

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

JOSHUA RYAN BEATY,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12394
Trial Court No. 3PA-12-2890 CR

MEMORANDUM OPINION

No. 6523 — September 20, 2017

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

Appearances: Glenda J. Kerry, Law Office of Glenda J. Kerry,
Girdwood, for the Appellant. Kerry A. Corliss, Assistant
District Attorney, Palmer, and Craig W. Richards, Attorney
General, Juneau, for the Appellee.

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

Judge WOLLENBERG.

Pursuant to a plea agreement, Joshua Ryan Beaty pleaded guilty to one count of first-degree burglary and one consolidated count of third-degree assault. The State dismissed numerous other counts, and sentencing was open to the court.

As a third felony offender, Beaty was subject to a presumptive sentencing range of 6 to 10 years on the burglary conviction¹ and 3 to 5 years on the assault conviction.² The court imposed the maximum term of imprisonment of 10 years for the burglary and a consecutive 3-year active term for the assault, for a composite sentence of 13 years to serve.

Beaty now appeals his sentence. For the reasons discussed below, we reject Beaty's challenges to the aggravating factors, but we conclude that a remand is required to address Beaty's contention that the court failed to sufficiently justify a sentence in excess of 10 years.

Underlying facts

Because Beaty elected not to go to trial, the following facts are taken primarily from the presentence report prepared in this case.

In October 2012, a Big Lake homeowner returned home with two friends to find an unfamiliar Jeep in his driveway. The homeowner confronted the driver of the Jeep, later identified as Beaty, and Beaty quickly reversed the Jeep, colliding with the homeowner's utility trailer. Beaty then reached into the back seat of the Jeep for a revolver. The homeowner recognized the revolver as his own.

One of the homeowner's friends approached and pointed a handgun at Beaty. When Beaty did not drop the revolver, the friend fired a round into the ground.

¹ AS 11.46.300(b) (first-degree burglary is a class B felony); former AS 12.55.125(d)(4) (pre-July 2016 version) (setting presumptive range for a third felony offender convicted of a class B felony).

² AS 11.41.220(e) (third-degree assault is a class C felony); former AS 12.55.125(e)(3) (pre-July 2016 version) (setting presumptive range for a third felony offender convicted of a class C felony).

Beaty then fled from the scene, but the men caught him and held him on the ground until police arrived.

Items from the residence, totaling between \$2,500 and \$3,000 in value, were identified in the Jeep and on Beaty's person. The police also found heroin on Beaty. During a later search of the Jeep, the police found additional items from the Big Lake residence plus items from several other reported burglaries in the area. In Beaty's apartment, the police discovered more stolen items.

For the October incident at Big Lake, a grand jury indicted Beaty for two counts of first-degree burglary, two counts of second-degree theft, three counts of third-degree assault, and one count of fourth-degree controlled substance misconduct.³ By information, the State charged Beaty with first-degree criminal trespass.⁴ A second grand jury indicted Beaty for multiple charges related to seven other residential burglaries. Beaty was also charged federally with being a felon in possession of a firearm in connection with the Big Lake incident.

Plea agreement and sentencing

To resolve all of the state charges, the State reached a plea agreement with Beaty. Under the agreement, Beaty pleaded guilty to one count of first-degree burglary and one consolidated count of third-degree assault in connection with the burglary of the Big Lake residence. The State dismissed the remaining charges, and sentencing was open to the court. At the time of sentencing, Beaty was twenty-eight years old.

³ AS 11.46.300(a)(1) & (a)(2)(A); AS 11.46.130(a)(1) & (a)(2); AS 11.41.220(a)(1)(A); and former AS 11.71.040(a)(3)(A) (2012), respectively.

⁴ AS 11.46.320(a)(1).

The presentence report shows that Beaty had four prior felony convictions — a conviction for fourth-degree misconduct involving a controlled substance (3PA-07-1084 CR); a conviction for first-degree burglary (3PA-08-0413 CR); a conviction for second-degree theft (3PA-08-0808 CR); and another conviction for first-degree burglary (3PA-10-2192 CR). Although the first three cases (the 2007 and 2008 cases) arose out of separate episodes, Beaty was sentenced in these cases at the same hearing as part of a plea agreement.

