

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

MICHAEL CHARLES REDFOX,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals Nos. A-11812 & A-11906
Trial Court Nos. 4EM-13-151 CR &
4EM-10-104 CR

MEMORANDUM OPINION

No. 6524 — September 27, 2017

Appeal from the Superior and District Courts, Fourth Judicial District, Emmonak and Bethel, Charles W. Ray Jr., Judge, and Bruce Ward, Magistrate Judge.

Appearances: Douglas O. Moody, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Thomas J. Aliberti, Assistant District Attorney, Anchorage, and Craig W. Richards, 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).

While Michael Charles Redfox was on bail release pending adjudication of a petition to revoke his probation in a prior case, he was charged with additional crimes, including violation of the conditions of his release (VCOR). Magistrate Judge Bruce Ward granted the defense's request to bifurcate the trial, with trial on the VCOR charge to follow trial on the other charges.

The judge also granted the defense a protective order precluding the State from informing the jury that Redfox was on probation at the time of his crimes. Then, at trial, the judge denied a mistrial after a village police officer (whom the prosecutor had not informed of the protective order) briefly mentioned Redfox's probation status during her testimony.

Redfox appeals, arguing that, in light of the prosecutor's failure to inform the witness of the protective order, the trial judge abused his discretion by denying a mistrial. We conclude that the judge did not abuse his discretion.

After the jury returned guilty verdicts following the first stage of the trial, the defense attorney informed the judge that Redfox would waive a jury trial on the VCOR charge. The judge accepted the waiver without obtaining a waiver from Redfox personally. The State concedes that this was reversible error, and we agree. Because a different judge relied in part on the VCOR conviction when he later revoked Redfox's probation, we additionally vacate that probation revocation.

Facts and proceedings

The State filed a petition to revoke Redfox's felony probation in case no. 4EM-10-104 CR based on allegations that he consumed alcohol and committed disorderly conduct. Redfox was arrested but released on his own recognizance pending adjudication of the petition to revoke his probation. One of his conditions of release was that he obey all federal, state, and local laws and ordinances.

Six days later, Redfox was arrested in Emmonak on new charges: one count of first-degree harassment for touching a woman's buttocks through her clothing, two counts of first-degree criminal trespass for unlawfully entering or remaining in two houses, and one count of VCOR for committing harassment and criminal trespass while on bail release.¹

The judge granted a defense motion to bifurcate the trial, with the VCOR charge to be tried after the other charges. The judge also granted a defense motion prohibiting the State from referring to Redfox's probation status.

The prosecutor neglected to inform Emmonak Village Police Officer (VPO) Ruth Smith about this protective order prior to her testimony at trial. The officer testified about her initial contact with the two complaining witnesses. The prosecutor then asked her a question about reporting the incident to the Alaska State Troopers:

Prosecutor: Now after you received these reports — you had done audio interviews with both of these folks, and after you received these reports, you contacted the troopers, is that right?

VPO Smith: Yes, I did.

Prosecutor: Okay.

VPO Smith: Well, I contacted his probation off ...

Redfox's attorney: Objection.

Outside the presence of the jury, the defense attorney moved for a mistrial. The prosecutor conceded that the witness's answer violated the court's protective order, admitting that he had not informed VPO Smith of the order. (VPO Smith confirmed

¹ AS 11.61.118(a)(2), AS 11.46.320(a)(2), and former AS 11.56.757(a) & (b)(1) (pre-2016 version), *amended by* ch. 36, §§ 29 & 30, SLA 2016, respectively.

this.) But the prosecutor indicated that VPO Smith's reference to the probation officer had surprised him, because his question had been about her report to the state troopers.

The judge reserved a ruling on the defendant's motion for a mistrial, noting that the defense attorney's prompt objection had cut the witnesses's answer short. He recalled the jury and instructed it to disregard the officer's response. After conducting further research during a break in the trial, the judge ruled that the brief reference to the probation officer did not require a mistrial.

