IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JERRY DION NUSBAUM, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals Nos. A-12371, A-12372, & A-12401 Trial Court Nos. 3PA-09-00576 CR & 3PA-14-03777 CR MEMORANDUM OPINION No. 6804 — July 3, 2019

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

Appearances: Michael L. Barber, Attorney at Law, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant/Cross-Appellee. John C. Cagle, Assistant District Attorney, Palmer (opening brief), Terisia K. Chleborad, Assistant Attorney General, Office of Criminal Appeals, Anchorage (supplemental brief), and Jahna Lindemuth, Attorney General, Juneau, for the Appellee/Cross-Appellant.

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

Judge ALLARD.

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

Jerry Dion Nusbaum was convicted, following a jury trial, of two separate driving while license revoked charges based on two driving incidents that occurred within the same day in close temporal proximity to one another.[1]

At sentencing, the trial court imposed a composite sentence of 300 days with 180 days suspended (120 days to serve) for both convictions. The court also imposed an additional 30 days on a petition to revoke probation that had been filed in Nusbaum's previous driving under the influence case.[2]

Nusbaum now appeals, arguing that 150 days to serve is excessive. The State has cross-appealed, arguing that Nusbaum should have been sentenced in accordance with the mandatory minimum sentences required under former AS 28.15.-291(b)(1)(D). For the reasons explained here, we conclude that the sentence is not excessive. We also conclude that the trial court did not err when it failed to apply the mandatory minimum sentences under former AS 28.15.291(b)(1)(D) to this case. Accordingly, we affirm the judgment of the district court.

Factual background

On December 21, 2014, a Palmer police officer was on routine patrol when he observed Nusbaum exit a store in downtown Palmer. Nusbaum appeared startled to see the officer and looked down while crossing the street in front of the patrol car. Nusbaum got into a parked car, made a u-turn, and drove in the opposite direction of the police officer. The officer had dispatch run the car's plates and discovered that Nusbaum was the vehicle's owner and that his driver's license was currently revoked.

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[1] AS 28.15.291(a)(1).

[2] By law, the 30 days imposed for the probation violation had to run consecutively to Nusbaum's sentence for the two DWLR counts. *See* AS 12.55.127(a).

The officer saw the same vehicle about twenty minutes later, again parked downtown. A second officer drove to the scene, and the two officers waited to see who would enter the vehicle. A few minutes later, Nusbaum exited the same store, entered the car, and drove away. The second officer initiated a traffic stop. During the stop, Nusbaum admitted that he did not have a valid license, although he asserted that he believed that the revocation period was over.

The State subsequently charged Nusbaum with two counts of driving while license revoked, one for each separate incident of driving witnessed by the officers. The State also filed a petition to revoke probation in Nusbaum's 2009 misdemeanor driving under the influence case, for which Nusbaum was still on informal probation.

The case proceeded to a jury trial, where Nusbaum was convicted of both counts.

At sentencing, the State argued that the mandatory minimum sentence under former AS 28.15.291(b)(1)(D) applied to Nusbaum's case. Under former AS 28.15.291(b)(1)(D), a mandatory minimum sentence of 30 days to serve and a $1,000 fine applied to drivers who drove during the time their license was revoked by the court for a second or subsequent driving under the influence offense.[3]

The State argued that Nusbaum was subject to this mandatory minimum sentence because Nusbaum was convicted in 2009 of a second or subsequent driving under the influence offense. The State acknowledged that the court-ordered revocation was only for five years and that the driving incidents in the current case took place more than five years after the court issued its revocation order. But the State argued that execution of that order had been delayed by more than three years because the court had ordered the revocation to be "[c]oncurrent with DMV action" and Nusbaum had prior

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[3] *See* AS 28.15.291(b)(1)(D) (2015). This provision is no longer in effect.

administrative DMV revocations that needed to be completed before the DMV revocation related to the 2009 driving under the influence offense could begin. In support of this argument, the State presented the testimony of a Division of Motor Vehicles supervisor, who testified that the DMV's administrative revocation related to the 2009 driving under the influence offense did not begin until 2013.

Nusbaum argued that former AS 28.15.291(b)(1)(D) did not apply to his case for three reasons. First, he argued that, under the United States Supreme Court precedent in *Alleyne v. United States*, the facts underlying the application of former AS 28.15.291(b)(1)(D) to his case had to be proved to a jury beyond a reasonable doubt.[4] Second, he argued that the court order revoking his license for five years went into effect on the date the order was issued, not more than three years later as the State claimed. Lastly, he argued that, even if the execution of the court order *had* been delayed by the prior administrative revocations, he had reasonably believed that the court-ordered revocation was complete five years after the order was issued and therefore the enhanced penalty should not apply to him.