By the time of sentencing in this case, Beaty had also been convicted and sentenced in federal court for being a felon in possession of a firearm during the course of the Big Lake burglary. The federal sentence was imposed concurrently with the sentence in this case.

At the sentencing hearing in this case, the prosecutor proposed a sentence of 13 years to serve — 10 years to serve on the burglary conviction consecutive to 3 years to serve on the assault conviction. The prosecutor also asked the court to find two aggravating factors: that Beaty had three or more prior felony convictions⁵ and that, based on his prior convictions for burglary and theft, Beaty had a history of repeated offenses similar in nature to the current offense.⁶

Beaty's attorney agreed with the State's proposed sentence of 10 years to serve on the burglary conviction. Beaty's attorney, however, asked the court to impose an almost entirely concurrent 3-year sentence for the assault conviction, for a composite sentence of 10 years and 1 day.⁷

⁵ AS 12.55.155(c)(15).

⁶ AS 12.55.155(c)(21).

⁷ Beaty's attorney appeared to believe that the court was statutorily barred under AS 12.55.127(c)(2) from imposing an entirely concurrent sentence and was therefore
(continued...)

The court found that Beaty was a worst offender. The court also found that the State had proven the aggravating factors by clear and convincing evidence “because he’s got a prior criminal history of six felony convictions.” In light of Beaty’s criminal history and the number of other crimes with which Beaty was charged, the court concluded that probation was not appropriate. The court adopted the State’s recommended sentence, imposing 10 years to serve on the burglary conviction and a consecutive term of 3 years to serve on the consolidated assault conviction, for a composite sentence of 13 years to serve.

Beaty’s arguments regarding the aggravating factors

Beaty makes two arguments regarding the aggravating factors. First, Beaty argues that it is unclear what aggravating factors the sentencing judge found since the State gave notice of five proposed aggravating factors prior to the sentencing hearing but then only asked the court to find two of these factors at the sentencing hearing itself. However, in light of the State’s oral limitation of its proposal at sentencing and the superior court’s finding of the aggravating factors based on Beaty’s prior convictions, the record is clear that the court found only the (c)(15) and (c)(21) aggravating factors.

Second, Beaty contends that three of his four prior convictions (the 2007 and 2008 cases) “arguably should have been counted as one prior conviction” for purposes of the (c)(15) aggravating factor.

⁷ (...continued)
required to impose at least some portion of the sentence on the assault count consecutively. But this assumption was incorrect. Under AS 12.55.127(c)(2), a sentencing court is required to impose a term of consecutive imprisonment in certain cases involving two or more convictions under AS 11.41. But Beaty was only sentenced for a single crime under AS 11.41; Beaty’s second crime, burglary, is a crime against property under AS 11.46. Thus, AS 12.55.127(c)(2) did not mandate the imposition of any consecutive time.

Beaty does not meaningfully brief this issue, and we conclude that we need not resolve it because the presence or absence of this aggravating factor made no difference to the judge’s sentencing authority. Each of Beaty’s 2007 and 2008 convictions arose from separate criminal episodes. Therefore, for purposes of presumptive sentencing, Beaty was indisputably a third felony offender.⁸ Because Beaty was a third felony offender, the high end of the presumptive sentencing ranges he faced by virtue of his convictions was the same as the maximum statutory penalties for those crimes.⁹ Thus, the court was authorized to impose the statutory maximum sentence for the burglary and assault convictions without finding any aggravating factors.

Why we conclude that a remand is necessary

On appeal, Beaty argues that the superior court failed to consider whether to impose concurrent sentences. He also raises a closely related argument — that the court failed to make sufficient findings to justify consecutive sentences above 10 years to serve. We conclude that this latter claim requires a remand.

In *Neal v. State*, the Alaska Supreme Court held that when a defendant is sentenced for two or more crimes, the composite sentence of imprisonment may not exceed the maximum sentence for the defendant’s most serious crime unless the judge finds that the longer sentence is necessary to protect the public.¹⁰ (This rule is often

⁸ See *State v. Rastopsoff*, 659 P.2d 630, 637 (Alaska App. 1983) (holding that prior felony convictions entered on the same date but arising out of separate criminal episodes are considered separate convictions for purposes of determining a defendant’s presumptive sentencing status on a subsequently committed offense).

