IN THE COURT OF APPEALS OF THE STATE OF ALASKA

THOMAS JACK JR., Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13471 Trial Court No. 1JU-09-00194 CR MEMORANDUM OPINION No. 7010 — June 8, 2022

Appeal from the Superior Court, First Judicial District, Juneau, Philip M. Pallenberg, Judge, and the Statewide Three-Judge Sentencing Panel, Trevor Stephens, Anna Moran, and Michael McConahy, Judges.

Appearances: Margot O. Knuth, Attorney at Law, La Conner, Washington, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Eric A. Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

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

Judge WOLLENBERG.

Thomas Jack Jr. appeals his composite sentence for multiple counts of sexual abuse of a minor. For the reasons we explain in this opinion, we reject Jack's claims and affirm his sentence.

Underlying facts and proceedings

In 2010, a jury found Thomas Jack Jr. guilty of three counts of first-degree sexual abuse of a minor and three counts of second-degree sexual abuse of a minor for conduct involving his eleven-year-old foster daughter.[1] The superior court imposed a composite sentence of 50 years and 3 days with 10 years suspended (40 years and 3 days to serve) — the lowest active term of imprisonment permitted under the sentencing statutes in the absence of a mitigating factor or referral to the statewide three-judge sentencing panel.[2]

Jack appealed his convictions and sentence. In a 2014 decision, we rejected most of Jack's challenges, including his claim that the sentencing judge should have referred his case to the three-judge panel *sua sponte*.[3] However, we agreed with Jack that the sentencing judge erred in failing to merge two of the second-degree sexual abuse

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[1] AS 11.41.434(a)(3) and AS 11.41.436(a)(5), respectively.

[2] Jack's offenses occurred in 2008, and he was therefore subject to the higher sentencing ranges for sexual felonies enacted by the legislature in 2006. SLA 2006, ch. 14, § 4. As a first felony offender, Jack faced a presumptive range of 25 to 35 years on each first-degree sexual abuse of a minor count and 5 to 15 years on each second-degree sexual abuse of a minor count. *See* AS 12.55.125(i)(1)(A)(i) (first-degree sexual abuse of a minor); AS 12.55.125(i)(3)(a) (second-degree sexual abuse of a minor). Sentencing for these offenses is additionally subject to various consecutive sentencing rules. *See* AS 12.55.127(c)(2)(E)-(F), (e)(3).

[3] *Jack v. State*, 2014 WL 5799455, *2-7 (Alaska App. Nov. 5, 2014) (unpublished).

of a minor counts into two of the first-degree sexual abuse of a minor convictions.[4] We therefore remanded Jack's case with directions to merge the relevant counts and resentence Jack.[5]

While Jack's appeal was pending, two developments in the law relating to the three-judge panel occurred.

First, in 2012, we decided *Collins v. State* (*Collins I*).[6] In *Collins I*, we reviewed the legislative history accompanying the 2006 increase in presumptive sentencing ranges for sexual felonies, and based on that history, we recognized two new grounds for referral to the three-judge panel for defendants subject to the increased sentencing ranges.[7] In particular, we held that these defendants were entitled to referral to the three-judge panel if they could show, by clear and convincing evidence, that the legislative assumptions underlying the increased sentencing ranges did not apply to them — either because (1) they did not have a history of unprosecuted sexual offenses, or (2) they had rehabilitative prospects that were "good" or "normal," even if not "extraordinary."[8]

Then, in 2013, a second event occurred: the legislature overturned our decision in *Collins I* by amending the statutes governing the three-judge panel.

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[4] *Id.* at *7.

[5] *Id.* at *8.

[6] *Collins v. State*, 287 P.3d 791 (Alaska App. 2012) (*Collins I*), *superseded by statute*, SLA 2013, ch. 43, §§ 22-23 (codified at AS 12.55.165(c) and AS 12.55.175(f)).

[7] *Id.* at 794-97.

