IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ALAN MICHAEL LYNOTT, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13001 Trial Court No. 4FA-14-00109 CR MEMORANDUM OPINION No. 6836 — November 20, 2019

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Douglas L. Blankenship, Judge.

Appearances: Heather O'Brien, Gazewood & Weiner, PC, Anchorage, for the Appellant. David Buettner, Assistant District Attorney, Fairbanks, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

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

Judge WOLLENBERG.

Alan Michael Lynott pleaded guilty to second-degree assault, first-degree vehicle theft, and second-degree theft in exchange for the dismissal of several other

charges.[1] As a third felony offender sentenced in September 2017, Lynott was subject to a presumptive sentencing range of 4 to 10 years for the second-degree assault conviction, 2 to 5 years for the first-degree vehicle theft conviction, and 2 to 5 years for the second-degree theft conviction.[2]

As part of the plea agreement, Lynott agreed to a minimum composite sentence of 6 years to serve and a maximum composite sentence of 10 years to serve. Lynott also agreed that the statutory aggravating factor AS 12.55.155(c)(4) — use of a dangerous weapon in furtherance of the offense — applied to the second-degree assault conviction. Lynott agreed not to propose any statutory mitigators or to seek referral of his case to the three-judge sentencing panel. There was no agreement as to the amount of suspended time or the length of the term of probation.

At sentencing, the superior court imposed a sentence of 10 years with 4 years suspended (6 years to serve) for the second-degree assault, 5 years with 2 years suspended (3 years to serve) for the first-degree vehicle theft, and 5 years with 3 years suspended (2 years to serve) for the second-degree theft. The court ran one year of the active term for the second-degree theft concurrently with the sentence for the first-degree vehicle theft, making Lynott's composite sentence 19 years with 9 years suspended (10 years to serve) — *i.e.*, a composite sentence within the agreed-upon range.

Lynott now appeals his sentence, raising two claims.

First, Lynott argues that his composite sentence is excessive. He asserts, in particular, that the trial court failed to make adequate findings to justify the imposition of mostly consecutive sentences.

---

[1] AS 11.41.210(a)(2), AS 11.46.360(a)(1), and former AS 11.46.130(a)(1) (pre-July 2014 version), respectively.

[2] Former AS 12.55.125(d)(4), (e)(3) (2017).

We do not have jurisdiction to consider Lynott's excessive sentence claim.[3] Alaska Statute 12.55.120(a) limits a criminal defendant's right of sentence appeal. Under this statute, a defendant who has received a felony sentence exceeding 2 years to serve may appeal the sentence to this Court on the ground that it is excessive "unless the sentence was imposed in accordance with a plea agreement . . . and that agreement provided for imposition of a specific sentence or *a sentence equal to or less than a specific maximum sentence*."[4] This Court's jurisdictional statute specifically incorporates the limitations set out in AS 12.55.120.[5]

We have recognized that a defendant who received a sentence similar to Lynott's had no right to appeal the sentence as excessive under AS 12.55.120(a).[6] But although Lynott does not have the right to appeal his sentence as excessive to this Court, he can petition the Alaska Supreme Court for discretionary sentence review.[7] We

---

[3] If we identify a potential flaw in our subject-matter jurisdiction, we must decide the jurisdictional question before addressing other issues presented in an appeal. *Totemoff v. State*, 905 P.2d 954, 957 (Alaska 1995).

[4] AS 12.55.120(a) (emphasis added).

[5] *See* AS 22.07.020(b).

[6] *Stone v. State*, 2009 WL 795211, at *1, *5 (Alaska App. Mar. 25, 2009) (unpublished), *rev'd on other grounds*, 255 P.3d 979 (Alaska 2011); *cf. Reandeau v. State*, 265 P.3d 1045, 1058-59 (Alaska App. 2011) (interpreting certain right-to-appeal provisions in AS 12.55.120(a), (e) as determined by a defendant's time to serve), *rev'd on other grounds*, 2014 WL 1779312, at *1 (Alaska App. April 30, 2014) (unpublished).

[7] *See* Alaska R. App. P. 215(a)(5) (providing the supreme court with jurisdiction to take discretionary review of sentences falling outside this Court's jurisdiction); *Stone*, 255 P.3d at 983 (holding that an indigent defendant has the right to court-appointed counsel in filing a petition for sentence review under these circumstances).

therefore transfer this portion of Lynott's appeal to the Alaska Supreme Court under Alaska Appellate Rule 215(k).[8]

Lynott's second argument is one that we can resolve because it involves an assertion that the sentencing judge incorrectly applied the law when sentencing Lynott.

Lynott argues that he should have been sentenced for a misdemeanor-level theft rather than a felony-level theft because the legislature altered the definition of second-degree theft between the date of his original offense and the date of his sentencing hearing. At the time of Lynott's offense in early 2014, second-degree theft, a class C felony, was defined in relevant part as the theft of property or services of $500 or more.[9] Later in 2014, the legislature increased this minimum threshold to $750,[10] and in 2016, the legislature further increased the threshold to $1,000.[11]

Lynott acknowledges that he was properly convicted of felony-level theft under the law that existed at the time of his offense. But he argues that because the value of the items stolen was more than $500 but less than $750 — conduct that would constitute a class A misdemeanor at the time of his *sentencing* — his sentence should be no greater than that applicable to a class A misdemeanor.

---

[8] *See* Alaska R. App. P. 215(k) (directing this Court to refer sentence challenges outside its jurisdiction to the supreme court after resolving merit issues).

[9] Former AS 11.46.130(a)(1) (pre-July 2014 version).

[10] SLA 2014, ch. 83, § 4 (effective July 17, 2014).

[11] SLA 2016, ch. 36, § 6. The legislature has since reduced the threshold to $750. SLA 2017, ch. 1, § 2.

This argument is without merit. Lynott pleaded to, and was convicted of, a class C felony. He was therefore subject to the presumptive range applicable to class C felonies.[12]

As it happens, by the time Lynott was sentenced in 2017, the legislature had reduced the presumptive range for a third felony offender convicted of a class C felony — from 3 to 5 years to 2 to 5 years. Because this ameliorative sentencing enactment was applicable to sentences imposed on or after its effective date (July 12, 2016), Lynott did receive the benefit of that reduction.[13] (Indeed, the superior court imposed the lowest active sentence within the applicable presumptive range — 2 years to serve — and ran one of those years concurrently with Lynott's sentence for the first-degree vehicle theft conviction. As a result, Lynott — who has multiple prior theft convictions — effectively received one year to serve for his second-degree theft conviction.)

To the extent that a defendant might have an argument for a non-statutory mitigator under these circumstances,[14] Lynott waived that argument by entering into a plea agreement that precluded him from requesting referral of his case to the statewide three-judge sentencing panel.

Accordingly, with respect to Lynott's claim that he should have been sentenced for a misdemeanor-level theft, we AFFIRM the judgment of the superior court.

---

[12] *See* former AS 12.55.125(e) (2017); *see also Yako v. State*, 317 P.3d 627, 629 (Alaska App. 2014) (distinguishing between an ameliorative sentencing change and a change in the classification of the offense itself).

[13] *Compare* former AS 12.55.125(e)(3) (pre-July 2016 version), *with* former AS 12.-55.125(e)(3) (2017).

[14] *See Smith v. State*, 2019 WL 5787951, at *3 (Alaska App. Nov. 6, 2019) (unpublished).

With respect to Lynott's excessive sentence claim, we TRANSFER this case to the Alaska Supreme Court under Appellate Rule 215(k).