IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JOANNA MARIE SANTILLANA, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13336 Trial Court No. 3AN-17-06397 CR MEMORANDUM OPINION No. 6971 — September 1, 2021

Appeal from the Superior Court, Third Judicial District, Anchorage, Kevin M. Saxby, Judge.

Appearances: Bradly A. Carlson, The Law Office of Bradly A. Carlson, LLC, under contract with the Public Defender Agency, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Ryan T. Bravo, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Clyde "Ed" Sniffen Jr., Acting Attorney General, Juneau, for the Appellee.

Before: Wollenberg, Harbison, and Terrell, Judges.

Judge HARBISON.

Following a trial, Joanna Marie Santillana was convicted of one count of felony driving under the influence (DUI).[1] The superior court initially sentenced Santillana to 24 months' imprisonment with 18 months suspended and a 3-year term of probation. But immediately after the court imposed this sentence, Santillana refused probation, and the court imposed a flat 24-month sentence. Santillana now appeals both her conviction and her sentence.

First, Santillana argues that there was insufficient evidence presented to the jury to support her conviction. Second, Santillana argues that when she rejected probation, the superior court automatically imposed all of the suspended time without giving her an opportunity to be heard and without reevaluating her sentence in light of the *Chaney* criteria. We reject these claims of error.

Santillana also challenges her sentence as excessive, but we do not have jurisdiction to consider her excessive sentence claim. We therefore transfer this case to the Alaska Supreme Court so that it may determine whether to exercise its discretion to review Santillana's sentence.

Background facts and proceedings

On August 15, 2017, Santillana went out to dinner with her mother. Santillana had recently been staying at the Brother Francis Shelter in Anchorage, but after dinner that night, she became concerned that it would be too late to check into the shelter. According to Santillana, she then asked to borrow her mother's car in order to

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[1] AS 28.35.030(n). The parties agreed to bifurcate the trial so that the question of whether Santillana had two prior DUI convictions in the preceding ten years would be tried after the determination of Santillana's guilt on the current DUI charge. Santillana waived her right to a jury trial as to her prior convictions, and this question was tried before the judge.

sleep in it for the night. Santillana's mother agreed, and Santillana drove the vehicle to the Brother Francis Shelter's parking lot to spend the night.

Santillana testified that, once back at the shelter, she met two acquaintances who asked her for a ride. Santillana brought one of these acquaintances, whom she referred to as "Billy Jean," to an Anchorage gas station. At the gas station, Billy Jean gave Santillana some alcohol to repay Santillana for driving.

Santillana also testified that, after she drank the alcohol, she became "instantly warm all over [her] body." Santillana and Billy Jean later went into the gas station's convenience store to buy some food; Santillana then returned to the car to eat. Santillana testified that she turned the vehicle on to stay warm while she was waiting for Billy Jean to return to the car, and then she fell asleep.

The next morning, at around 6:00 a.m., gas station staff discovered the car parked by one of the fuel pumps with the engine running. Santillana was sleeping in the driver's seat. When the manager approached the car to check on her, Santillana woke up abruptly and slammed on the car's gas pedal before falling back asleep. (The car remained in park and did not move.) The manager then contacted the police.

The responding police officers observed that Santillana smelled of alcohol, had slurred speech, and had difficulty standing. Santillana submitted to field sobriety tests, which she failed. As a result, Santillana was arrested. She later submitted to a breath test, which revealed that her blood alcohol content was 0.143 percent.

The matter proceeded to trial, and Santillana was convicted of felony driving under the influence based on the fact that she had two prior convictions for DUI within the preceding ten years.

At the sentencing hearing, the superior court considered the arguments of both attorneys and gave Santillana an opportunity for allocution. The court first found two aggravating factors — AS 12.55.155(c)(8) (that Santillana's prior criminal history

included repeated instances of assaultive behavior) and AS 12.55.155(c)(31) (that Santillana's prior criminal history included five or more crimes that are class A misdemeanors). It then considered and rejected Santillana's proposed mitigating factor — AS 12.55.155(d)(9) (that the conduct constituting the offense was among the least serious included in the definition of the offense). Finally, the court made findings based on the *Chaney* criteria,[2] and it imposed a sentence of 24 months' imprisonment with 18 months suspended (6 months to serve) and a 3-year term of probation.

Immediately after the court imposed this sentence, Santillana interrupted and announced that she wished to reject probation in favor of a flat-time sentence. In response, the court questioned Santillana to ensure that her decision was knowing and voluntary, and it then imposed all of the suspended time without making any additional findings.

