IN THE COURT OF APPEALS OF THE STATE OF ALASKA

STEPHEN JOSEPH HARMON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13760 Trial Court No. 4FA-13-02849 CI MEMORANDUM OPINION No. 7013 — June 22, 2022

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Michael A. MacDonald, Judge.

Appearances: Stephen Harmon, *in propria persona*, Wasilla, Appellant. Nancy R. Simel, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

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

Judge HARBISON.

Stephen Joseph Harmon appeals the superior court's denial of his motion to vacate his 1993 criminal judgment under Alaska Civil Rule 60(b). For the reasons explained in this opinion, we affirm the ruling of the superior court.

Procedural background

In 1993, following a jury trial, Harmon was convicted of first-degree murder and first-degree sexual assault.[1] He was sentenced to maximum consecutive sentences of 99 years for the murder and 30 years for the sexual assault, and his discretionary parole eligibility was restricted for 99 years.[2] Harmon appealed, and this Court affirmed his convictions and composite sentence.[3]

Harmon then filed a series of applications for post-conviction relief. In 2013, he filed his fifth application for post-conviction relief, but he ultimately converted this application into a motion to correct an illegal sentence under Alaska Criminal Rule 35(a). In that motion, Harmon argued that his sentence was rendered unlawful by the United States Supreme Court's decision in *Blakely v. Washington*, which explained that the federal constitutional right to a jury trial extends to any fact (other than a prior conviction) that increases the maximum sentence a judge may impose.[4] The superior court denied the motion and, in 2017, this Court affirmed the superior court's decision.[5]

In affirming the superior court's ruling, we held that *Blakely* did not apply to Harmon's sentence for first-degree murder because the sentencing range for first-degree murder is not governed by presumptive sentencing and therefore is not affected by aggravating or mitigating factors that would implicate the constitutional right to a jury

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1 *Harmon v. State*, 908 P.2d 434, 435 (Alaska App. 1995).

2 *Id.*

3 *Id.*

4 *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004).

5 *Harmon v. State*, 2017 WL 540969 (Alaska App. Feb. 8, 2017) (unpublished).

trial.[6] We also held that *Blakely* did not apply in Harmon's case because *Blakely* was not retroactive and Harmon's convictions were final more than eight years before *Blakely* was decided.[7]

In February of 2020, Harmon filed a Civil Rule 60(b) motion to vacate his 1993 criminal judgment, asserting that the judgment was void. In this motion, Harmon argued that the United States Supreme Court's decision in *Montgomery v. Louisiana*[8] established that *Blakely* was fully retroactive, that his 1993 composite sentence was unconstitutional, and that his composite sentence was void. The superior court denied Harmon's motion. This appeal followed.

Harmon's challenges to the 1993 sentencing statutes

On appeal, Harmon renews the arguments he made in the superior court. First, Harmon argues that the Supreme Court's opinion in *Montgomery v. Louisiana* establishes that *Blakely* applies to both his presumptive sentence for first-degree sexual assault and to his entire 1993 composite sentence.

But Harmon miscomprehends the *Montgomery* decision. In *Montgomery,* the Supreme Court held that a different rule is fully retroactive — the rule from *Miller v. Alabama*[9] that mandatory life sentences without parole for juvenile homicide offenders

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[6] *Id.* at *2; *see also Malloy v. State*, 153 P.3d 1003, 1008-09 (Alaska App. 2007).

[7] *Harmon*, 2017 WL 540969, at *2; *see State v. Smart*, 202 P.3d 1130, 1147 (Alaska 2009) (concluding that the *Blakely* rule is not fully retroactive under Alaska law).

[8] *Montgomery v. Louisiana*, 577 U.S. 190 (2016).

[9] *Miller v. Alabama*, 567 U.S. 460, 465 (2012).

are unconstitutional.[10] Neither the *Montgomery* decision nor the *Miller* decision has any bearing on whether *Blakely* is retroactive. Moreover, *Blakely* was never applicable to the sentence Harmon received for his first-degree murder conviction because the sentencing range for first-degree murder is not affected by aggravating or mitigating factors.[11]

Harmon next argues that, under *Blakely*, the presumptive sentencing scheme for his first-degree sexual assault conviction was unconstitutional and therefore void *ab initio*.[12] But Harmon is incorrect.

