IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CHRIS N. NELSON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13343 Trial Court No. 3AN-15-04846 CI MEMORANDUM OPINION No. 7009 — June 8, 2022

Appeal from the Superior Court, Third Judicial District, Anchorage, Kevin M. Saxby, Judge.

Appearances: Sharon Barr, Assistant Public Defender, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Matthias R. Cicotte, Assistant Attorney General, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

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

Judge ALLARD.

In 1982, the Alaska legislature amended AS 12.55.025 to require trial courts to run any sentence in a new criminal case consecutively to any term of

imprisonment imposed in an earlier criminal case.[1] (Prior to this amendment, trial courts had the discretion to impose the new sentence concurrently with prior sentences.[2]) This new consecutive sentencing statutory provision went into effect on October 1, 1982.[3]

In 1985, Chris N. Nelson was arrested and charged with first-degree sexual assault and kidnapping. At the time of his arrest, Nelson was on parole for two prior felony convictions from 1981 and 1982. Nelson's parole was revoked based on the new charges, and the parole board imposed the remaining time from the older cases, 356 days to serve. Nelson was ultimately convicted of first-degree sexual assault and kidnapping and sentenced to a composite sentence of 40 years to serve.[4] In accordance with the post-1982 law, the two sentences — *i.e.*, the parole sentence and the new sentence — were run consecutively.

Nelson subsequently filed an application for post-conviction relief, alleging that the sentences should have run concurrently under the pre-1982 law because the conduct underlying his prior convictions preceded the effective date of the 1982 statute. According to Nelson, if the sentences had been run concurrently, then Nelson would not have been on supervised parole beyond July 2012, and his subsequent parole revocations would be invalid.

The superior court denied Nelson's application, ruling that the post-1982 statute controlled. The superior court also rejected Nelson's claim that the sentencing

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[1] Former AS 12.55.025(e) (1983); SLA 1982, ch. 143, § 24. This statutory provision was later moved to AS 12.55.127(a). *See* SLA 2004, ch. 125, §§ 3, 7.

[2] *See* former AS 12.55.025(e) (1981).

[3] SLA 1982, ch. 143.

[4] Nelson was initially convicted of these charges in 1986. However, his convictions were reversed by this Court. *See Nelson v. State*, 781 P.2d 994, 995 (Alaska App. 1989). Nelson was then retried and again convicted. His new sentencing occurred in 1991.

judge in the 1985 case had intended Nelson to serve 40 years total, including the 356 days imposed by the parole board. This appeal followed.

On appeal, Nelson renews his argument that the pre-1982 sentencing law should apply to his case. But, as Nelson acknowledges, we have already rejected a similar argument in other cases. In *Sanders v. State*, the defendant argued that the trial court had the authority to run his new sentence for a 1984 conviction concurrently with the time imposed by the parole board for a 1978 conviction.[5] We disagreed, holding that the plain meaning of the post-1982 statutory provision, AS 12.55.025(e), required the two sentences to run consecutively.[6] We reached similar conclusions in *Jennings v. State*[7] and *Wells v. State*.[8]

Nelson argues that these decisions are "inapplicable" because none of them directly addressed his claim that failure to apply the pre-1982 statute would violate the state and federal constitutional prohibition against *ex post facto* laws. Nelson is correct that the prior cases did not directly address this *ex post facto* argument. Accordingly, we do so now.

"The ex post facto clauses of the state and federal constitutions prevent the legislature from enacting a statute that retroactively makes the punishment for a crime more burdensome."[9] Nelson argues that application of the post-1982 consecutive sentencing statute to his 1985 offense violates the state and federal *ex post facto* clauses

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[5] *Sanders v. State*, 718 P.2d 167 (Alaska App. 1986).

[6] *Id.* at 168.

[7] *Jennings v. State*, 713 P.2d 1222, 1223-24 (Alaska App. 1986).

[8] *Wells v. State*, 706 P.2d 711, 713 (Alaska App. 1985).

[9] *James v. State*, 244 P.3d 542, 545-56 (Alaska App. 2011); *see also* U.S. Const. art. I, § 10; Alaska Const. art. I, § 15.

because it purportedly makes the punishment for his earlier 1981 and 1982 crimes "more burdensome."

We find no merit to this claim. The enactment of the mandatory consecutive sentencing statutory provision in 1982 did not alter the punishment that Nelson faced for his 1981 and 1982 offenses. It only meant that if Nelson committed a new crime after 1982, the sentence for that new crime could not run concurrently with the sentences for those earlier cases.[10] Moreover, Nelson was on notice since 1982 that this consequence would occur if he committed a new crime.[11] Accordingly, we hold that application of the post-1982 sentencing statute to Nelson's 1985 offense does not violate the *ex post facto* clauses.

We also find no merit to Nelson's claim that his sentence for the 1985 offense should be revised to account for what Nelson claims was the sentencing court's intent that he serve 40 years, inclusive of the 356 days imposed by the parole board. As the superior court found, there is nothing in the record to support Nelson's contention that this was the sentencing court's intent. On the contrary, the court's sentencing remarks indicate that the court intended to impose an aggravated sentence because it found that Nelson was a "dangerous person" who was "reasonably likely to commit other rapes and kidnappings unless [he was] incarcerated for a long period of time." Moreover, given that the post-1982 law required the two sentences to run consecutively,

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[10] *See Danks v. State*, 619 P.2d 720, 722 (Alaska 1980) (rejecting similar *ex post facto* argument with regard to habitual offender statute); *Gryger v. Burke*, 334 U.S. 728, 732 (1948) (same).

[11] *See Weaver v. Graham*, 450 U.S. 24, 30-31 (1981) ("Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.").

there was no reason to believe that the sentencing court ever considered the possibility that the two sentences could run concurrently.

The judgment of the superior court is AFFIRMED.