[8] *Id.* at 797. Judge Bolger dissented, disagreeing with the majority that the legislative history underlying the 2006 increase in presumptive ranges for sexual felonies justified additional grounds for referral to the three-judge panel. *See id.* at 797-99 (Bolger, J., dissenting).

Specifically, the legislature barred referral to (and sentencing by) the panel based solely on the claim that the defendant had either "a history free of unprosecuted, undocumented, or undetected sexual offenses" or "prospects for rehabilitation that are less than extraordinary" (or both).[9] In the uncodified session law, the legislature expressly declared that, when it increased the sentences for sexual felonies in 2006, it had not intended to create new or additional means for these defendants to obtain referral to the three-judge panel.[10]

On remand following our 2014 decision, Jack argued for the first time that the sentencing judge should refer his case to the three-judge panel.

Under AS 12.55.165, a sentencing judge shall refer a defendant's case to the three-judge sentencing panel if one of two circumstances exist: (1) the judge concludes that imposition of the prescribed presumptive sentence would be manifestly unjust, or (2) the defendant proves a non-statutory mitigator like extraordinary potential for rehabilitation, and the judge concludes that it would be manifestly unjust to fail to consider that non-statutory mitigator in imposing the defendant's sentence.[11] Jack argued that he had extraordinary potential for rehabilitation and that imposition of a sentence within the presumptive range would be manifestly unjust based on his minimal criminal history, his support in the community, and his rehabilitative efforts since he committed

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[9] SLA 2013, ch. 43, §§ 22-23 (codified at AS 12.55.165(c) and AS 12.55.175(f)).

[10] *See* SLA 2013, ch. 43, § 1(b)-(c) ("It is the intent of the legislature in AS 12.55.165, as amended by sec. 22 of this Act, and AS 12.55.175, as amended by sec. 23 of this Act, to overturn the majority decision in *Collins v. State*, 287 P.3d 791 (Alaska App. 2012), and to endorse the dissenting opinion in the same case.").

[11] *See Olmstead v. State*, 477 P.3d 656, 661 (Alaska App. 2020) (citing *Daniels v. State*, 339 P.3d 1027, 1030 (Alaska App. 2014)); *Beltz v. State*, 980 P.2d 474, 480-81 (Alaska App. 1999).

his offenses.[12] Jack also argued that he was entitled to referral based on our decision in *Collins I*.

Following a hearing, the sentencing judge found that Jack had not established either the non-statutory mitigating factor of extraordinary potential for rehabilitation or that imposition of a sentence within the presumptive range would be manifestly unjust. The judge noted that Jack was a foster parent who had repeatedly abused a vulnerable child in his care. The judge also found that Jack had expressed no remorse for his crimes, and that he had not established the existence of any situational factors that accounted for his offenses or that the circumstances leading to his criminal conduct were unlikely to recur.

The sentencing judge nonetheless determined that, while Jack did not have "extraordinary" prospects for rehabilitation, he had established that his prospects for rehabilitation were sufficiently favorable to qualify him for referral to the three-judge panel under *Collins I*. Further, the judge concluded that applying the 2013 statutory amendments overturning *Collins I* to Jack's case would violate the constitutional prohibition on *ex post facto* laws.[13] The judge therefore referred Jack's case to the three-judge panel solely on one of the two *Collins I* factors — that Jack had "good" or "normal" prospects for rehabilitation.

In advance of Jack's appearance before the three-judge panel, both the State and Jack filed sentencing memoranda. The State asked the panel to revisit the legality of the sentencing judge's referral, arguing *inter alia* that *Collins I* did not apply to Jack's

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[12] Jack also appeared to argue that referral to the three-judge panel was warranted on the basis of other non-statutory mitigating factors. But neither the sentencing judge nor the three-judge panel addressed these arguments, and Jack does not discuss them in his briefing on appeal.