⁹ AS 12.55.125(d) & (e).

¹⁰ *Neal v. State*, 628 P.2d 19, 21 (Alaska 1981).

referred to as the “*Neal-Mutschler*” rule.¹¹) In 2010, recognizing that the supreme court had disapproved of benchmark sentencing guidelines in the years since *Neal*, this Court held that a judge may impose a composite sentence greater than the *Neal* ceiling if the judge finds that the longer sentence is necessary to satisfy any one or more of the other sentencing criteria set out in AS 12.55.005, not just protection of the public.¹²

Beaty argues that the sentencing court failed to articulate a proper basis under this rule for imposing a 13-year sentence. We agree that the court did not make an explicit finding that protection of the public or other sentencing goals under AS 12.55.005 required a sentence greater than the maximum 10-year term for first-degree burglary, Beaty’s most serious offense.

Both the supreme court and this Court have overlooked this error in past cases when the sentencing record as a whole demonstrated that the sentencing court implicitly made the required finding.¹³ But while the court’s remarks in this case were extensive, they were aimed primarily at explaining the court’s decision to forgo the imposition of probation and order a flat sentence. We are unable to discern from the current record whether the court considered the *Neal* ceiling.

We also note that the court mistakenly stated that Beaty had six prior felony convictions. Beaty had four felony convictions that predated the events in this case. Given this, and given the court’s failure to make a sufficient finding under *Neal* (as modified by our decision in *Phelps*), we conclude that a remand is appropriate.

¹¹ See *Mutschler v. State*, 560 P.2d 377, 380-81 (Alaska 1977).

¹² *Phelps v. State*, 236 P.3d 381, 393-94 (Alaska App. 2010). Alaska Statute 12.55.005 codifies the sentencing criteria originally announced in *State v. Chaney*, 477 P.2d 441, 444 (Alaska 1970).

¹³ See, e.g., *Neal*, 628 P.2d at 21; *Christian v. State*, 276 P.3d 479, 490 (Alaska App. 2012); *Waters v. State*, 64 P.3d 169, 175 (Alaska App. 2003).

We acknowledge that neither party brought the *Neal-Mutschler* rule to the trial court’s attention. And we are cognizant of the Alaska Supreme Court’s directive that benchmarks should not inflexibly confine sentencing discretion.¹⁴ But a “defendant’s liberty should be restrained only to the minimum extent necessary to achieve the objectives of sentencing.”¹⁵ The *Neal-Mustchler* rule (as modified by *Phelps*) continues to serve an important purpose by requiring sentencing courts to thoughtfully consider and articulate reasons for imposing a sentence above the *Neal* ceiling, consistent with “the traditional requirement that sentencing decisions be carefully formulated and thoroughly explained.”¹⁶

Accordingly, we remand this case to the superior court for further findings and reconsideration of Beaty’s sentence.

Conclusion

We direct the superior court to reconsider whether Beaty’s composite sentence should exceed 10 years to serve. With that exception, the judgment of the superior court is AFFIRMED.

¹⁴ See, e.g., *State v. Hodari*, 996 P.2d 1230, 1235-36 (Alaska 2000).

¹⁵ *Pears v. State*, 698 P.2d 1198, 1205 (Alaska 1985). See also *ABA Standards for Criminal Justice: Sentencing* § 18-2.4 (3d ed. 1994) (“Sentences authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized.”), § 18-6.1(a) (“The sentence imposed should be no more severe than necessary to achieve the societal purpose or purposes for which it is authorized.”).

¹⁶ *Juneby v. State*, 641 P.2d 823, 846 n.39 (Alaska App. 1982), modified on other grounds, 665 P.2d 30 (Alaska App. 1983). See also *Perrin v. State*, 543 P.2d 413, 418 (Alaska 1975) (discussing “the importance of a thorough explanation for the sentence imposed by the trial judge”).