

NOTICE

*Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law, although it may be cited for whatever persuasive value it may have. See McCoy v. State, 80 P.3d 757, 764 (Alaska App. 2002).*

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JAMES W. GRIM,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12839  
Trial Court No. 3PA-11-01881 CR

MEMORANDUM OPINION

No. 6813 — August 14, 2019

Appeal from the Superior Court, Third Judicial District, Palmer,  
Gregory Heath, Judge.

Appearances: Callie Patton Kim, Assistant Public Defender,  
and Quinlan Steiner, Public Defender, Anchorage, for the  
Appellant. Donald Soderstrom (briefing) and Hazel Blum (oral  
argument), Assistant Attorneys General, Office of Criminal  
Appeals, Anchorage, and Jahna Lindemuth, and Kevin G.  
Clarkson, Attorneys General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Harbison, Judge, and Suddock,  
Senior Superior Court Judge.\*

Judge HARBISON.

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

James W. Grim was convicted of three counts of felony assault against one victim and an additional count of felony assault against another victim, an Alaska State Trooper. He was also convicted of two associated misdemeanors.

Grim previously appealed his convictions and his sentence, and we remanded Grim's case, instructing the superior court to reconsider its sentencing decision.<sup>1</sup> Following our remand, the superior court held a sentencing hearing and then took the matter under advisement. After the sentencing hearing, but before the court issued a decision, the legislature enacted Senate Bill 91. This statute reduced the presumptive sentencing ranges for felony assaults and decreed that its provisions applied to all sentences imposed after the bill took effect, regardless of when the crime occurred.

After S.B. 91 took effect, the superior court issued a written order and an amended judgment. Pursuant to the amended judgment, Grim's composite sentence exceeded that authorized by S.B. 91.

Grim now appeals his sentence as illegal because it exceeds the sentence authorized by S.B. 91.<sup>2</sup> The State argues that the superior court was not required to impose a sentence that complied with the more lenient sentencing provisions of the statute because this Court's mandate to the superior court was limited to reconsideration of only one aspect of the sentence.

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<sup>1</sup> *Grim v. State*, 2016 WL 482543 \*1 (Alaska App. Feb. 3, 2016) (unpublished).

<sup>2</sup> Grim additionally contends that he was entitled to be present for the imposition of his sentence, noting that while he was present for the sentencing hearing, he was not present when the judge actually imposed the sentence via a written order. The State agrees that Grim is entitled to be present at all stages of the sentencing, including a resentencing hearing on remand. We also agree. But because we are vacating Grim's sentence and remanding this case to the superior court for resentencing, we need not address this issue further.

For the reasons we explain in this opinion, we conclude that the superior court was required to comply with the sentencing provisions of S.B. 91. We therefore vacate Grim’s sentence and remand this case to the superior court for resentencing.

*Underlying facts and procedural history*

Grim was charged with one count of assault in the second degree and two counts of assault in the third degree against one victim, one count of assault in the third degree against the responding Alaska State Trooper, one count of resisting arrest, and one count of violating conditions of release.<sup>3</sup> A jury convicted Grim of all counts, and the superior court imposed a composite sentence of 11 years and 180 days with 5 years suspended (6 years and 180 days to serve).

Grim appealed his convictions and sentence.<sup>4</sup> This Court upheld Grim’s convictions, but we remanded the case to the superior court to merge Grim’s three convictions against the same victim into a single conviction for second-degree assault.<sup>5</sup> We also held that, under Alaska law, the sentence for the assault on the trooper was required to be consecutive to the assault on the other victim by at least one day.<sup>6</sup> Because the record was unclear as to whether the superior court erroneously believed that the sentences had to be wholly consecutive, we remanded the case, directing the court to reconsider its sentencing decision if it acted under this mistaken belief.<sup>7</sup>

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<sup>3</sup> AS 11.41.210(a)(1), AS 11.41.220(a)(1)(A) & (B), AS 11.41.220(a)(1)(A), AS 11.56.700(a)(1), and AS 11.56.757(b)(1), respectively.

<sup>4</sup> *See Grim*, 2016 WL 482543, at \*1.

<sup>5</sup> *Id.* at \*7.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

On remand, the superior court held a hearing at which the State argued for wholly consecutive sentences and Grim’s attorney argued for minimally consecutive ones. At that hearing, the court heard a new brief statement of allocution by Grim, asked the parties whether Grim had completed a substance abuse program previously ordered, and whether he had committed any other crimes while on bail release pending appeal. The court then took the matter under advisement.

Two months later, the judge issued an order merging the assaults against the same victim into a single conviction and imposing half of the sentence for that assault concurrently with the assault on the trooper. This shortened Grim’s time to serve by one year.