[13] U.S. Const. art. I, § 9; Alaska Const. art. I, § 15.

case. Jack in turn reiterated his claim that applying the 2013 legislative amendments to his case would violate the *ex post facto* prohibition and that Jack satisfied the *Collins I* factors. In the alternative, Jack argued that the panel should reconsider the grounds for referral that the sentencing judge had rejected. He also asserted — for the first time — that his offense made him ineligible for discretionary parole absent action by the panel, and he asked the panel to declare him eligible for discretionary parole after serving half of the sentence imposed. (As we explain later, Jack was mistaken that he is ineligible for discretionary parole.)

At a hearing, the three-judge panel questioned its authority to proceed with the sentencing. The panel rejected the sentencing judge's conclusion that applying the 2013 legislation overturning *Collins I* to Jack's case would violate the *ex post facto* prohibition, since Jack committed his offense in 2008, before *Collins I* was decided.[14] The panel therefore concluded that it had no authority to consider Jack's case on the basis of "good" rehabilitative potential, and it solicited the parties' recommendations on how to proceed. The parties disagreed over whether the panel could consider Jack's case on an alternative basis.

Ultimately, the panel declined to reconsider the grounds that had been expressly rejected by the sentencing judge (a decision that Jack does not challenge on appeal). With respect to Jack's request for increased discretionary parole eligibility, the panel recognized that, as a general matter, it had the authority to expand a defendant's

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[14] The panel acknowledged that, even though the legislature had rejected the *Collins I* factors, the circumstances identified in *Collins I* — whether a defendant lacked a history of sexual offenses and had good rehabilitative potential — may still be considered in the context of a claim that manifest injustice would result from sentencing a defendant within the presumptive range. *See State v. Seigle*, 394 P.3d 627, 635 (Alaska App. 2017).

discretionary parole eligibility.[15] But the panel declined to do so under the unique facts of this case — where the panel lacked the legal authority to even *consider* the grounds on which the judge had referred the case.[16] In other words, the panel found that, because the referral itself was prohibited by statute, it lacked jurisdiction to fashion the remedy that Jack was requesting.

On remand from the three-judge panel, Jack requested re-referral to the panel, arguing that, because he was statutorily ineligible for parole, manifest injustice would result from the failure to make him eligible for discretionary parole at some point. The sentencing judge denied Jack's request, finding neither Jack nor Jack's offense to be sufficiently atypical to establish manifest injustice.

The court proceeded to sentence Jack to a composite sentence of 50 years and 1 day with 10 years suspended (40 years and 1 day to serve) — the minimum active term within the presumptive range, in light of the merger that we had previously mandated.

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[15] *See Luckart v. State*, 314 P.3d 1226, 1234 (Alaska App. 2013).

[16] *See* AS 12.55.175(f), which provides:

> A defendant being sentenced for a sexual felony under AS 12.55.125(i) may not establish, nor may the three-judge panel find under (b) of this section or any other provision of law, that manifest injustice would result from imposition of a sentence within the presumptive range based solely on the claim that the defendant, either singly or in combination, has
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> (1) prospects for rehabilitation that are less than extraordinary; or
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> (2) a history free of unprosecuted, undocumented, or undetected sexual offenses.

Why we affirm Jack's sentence

On appeal, Jack raises several claims regarding the three-judge panel's decision to decline to impose sentence and the sentencing judge's refusal to re-refer his case to the panel.

Jack first argues that the three-judge panel had no authority to reevaluate the sentencing judge's legal conclusion regarding his *ex post facto* claim. Our prior case law casts doubt on this premise.[17] However, even assuming that Jack is correct, we conclude that Jack's claim is moot, as there is no remedy available to him in light of our recent decision in *Collins II*.

