defendant must serve before becoming eligible for release on discretionary and mandatory parole.

Judge Smith responded that he believed that Evans was required to serve his entire presumptive term of 30 years — in other words, that Evans was not eligible for either discretionary or mandatory parole and that he must serve his entire unsuspended term of imprisonment.

The judge's pronouncement that Evans would serve a 30-year term in prison was correct. For conduct committed on or after July 1, 2013 (Evans pleaded guilty to conduct occurring in 2014), a defendant sentenced for an unclassified sexual felony under AS 12.55.125(i) is not eligible for good time deductions.[11] Nor is Evans

[11] AS 33.20.010(a)(3)(B). *See* ch. 43, § 33, SLA 2013.

eligible for discretionary parole.[12] He will serve the entire 30-year term imposed by the court before being released on probation.

But after the judge correctly stated that Evans would serve a full 30 years' imprisonment, the prosecutor dissuaded the judge from this conclusion. The prosecutor argued that she believed Evans must serve the minimum of the presumptive range (20 years) plus a third of any time to serve above that minimum (one-third of 10 years). Under the prosecutor's accounting (which the State does not defend on appeal), Evans would be released on mandatory parole after serving 23 and one-third years. After additional discussion, the judge said to the prosecutor, "I'll accept your representation."

On appeal, Evans argues that because the judge deferred to the prosecutor's understanding of the law, the judge "demonstrated a fundamental lack of understanding about the primary sentencing baseline: when a defendant gets out of jail. And if the sentencing court cannot determine when a defendant actually gets out of jail, it cannot apply the *Chaney* sentencing criteria."

We first note that under AS 12.55.025(j), even if a judge misstates the approximate minimum term that a defendant must serve before becoming eligible for discretionary or mandatory parole, such an error does not "form a basis for review or appeal of the sentence imposed ... ."

But here the record establishes that when the judge sentenced Evans, he did so under the understanding that Evans was not eligible for either discretionary or mandatory parole, and that Evans would serve his entire 30-year sentence. It was only after the judge imposed Evans's sentence that the prosecutor sowed doubt in the judge's mind about the applicable parole statutes. Because the judge correctly understood the

[12] AS 33.16.090(b)(2).

law when he imposed Evans's sentence, Evans's argument that the judge imposed a longer sentence than the judge had intended is unsupported.

Evans's challenges to his probation conditions

On appeal, Evans challenges four general probation conditions and two special conditions.

Evans challenges general condition No. 4 requiring him to maintain full-time employment unless he is engaged in education or treatment, or is unable to work due to a disability. Evans argues that because he will be elderly when he is released, and because sex offenders face employment disadvantages, this condition is unreasonable.

We have previously upheld this condition.[13] Implicit in the condition is an assumption that it will not be unreasonably enforced — or that if it is, Evans can seek judicial review.[14] We conclude that the condition is not unreasonable.

Evans also challenges general condition No. 6, which prohibits him from possessing concealed weapons, firearms, switchblades, or gravity knives. The judge imposed this condition because of Evans's past history of assaultive behavior. On appeal, Evans does not challenge the prohibition against possessing firearms — possession of concealable firearms by felons is a felony under Alaska law.[15] But Evans argues that the prohibition of other types of concealed weapons lacks a nexus to his offense.

Evans assumes that this condition would preclude him from employment involving box cutters or knives. But the plain wording of the condition only precludes

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[13] *Marunich v. State*, 151 P.3d 510, 521 (Alaska App. 2006).

[14] *Id.* at 522 (citing *Dayton v. State*, 120 P.3d 1073, 1084 (Alaska App. 2005)).

[15] *See* AS 11.61.200(a)(1).

Evans from carrying *concealed* weapons, and not from merely possessing weapons (other than switchblades and gravity knives). Evans does not specifically argue that he should be allowed to possess switchblades or gravity knives. Given Evans's prior assaultive behavior directed at M.G., the judge did not abuse his discretion by prohibiting Evans from carrying concealed weapons or from possessing switchblades and gravity knives.

Special condition No. 1 authorizes searches of Evans's person, property, residence, or vehicle for deadly weapons. Courts may not constitutionally impose warrantless probation search conditions without finding a direct relationship between the defendant's offense or his rehabilitation and imposition of the condition.[16] Here, the judge did not engage in this analysis. And as we have just noted, Evans's conditions of probation do not prohibit him from possessing weapons in general, but only from possessing switchblades, gravity knives, and firearms. Because special condition No. 1 authorizes searches for weapons that Evans is entitled to possess, it is overbroad. We accordingly vacate this condition and direct the judge to reconsider it.

Evans also challenges general condition No. 7 prohibiting him from associating with felons without the permission of Evans's probation officer. We deny Evans's challenge to this routine provision. If Evans believes that his probation officer has unreasonably denied him permission to associate with a particular felon, he can petition the superior court to review the probation officer's decision.[17]

Evans challenges general probation condition No. 8, which forbids him from drinking to excess, defined as drinking that puts his blood-alcohol level above .08

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[16] *Lambert v. State*, 172 P.3d 838, 840-41 (Alaska App. 2007) (internal citations omitted).

[17] *See Marunich*, 151 P.3d at 522 (citing *Dayton*, 120 P.3d at 1084).

grams of alcohol per liter of blood. Because Evans's sexual abuse of J.F. was a crime of domestic violence, this condition is authorized by AS 12.55.101(a)(2). But the State presented no evidence that Evans's current or past misconduct was related to alcohol, and the superior court did not articulate a case-specific nexus between Evans's offense and alcohol. Therefore, we vacate this condition and direct the superior court to reconsider it.

Finally, Evans challenges special condition No. 18. This condition requires Evans to "inform all persons with whom he has a significant relationship, or with whom he is closely affiliated, of Evans's sexual offending history." It requires Evans to consult "with the approved treatment provider and the probation officer" to determine what qualifies as a "significant relationship" or who is "closely affiliated" with Evans.

We have vacated nearly identical conditions on multiple occasions.[18] For the same reasons, we vacate this condition. On remand, the superior court may reimpose the condition after additional clarification of the terms "significant relationship" and "closely affiliated."[19]

Conclusion

We AFFIRM Evans's sentence. We VACATE general condition of probation No. 8 as well as special conditions of probation Nos. 1 and 18. We REMAND Evans's case to the superior court for reconsideration of these conditions of probation. We do not retain jurisdiction.

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[18] *See, e.g.*, *Smith v. State*, 349 P.3d 1087, 1095 (Alaska App. 2015); *Whiting v. State*, 2014 WL 706268, at *2-3 (Alaska App. Feb. 19, 2014) (unpublished).

[19] *See Smith*, 349 P.3d at 1095.