

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

TROY D. BAKER,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12661  
Trial Court No. 4FA-12-2663 CI

MEMORANDUM OPINION

No. 6527 — October 11, 2017

Appeal from the Superior Court, Fourth Judicial District,  
Fairbanks, Douglas L. Blankenship, Judge.

Appearances: Maureen E. Dey, Gazewood & Weiner, P.C.,  
Fairbanks, for the Appellant. John K. Bodick, Assistant  
Attorney General, Criminal Division Central Office, Anchorage,  
and Jahna Lindemuth, Attorney General, Juneau, for the Appel-  
lee.

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

Judge WOLLENBERG.

This appeal involves an ex post facto challenge to the special medical parole statute, AS 33.16.085. Under this statute, a prisoner who is serving a term of at least 181 days may be released by the parole board on special medical parole if the prisoner is severely disabled and meets certain criteria.

When the legislature first enacted the special medical parole statute in 1995, the statute excluded from eligibility only one group of prisoners — those prisoners who were convicted of sexual abuse of a minor in the first, second, or third degree under AS 11.41.434 - AS 11.41.438.<sup>1</sup> (This exclusion contained one exception: if a prisoner convicted of sexual abuse of a minor under AS 11.41.434 - AS 11.41.438 had become a quadriplegic since the time of the offense or the parole or probation violation for which he was incarcerated, that person was eligible for special medical parole.<sup>2</sup>) In 2003, the legislature expanded the statutory exclusion to include convictions under AS 11.41.410 - AS 11.41.425 (sexual assault in the first, second, and third degrees) and removed any exception to the sexual abuse of a minor exclusion for quadriplegia.<sup>3</sup> Thus, the current version of the special medical parole statute excludes from consideration those prisoners convicted of first-, second-, or third-degree sexual abuse of a minor or first-, second-, or third-degree sexual assault, regardless of their medical condition.<sup>4</sup>

Troy D. Baker was convicted of attempted first-degree sexual assault based on conduct that occurred in 1984. He completed serving his active sentence. Since that time, Baker has been in and out of correctional custody serving sentences for several new convictions and probation and parole violations.

In 2011, Baker began serving his most recent term of incarceration, for a new theft conviction and probation and parole violations. A time-accounting record by the Department of Corrections (DOC) shows that a portion of Baker's current sentence is attributable to his 1984 attempted sexual assault conviction.

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<sup>1</sup> SLA 1995, ch. 70, § 5; former AS 33.16.085(a)(1)(A) (1995).

<sup>2</sup> SLA 1995, ch. 70, § 5; former AS 33.16.085(a)(1)(B) (1995).

<sup>3</sup> SLA 2003, ch. 25, § 3.

<sup>4</sup> AS 33.16.085.

In 2013 and 2014, after Baker developed a serious health issue, he applied for special medical parole. The Alaska Parole Board declined to consider his application. The parole board advised Baker that he was ineligible for special medical parole because he was serving time for the 1984 attempted sexual assault conviction.

Baker requested post-conviction relief from the parole board's decision. Baker did not challenge DOC's determination that he was still serving a portion of the sentence on his 1984 conviction. Rather, Baker argued that applying the sexual assault exclusion in AS 33.16.085 to him violated the ex post facto clause of the Alaska Constitution since he committed his underlying offense in 1984, prior to enactment of the statute and the relevant exclusion.<sup>5</sup>

The superior court denied Baker's claim, ruling that the exclusion applied to crimes of "attempt" and that application of the exclusion to Baker did not violate Alaska's ex post facto clause.

On appeal, Baker challenges the superior court's rejection of the ex post facto claim in his post-conviction relief application.<sup>6</sup> (Baker does not challenge the superior court's ruling that the statutory exclusion applies to crimes of attempted first-degree sexual assault, so that issue is not before us.)

Article I, Section 15 of the Alaska Constitution provides that "[n]o . . . ex post facto law shall be passed." This provision prohibits the Alaska Legislature from enacting any law that "makes more burdensome the punishment for a crime, after its

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<sup>5</sup> See Alaska Const. art. I, § 15.