Although Santillana did not object to this procedure during the sentencing hearing, she filed a motion for reconsideration after the hearing. Relying on our opinion in *DeMario v. State*,[3] she asked the court to conduct a resentencing hearing in order to determine an appropriate flat-time sentence in light of the *Chaney* criteria. She did not suggest that she had any new information to offer, nor did she make any additional arguments.

The superior court partially granted Santillana's motion. The court did not conduct a second sentencing hearing; instead, it issued a written order reaffirming the 24-month sentence and detailing its *Chaney* analysis.

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[2] *State v. Chaney*, 477 P.2d 441 (Alaska 1970); AS 12.55.005 (codifying the *Chaney* criteria).

[3] *DeMario v. State*, 933 P.2d 558, 562 (Alaska App. 1997) (holding that when a trial court revokes probation, it may not automatically impose all previously suspended time but instead must first conduct a separate *Chaney* analysis).

This appeal followed.

Santillana's challenge to the sufficiency of the evidence

Evidence is legally sufficient to support a criminal conviction if the evidence and the reasonable inferences to be drawn from that evidence, when viewed in the light most favorable to the jury's decision, are sufficient to convince a fair-minded juror that the government has proved the defendant's guilt beyond a reasonable doubt.[4]

To prove the charge of felony driving under the influence, the State was required to establish that Santillana: (1) knowingly operated or drove a motor vehicle; (2) was either under the influence of an alcoholic beverage or had a breath alcohol content of at least .08 grams or more of alcohol per 210 liters of her breath as measured by a chemical test taken within four hours after her operating or driving; and (3) had two qualifying convictions (in Santillana's case, DUI convictions) within the preceding ten years.[5]

On appeal, Santillana argues that there was insufficient evidence to establish that she knowingly operated or drove the vehicle. In support of this claim, she contends that the State did not present any evidence that she intended to move the vehicle, or that her actions in revving the engine were voluntary.

But the State was not required to prove that Santillana moved a vehicle or intended to move a vehicle. As we have explained in prior opinions, the State may prove that the defendant "operat[ed] or [drove] a motor vehicle" by establishing that the defendant exercised "actual physical control" over the vehicle.[6] And although a person's

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[4] *Iyapana v. State*, 284 P.3d 841, 848-49 (Alaska App. 2012).

[5] AS 28.35.030(a), (n); *see also State v. Simpson*, 53 P.3d 165, 167 (Alaska App. 2002).

[6] *Kingsley v. State*, 11 P.3d 1001, 1002-03 (Alaska App. 2000).

attempt to operate a vehicle "may furnish convincing proof that the person is in actual physical control of the vehicle, . . . a person may exercise actual physical control over a vehicle without making active attempts to operate it."[7]

Here, Santillana's own trial testimony established that she sat in the driver's seat of the car and started the engine after "chugg[ing]" alcohol and getting "warm all over." She was later found heavily intoxicated and sitting in the driver's seat of the running vehicle, next to a gas pump. Thus, even if — as Santillana contends — her act of stepping on the gas pedal was involuntary, the remaining evidence was sufficient, when viewed in the light most favorable to the verdict, to establish that Santillana knowingly exercised physical control over the vehicle. (We note that the jury could also reasonably reject Santillana's argument that her act of slamming on the gas pedal was involuntary.)

Additionally, Santillana argues that the State failed to prove both that she was operating the vehicle on a highway and that, by doing so, she presented the danger contemplated by the DUI statute. But there is no requirement in the DUI statute that a person be driving or operating a vehicle on a highway in order to be found guilty of the offense.[8]

We therefore reject Santillana's claims that the evidence was insufficient to support her conviction.

Santillana's sentencing claims

On appeal, Santillana also challenges her sentence.

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[7] *Id.*

[8] AS 28.35.030; *see also Caulkins v. State, Dep't of Pub. Safety, Div. of Motor Vehicles*, 743 P.2d 366, 368 (Alaska 1987).

First, Santillana argues that, after she rejected probation, the superior court automatically imposed all of the suspended time without giving her an opportunity to be heard and without reevaluating her sentence in light of the *Chaney* criteria.

In *DeMario v. State*, we explained:

> It is well settled that when the trial court revokes probation, it may not automatically impose all previously suspended time. Instead, the court must carefully reevaluate all currently available information in light of the *Chaney* criteria. The court's sentence must be based on the totality of the circumstances, including the original offense, the offender, and the offender's intervening conduct. These sentencing principles apply with equal force to situations in which the defendant refuses probation; the defendant's refusal of a probationary term cannot, in itself, be given determinative consideration.[9]

Santillana notes that, when the superior court imposed the flat-time sentence during the sentencing hearing, the court failed to reevaluate the sentence in light of the *Chaney* criteria.

