IN THE COURT OF APPEALS OF THE STATE OF ALASKA

MARK J. KON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11867 Trial Court No. 3AN-97-9242 CR MEMORANDUM OPINION No. 6550 — November 29, 2017

Appeal from the Superior Court, Third Judicial District, Anchorage, Philip R. Volland, Judge.

Appearances: Morgan White, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Jason Gist, 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 MANNHEIMER.

Mark J. Kon appeals the superior court's revocation of his probation and the court's imposition of 40 months of Kon's previously suspended prison sentence. As we explain in more detail in this opinion, the superior court revoked Kon's probation

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

because the court found that Kon discontinued sex offender treatment without permission.

On appeal, Kon contends that the evidence presented to the superior court was legally insufficient to support the superior court's finding that he willfully discontinued his sex offender treatment. Kon also argues that the probation condition requiring him to engage in sex offender treatment is worded so vaguely that he lacked fair notice of what conduct would constitute a violation of this condition. Finally, Kon argues that his probation revocation sentence of 40 months to serve is excessive.

For the reasons explained here, we find that Kon's arguments lack merit, and we therefore affirm the superior court's decision.

Underlying facts

In 1998, Kon pleaded no contest to two counts of first-degree sexual abuse of a minor involving his daughters. Kon received a composite sentence of 30 years' imprisonment with 18 years suspended.

One of Kon's conditions of probation required him to "actively participate in and successfully complete an approved sexual offender treatment program as directed by the Department of Corrections." This same condition of probation declared that Kon "[was] not to discontinue treatment without the written approval of [his] Probation/Parole Officer".

After serving his active term of imprisonment, Kon was released on probation. In late 2013, the Department of Corrections petitioned the superior court to revoke Kon's probation on the ground that he had violated the condition requiring him to engage in sex offender treatment.

Following a hearing, the superior court found that Kon had violated this condition of probation. Based on this finding, the court revoked Kon's probation and sentenced him to serve 40 months of his previously suspended prison sentence.

Because Kon claims that the evidence presented to the superior court was legally insufficient to support the court's finding that he violated his probation, we present the evidence in the light most favorable to the superior court's finding.

Following Kon's release on probation, he was assigned to a sex offender treatment program for "deniers" — that is, for defendants who refused to acknowledge that they had sexually abused a minor. (As we noted earlier, Kon did not plead guilty to the charges of sexual abuse; instead, he pleaded "no contest".)

When Kon attended his second session of this "deniers group", Kon's mobile phone rang and he began to answer the phone call. When the group leader reminded Kon that the rules prohibited phone calls during a treatment session, Kon became hostile. He asked the leader, "Do you want me to leave?", and then he stated, "I'll gladly leave."

The group leader responded that if Kon intended to act that way, he should leave. Kon then got up and left — exclaiming "Up yours!" and telling the group leader, "I don't give a fuck about you or this fucking program." The group leader followed Kon as he left, advising him, "You might want to call your P.O." (*i.e.*, Kon's probation officer). Kon rejoined, "You call him. I don't give a shit."

Based on this evidence, the superior court found that Kon "knew well" what "obligation [was] imposed on him", that Kon's behavior in the treatment group justified his dismissal from the group, that Kon's behavior reflected a lack of "intent or desire" to engage in treatment, and that Kon therefore "did not participate in [sex offender treatment] as required".

At the ensuing sentencing hearing, the superior court found that Kon's history demonstrated "a persistent pattern of [refusal] to engage in treatment, a persistent portrayal of himself as a victim, a persistent casting of blame on others, a persistent perception that others are out to get him."

The court declared that "the most pertinent fact" for sentencing purposes was Kon's continuing denial "that he is a sex offender" — Kon's denial "[that] his crimes have any basis". Because of that denial, the court found that Kon "remains an untreated offender [who] therefore [poses a] very high risk to minors in the community".

The court further declared that, given Kon's age, his attitude toward his offenses, and his history of repeatedly "assuming the role of the victim and ... blaming others for what is happening to him", Kon's potential for rehabilitation was "very low".

Based on this assessment, the superior court imposed 40 months of Kon's previously suspended jail time.

Kon's arguments on appeal

Kon argues that the evidence presented to the superior court was legally insufficient to support the court's finding that Kon willfully failed to engage in sex offender treatment. But Kon's argument hinges on viewing the evidence in a light favorable to him. We are required to view the evidence in the light most favorable to the superior court's finding[1] — and, viewing the evidence in that light, it is sufficient to support the superior court's finding.

Kon additionally argues that the probation condition relating to sex offender treatment was too vague to give him fair notice of what he was required to do. In

[1] *See Stevens v. Matanuska-Susitna Borough*, 146 P.3d 3, 13 (Alaska App. 2006).

particular, Kon asserts that the phrases "actively participate in [treatment]" and "successfully complete [treatment]" are so vague that, without further definition, he could not know beforehand what conduct would constitute a violation of the probation condition.

As the State points out in its brief, and as Kon acknowledges in his reply brief, Kon never attacked his probation condition on this basis during the proceedings in the superior court. Kon nevertheless argues that the probation condition was so obviously vague that it was plain error for the superior court to find that Kon willfully violated this condition.

We disagree. The probation condition at issue here required Kon to "actively participate in and successfully complete an approved sexual offender treatment program as directed by the Department of Corrections", and it directed him "not to discontinue treatment without the written approval of [his] Probation/Parole Officer". While there might be marginal cases where the application of these provisions to a defendant's specific behavior would be in doubt, that is not the situation in Kon's case. The evidence supports the superior court's findings that Kon willfully refused to participate in sex offender treatment, that Kon essentially challenged the group leader to discharge him from the group, and that Kon had no "intent or desire" to engage in treatment. Kon had adequate notice that this conduct violated the probation condition.

Finally, Kon argues that the probation revocation sentence imposed by the superior court — 40 months to serve — is excessive. We have already described the superior court's sentencing findings and its sentencing analysis. The question is whether, given these findings and this analysis, the 40-month sentence is "clearly mistaken" — *i.e.*, whether the 40-month sentence falls outside the "permissible range of reasonable

sentences" that judges might impose, given the facts of the case and the defendant's history. [2]

Having independently reviewed the record, we conclude that the superior court's sentencing decision is not clearly mistaken.

Conclusion

The judgement of the superior court is AFFIRMED.

[2] *State v. Hodari*, 996 P.2d 1230, 1232 (Alaska 2000), quoting *Erickson v. State*, 950 P.2d 580, 586 (Alaska App. 1997).