<sup>6</sup> Since completion of the briefing in this case, DOC moved Baker from institutional custody to DOC electronic monitoring. We asked the parties to advise us whether the appeal continued to present a live controversy. Based on the responses filed by the parties, we conclude that the issue presented in this case is not moot, and we therefore proceed to the merits.

commission[.]”<sup>7</sup> The mere “fact that a criminal statute is retrospective does not necessarily mean that it is a prohibited ex post facto law.”<sup>8</sup> Rather, the “threshold question” is whether the statute at issue “increase[s] the quantum of punishment” to which a criminal defendant was subject at the time he committed the relevant offense.<sup>9</sup>

Here, the exclusion in AS 33.16.085 for those convicted of sexual assault does not “increase the quantum of punishment” for Baker’s attempted sexual assault conviction because at the time Baker committed that offense in 1984, there was no special medical parole. The legislature did not enact special medical parole until 1995. Initially, the legislature did not restrict the eligibility of individuals who were convicted of sexual assault — thus, affording individuals like Baker an additional potential avenue for release. But in 2003, the legislature expanded the blanket exclusion to those convicted of first-, second-, or third-degree sexual assault.

In *Doe v. State*, the Alaska Supreme Court applied a multi-factor test to determine whether a statute is punitive, either in intent or effect, for purposes of Alaska’s ex post facto clause.<sup>10</sup> Applying this test, Baker argues that the 2003 exclusion is so punitive in effect as to constitute punishment. But whether the statutory exclusion constitutes punishment is only part of the ex post facto equation. The key question is whether the statute imposes *additional* punishment on individuals, like Baker, who

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<sup>7</sup> *Doe v. State*, 189 P.3d 999, 1003 (Alaska 2008) (internal quotations omitted).

<sup>8</sup> *See Ortiz v. State*, 173 P.3d 430, 431 (Alaska App. 2007).

<sup>9</sup> *Id.* at 431-32 (internal quotations omitted).

<sup>10</sup> *Doe*, 189 P.3d at 1007.

committed their qualifying convictions prior to the enactment of the special medical parole statute.<sup>11</sup>

Here, the expansion of the statutory exclusion in 2003 simply returned Baker to the position he was in at the time he committed his 1984 offense, before special medical parole was enacted. Baker does not point to any other equivalent release mechanism that *was* available to him at the time he committed his underlying sexual offense but is no longer available to him due to later statutory amendments. Thus, even if the statutory exclusion is punitive, as Baker asserts, he is not in a worse position now than he was in 1984.<sup>12</sup>

Because the exclusion does not constitute additional punishment for Baker's underlying crime of attempted first-degree sexual assault, we reject Baker's ex post facto claim. (We express no opinion as to whether application of the sexual assault exclusion to a person who was convicted of committing a first-, second-, or third-degree sexual assault between the statute's enactment in 1995 and the effective date of the sexual assault exclusion in 2003 would constitute an ex post facto violation.)

Baker makes one additional argument. While acknowledging that he has been in and out of custody numerous times since his arrest in 1984, Baker argues that his criminal history demonstrates that he is not a repeat sexual offender; he therefore suggests that in light of his medical issues, he is a good candidate for release. To the extent Baker is challenging the policy decisions underlying the sex offense exclusions in AS 33.16.085, that argument must be directed to the legislature. To the extent Baker

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<sup>11</sup> *See, e.g., id.* at 1003.

<sup>12</sup> *Cf. James v. State*, 244 P.3d 542, 546 (Alaska App. 2011) (holding that application of new parole statute to establish parole conditions for person convicted prior to enactment of statute did not constitute ex post facto increase in punishment since conditions could have been imposed under former parole statute).

is seeking to raise a due process challenge to AS 33.16.085 because of the absence of an individualized risk assessment for certain sex offenders who wish to apply for special medical parole, he fails to independently brief this legal claim. And in any event, he did not raise this legal issue in the superior court. We therefore do not address it further.<sup>13</sup>

We AFFIRM the superior court's dismissal of Baker's ex post facto claim and denial of Baker's post-conviction relief application.

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<sup>13</sup> See *Great Divide Ins. Co. v. Carpenter ex rel. Reed*, 79 P.3d 599, 608 (Alaska 2003) (declining to consider legal argument that was inadequately briefed and not raised in the trial court).