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

ISMAEL TANGONAN BALALLO, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11846 Trial Court No. 3UN-12-051 CR MEMORANDUM OPINION No. 6522 — September 6, 2017

Appeal from the Superior Court, Third Judicial District, Unalaska, Patricia L. Douglass, Judge, and the statewide three-judge sentencing panel.

Appearances: Barbara Dunham, Assistant Public Advocate, Appeals and Statewide Defense Section, and Richard Allen, Public Advocate, Anchorage, for the Appellant. Nancy R. Simel, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

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

Judge MANNHEIMER.

Ismael Tangonan Balallo was convicted of first-degree sexual assault based on an incident that occurred in Unalaska in March 2012. He now appeals his conviction and his sentence. For the reasons explained in this opinion, we affirm Balallo's conviction, but we direct the three-judge sentencing panel to reconsider his sentence.

Balallo's claim that he should not have been jointly tried with his co-defendant, Diego Mayuyo

Before presenting our analysis of Balallo's claim that he should have been tried separately from his co-defendant, Diego Mayuyo, we must explain how two pre-trial issues in this case were litigated.

Balallo and Mayuyo were accused of sexually assaulting a woman at a seafood processing facility in Unalaska. According to the State's evidence, Balallo and Mayuyo entered the victim's dormitory room in the early morning hours. Balallo sexually assaulted the woman in the bathroom, and then Mayuyo sexually assaulted her on the bed.

The two men were scheduled to be tried together, but in early July 2012, the State alerted the superior court that there was a potential severance problem: the State believed that Mayuyo would be ready for the scheduled trial, but that his co-defendant Balallo would ask for a continuance. The State suggested that the trial of both defendants be delayed until early September 2012.

On July 3rd, the parties appeared in court to discuss the possibility of delaying the trial. Balallo's attorney confirmed that he would be asking for a continuance. Mayuyo's attorney, on the other hand, announced that he was ready for trial, and he objected to the proposed continuance.

The superior court ultimately ruled that the two co-defendants should remain joined for trial, and that this joint trial should be continued to accommodate Balallo's attorney's request for more time.

There was one additional problem with holding a joint trial in this case. The State wanted to introduce evidence of an out-of-court statement that Mayuyo made to his roommate, Rommel Viado, shortly after the alleged sexual assault. According to

Viado, Mayuyo told him several times, "We're going to jail." However, Viado understood Mayuyo to be saying that he (Mayuyo) and Balallo were going to jail because of what *Balallo* had done.

The prosecutor acknowledged that, because Mayuyo and Balallo were being tried together, any testimony from Viado about Mayuyo's out-of-court statement would raise a confrontation problem under the United States Supreme Court's decision in *Bruton v. United States*[1] — because Mayuyo's statement directly incriminated Balallo. (In *Bruton*, as later modified by *Richardson v. Marsh*,[2] the Supreme Court held that a defendant's Sixth Amendment right of confrontation is violated if the confession of a non-testifying co-defendant is introduced at their joint trial, and if this confession directly implicates the defendant.)

However, the prosecutor proposed that the jury receive an amended version of Mayuyo's out-of-court statement to Viado. The prosecutor suggested that (1) she would not ask Viado about Mayuyo's direct accusations against Balallo, and (2) Viado should be instructed to testify that Mayuyo said, "*I'm* going to jail," rather than "*We're* going to jail."

We recently reversed Mayuyo's conviction because of this ruling. As we explained in our opinion, "The alteration of Mayuyo's statement certainly protected Balallo's confrontation rights under *Bruton*. But the alteration was unfair to Mayuyo. Compared to Mayuyo's original statement, the altered version made it appear that Mayuyo was incriminating himself to a significantly greater degree." *Mayuyo v. State*, __ P.3d __, Alaska App. Opinion No. 2556, 2017 WL 2391807 (June 2, 2017).

---

[1] 391 U.S. 123, 126, 128-29; 88 S.Ct. 1620, 1622-25; 20 L.Ed.2d 476 (1968).

