IN THE COURT OF APPEALS OF THE STATE OF ALASKA

GARY ARTHUR MARTIN, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11885 Trial Court No. 3AN-11-9716 CR MEMORANDUM OPINION No. 6530 — October 25, 2017

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael L. Wolverton, Judge.

Appearances: John N. Page III (opening brief), and Lars Johnson (reply brief), Assistant Public Defenders, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Donald Soderstrom, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Coats, Senior Judge.[*]

Senior Judge COATS.

[*] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

Gary Arthur Martin was convicted of second-degree sexual assault for having sex with a homeless woman who was so intoxicated that she was unable to consent to the act of intercourse. In this appeal, Martin challenges an in limine evidentiary ruling by the superior court.

Originally, Martin was indicted for two counts of sexually assaulting the victim — one count for the incident in this case, and another count for an incident that took place the night before. But the victim died (from unrelated causes) before Martin's case went to trial. There was an independent witness (a bystander) who could testify about the latter sexual assault, but the State had no other witness to testify about the alleged sexual assault the night before, so the State dismissed that charge. The State tried Martin for the latter sexual assault without the victim's testimony.

At trial, Martin's attorney indicated that Martin would take the stand and testify that he and the victim engaged in consensual sexual intercourse on the night before the charged incident — thus supporting the inference that the victim consented to the charged act of intercourse, or at least that Martin reasonably thought she did.

The trial judge ruled that if Martin testified in this fashion, the judge would allow the State to impeach Martin by introducing the grand jury indictment charging Martin with sexual assault for this earlier episode, as well as supporting portions of the grand jury record. This is the ruling that Martin challenges on appeal.

However, after the judge issued this ruling, the prosecutor announced that she did *not* intend to introduce the indictment or any other part of the grand jury record. Instead, she intended to simply cross-examine Martin about his version of events — based, in part, on information elicited during the grand jury proceedings, but without revealing the source of this information to the jury.

Martin's attorney did not object to the prosecutor's planned cross-examination. In fact, he told the court that this would be "fair cross-examination."

After these proceedings, Martin still took the stand, but he did not testify about having sexual intercourse with the victim the night before. Therefore, the judge's ruling never became anything other than a hypothetical issue.

Because of this, Martin's claim of error fails for two reasons. First, it is not preserved for appeal under *State v. Wickham*, 796 P.2d 1354, 1357-58 (Alaska 1990), and *Sam v. State*, 842 P.2d 596, 598-99 (Alaska App. 1992) — both holding that when a defendant declines to testify after a trial judge rules in favor of the State on a question regarding the scope of permitted impeachment, the defendant abandons any claim that the trial court's ruling was erroneous. Second, because the prosecutor announced that she did not intend to take advantage of the judge's ruling, and because Martin's attorney agreed that the prosecutor's proposed cross-examination was "fair," any error in the court's ruling is moot and inappropriate for appellate review.

Martin also argues that several of his probation conditions are unconstitutionally vague and unrelated to his offense.

Conditions of probation must be "reasonably related to the rehabilitation of the offender and the protection of the public and must not be unduly restrictive of liberty."[1] Conditions that restrict constitutional rights are subject to special scrutiny; before imposing such conditions, a sentencing judge must affirmatively consider and have good reason for rejecting less restrictive alternatives.[2]

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[1] *Roman v. State*, 570 P.2d 1235, 1240 (Alaska 1977).

[2] *Peratrovich v. State*, 903 P.2d 1071, 1079 (Alaska App. 1995).

Martin's conditions were imposed at his sentencing without any findings, discussion, or objection.[3] The State concedes that the challenged conditions are problematic, and we agree.[4]

Several of the challenged probation conditions contain prohibitions on sexually explicit material and require Martin to inform anyone with whom he has a "significant relationship," or with whom he is "closely affiliated," of his sexual offending history. We recently disapproved of nearly identical conditions in *Diorec v. State* and *Smith v. State*.[5] For the same reasons, we vacate and remand these conditions.

Martin also challenges several of his conditions that require him to submit to various tests and warrantless searches for the presence of drugs. We vacate these conditions and remand for a determination of whether Martin's history justifies these conditions.[6]

Finally, Martin challenges a condition requiring that he be employed full-time or be engaged in seasonal subsistence activities. The State argues that the condition should be read in conjunction with the general condition requiring Martin to

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[3] *See Beasley v. State*, 364 P.3d 1130, 1133 (Alaska App. 2015) (holding that sentencing judges have an affirmative duty to review the State's proposed probation conditions, even if the defendant does not object to the conditions).

[4] *See Boles v. State*, 210 P.3d 454, 455 (Alaska App. 2009) (appellate court has the duty to independently evaluate whether a concession of error is well-founded).

[5] *Diorec v. State*, 295 P.3d 409, 416-17 (Alaska App. 2013) (holding that a probation condition prohibiting possession of sexually explicit material provided constitutionally inadequate notice of what conduct was prohibited); *Smith v. State*, 349 P.3d 1087, 1095 (Alaska App. 2015) (holding that the terms "significant relationship" and "closely affiliated" provided no guidance on when an association becomes sufficiently close or significant that a probationer will be subject to prosecution for failing to disclose his criminal history).

[6] *See Phillips v. State*, 211 P.3d 1148, 1153 (Alaska App. 2009) (requiring a case-specific basis for imposition of warrantless searches for drugs and alcohol).

make "reasonable efforts" to secure employment. On remand, we direct the superior court to clarify the meaning of this condition, and to justify any requirement that goes beyond the cited general condition.

Conclusion

Martin's conviction for sexual assault is AFFIRMED. However, we VACATE all of the challenged probation conditions and REMAND Martin's case to the superior court for further proceedings in light of the cases cited in this opinion. The superior court should determine whether the conditions have a sufficient causal nexus under *Roman*, and the court should also clarify the scope and meaning of the vague terms. We do not retain jurisdiction.