IN THE COURT OF APPEALS OF THE STATE OF ALASKA

TRENTON L. SHEPERSKY, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12766 Trial Court No. 3PA-15-01783 CR MEMORANDUM OPINION No. 6840 — December 18, 2019

Appeal from the Superior Court, Third Judicial District, Palmer, David L. Zwink, Judge.

Appearances: Gavin Kentch, Law Office of Gavin Kentch, LLC, Anchorage, for the Appellant. Shawn D. Traini, Assistant District Attorney, Palmer, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges.

Judge HARBISON.

Trenton L. Shepersky drove his truck into oncoming traffic, killing one person and injuring three others. Based on this conduct, Shepersky was charged with alternative counts of manslaughter and criminally negligent homicide, one count of third-degree assault, and one count of driving under the influence.

Shepersky later entered into a plea agreement with the State to resolve his case. Pursuant to this agreement, Shepersky pleaded guilty to one count of criminally negligent homicide and two counts of fourth-degree assault, and the remaining charges were dismissed. He also stipulated that an aggravating factor applied to the criminally negligent homicide — that, under AS 12.55.155(c)(10), his conduct was among the most serious within the definition of the offense. At a subsequent sentencing hearing, the court imposed a composite sentence of 9 years and 60 days with 5 years suspended (4 years and 60 days to serve).

Shepersky now appeals, raising several claims. First, Shepersky argues that the superior court erred by accepting the parties' stipulation to the aggravating factor. Second, Shepersky argues that the court failed to adequately explain why it aggravated his sentence for criminally negligent homicide, and that this failure entitles him to resentencing. Finally, Shepersky argues that the sentence imposed for his criminally negligent homicide conviction is excessive.

For the reasons explained in this opinion, we reject Shepersky's claims, and we affirm his sentence.

Factual and procedural background

While driving on the Glenn Highway, Shepersky drove his truck over the median into the opposing lane of traffic. His truck collided with two vehicles, killing a passenger in another vehicle and injuring three others.

A drug toxicology report from the crime laboratory revealed that Shepersky's blood was positive for cocaine metabolites, THC, and carboxy THC. Shepersky also had three hydrocodone pills in his pocket. Inside of Shepersky's truck, troopers located 199 nitrous oxide canisters and a balloon that can be used for inhaling

nitrous oxide. Based on this conduct, Shepersky was charged with manslaughter, criminally negligent homicide, third-degree assault, and driving under the influence.[1]

While on bail release, Shepersky was diagnosed with a seizure disorder caused by epilepsy. His attorney provided the district attorney's office with a neurologist's report regarding the diagnosis.

Shepersky subsequently entered into a plea agreement with the State. Under the agreement, Shepersky pleaded guilty to criminally negligent homicide and to two counts of fourth-degree assault.[2] Shepersky also stipulated to an aggravating factor — that under AS 12.55.155(c)(10), his conduct was among the most serious conduct included in the definition of criminally negligent homicide.

Shepersky had no prior felony convictions. He therefore faced a presumptive sentencing range of 1 to 3 years for the criminally negligent homicide conviction, and a sentence of up to 1 year for each of the fourth-degree assault convictions.[3]

After considering the information presented at the sentencing hearing and in the presentence report, the trial court found that the accident was likely the result of Shepersky having a seizure, and the court also found that it was "tough to tell" whether the seizure could have been caused by Shepersky's substance use. The court imposed an aggravated sentence for the criminally negligent homicide conviction — 9 years with 5 years suspended. It imposed 180 days for each of the two misdemeanor assault convictions, and it ran all but 30 days for each count concurrently with the sentence for

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[1] AS 11.41.120(a)(1), AS 11.41.130, AS 11.41.220(a)(1)(A), and AS 28.35.030(a)(1), respectively.

[2] AS 11.41.130 and AS 11.41.230(a)(1), respectively.

[3] Former AS 12.55.125(d)(2)(A)(ii) (2016) and former AS 12.55.135(a)(1)(D) (2016), respectively.

the felony. As a result, Shepersky's composite sentence is 4 years and 60 days to serve, with an additional 5 years suspended.

Shepersky now appeals his sentence.