"A statute is void *ab initio* under a new constitutional rule . . . only if the new rule renders the statute facially unconstitutional."[13] And a statute is considered facially unconstitutional only if "no set of circumstances exists under which the [statute] would be valid."[14]

Alaska's pre-*Blakely* presumptive sentencing scheme was not facially unconstitutional because there were circumstances under which the sentencing scheme was valid even after *Blakely* was decided. For instance, despite the *Blakely* rule, a judge

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[10] *Montgomery*, 577 U.S. at 212.

[11] *See Malloy*, 153 P.3d at 1008-09.

[12] *See Vik v. Com. Fisheries Entry Comm'n*, 636 P.2d 597, 601 n.9 (Alaska 1981). We note that "void *ab initio*" means "void from the beginning." *See Starkey v. State*, 382 P.3d 1209, 1212 (Alaska App. 2016).

[13] *Lucien v. Briley*, 821 N.E.2d 1148, 1150 (Ill. 2004).

[14] *Javed v. Dep't of Pub. Safety, Div. of Motor Vehicles*, 921 P.2d 620, 625 (Alaska 1996) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); *see also Lucien,* 821 N.E.2d at 1150 ("A statute is facially unconstitutional if there are no circumstances in which it could be validly applied.").

may impose an enhanced maximum sentence for an offense if the aggravating factors were based on the defendant's prior convictions, or were conceded by the defendant.[15] Thus, even if *Blakely* applied to either of Harmon's sentences, the statutes he was sentenced under would not be void *ab initio*.

Harmon also argues that this Court's decision in *West v. State* stands for the proposition that the 2005 presumptive sentencing scheme, which was enacted in response to *Blakely*, did not adequately address the *Blakely* problems in the statute and that, as a result, the previous statute (which was in effect at the time he was sentenced) is unconstitutional.[16] We conclude that this circular argument bears no resemblance to our actual holding in *West*.

In *West*, we explained that when the legislature enacted the 2005 sentencing laws, it neglected "to specify the identity of the fact-finder (sentencing judge or jury) who would resolve disputes concerning the sentence enhancement factors listed in AS 12.55.125(c)(2)," and also neglected "to specify the burden of proof that would govern that litigation."[17] But we did not then hold that the 2005 presumptive sentencing scheme was unconstitutional — rather, we corrected these two oversights, thereby ensuring that the scheme was constitutional.

Harmon's additional claims

Harmon raises several claims relating to the superior court's order granting the State an extension of time to respond to his Civil Rule 60(b) motion and the date of

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[15] *See Alexiadis v. State*, 355 P.3d 570, 572 (Alaska App. 2015); *Blakely v. Washington*, 542 U.S. 296, 301-04 (2004).

[16] *West v. State*, 223 P.3d 634 (Alaska App. 2010).

[17] *Id.* at 638.

the filing of the State's response. We have reviewed the record and conclude that the superior court's procedural decisions were not an abuse of its discretion and that its actions did not prevent Harmon from litigating his Rule 60(b) motion. We accordingly reject these claims of error.

Harmon also claims that the superior court erred by denying his motion for reconsideration of its denial of the Rule 60(b) motion, and by denying his related request to supplement the record. But in his motion for reconsideration, Harmon largely reiterated arguments that the superior court had already adequately considered. And in his request to supplement the record, Harmon asked the court to consider additional evidence that he had not timely presented to the court. Harmon accordingly has not shown that the superior court's decision to deny these motions was an abuse of discretion.[18]

Conclusion

For these reasons, we AFFIRM the judgment of the superior court.[19]

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[18] *See Smith v. Groleske*, 196 P.3d 1102, 1105-06 (Alaska 2008).

[19] Harmon's brief and superior court pleadings are difficult to read and to understand, and he may have intended to raise other claims besides the ones discussed here. To the extent that Harmon was attempting to raise other claims in his brief, these claims are inadequately briefed. *See Petersen v. Mut. Life Ins. Co. of N.Y.*, 803 P.2d 406, 410 (Alaska 1990) (issues that are only cursorily briefed are deemed abandoned); *see also A.H. v. W.P.*, 896 P.2d 240, 243-44 (Alaska 1995) (waiving for inadequate briefing the majority of the fifty-six arguments raised by *pro se* appellant).