But the superior court cured this error after the sentencing hearing, when it issued its written order. The written order included a thorough analysis of the *Chaney* factors. And because Santillana refused probation during her initial sentencing hearing, there was no "intervening conduct" for the court to consider. Instead, the superior court imposed the flat-time sentence based on the totality of the circumstances of the original offense, as well as Santillana's extensive prior criminal history.

Second, Santillana argues that, once the trial court recognized that it had erred by failing to reevaluate the sentence in light of her decision to reject probation, it was required to conduct a second sentencing hearing.

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[9] *DeMario v. State*, 933 P.2d 558, 562 (Alaska App. 1997) (internal citations omitted).

This Court has previously addressed the question of when a criminal defendant is entitled to a new sentencing hearing, and when, at the sentencing court's discretion, the sentence can be modified by a written order alone:

> Where a sentence is vacated because the defendant did not receive a full and fair sentencing hearing, either because he was deprived of [an essential sentencing right] or because the trial court refused to consider material evidence or erroneously considered immaterial or unlawful evidence, then the defendant should receive a full resentencing hearing as if the earlier sentencing proceeding had not taken place. In contrast, where the defendant received a full and fair sentencing hearing during which he was able to put on all of his evidence, make allocution, and argue his case, and where the trial court did not consider any immaterial or illegal evidence, no new hearing is required[.][10]

In the present case, Santillana received a full and fair sentencing hearing. At that hearing, she was present with counsel and was given an opportunity for allocution.[11] After she rejected probation, Santillana was given another opportunity to speak with her attorney, and she was questioned by the court to ensure that her rejection of probation was knowing, intelligent, and voluntary. Moreover, in her numerous motions for resentencing, Santillana never offered any new information in mitigation of punishment or asked to present additional evidence.

Santillana's only complaint about the original sentencing hearing was that the superior court made a legal error by failing to conduct a second *Chaney* analysis after

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[10] *Tookak v. State*, 680 P.2d 509, 511 (Alaska App. 1984). Of course, the trial court may in its discretion, grant a hearing, and it may be particularly appropriate to do so when there has been a material change in circumstances since the original sentence was imposed. *Id.*

[11] Santillana spoke briefly during her sentencing and asked the court to "listen to [her] lawyer."

she rejected probation. Under these circumstances — where the defendant received a full and fair sentencing hearing but the court later reconsidered and corrected a legal defect, and the defendant had no apparent additional information to provide — the superior court was not required to conduct a full resentencing hearing. We accordingly reject Santillana's claim that the court erred by issuing a written order rather than conducting a second hearing.

Third, Santillana argues that the sentencing court erred by rejecting her proposed mitigating factor — that the conduct constituting the offense was among the least serious conduct included in the definition of the offense.[12] But, in this case, the bottom of the presumptive range was the same as the mandatory minimum sentence.[13] The superior court could not have imposed a sentence below the mandatory minimum, regardless of whether Santillana had proven the mitigating factor.[14] Thus, this claim is moot.

Lastly, Santillana contends that her sentence was excessive. According to Santillana, the superior court failed to give sufficient weight to her prospects for rehabilitation, and gave too much weight to the two aggravating factors it found. But

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[12] AS 12.55.155(d)(9).

[13] As we have explained, Santillana was convicted of felony driving under the influence, in violation of AS 28.35.030(n). Because she did not have any prior felony convictions but did have two prior DUI convictions within the preceding ten years, the applicable presumptive range was 120 to 239 days, with a mandatory minimum sentence of 120 days. *See* former AS 12.55.125(e)(4)(B) (2017) (setting a presumptive range of 120 to 239 days for a first felony offender convicted of felony DUI when the offender has been twice previously convicted of DUI); AS 28.35.030(n)(1)(A) (setting a mandatory minimum term of imprisonment of 120 days for felony DUI when the offender has been twice previously convicted of DUI).

[14] AS 28.35.030(n)(1)(A).

because Santillana's sentence does not exceed two years of imprisonment, Santillana does not have the right to appeal her sentence as excessive to this Court, and we do not have jurisdiction to consider her excessive sentence claim.[15] Santillana must instead petition the supreme court for discretionary sentence review.[16]

Conclusion

With respect to Santillana's excessive sentence claim, we TRANSFER this case to the Alaska Supreme Court under Alaska Appellate Rule 215(k). With that exception, the judgment of the superior court is AFFIRMED.

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[15] AS 12.55.120(a); AS 22.07.020(b).

[16] *See* Alaska R. App. P. 215(a)(5) (providing that a defendant may seek discretionary review of sentences that are outside this Court's subject matter jurisdiction by filing a petition in the supreme court).