IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DAMIAN JOSEPH BLAKE, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11936 Trial Court No. 3PA-13-1123 CR MEMORANDUM OPINION No. 6558 — January 3, 2018

Appeal from the District Court, Third Judicial District, Palmer, John Wolfe, Judge.

Appearances: Michael L. Barber, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Lindsey M. Burton, Assistant District Attorney, Palmer, 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).

Damian Joseph Blake was charged with driving while his license was revoked.[1] During his trial, he testified and conceded that he had in fact driven without a valid license. But Blake also testified that this violation of the law was justified by his unexpected and immediate need to drive to a store to purchase medication for his ailing dog. Based on this testimony, the judge instructed the jury on the defense of necessity.

After Blake testified, his defense attorney sought to introduce testimony that Blake was a truthful person. The judge denied this request, ruling that such testimony was not authorized by Alaska Evidence Rule 608, because the prosecutor's cross-examination of Blake had not attacked Blake's character for truthfulness. Blake appeals this ruling. We agree with the judge's ruling that the prosecutor's cross-examination of Blake did not amount to an attack on Blake's credibility that would justify admission of evidence of Blake's character for truthfulness under Evidence Rule 608.

Blake also argues that he was prejudiced by the admission at trial of a DMV record setting forth irrelevant particulars of his license revocation, after he stipulated that he had knowingly driven with a revoked license. We conclude that even if the judge erred when he admitted this document, any error was harmless.

Lastly, Blake appeals his 180-day sentence as excessive. In light of Blake's extensive prior record of driving with a revoked license and driving while intoxicated, we conclude that the judge's sentence was not clearly mistaken. Accordingly, we affirm the judgment and sentence of the district court.

Background facts

As Blake was turning from Knik Goose Bay Road into a store parking lot around 7:00 p.m. on an April evening, an Alaska State Trooper stopped him for

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[1] AS 28.15.291.

equipment violations. Blake told the trooper that his license had been revoked. The trooper cited Blake for driving without a license.

At trial, Blake testified that about a month before his arrest, Blake promised his dying friend that he would take care of his dog, a Labrador named Buddy. Blake testified that Buddy was in poor health; he had vomited each day that he was in Blake's care. Then, on the day of Blake's traffic citation, Buddy's breathing became labored, and he howled in pain when Blake touched his stomach.

Blake further testified to a lack of resources to help Buddy. Blake's live-in girlfriend was out of state. He had only ten dollars in cash. His neighbors were either not at home or, for various reasons, were unable to help. An animal ambulance business that he contacted did not serve the Wasilla area. Blake additionally testified that, perceiving no other options, he drove his girlfriend's car to a store to purchase pain medication for Buddy. Blake testified that he did not explain these matters to the citing trooper partly because his explanation might be taken as a "dog ate my homework" excuse and partly out of concern that animal control might get involved. Blake was concerned that if Buddy died while in animal control's care, he might not be able to bury him.

During cross-examination of Blake, the prosecutor did not attempt to undermine Blake's account of Buddy's condition or Blake's attempts to get help for Buddy without driving. Instead, the prosecutor's questions focused on alternative ways that Blake could have gotten help for Buddy, and on the reasonableness of Blake's decision to drive to a store to obtain medication for Buddy.

After the prosecutor's cross-examination of Blake concluded, the defense attorney attempted to present testimony that Blake was a truthful person. District Court Judge John Wolfe sustained the prosecutor's objection, reasoning that the prosecutor's

cross-examination had not attacked Blake's character for truthfulness, a prerequisite for admission of evidence of Blake's character under Evidence Rule 608.

The jury rejected Blake's necessity defense and returned a guilty verdict. This appeal ensued.

The prosecutor's cross-examination of Blake was not an attack on Blake's general character for truthfulness

Blake contends that the judge erred when he ruled that the prosecutor's cross-examination of Blake was not an attack on Blake's character for truthfulness entitling him to present rehabilitative testimony under Evidence Rule 608(a). The judge stated, "[h]e has not been attacked, his credibility has not been attacked. He has been cross-examined and that's it."

Alaska Evidence Rule 608(a) reads as follows:

> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness; and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

In *United States v. Dring*, the Ninth Circuit held that evidence of a witness's truthful character is admissible only to rebut "evidence of bad reputation, bad opinion of character for truthfulness, conviction of crime, or eliciting from the witness on cross-examination acknowledgment of misconduct which has not resulted in conviction."[2] We cited *United States v. Dring* with approval in an unreported decision,

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[2] *United States v. Dring*, 930 F.2d 687, 692 (9th Cir. 1991); *see also Ahkivgak v. State*, 1993 WL 13156790, at *3 (Alaska App. July 9, 1993) (unpublished) (acknowledging the (continued...)

