IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DOUGLAS L. SMITH, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12722 Trial Court No. 1KE-15-00503 CR MEMORANDUM OPINION No. 6833 — November 6, 2019

Appeal from the Superior Court, First Judicial District, Ketchikan, Trevor Stephens, Judge.

Appearances: Kelly R. Taylor, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. RuthAnne Beach, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Harbison, Judge, and E. Smith, Senior Superior Court Judge.[*]

Judge SMITH.

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

Douglas L. Smith appeals his sentence for fourth-degree misconduct involving a controlled substance. He argues that the trial court erred when it decided that Smith's conduct did not qualify for the mitigating factor of "among the least serious conduct included in the definition of the offense"[1] and that the trial court erred in not referring the case to a three-judge sentencing panel for consideration of a non-statutory mitigator — subsequent legalization of marijuana laws. Finding no error, we affirm.

Facts and proceedings

In May 2015, Douglas L. Smith was caught transporting marijuana on the ferry into Ketchikan from Washington, with the intent to deliver to others in his hometown of Craig. The police found approximately 12 pounds of marijuana and 3 pounds of hash oil hidden in a boat that Smith was shipping via ferry; his personal luggage contained three iPhones, odor concealment, a marijuana bud, cannabinoidal pills, a marijuana cigarette, sports cream containing THC, a "rep sample" of 1.88 grams of marijuana, a notebook with ledgers, and around 3.4 additional pounds of hash oil. The total estimated street value of the drugs found on Smith and in his boat was $171,514 for the marijuana and $132,164 for the hash oil.

Smith was indicted for eight felony drug offenses: three counts of third-degree misconduct involving a controlled substance and five counts of fourth-degree misconduct involving a controlled substance. He entered into a plea agreement and pleaded guilty to a single count of fourth-degree misconduct involving a controlled substance for possessing "one or more preparations, compounds, mixtures, or substances of an aggregate weight of four ounces or more containing a schedule VIA controlled

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

substance" — marijuana.[2] Under that agreement, the State dismissed the remaining counts.

Smith requested that the trial court find two statutory mitigating factors: that the offense involved distribution of a controlled substance for no profit and that his conduct was among the least serious conduct included in the definition of the offense.[3] In support of his request, he primarily argued that he had not sold any marijuana, but instead had distributed the marijuana he brought to Craig as a public service to people who needed it.

The trial judge rejected both mitigating factors. The judge found that the "not for profit" mitigator did not apply because Smith "was covering his costs and making a little bit." (Smith does not challenge this finding on appeal.) The judge further found that the "least serious conduct" mitigator did not apply because "the elements of the offense are an ounce, and here, we had, I think, 10 pounds" and because he could not properly rely on the fact that the community viewed marijuana as a less serious drug "because the offense, by definition, is a marijuana offense." But he added that, "I have to confess I'm not entirely happy with this outcome, but I just can't find that either of these aggravators [sic][4] have been proven by clear and convincing evidence."

Smith also asked the judge to refer the case to the three-judge sentencing panel based on a new non-statutory mitigating factor: that changes in the law had rendered his conduct less criminal. The judge declined to refer the case.

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[2] Former AS 11.71.040(a)(3)(F) (2015).

[3] AS 12.55.155(d)(14) and AS 12.55.155(d)(9), respectively.

[4] The trial judge meant "mitigators." He was discussing the proposed two mitigating factors, and there were no aggravating factors at issue at the hearing.

The applicable presumptive sentencing range for the offense was at that time 1 to 3 years. The trial judge imposed a flat sentence of 1 year to serve, and this appeal followed.

The trial court correctly did not find the "least serious conduct" mitigator

The determination as to whether a defendant's conduct qualifies as "among the least serious conduct" is a mixed question of law and fact. We review the trial court's factual findings for clear error, but decide *de novo* whether the conduct is among the least serious.[5]

Smith's argument is that the trial judge failed to consider the "totality of the circumstances," as required by this Court in *Juneby v. State*.[6] According to Smith, the totality of the circumstances included the community's recognition that marijuana is a much less serious drug than the other drugs listed in AS 11.71, and the fact that Smith distributed the drugs as a public service.

We find no error in the trial court's rejection of this mitigator. As the trial court noted, the statute prohibits distribution of more than 1 ounce of marijuana, yet Smith was caught with over 10 pounds of marijuana, as well as 6.4 pounds of hash oil, a much more powerful drug. He smuggled the drugs into Craig, hiding almost all of the marijuana and half of the hash oil in a boat, and he used an odor concealment in his personal luggage, which held the rest of his hash oil. And the overall street value of the

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[5] *Michael v. State*, 115 P.3d 517, 519 (Alaska 2005); *see also Voyles v. State*, 2017 WL 2709730, at *5 (Alaska App. June 21, 2017) (unpublished).