The district court agreed with Nusbaum that the mandatory minimum sentence did not apply to his case. The court noted that the purpose of running a court-ordered revocation concurrent with the DMV revocation is to provide a benefit to the defendant. The court therefore questioned whether the Division of Motor Vehicles was calculating a defendant's court-ordered revocation properly in circumstances where it delayed execution of the court order for years to account for various other administrative revocations. The court also expressed concern that the deterrent purpose of the enhanced penalties under former AS 28.15.291(b)(1)(D) would be thwarted if execution of a court-ordered revocation is delayed for years. The court therefore concluded that the 2009

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[4] *Alleyne v. United State*, 570 U.S. 99, 111-12 (2013).

revocation order was effective on the day it was issued and the five-year court-ordered revocation was complete before the driving incidents in this case took place. Based on this reasoning, the court ruled that the mandatory minimum sentences under former AS 28.15.291(b)(1)(D) did not apply to Nusbaum's case.

The court nevertheless agreed with the State that a substantial sentence was still needed given Nusbaum's history of driving offenses, which includes multiple convictions for both driving under the influence and driving while license revoked.

For Count I, the court imposed a sentence of 300 days' imprisonment with 200 days suspended (100 days to serve), a $5,000 fine with $4,500 suspended ($500 fine), and a 90-day license revocation. For Count II, the court imposed a sentence of 300 days' imprisonment with 280 days suspended (20 days to serve), a $5,000 fine with $4,500 suspended ($500 fine), and a 90-day license revocation. The court imposed the time to serve consecutively. The court also imposed an additional 30 days to serve on the petition to revoke Nusbaum's probation in the 2009 driving under the influence case, for a composite sentence of 150 days to serve.

Nusbaum now appeals, arguing that his sentence is excessive. The State has filed a cross-appeal, arguing that the district court erred when it failed to apply the mandatory minimum sentences required under former AS 28.15.291(b)(1)(D).

Did the district court err in finding former AS 28.15.291(b)(1)(D) inapplicable to Nusbaum's case?

In its cross-appeal, the State argues that former AS 28.15.291(b)(1)(D) applied to Nusbaum's case because (according to the State) the 2009 court order revoking Nusbaum's license did not go into effect when it was issued. Instead, according to the State, execution of the order was delayed until April 25, 2013, which is when Nusbaum's other DMV administrative revocations ended and the DMV

administrative revocation directly related to the 2009 driving under the influence offense began. The State argues that this result is dictated by the language of the 2009 order, which made the court-ordered revocation "[c]oncurrent with DMV action."

The proper interpretation of a court order is a question of law to which we apply our independent judgment.[5] Here, the 2009 order declared "Your driver's license is revoked for 5 years" and a box was checked that stated "Concurrent with DMV action." The use of the present tense "is revoked" suggests that the revocation took effect on the day the order was issued — June 29, 2009. Indeed, that date is explicitly referred to as the "Effective Date" of the order.

Notably, there is nothing on the face of the order to suggest that the revocation would begin any later than that effective date. Nor does the Division of Motor Vehicles "stacking" statute, AS 28.15.211(b), mandate a later effective date. Alaska Statute 28.15.211(b) states that "if another court or department . . . revocation is in effect on the date of final judgment, the effective date of the last imposed . . . revocation is at the end of the last day of the previous . . . revocation *unless the court or department specifies otherwise*." (Emphasis added.) Here, the court ordered that the 5-year license revocation be "[c]oncurrent with DMV action," without specifying the DMV action to which it could be concurrent. Thus, the fact that Nusbaum's license was administratively revoked at the time the order was issued did not preclude the court-ordered revocation from taking immediate effect. Instead, that court-ordered revocation would run concurrently with whatever administrative DMV revocation was already in place.

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[5] *Bennett v. Bennett*, 6 P.3d 724, 726 (Alaska 2000); *see also John v. Baker*, 125 P.3d 323, 326 n.7 (Alaska 2005).

We acknowledge that the Division of Motor Vehicles viewed the court order otherwise. The testimony of the Division of Motor Vehicles supervisor suggests that the Division of Motor Vehicles viewed the order as not going into effect until many years after it was issued — after Nusbaum's other administrative revocations were complete and his DMV administrative revocation related to the 2009 driving under the influence offense finally began. But, as the district court recognized, interpreting the order in that manner leads to anomalous results. The primary purpose of former AS 28.15.291(b)(1)(D) is deterrence. This purpose is thwarted if the defendant has no notice of when their court-ordered revocation is in place. Nor does it make sense for the enhanced penalties to apply to a defendant at some arbitrary time in the future but to not apply to a defendant who drives immediately after the court issues its order revoking the defendant's license.