Shepersky may not challenge the aggravating factor for the first time in this appeal

On appeal, Shepersky argues that the aggravating factor does not apply and that, as a result, this Court should remand the case for resentencing "with directions to impose a sentence within the presumptive range." In other words, the remedy he asks for is resentencing without the aggravating factor.

This remedy is not available to Shepersky. When, as here, "a defendant wishes to challenge an already consummated plea agreement as being unlawful, the defendant must seek recision of the agreement — not selective enforcement of only those provisions favorable to the defendant."[4]

Shepersky notes that when a defendant admits an aggravating factor, the judge has a duty to ensure that there is a reasonable basis for the admission.[5] He argues that, although he stipulated to the aggravating factor, there was no basis to accept the stipulation because there was insufficient evidence that the accident was caused by substance impaired driving.

But we have previously explained that when the facts supporting an aggravator are in dispute, and reasonable people could differ on the question of whether the evidence establishes clearly and convincingly the existence of the aggravator, the

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[4] *Woodbury v. State*, 151 P.3d 528, 532 (Alaska App. 2007) (citing *Grasser v. State*, 119 P.3d 1016, 1018 (Alaska App. 2005)).

[5] *See Ulak v. State*, 238 P.3d 1254, 1257 (Alaska App. 2010).

court may accept a stipulation regarding it.[6] Here, defense counsel specifically told the court that, given the drug-related evidence found in Shepersky's blood and vehicle, "any reasonable person [would] believe that [the crash] was impairment-related, and [that] this is a manslaughter." The court therefore had a valid basis for accepting the stipulation.

The position Shepersky now takes — that there is an insufficient basis for the aggravator — is a repudiation of the position that he took when he negotiated his plea agreement with the State. Shepersky may not attack his plea agreement in such a piecemeal fashion.

The sentence imposed was not clearly mistaken

Shepersky next argues that the trial court failed to adequately explain why it aggravated his sentence for criminally negligent homicide, and that this failure entitles him to resentencing. In the alternative, Shepersky argues that the trial court improperly weighed the aggravator and that the sentence imposed for the criminally negligent homicide is excessive. Shepersky specifically disclaims any challenge to the sentences imposed for the misdemeanor assaults, or any challenge to his composite sentence.

But Shepersky is not entitled to challenge the sentence he received on only one count, divorced from the sentences he received on other counts for which he was simultaneously sentenced. When this Court reviews a sentence imposed for two or more criminal convictions, we assess whether the composite sentence is justified in light of the entirety of the defendant's conduct and history.[7] We have further explained that "a trial judge simultaneously sentencing [a defendant] for multiple offenses may impose a total

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[6] *Connolly v. State*, 758 P.2d 633, 638 (Alaska App. 1988).

[7] *Brown v. State*, 12 P.3d 201, 210 (Alaska App. 2000); *Comegys v. State*, 747 P.2d 554, 558-59 (Alaska App. 1987).

sentence that is reasonable, taking into account all of the circumstances, even though one of the components of the total sentence, viewed in isolation, might be clearly mistaken if only that offense were considered."[8]

Here, Shepersky was sentenced not only for criminally negligent homicide but also for two fourth-degree assault convictions. Although Shepersky faced a sentence of up to one year on each of his assault convictions, the sentencing court imposed only 30 days of consecutive time on each count (with the remaining 150 days on each count running concurrently with Shepersky's sentence for criminally negligent homicide). As a result, Shepersky received an active composite sentence for all three offenses of 4 years and 60 days.

The sentencing court's intention to consider the sentences as a whole is clear from its remarks. The court commented that "[t]his is one horrific accident," borne out of "one action." As a result, the court noted that it was imposing the sentences on the assault convictions mostly concurrently even though a number of different people were injured.

The court acknowledged that Shepersky was a young man and that there were "extenuating circumstances" in this case. But the judge weighed the *Chaney* criteria, and recognizing the stipulation to the aggravating factor and the facts of the case, concluded that the composite term imposed was the appropriate sentence.

We have independently reviewed the record, and we conclude that the composite sentence imposed is not clearly mistaken.

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[8] *Connolly*, 758 P.2d at 639.

Conclusion

The judgment of the superior court is AFFIRMED.