[2] 481 U.S. 200, 211; 107 S.Ct. 1702, 1709; 95 L.Ed.2d 176 (1987) (limiting *Bruton* to instances where the confession of the non-testifying co-defendant directly implicates the defendant).

We now turn to the events that gave rise to Balallo's current claim that he should have been tried separately.

On the first day of trial, before the jury was brought in, the assigned trial judge, Superior Court Judge Patricia L. Douglass, was discussing various preliminary matters with the parties. During this discussion, without any motion for severance from the defense attorneys, Judge Douglass asked *sua sponte* whether Balallo and Mayuyo had been "fully informed of the conflicts that possibly arise when you have co-defendants", and whether each of them had "made a full and knowing, intelligent waiver of ... those conflicts."

It is unclear what the judge was referring to here.[3] Under Alaska Criminal Rules 8(b) and 13, co-defendants can be tried jointly if, as was true in Balallo and Mayuyo's case, "they are alleged to have participated in the same act or transaction".

When a joint trial is authorized by Criminal Rules 8(b) and 13, the co-defendants have no "right" to separate trials — no right that must be affirmatively waived before the joint trial can take place. Defendants whose trials are joined can seek severance (*i.e.*, separate trials) under Alaska Criminal Rule 14, but a defendant seeking severance must establish that they would be unfairly prejudiced by the joint trial.

In any event, here is the full text of the judge's colloquy with the attorneys:

> *The Court*: Now, ... before I forget, ... I want to make sure ... that each defendant has been fully informed of the

---

[3] Conceivably, the judge may have been thinking of the Alaska Supreme Court's decision in *Moreau v. State*, 588 P.2d 275 (Alaska 1978). In *Moreau*, the supreme court held that whenever two co-defendants are represented by the same attorney, the trial court must personally address the co-defendants, warning them of the potential conflicts of interest that might arise because of the joint representation, and obtaining each defendant's waiver of these potential conflicts. *Id.* at 284. But *Moreau* does not apply to the present case — because Balallo and his co-defendant Mayuyo each had their own attorney.

conflicts that possibly arise when you have co-defendants and that they have made a full and knowing, intelligent waiver of any of those conflicts. Have you all done that with, Mr. Boots, with your client?

Mr. Boots (representing Mayuyo): Actually, if we could have a minute, Your Honor.

The Court: All right. ... We'll go off the record so you all can discuss this. And when we [come] back in, I am going to ask each defendant individually if they understand the potential conflict and if they're making a full and knowing waiver.

. . .

The Court: Back on the record in the matter of *State of Alaska versus Mr. Balallo and Mr. Mayuyo* ... . Now, we were at the point where I was asking each of the defendants through counsel if they had discussed the idea of a conflict with having a co-defendant, and if they had indicated that they were waiving — making a full, knowing, and intelligent waiver of those conflicts.

Mr. Boots, I'll ask you first.

Mr. Boots: We are not waiving those conflicts, Your Honor. We can do severance if the Court wishes. ... [B]ut we're not waiving with respect to those conflicts.

Ms. Maciolek (representing Balallo): Judge, we don't waive insofar as the *Bruton* issue is at play. So long as [co-defendant Mayuyo's] statements are precluded from coming into the State's case against my client through hearsay ... , yeah, but that's ...

The Court: So ... if I understand, both defendants — you, Mr. Boots, your client [Mr. Mayuyo] is still standing by

his right to sever and have an independent trial, is that what you're saying?

Mr. Boots: That's correct, Your Honor.

The Court: And you're going forward [but] reserving this issue for appeal?

Mr. Boots: That's correct.

The Court: All right. And the same for you, Ms. Maciolek?

Ms. Maciolek: Correct.

The Court: All right; we have that on the record, then.

Based on the foregoing exchange, Balallo now contends that the trial judge committed error by holding the joint trial over his objection.