After the jury found Redfox guilty on all three counts, the judge asked the defense attorney how he wished to proceed on the bifurcated VCOR count. The attorney stated, "We'll waive a jury trial on that." The judge did not personally address Redfox to advise him of his rights and to determine whether he personally wished to waive a jury trial on the VCOR charge. After dismissing the jury, the judge found Redfox guilty of VCOR.

At a subsequent hearing on the pending petition to revoke Redfox's probation in case no. 4EM-10-104 CR, Superior Court Judge Charles W. Ray Jr. heard testimony that Redfox had consumed alcohol. Relying on this testimony, as well as Redfox's recent convictions for first-degree harassment, criminal trespass, and VCOR, the judge revoked Redfox's probation.

This appeal followed.

The trial judge did not abuse his discretion when he denied the mistrial motion

We review a trial court's denial of a mistrial motion for abuse of discretion.² The trial court commits an abuse of discretion "when, after reviewing the whole record,

² *Young v. State*, 374 P.3d 395, 405 (Alaska 2016), *reh'g denied* (July 19, 2016).

[the reviewing court is] left with a definite and firm conviction that the trial court erred in its ruling.”³

The Alaska Supreme Court has held that a “simple reference” at trial to a defendant’s probation status is not a “substantial violation” of a protective order precluding reference to that probation status.⁴ Likewise, a prosecutor’s “unintentional” failure to forestall a witness from violating a protective order is not sufficient to justify a mistrial; some level of prosecutorial misconduct must be shown.⁵

Here, the prosecutor assumed that the investigating officer had reported the matter to the Alaska State Troopers. The prosecutor indicated that he was surprised when VPO Smith did not simply affirm his leading question to that effect and instead testified that she had alerted Redfox’s probation officer. VPO Smith’s reference to probation was brief, and the officer did not elaborate on the nature of the underlying crime. Under these circumstances, it was reasonable for the judge to resolve the matter with a curative instruction.⁶

We conclude that the trial judge did not abuse his discretion when he denied the mistrial motion.

Redfox did not validly waive a jury trial on the VCOR charge

As the State concedes, the trial judge erred when he failed to secure Redfox’s personal waiver of his right to a jury trial on the bifurcated charge of VCOR.

³ *Tritt v. State*, 173 P.3d 1017, 1019 (Alaska App. 2008).

⁴ *Preston v. State*, 615 P.2d 594, 604 (Alaska 1980).

⁵ *Id.*

⁶ *See Allen v. State*, 51 P.3d 949, 955 (Alaska App. 2002).

“[W]aiver of the right to trial by a jury ... requires that the court personally address the defendant, and failure to do so is error per se.”⁷

The State’s concession is well-founded, and this error requires reversal of Redfox’s conviction for VCOR.⁸ Also, because the superior court relied in part upon this VCOR conviction, we must additionally remand Redfox’s probation revocation in case no. 4EM-10-104 CR for the court’s reconsideration.

Conclusion

We AFFIRM Redfox’s convictions for first-degree harassment and two counts of first-degree criminal trespass. We REVERSE his conviction for VCOR, and we REMAND his probation case to the superior court. If the State elects not to retry Redfox on the VCOR charge, the district court may proceed to re-sentence Redfox on the other convictions,⁹ and the superior court may re-sentence Redfox based on the remaining grounds to revoke his probation.

⁷ *Walker v. State*, 578 P.2d 1388, 1389 (Alaska 1978) (footnotes omitted); *accord Dolchok v. State*, 639 P.2d 277, 286 (Alaska 1982); *see also O’Donnell v. Anchorage*, 642 P.2d 835, 836 (Alaska App. 1982); *Land v. Anchorage*, 640 P.2d 164, 165 (Alaska App. 1982).

⁸ *See Alexiadis v. State*, 355 P.3d 570, 572 (Alaska App. 2015) (citing *Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972)).

⁹ *See Allain v. State*, 810 P.2d 1019 (Alaska App. 1991) (holding that merger of two counts on appeal did not necessarily require adjustment of the duration of the composite sentence imposed).