Ahkivgak v. State.[3] We concluded that, while the prosecutor's evidence in *Ahkivgak* tended to establish that Ahkivgak had testified untruthfully, the trial judge did not abuse his discretion when he found that the State's *case-specific* impeachment of Ahkivgak did not amount to an attack on Ahkivgak's *general* credibility, and so it did not entitle him to present evidence of his truthful character.[4]

During his cross-examination of Blake, the prosecutor accepted as true Blake's testimony that Buddy was in severe distress and that Blake had actually taken the steps he recited in order to obtain relief for Buddy short of driving. Instead, the prosecutor focused on other avenues Blake could have explored, and the reasonableness of his decision to drive.

Given these circumstances, the judge could reasonably conclude that the cross-examination did not amount to the sort of generalized attack on Blake's character for truthfulness that would entitle him to present rebutting evidence of his character under Evidence Rule 608.

The license revocation document

The trial court admitted a DMV record into evidence that established that Blake's license to drive had been revoked. The document revealed that this revocation had occurred in 1993. Blake objected that, because he had stipulated that he had knowingly driven with a revoked license, this exhibit was more prejudicial than probative and should have been excluded under Alaska Evidence Rule 403. Blake

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[2] (...continued)
scarcity of Alaska cases interpreting Rule 608(a) and turning to the identical federal rule for guidance).

[3] *Ahkivgak*, 1993 WL 13156790, at *3.

[4] *Id.* at *4.

argued that the document was prejudicial because it revealed various dates, the fact that Blake had acquired eight points for bad driving, and unexplained data codes. The prosecutor in turn argued that, even though Blake had stipulated to the *actus reus* and the *mens rea* of the crime, "juries like a little bit of paper."

The judge agreed with the State and told defense counsel that he would "tell [the jury] not to speculate [on why Blake lost his driving privileges in 1993], but again, I don't see anything unduly prejudicial about any of it."

Blake now argues that this evidence should not have been admitted. We have previously discussed the circumstances under which the State is entitled to introduce evidence notwithstanding a stipulation between the parties, either to a particular fact which is not an element of the charged crime, or to one or more elements of the charged crime. Under these decisions, the fact of a stipulation does not automatically foreclose the State from presenting evidence as to the stipulated fact, but the balancing of probative value versus prejudicial effect under Evidence Rule 403 may require exclusion of the evidence.[5]

On appeal, Blake argues that "the possibility of this evidence confusing, misleading, or prejudicing the jury outweighed its probative value." We conclude that, even if the judge erred by admitting the document, any superfluous data in the document did not materially prejudice Blake. He conceded that he had been driving, and defended

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[5] *See State v. McLaughlin*, 860 P.2d 1270, 1273 (Alaska App. 1993) (holding that the State was entitled to prove the stipulated fact that the defendant was a felon, with independent evidence of that fact); *Blevins v. State*, 2013 WL 1283389, at *2 (Alaska App. Mar. 27, 2013) (unpublished) ("the State was entitled to prove its case despite any offered stipulation" that the complaining witness had suffered serious physical injury). *But see Olson v. State*, 390 P.3d 1188, 1191 (Alaska App. 2017) (holding that once the defendant stipulated to the validity of a domestic violence restraining order, admission of the order itself was error, because the order referred to unproven prior crimes).

solely based on a necessity defense. The challenged document did not undercut this defense. Accordingly, admission of the document had no appreciable affect on the jury's evaluation of Blake's necessity defense, and so, if error at all, it was harmless error.[6]

Blake's sentence appeal

At sentencing, the judge found that Blake was a worst offender in the class of those persons driving with a revoked license. But the judge elected to impose less than a maximum sentence because of Blake's cooperation with the authorities and because he did not have alcohol in the car. The judge stated, "I think the most important sentencing goal is individual deterrence to ensure that Mr. Blake gets the message that when he violates this law, there's going to be substantial consequences and also to reaffirm society's norms." Blake now appeals his 180-day sentence as excessive.

We review a claim of an excessive sentence under the "clearly mistaken" standard of review.[7] This deferential standard derives from the Alaska Supreme Court's recognition that "reasonable judges, confronted with identical facts, can and will differ on what constitutes an appropriate sentence; [and] that society is willing to accept these sentencing discrepancies, so long as a judge's sentencing decision falls within a permissible range of reasonable sentences.[8]

Judge Wolfe relied mainly on Blake's history of DWIs and DWLRs. Blake had four prior convictions for DWLR, and eight prior convictions for DWI. Given this record, we cannot say that the judge was clearly mistaken when he emphasized

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[6] *See Love v. State*, 457 P.2d 622, 629-34 (Alaska 1969).

[7] *McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974).

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

individual deterrence and reaffirmation of societal norms over Blake's prospects for rehabilitation.

Conclusion

We AFFIRM the judgment and sentence of the district court.