Given all this, we agree with the district court's interpretation of the 2009 court order and we therefore affirm the district court's ruling that former AS 28.15.291(b)(1)(D) does not apply in Nusbaum's case. Because we are affirming on these grounds, we need not reach the question of whether imposition of former AS 28.15.291(b)(1)(D) requires a jury finding beyond a reasonable doubt under *Alleyne v. United States*.[6]

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[6] *See Alleyne*, 570 U.S. at 99. In *Alleyne*, the United States Supreme Court held that there is a right to a jury trial under the Sixth Amendment with respect to any finding of fact that triggers or increases a mandatory minimum sentence. *Id*. at 103. As we recognized in *State v. Clifton*, 315 P.3d 694, 702 n.4 (Alaska App. 2013), the United States Supreme Court's decision in *Alleyne* implicitly overrules the Alaska Supreme Court's contrary interpretation of the right to jury trial in *State v. Malloy*, 46 P.3d 949 (Alaska 2002). In *Malloy*, the Alaska Supreme Court held that a defendant has no right to a jury trial with respect to a finding of fact that increases the applicable mandatory minimum sentence but does not increase the defendant's potential maximum sentence. *Id.* at 956-57.

Is Nusbaum's sentence excessive?

Before we address Nusbaum's claim that his sentence is excessive, we must first clarify what that sentence is.

In the original briefing in this case, the parties appeared to assume that the district court had imposed fully consecutive sentences on both counts. However, in the supplemental briefing, the State pointed out that the court had only imposed the time to serve consecutively, and the other parts of the sentence — *i.e.*, the suspended time, the fines, and the 90-day license revocation — were therefore, by default, imposed concurrently.[7] We have reviewed the sentencing record and we agree with the State's reading of the record. We also note that we would have had concerns about this sentence if the suspended time had been imposed consecutively. As Nusbaum points out, very little time separated his two acts of driving, and fully consecutive sentences under these circumstances would need to be explained and justified by the court.[8]

On appeal, Nusbaum focuses primarily on the composite time to serve — 150 days. Nusbaum argues that this amount of time to serve is excessive because Nusbaum's driving did not involve reckless driving or any consumption of alcohol. Nusbaum also argues that the district court failed to account for Nusbaum's rehabilitation and the fact that he had completed his alcohol treatment for the 2009 driving under the influence offense.

We find no merit to these arguments. In its sentencing remarks, the district court acknowledged that the current convictions did not involve any alcohol or reckless

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[7] *Paige v. State*, 115 P.3d 1244, 1246-47 (Alaska App. 2005) (citing *Baker v. State*, 110 P.3d 996, 1002 (Alaska App. 2005)), *see also Trumbly v. State*, 379 P.3d 996, 999 (Alaska App. 2016).

[8] *Phelps v. State*, 236 P.3d 381, 385 (Alaska App. 2010) (quoting *Neal v. State*, 628 P.2d 19, 20 n.3 (Alaska 1981)).

driving. The court also acknowledged that Nusbaum had completed the treatment requirements for his most recent driving under the influence case. But the court nevertheless concluded that a substantial sentence was required based on Nusbaum's significant history of driving offenses. This criminal history includes four driving under the influence convictions from 1995, 1996, 2007, and 2009. It also includes four prior driving while license revoked/suspended convictions from 1997, 1999, 2000, and 2001. Moreover, according to the Division of Motor Vehicles, Nusbaum has not had a valid driver's license since 1988.

Based on this history, the court found that Nusbaum was "a fairly difficult person to deter because you either don't respect authority — and/or don't think about your actions before you do things." The court therefore focused on the need for individual deterrence and reaffirmation of societal norms when fashioning Nusbaum's sentence.

This Court has previously upheld substantial sentences for the crime of driving while license revoked.[9] Nusbaum points out that many of these cases involved contemporaneous alcohol use or reckless driving — neither of which were present in his case. But many of the sentences imposed in those cases were also higher than the

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[9] *See, e.g.*, *Downs v. State*, 872 P.2d 1229, 1231 (Alaska App. 1994) (upholding composite sentence of approximately 2 years to serve when defendant had four prior driving while intoxicated convictions and ten prior driving with license revoked convictions); *Alward v. State*, 767 P.2d 1175, 1177 (Alaska App. 1989) (upholding composite sentence of 2 years to serve as not clearly mistaken when defendant had six prior driving while intoxicated convictions and five prior driving with license suspended convictions within the previous ten years); *Joseph v. State*, 775 P.2d 519, 519-20 (Alaska App. 1989) (upholding composite sentence of 15 months as not clearly mistaken when defendant had eleven prior driving with license suspended convictions and a driving while intoxicated conviction); *Wilson v. State*, 765 P.2d 106, 106 (Alaska App. 1988).

sentence Nusbaum received here. Having independently reviewed the record, we conclude that the sentence imposed was not clearly mistaken.[10]

Conclusion

The judgment of the district court is AFFIRMED. However, we remand this case to the district court to correct the written judgment so that it comports with the oral sentence, which imposed only the time to serve consecutively.

[10] *See McClain v. State*, 519 P.2d 811, 814 (Alaska 1974).