IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DALE L. KULLER, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12278 Trial Court No. 3SW-13-00021 CR MEMORANDUM OPINION No. 6825 — September 25, 2019

Appeal from the Superior Court, Third Judicial District, Seward, Charles T. Huguelet, Judge.

Appearances: Josie W. Garton, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Michal Stryszak, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

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

Judge HARBISON.

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

Dale L. Kuller was convicted of one count of soliciting the offense of second-degree sexual abuse of a minor and one count of misdemeanor prostitution.[1] On appeal, Kuller argues that, under Alaska's double jeopardy clause, the superior court should have merged his two offenses into a single conviction. Additionally, Kuller argues that the superior court failed to apply special scrutiny in its decision to impose conditions of probation that restrict Kuller's possession of sexually explicit material.

For the reasons explained in this opinion, we reject Kuller's double jeopardy argument, and we therefore uphold the superior court's entry of separate convictions for Kuller's two offenses. We also reject Kuller's argument that the superior court failed to adequately justify the challenged conditions of probation.

Underlying facts

One morning in January of 2013, Kuller was alone in the trailer he shared with his girlfriend and four-year-old son, when J.D., the fifteen-year-old daughter of his girlfriend, came to the house. While they were alone, Kuller told J.D. that she was pretty. He then offered her fifty dollars if she would allow him to perform cunnilingus on her. J.D. refused and left the house, but Kuller followed her. J.D. then called a friend to pick her up because she did not want to wait for the school bus. When J.D. got to school, she reported these events to the school principal and resource officer.

The school contacted the police, and the police obtained a warrant to monitor and record a telephone call between Kuller and J.D. During this recorded phone call, Kuller told J.D. that his fifty-dollar offer was "just an offer," and then he declared that J.D. was "almost like a daughter to [him]," and that he "really didn't mean it."

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[1] AS 11.41.436(a)(1) & AS 11.31.110, and AS 11.66.100(a)(2), respectively.

Kuller was subsequently charged with prostitution and soliciting the offense of second-degree sexual abuse of a minor. A jury convicted Kuller of both charges.

For the offense of misdemeanor prostitution, Kuller faced a maximum penalty of 90 days in prison.[2] Because Kuller had a prior felony conviction, he faced a presumptive sentencing range of 8 to 15 years' imprisonment for soliciting the offense of second-degree sexual abuse of a minor.[3] However, the superior court found that Kuller had proved mitigator AS 12.55.155(d)(9), that his conduct was among the least serious included in the definition of the offense. Based on this mitigator, the court was authorized to impose a sentence of as little as 4 years to serve.[4]

The superior court ultimately sentenced Kuller to 8 years' imprisonment with 4 years suspended on the solicitation charge and to a concurrent sentence of 1 month of imprisonment on the prostitution charge.

Kuller's argument that his two convictions should have merged

On appeal, Kuller argues that he should not have received separate convictions for prostitution and soliciting an act of sexual penetration.

Kuller's conduct in this case consisted of a single act of solicitation — asking J.D. to let him perform cunnilingus on her, and offering her fifty dollars if she did so. Kuller argues that his conduct cannot support two separate convictions because, according to him, the two statutes involved (the sexual abuse of a minor statute and the

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[2] AS 11.66.100(d) & AS 12.55.135(b) (pre-2016 version).

[3] AS 12.55.125(i)(4)(B) (establishing a presumptive sentencing range of 8 to 15 years for a second felony offender convicted of soliciting second-degree sexual abuse of a minor, if the defendant's prior felony was not a sexual felony).

[4] *See* AS 12.55.155(a)(2).

prostitution statute) serve the same societal interest — an interest which Kuller identifies as "protect[ing] vulnerable people from sexual exploitation."

This argument is unpersuasive. First, essentially *every* sexual offense defined in Title 11 of the Alaska Statutes could be described as having the aim of protecting vulnerable people from sexual exploitation. Moreover, while it is true that the sexual abuse of a minor statutes are directly aimed at protecting a vulnerable group within our society — underage children — from sexual exploitation by adults, the misdemeanor prostitution statute does not share this same focus.

As defined in AS 11.66.100(a)(2), prostitution consists of offering someone a fee in return for sexual conduct. The statute does not require proof that the recipient of this offer was unwilling, or was underage, or was otherwise incapable of giving informed consent. Rather, the statute is aimed at commercial sex — even when both parties are adults and both parties freely consent. This is why the legislature classified prostitution as an "offense[] against public health and decency" under AS 11.66.

We acknowledge that a charge of *felony* prostitution under AS 11.66.110(e) requires proof that the prostitute was under 18 years of age. This provision of the statute suggests that the legislature *was* concerned, at least in part, with protecting a vulnerable segment of society from sexual exploitation.

Had Kuller been convicted of felony prostitution, his double jeopardy argument might have more force. But because Kuller was convicted only of the misdemeanor offense, the offenses clearly violate different societal interests. We reject Kuller's double jeopardy argument and uphold the entry of separate convictions.

Kuller's challenges to his conditions of probation

Kuller initially challenged three of the conditions of probation imposed by the superior court — Condition Nos. 15, 16, and 18 — as unduly restrictive and unconstitutionally vague. But after the initial briefing, this Court issued a stay to permit the superior court to consider a motion to modify the probation conditions based on these same arguments. Kuller then filed a motion for reconsideration in the superior court, which the State opposed. After a hearing, the superior court granted the motion in part and revised the definition of "sexually explicit material" in the three conditions but found that the conditions did not unnecessarily restrict Kuller's First Amendment rights. Kuller acknowledges that his claim that this term was unconstitutionally vague is now moot. The remaining issue on appeal is whether the superior court applied special scrutiny in its decision to uphold its restrictions on Kuller's possession of sexually explicit material.

A sentencing court generally has broad authority to fashion conditions of probation — so long as they are "reasonably related to the rehabilitation of the offender and protection of the public and [are] not unduly restrictive of liberty."[5] However, when a probation condition restricts a defendant's constitutional rights, the trial court must apply special scrutiny. To survive special scrutiny the probation condition must be "'narrowly tailored to avoid unnecessary interference' with a defendant's constitutional rights."[6] Additionally, the trial court must "affirmatively consider and have good reason for rejecting lesser restrictions."[7]

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[5] *Johnson v. State*, 421 P.3d 134, 139 (Alaska App. 2018) (quoting *Thomas v. State*, 710 P.2d 1017, 1019 (Alaska App. 1985)).

[6] *Id.* (quoting *Simants v. State*, 329 P.3d 1033, 1039 (Alaska App. 2014)).

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

Here, we have reviewed the record and the conditions of probation that were imposed in this case, and we find that the superior court did apply special scrutiny to Kuller's probation conditions, and it sufficiently tailored Kuller's probation conditions to the goals of probation. Therefore we conclude that the superior court's restrictions on Kuller's right to possess sexually explicit material were not an abuse of discretion.[8]

Conclusion

The judgment of the superior court is AFFIRMED.

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[8] *See Diorec v. State*, 295 P.3d 409, 416-17 (Alaska App. 2013). To the extent Kuller is attempting to raise a Fourth Amendment challenge to his probation conditions, this claim is waived due to inadequate briefing. *See, e.g.*, *Peterson v. Mutual Life Ins. Co. of New York*, 803 P.2d 406, 410 (Alaska 1990). We also note that Kuller never directly raised a Fourth Amendment claim below and the superior court made no ruling. *See Mahan v. State*, 51 P.3d 962, 966 (Alaska App. 2002) (defendants who do not demand a ruling from the trial court waive any potential claim of error).