In the two-month interim between the sentencing hearing and the issuance of the amended judgment, S.B. 91 took effect and modified the sentencing laws for all sentences imposed after its effective date.<sup>8</sup> Grim accordingly moved to correct his sentence, but the superior court denied his motion. This appeal followed.

*Why we conclude that the superior court erred when it denied Grim’s motion to correct his illegal sentence*

The presumptive ranges in S.B. 91 “apply to sentences imposed on or after the effective date of those sections for conduct occurring before, on, or after the effective date of those sections.”<sup>9</sup> Senate Bill 91 reduced the presumptive range for a second felony offender convicted of second-degree assault from 4 to 7 years, to 2 to 5 years.<sup>10</sup> Grim’s sentence of 7 years with 3 years suspended on this charge exceeded this new

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<sup>8</sup> 2016 SLA, ch. 36.

<sup>9</sup> 2016 SLA, ch. 36, § 185(u).

<sup>10</sup> 2016 SLA, ch. 36, § 89; AS 12.55.125(d)(3) (2016).

presumptive range. Likewise, the legislation reduced the presumptive range for a second felony offender convicted of third-degree assault from 2 to 4 years, to 1 to 3 years.<sup>11</sup> Grim's sentence on this charge of 4 years with 2 suspended again exceeded the new presumptive range.

The State argues that, even though the superior court entered judgment after the effective date of the statute, Grim was not entitled to the benefit of the new presumptive sentencing ranges. The State notes that our remand only required a decision whether Grim's two assault sentences should be wholly or partially consecutive. Since the provisions of S.B. 91 did not impact this particular decision, the State argues that the superior court correctly applied the law applicable at the time of Grim's original sentencing.

We conclude that S.B. 91 applies to sentences imposed after its effective date when the judge is either required to, or discretionarily decides to, hold a sentencing hearing in order to resentence a defendant. In *Tookak v. State* we discussed the circumstances under which a trial court is either required to, or is discretionarily authorized to, hold a resentencing hearing upon remand.<sup>12</sup> We held that, when a sentence is vacated because the defendant did not receive a full and fair hearing, the defendant is entitled to a sentencing, as if the first sentencing had not occurred.<sup>13</sup> But we noted that, even if the defendant was accorded a full and fair hearing,

the trial court has discretion in this situation to grant a hearing upon application. This may be desirable where an

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<sup>11</sup> 2016 SLA, ch. 36, § 90; AS 12.55.125(e)(2) (2016).

<sup>12</sup> *Tookak v. State*, 680 P.2d 509 (Alaska App. 1984).

<sup>13</sup> *Id.* at 511.

application is made showing a material change in circumstances since the original sentence was imposed.<sup>[14]</sup>

We stated that this discretion extends to situations where our mandate only required a judge to perform a ministerial act: “Whether [the judge] should go beyond the minimum requirement of our mandate [is] a matter committed to [the judge’s] discretion.”<sup>15</sup>

Our remand in *Grim* authorized the superior court to take no action if it in fact sentenced Grim with a correct understanding of the applicable sentencing law regarding consecutive sentences. But we required the court to revisit Grim’s sentence if it had acted under a misunderstanding of the applicable law.<sup>16</sup>

Following our remand of the case, the superior court held a hearing at which Grim personally appeared. The attorneys argued their respective positions regarding consecutive sentences for the two assaults. The judge asked the parties about Grim’s conduct while on bail pending appeal, and whether he had committed any new crimes. The judge stated, “Mr. Grim, since I’m revisiting the original sentencing and making a determination, you do have the right to make a statement of allocution.” Grim then spoke to the judge. The judge then asked whether Grim had completed the substance abuse program required by the original sentence; Grim affirmed that he had done so.

After the hearing, the court took the matter under advisement for two months before issuing an order stating:

Having reconsidered the specific facts of the case, the argument of the parties, and the relevant statutes and case

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Grim v. State*, 2016 WL 482543, at \*1, 7 (Alaska App. Feb. 3, 2016) (unpublished).

law, the court finds the goals of Grim's sentencing will be met by imposing half of the sentence for the assault on [the trooper] to run consecutively to the sentence for the assault on the [other victim].

This order had the practical effect of shortening Grim's time to serve by one year.

Based on this record, we agree with Grim that the superior court exercised its discretionary authority to resentence Grim, and thereby triggered the applicability of S.B. 91 and its new presumptive sentencing ranges. We accordingly conclude that because Grim's sentence was not authorized by S.B. 91, we must vacate it and remand the case to the superior court for resentencing.

*Conclusion*

The superior court's judgment is VACATED and the case is REMANDED for a full resentencing under applicable sentencing laws.