The judge's inquiry appears to have been premised on her mistaken belief that co-defendants whose trials are properly joined under Rules 8(b) and 13 nevertheless have (in the judge's words) "[a] right to sever and have an independent trial". There is no such right (and Balallo does not assert that there is one). Thus, it is irrelevant that Balallo and Mayuyo never affirmatively waived this purported "right".

As we have explained, a defendant can ask the court to grant severance of the joined trials, but a defendant seeking severance must affirmatively demonstrate that they would be unfairly prejudiced by the joint trial.

Balallo's attorney did not ask the court to sever the trials. The only concern that Balallo's attorney expressed was to seek the court's assurance that the *Bruton* rule would be enforced at the joint trial.

(In other words, Balallo's attorney was apparently assuming that there would be a joint trial, and she wanted to make sure that the State would be barred from introducing Mayuyo's out-of-court statement against Balallo at that joint trial. Balallo makes no claim that the *Bruton* rule was violated at his trial.)

On appeal, Balallo argues for the first time that he was unfairly prejudiced by the joint trial. He asserts, in particular, that the State's evidence was equally strong against his co-defendant Mayuyo, but only he (Balallo) was charged with the more serious crime of first-degree sexual assault — *i.e.*, non-consensual sexual penetration. (Mayuyo was charged with the lesser offense of second-degree sexual assault — *i.e.*, non-consensual sexual contact.) Balallo therefore contends that, given the evidence in the case and "[given] the way the charges were presented", the jury might have been "unduly swayed ... toward an inference of Balallo's guilt".

But as we have explained, Balallo's attorney never asked the judge to order severance of the trials. Nor did Balallo's attorney ever argue that a joint trial would be unfairly prejudicial to Balallo in the manner just described. As Balallo concedes in his brief to this Court, his attorney "did not alert the [trial] court to the specific form of prejudice [that he now argues]".

For these reasons, we conclude that Balallo's severance claim is not preserved for appeal. Because Balallo's attorney never asked the trial judge to grant severance of his trial, there was no error in trying Balallo jointly with his co-defendant Mayuyo.

Why we remand Balallo's case to the three-judge sentencing panel

At sentencing, Judge Douglass concluded that Balallo had extraordinary potential for rehabilitation, and she further concluded that it would be manifestly unjust to sentence Balallo to a term of imprisonment within the prescribed presumptive

sentencing range for first-degree sexual assault (20 to 30 years' imprisonment).[4] The judge therefore granted Balallo's motion to have his sentencing referred to the statewide three-judge sentencing panel. *See* AS 12.55.165.

The three-judge panel concluded that Balallo had failed to prove that he had extraordinary potential for rehabilitation, and Balallo does not challenge the three-judge panel's ruling on this issue.

The three-judge panel also concluded that, given the circumstances of the case, it would not be manifestly unjust to sentence Balallo to a term of imprisonment within the applicable presumptive range. But after the three-judge panel announced this decision, Balallo's attorney asked the panel if they had considered the option of (1) imposing a sentence within the presumptive range, but (2) making Balallo eligible to apply for discretionary parole. In response, the three-judge panel declared that they did not need to consider that option, since they had no authority to grant parole eligibility to Balallo.

On appeal, the State concedes that the three-judge panel misunderstood their authority: the three-judge panel does, in fact, have the power to expand a defendant's eligibility for discretionary parole. *See Luckhart v. State*, 314 P.3d 1226, 1234 (Alaska App. 2013). For this reason, the State asks us to remand Balallo's case to the three-judge panel so that the panel can reconsider Balallo's request for expanded parole eligibility.

The State's concession is well-taken, and we will remand Balallo's case to the three-judge panel for this purpose.

---

[4] *See* AS 12.55.125(i)(1)(A)(ii).

Conclusion

We AFFIRM Balallo's conviction for first-degree sexual assault, but we VACATE the three-judge panel's ruling on Balallo's request for expanded parole eligibility, and we remand this case to the three-judge panel for reconsideration of Balallo's request.