In *Collins II*, we rejected this same *ex post facto* claim.[18] We held that the 2013 statutory amendments overturning *Collins I* constituted "clarifying legislation" that did not change Alaska law, but rather, clarified the meaning of the 2006 sentencing law.[19] Accordingly, we concluded that the defendant in *Collins* — who, like Jack, had committed a sexual felony in 2008 — was not entitled to referral to the three-judge panel on the grounds previously identified in our decision in *Collins I*:

> [D]espite what was said in the *Collins* majority opinion, the 2006 sentencing statute did not expand the grounds for seeking referral to the three-judge panel. Accordingly, under Alaska sentencing law as it existed in 2008 (when Collins committed his crime), Collins was not entitled to seek referral

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[17] *See Winther v. State*, 749 P.2d 1356, 1359-60 (Alaska App. 1988) ("The three-judge panel is not bound . . . by the trial court's evaluation of the facts or determination of the law.").

[18] *Collins v. State*, 494 P.3d 60, 64-65 (Alaska App. 2021) (*Collins II*).

[19] *Id.* at 70.

> to the three-judge panel based solely on the two grounds identified in the *Collins* majority opinion.[20]

Stated differently, we held that, because the 2013 law clarified the intent of the 2006 law, "application of the clarified law to Collins (and to other similarly situated offenders) does not violate the *ex post facto* clause of either the federal or the Alaska constitution."[21]

Thus, even if we were to remand Jack's case to the three-judge panel, the panel would have no authority — under the 2013 law, as codified at AS 12.55.175(f) — to impose a sentence based solely on Jack's prospects for rehabilitation that were less than extraordinary. Jack's challenge is therefore moot. And based on our decision in *Collins II*, we also reject Jack's substantive claim that application of the 2013 law to his case constitutes an unconstitutional *ex post facto* law.

Jack next argues that the three-judge panel should have considered his request for expanded discretionary parole eligibility. But Jack's claim was premised on his mistaken belief that he is not eligible for parole. Under the law that existed at the time of his offenses, Jack remains eligible for both mandatory and discretionary parole — and as the State notes, he will be eligible for discretionary parole after serving just over half of his active term of imprisonment.[22]

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[20] *Id.* at 65.

[21] *Id.* at 73. We note that the Alaska Supreme Court has granted the defendant's petition for hearing in *Collins II*, and the case is currently in the briefing stage.

[22] *See* former AS 33.16.090(b)(2), (b)(7)(C) (2008) & former AS 33.20.010(a) (2008). The legislature has since eliminated mandatory and discretionary parole eligibility for individuals serving a sentence for an unclassified sexual felony offense (although the three-judge panel may allow for discretionary parole eligibility). *See* AS 33.16.090(a)(1)(E) (enacted by FSSLA 2019, ch. 4, § 106) & AS 33.20.010(a)(3)(B) (enacted by SLA 2013, ch. 43, § 33).

Moreover, the panel correctly concluded that it was legally precluded from sentencing Jack on the sole basis on which the sentencing judge referred Jack's case — that he had "good" or "normal" prospects for rehabilitation. And the sentencing judge had expressly declined to refer Jack's case to the three-judge panel on other grounds.[23] Under these unique circumstances, the panel lacked the jurisdiction to craft the remedy Jack was requesting. (The panel nonetheless left open the option for Jack to request re-referral from the sentencing judge — which Jack later did.)

Finally, Jack argues that the sentencing judge should have re-referred his case to the three-judge panel following the remand from the panel. We have independently reviewed the sentencing record in this case. Given the judge's findings that Jack's rehabilitative potential was "speculative at best," that he had not shown any remorse, and that he had failed to establish that the circumstances leading to these offenses were unlikely to recur — findings which Jack does not challenge — we conclude that the sentencing judge was not clearly mistaken in concluding that a sentence within the presumptive range would not be manifestly unjust, particularly given that Jack is, in fact, eligible for discretionary parole.

Conclusion

The judgment of the superior court is AFFIRMED.

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[23] *See, e.g.*, *Luckart v. State*, 270 P.3d 816, 821 (Alaska App. 2012) ("The commentary to AS 12.55.175 strongly suggests that the jurisdiction of the three-judge panel is limited by the scope of the referral from the sentencing court.").