IN THE COURT OF APPEALS OF THE STATE OF ALASKA

FRANK MILLER KIGNAK, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12519 Trial Court No. 2BA-13-00092 CR MEMORANDUM OPINION No. 6829 — October 16, 2019

Appeal from the Superior Court, Second Judicial District, Barrow, Angela Greene, Judge, and the Statewide Three-Judge Sentencing Panel, Trevor N. Stephens, Anna Moran, and Michael McConahy, Judges.

Appearances: Michael Horowitz, Law Office of Michael Horowitz, Kingsley, Michigan, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Diane L. Wendlandt, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Wollenberg, Judge, and Mannheimer, Senior Judge.[*]

Judge WOLLENBERG.

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

In 2013, a grand jury indicted Frank Miller Kignak on one count of second-degree sexual assault for engaging in sexual penetration with an incapacitated person. Kignak and the State subsequently reached an agreement to resolve the case. Under this agreement, Kignak pleaded guilty to the lesser charge of third-degree sexual assault (engaging in sexual contact with an incapacitated person), with sentencing open to the court.

Kignak had three prior felony convictions from approximately ten years earlier — two convictions for second-degree burglary and one conviction for second-degree theft. (Two of these convictions arose from the same criminal episode and thus constituted a single conviction for presumptive sentencing purposes.)[1]

As a third felony offender with no prior convictions for a sexual felony, Kignak was subject to a presumptive sentencing range of 15 to 25 years' imprisonment.[2] Under former AS 12.55.125(o)(3), the court was also required to impose a minimum period of suspended imprisonment of 2 years.[3] The sentencing judge referred Kignak's case to the statewide three-judge sentencing panel on the ground that it would be manifestly unjust to sentence Kignak within this presumptive range.

The panel disagreed with the sentencing judge and returned Kignak's case for sentencing. A different judge sentenced Kignak to 17 years with 2 years suspended (15 years to serve), the lowest possible sentence within the presumptive range.

On appeal, Kignak argues that the three-judge panel erred in rejecting his claim of manifest injustice. We have independently reviewed the sentencing record, and

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[1] *See* AS 12.55.145(a)(1)(C).

[2] Former AS 12.55.125(i)(4)(D) (2013). This subsection was re-numbered as AS 12.55.125(i)(4)(F) in 2019. FSSLA 2019, ch. 4, § 73.

[3] *See* former AS 12.55.125(o)(3) (pre-July 2016 version). This requirement is now codified at AS 12.55.125(q)(3).

we conclude that the panel's decision is not clearly mistaken in light of the totality of Kignak's conduct and history. We therefore affirm Kignak's sentence.

Sentencing proceedings

At Kignak's original sentencing hearing, the judge rejected Kignak's proposed mitigating factor that his conduct was "among the least serious" within the definition of third-degree sexual assault.[4] However, the judge determined that the lowest sentence within the applicable presumptive range (15 years) would be manifestly unjust, and he *sua sponte* referred Kignak's case to the three-judge panel on this basis.

The three-judge panel subsequently convened to determine whether it would be manifestly unjust to sentence Kignak within the presumptive range. Neither the State nor the defense presented any evidence at that hearing.

Kignak's attorney argued that a sentence at the low end of the presumptive range would be manifestly unjust because of the age and nature of Kignak's prior felony convictions. In particular, Kignak's attorney noted that: (1) Kignak's prior felony convictions predated his current offense by approximately ten years, (2) his prior felony convictions resulted in a combined active term of imprisonment of only 15 months to serve, (3) his prior felony convictions did not involve assaultive conduct and could be categorized as low-level property crimes, and (4) his prior felony convictions were not sexual offenses, nor did Kignak have any sexual offenses in his background. Kignak's attorney also argued that the facts of the current case — in particular, the fact that Kignak and the victim had been drinking together — mitigated the seriousness of the offense.

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[4] *See* AS 12.55.155(d)(9).

After considering the defense attorney's arguments, as well as Kignak's present offense, his criminal history, and the *Chaney* criteria,[5] the three-judge panel concluded that Kignak had not established that manifest injustice would result from a sentence within the presumptive range. Specifically, the panel found that Kignak had not established that his conduct was significantly different than a typical offense or that he was significantly different than a typical offender within the applicable category.[6]

Upon return of the case, the sentencing judge imposed the lowest sentence within the presumptive range — 17 years with 2 years suspended (15 years to serve).

The three-judge panel was not clearly mistaken in rejecting Kignak's claim of manifest injustice

Under AS 12.55.175(b), the three-judge panel is authorized to impose a sentence below the presumptive range if the panel finds that "manifest injustice would result from . . . imposition of a sentence within the presumptive range, whether or not adjusted for aggravating or mitigating factors[.]" To establish manifest injustice, a defendant must show "that the defendant or his conduct is significantly different than that of a typical offender."[7] In this analysis, the panel must consider "all of the appropriate sentencing considerations, including the defendant's background, his education, his character, his prior criminal history, and the seriousness of his offense" and determine

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[5] *See State v. Chaney*, 477 P.2d 441, 444 (Alaska 1970).

[6] *See Moore v. State*, 262 P.3d 217, 221 (Alaska App. 2011).

[7] *Id.* (citing *Manrique v. State*, 177 P.3d 1188, 1194 (Alaska App. 2008)).

whether the presumptive sentence "would be obviously unfair in light of the need for rehabilitation, deterrence, isolation, and affirmation of community norms."[8]

This Court will only reverse the panel's decision regarding manifest injustice if we conclude that it is clearly mistaken.[9]

Kignak's primary challenge is to the three-judge panel's rejection of his claim that he is an atypical offender. Kignak's attorney argued to the panel that because Kignak's prior felony convictions were for property crimes, they were less serious and different in nature from his current offense (or from other offenses). On appeal, the crux of Kignak's argument is that the panel should have weighed this circumstance and the remoteness of his prior felony convictions more heavily in its analysis of whether he was an atypical offender.