[6] *Juneby v. State*, 641 P.2d 823, 843 (Alaska App. 1982). Smith's brief could have been read as arguing that the Court should view marijuana as inherently less serious than other drugs, but counsel agreed at oral argument that *Juneby* had itself precluded any such claim. *Id.* at 841.

drugs he smuggled was over $300,000. Given the totality of the circumstances, we find no error in the superior court's rejection of the proposed mitigator.

The trial court's refusal to refer the case to the three-judge sentencing panel was not clearly mistaken

Alaska Statute 12.55.165 provides that a trial court must refer a case to a three-judge panel for sentencing if the court "finds by clear and convincing evidence that manifest injustice would result from failure to consider relevant aggravating or mitigating factors not specifically included in AS 12.55.155." If the judge declines to send a case to the three-judge panel, "that decision is reviewed under the 'clearly mistaken' standard."[7]

Smith requested that the trial court refer his case to the three-judge sentencing panel because the possession, sale, and distribution of marijuana had recently been legalized at the time that he was caught with the marijuana, but the Marijuana Control Board had not yet promulgated regulations governing the sale and distribution of marijuana. The trial court rejected this request, primarily on the ground that Smith's actions were illegal at the time he was caught. On appeal, Smith argues that the trial court erred in deciding that because Smith's actions were illegal at the time, the changes in marijuana laws could not be considered a non-statutory mitigating factor. Smith argues that the court still should have considered whether "ameliorative legislative changes" that occurred during and after Smith's offense would be sufficient as a non-statutory mitigating factor, regardless of whether Smith's actions were illegal. Smith

[7] *Bossie v. State*, 835 P.2d 1257, 1259 (Alaska App. 1992) (citing *Lepley v. State*, 807 P.2d 1095, 1099 n.1 (Alaska App. 1991); *Kirby v. State*, 748 P.2d 757, 765 (Alaska App. 1987); *Lloyd v. State*, 672 P.2d 152, 156 (Alaska App. 1983)).

asks that this Court remand with the instructions "that ameliorative legislative changes is a valid non-statutory mitigating factor."

We agree that an ameliorative legislative change can under proper circumstances constitute a non-statutory mitigating factor that can serve as a basis for a referral to the three-judge sentencing panel.[8] But we find that the superior court properly declined to do so here. As noted above, Smith was caught smuggling a substantial amount of drugs (including several pounds of hash oil), with a street value of over $300,000, which he admitted he planned to distribute notwithstanding that such conduct was flatly prohibited by the law both at the time he was caught and today. The fact that Smith was unable to apply for a permit at the time does not ameliorate that violation — indeed, the fact that the legislature gave the Board several months to adopt the regulations suggests that the legislature intended that there be no distribution until a well-conceived set of regulations could be adopted.

Lastly, we note that Smith presented no evidence that he would have been able to obtain a permit had he been able to apply for one. The regulations require, *inter alia*, a detailed operating plan, a food safety permit, marijuana handler permits, and a marijuana inventory tracking system.[9] There is no evidence in the record that Smith had put together any such plan, obtained the necessary permits, or developed the required tracking system. Nor, as the State points out, is there any indication in the record that Smith would have received the permit even if he had submitted this information, for the Board can reject a license application if "the applicant's actions or the operating plan

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[8] *See, e.g.*, *Smith v. State*, 258 P.3d 913, 921-23 (Alaska App. 2011) (the three-judge sentencing panel has authority to create non-statutory mitigating and aggravating factors).

[9] 3 Alaska Administrative Code 306.020(c), 3 AAC 306.315(1), 3 AAC 306.320, and 3 AAC 306.330, respectively.

does not adequately demonstrate that the applicant will comply with the provisions of this chapter" or if "the license would not be in the best interests of the public" both of which are potentially significant hurdles for a person with Smith's lengthy criminal history.[10]

Given these circumstances, we conclude that the superior court's decision not to refer Smith's case to the three-judge sentencing panel was not clearly mistaken.

Conclusion

The judgment of the superior court is AFFIRMED.

[10] 3 AAC 306.080(a)(5), (a)(6). At the time he was sentenced, Smith had two prior felony convictions, fifteen misdemeanor convictions, one federal misdemeanor conviction, and two prior felony probation revocations.