We agree with Kignak that the three-judge panel was authorized to take into account the specific facts and circumstances of his prior convictions in analyzing the totality of circumstances.[10] But for the most part, when Kignak presented his case to the panel, he did not focus on the specific circumstances of his prior offenses or argue how those circumstances differentiated him from the typical offender with prior felony convictions for property offenses. Rather, Kignak argued that property crimes in general are less serious than other types of felonies — a categorical argument that appears to be

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[8] *Id.* (quoting *Totemoff v. State*, 739 P.2d 769, 775 (Alaska App. 1987)); *see also Duncan v. State*, 782 P.2d 301, 304 (Alaska App. 1989) ("[I]n order to decide whether the presumptive term would be manifestly unjust, the court must consider the totality of the circumstances surrounding the case[.]").

[9] *Totemoff*, 739 P.2d at 775 (reviewing the three-judge panel's decision that a 15-year presumptive sentence was not manifestly unjust under the clearly mistaken standard).

[10] *See Duncan*, 782 P.2d at 304 (explaining that "[t]he nature and seriousness of an offender's prior criminal conduct are a legitimate part of the totality of the circumstances; as such, they may be considered in the overall determination of manifest injustice").

inconsistent with our presumptive sentencing scheme, which presumes that all non-sexual felony convictions that qualify as prior convictions under AS 12.55.145 have equal weight when determining the applicable presumptive range.[11]

Moreover, Kignak largely overlooked (and continues to overlook) his remaining criminal history — in particular, his misconduct between the time of his prior felony convictions and his current offense. Although Kignak's prior felony convictions occurred over ten years prior to the current offense, Kignak committed a string of misdemeanors and probation violations in the years following his release from prison after serving the active portion of his felony sentences.

Indeed, with the exception of one three-year period, Kignak was in and out of custody between his initial release from prison and his conduct in this case. Although Kignak originally received only 15 months' active imprisonment on his prior felony convictions, the superior court ultimately imposed all of Kignak's suspended time on those cases — approximately 2 years and 9 months. As a result, the three-judge panel found that Kignak's performance on felony probation was "extremely poor."

Additionally, Kignak's criminal conduct appeared to be escalating prior to this case. For instance, Kignak was convicted in 2011 of fourth-degree assault for punching and kicking a highly intoxicated woman who was on the ground. Most of Kignak's criminal behavior related to his own long-standing substance abuse issues.

In his childhood, Kignak had multiple delinquency adjudications and adjustments for unlawful acts, including assaultive conduct. The three-judge panel noted that the entirety of Kignak's criminal history had led the original sentencing judge to conclude that Kignak's prospects for rehabilitation were "guarded." The panel itself thought that Kignak's prospects were even worse — "marginal at best."

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[11] *See* AS 12.55.125(c), (d), (e), & (i).

Under our case law, it was appropriate for the three-judge panel to take Kignak's entire history into account.[12] No single factor or circumstance controls the panel's assessment of the *Chaney* criteria and the totality of the circumstances; it is up to the panel to examine and weigh all of the relevant circumstances and determine whether a sentence within the presumptive range is obviously unfair.[13] Having reviewed the record, we conclude that the panel was not clearly mistaken in concluding that Kignak did not meet his burden of showing that he was an atypical offender.

Nor was the panel clearly mistaken in concluding that Kignak's conduct in the instant case was not significantly different than a typical third-degree sexual assault. Even the judge who referred Kignak's case to the three-judge panel found that Kignak's conduct was a "standard example" of this offense.

Finally, Kignak argues that two sentencing "anomalies" worked an unfairness in his case. He first argues that the presumptive range applicable to his case is manifestly unjust because he was subject to the same or a higher presumptive minimum term than a first felony offender who committed a more serious sexual offense.[14] But as the State points out, this variation in sentencing ranges is merely a reflection of the increased sentencing consequences for repeat offenders.[15]

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[12] *See Totemoff*, 739 P.2d at 775.

[13] *State v. Seigle*, 394 P.3d 627, 635 (Alaska App. 2017).

[14] *Compare* former AS 12.55.125(i)(4)(D) (2016) (15- to 25-year presumptive range applicable to third felony offenders convicted of third-degree sexual assault, unless both prior convictions are sexual felonies), *with* AS 12.55.125(i)(2)(A)(ii) (15- to 30-year presumptive range applicable to first felony offenders convicted of attempted first-degree sexual assault, if victim is 13 years of age or older), *and* AS 12.55.125(i)(3)(A) (5- to 15-year presumptive range applicable to first felony offenders convicted of second-degree sexual assault).

[15] *See generally State v. Carlson*, 560 P.2d 26, 28-29 (Alaska 1977) (discussing habitual (continued...)

Second, Kignak argues that, had he pleaded guilty to second-degree sexual assault instead of third-degree sexual assault, he potentially could have received a lower sentence if the superior court found the "least serious" mitigator and reduced his sentence by half, imposing a sentence as low as 10 years to serve.[16] But Kignak did not raise this issue in the superior court, and it is no more than speculation.

Conclusion

We AFFIRM the judgment of the superior court.

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[15] (...continued)
criminal statutes).

[16] *See* AS 12.55.125(i)(3)(D) (setting the presumptive range for third felony offenders convicted of second-degree sexual assault at 20 to 35 years); AS 12.55.155(a)(2) (permitting a one-half reduction of the low end of the presumptive range based on a mitigating factor where the low end of the presumptive range is more than 4 years).