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

MICHAEL BRINK,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals Nos. A-12324 & A-12333
Trial Court Nos. 4BE-14-00425 CR & 4BE-14-00343 CR

MEMORANDUM OPINION

No. 7072 — September 20, 2023

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

Appearances: Bradly A. Carlson, Attorney at Law, under contract with the Public Defender Agency, and Samantha Cherot, Public Defender, 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: Wollenberg, Harbison, and Terrell, Judges.

Judge HARBISON.

Michael Brink pleaded guilty to two counts of second-degree sexual abuse of a minor for conduct that occurred when he was twenty and twenty-one years old.[1] As

[1] AS 11.41.436(a)(2) and AS 11.41.436(a)(1), respectively.

a first felony offender, Brink was subject to a presumptive range of 5 to 15 years for each offense.[2] But because Brink admitted that two aggravating factors applied to his conduct, the superior court was authorized to impose a sentence outside of the presumptive range. The court ultimately imposed a composite sentence of 85 years with 20 years suspended (65 years to serve). The active term of imprisonment was over twice as long as the recommendation made by both the State and the Department of Corrections.

On appeal, Brink argues that his sentence is excessive. Because we conclude that the court did not provide sufficient findings to support the sentence it imposed, we remand this matter to the superior court for further proceedings.

Background facts and proceedings

Brink was charged in two cases with a total of four counts of second-degree sexual abuse of a minor, one count of second-degree sexual assault, and one count of first-degree harassment.[3] In one case, Brink was accused of: (1) touching twelve-year-old J.N. on her breasts and vagina over her clothing (two counts of second-degree sexual abuse of a minor), and on her buttocks under her clothing (one count of first-degree harassment); and (2) touching eleven-year-old L.S. on her vagina over her clothing (one count of second-degree sexual abuse of a minor). This conduct occurred when Brink was twenty years old. In the second case, Brink was accused of engaging in penile-vaginal penetration with thirteen-year-old C.A. while she was incapacitated when he was twenty-one years old (one count of second-degree sexual abuse of a minor and one count of second-degree sexual assault). At the State's request, the cases were joined for trial.

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[2] AS 12.55.125(i)(3)(A); former AS 12.55.125(o) (pre-July 2016).

[3] AS 11.41.436(a)(1)-(2), AS 11.41.420(a)(3), and AS 11.61.118(a)(2), respectively.

Brink ultimately entered into a plea agreement with the State to resolve both cases. Pursuant to the agreement, Brink pleaded guilty to one consolidated count of second-degree sexual abuse of a minor (for the offenses against J.N. and L.S.) and one count of second-degree sexual abuse of a minor (for the offense against C.A.). Because Brink had not been previously convicted of a felony, the presumptive range for each count of second-degree sexual abuse of a minor was 5 to 15 years with at least 3 years suspended.[4]

As part of the plea agreement, Brink admitted to the facts as described in the police reports and also agreed that two aggravating factors applied to his conduct: (1) that he had previously engaged in the sexual abuse of the same or another victim; and (2) that he had a criminal history of repeated instances of conduct violative of criminal laws similar in nature to the current offense.[5] The agreement left sentencing open to the court, but the State agreed that it would not request an active term of imprisonment outside the presumptive range. (The parties also agreed that the court would impose certain probation conditions.)

There was no discussion during the change of plea hearing about whether Brink's sentences would be partially or entirely consecutive.[6] At the hearing, the court accepted Brink's plea and ordered the preparation of a full presentence report.

The presentence report detailed Brink's juvenile criminal history, which included prior acts of sexual abuse of young girls, and documented the time Brink had previously spent incarcerated and in treatment programs as a minor.

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[4] AS 12.55.125(i)(3)(A); former AS 12.55.125(o) (pre-July 2016).

[5] AS 12.55.155(c)(18)(B) and (21), respectively.

[6] Under AS 12.55.127(c)(2)(F), the court was required to impose "at least some" consecutive time for each additional crime (*i.e.*, at least one day).

The presentence report explained that Brink had previously sexually abused C.A. (who was one of the victims of the present offenses) when he was fourteen to fifteen years old and she was six to seven years old. Before that, he also sexually abused two other young girls. Delinquency petitions were filed against Brink for this conduct, and Brink ultimately admitted that he had committed the offense of fourth-degree sexual abuse of a minor by engaging in sexual contact with C.A. The other petition was dismissed.

The presentence report contained a comprehensive description of Brink's conduct while in the juvenile justice system, as well as the treatment he received. Brink entered juvenile supervision in early 2007, when he was fifteen, as a result of his adjudication for the sexual abuse of C.A. He had significant behavioral and academic problems for the next several years; he was certified as having a learning disability and frequently acted younger than his chronological age.

Brink was placed in the Alaska Children Services sex offender program in October 2007, but was discharged in January 2008 for inappropriate behavior and refusing to participate in treatment. After spending several months in custody at the McLaughlin Youth Center, Brink was placed at the Juneau Youth Services Wallington House residential sex offender treatment program. But he did not do well there either, and, according to the presentence report, "display[ed] an array of distorted thinking errors on a consistent basis." He remained in the Wallington House program for approximately two months. Then, in July 2009, Brink grabbed the crotch of a peer over the clothing and later tried to bribe a witness not to report what the witness saw, resulting in his discharge from the program.

After this, Brink, who was then eighteen years old, was held at the Bethel Youth Facility and at the McLaughlin Youth Facility. During his time in these facilities, his behavior and school work both started to improve. While at McLaughlin, Brink

chose to voluntarily extend his time in state custody until his twentieth birthday, so that he could receive residential sex offender treatment. He entered treatment, continued to exhibit improved behavior, and then successfully completed treatment. He also successfully completed high school with a 3.83 grade point average and earned a University of Alaska scholarship to pursue a college education. Brink left state custody when he turned twenty, in April 2011.

The presentence report noted that, in September 2012, Brink was charged with fourth-degree assault for conduct against his girlfriend. He was ultimately convicted of second-degree harassment and was sentenced to 60 days with 60 days suspended (no time to serve) and 2 years of probation. As part of his probation, he was required to complete an anger management course, which he did.

The author of the presentence report ultimately recommended a composite sentence for the present two offenses of 50 years with 20 years suspended (30 years to serve). The author noted that although Brink had a "disturbing criminal history" and had failed to complete two sex offender treatment programs, he never had the benefit of supervised probation as an adult and might benefit from it. The author also noted that Brink had no disciplinary infractions while incarcerated, and that he had made efforts toward rehabilitation — including making "tremendous improvement" in a third sex offender treatment program and completing an anger management course, a cognitive behavioral program, and substance abuse treatment. The presentence report also noted that Brink was employed at the AC store in Bethel when he was charged with the present offenses. Brink's supervisor stated that Brink was an "excellent" employee who was reliable and never received any negative reports.

Brink's sentencing hearing took place in January 2015, when he was twenty-three years old.[7] The State asked the court to impose the composite sentence recommended by the presentence report (50 years with 20 years suspended), while Brink asked for a sentence at the lower end of the presumptive range.

The superior court's sentencing remarks were brief. In discussing the *Chaney* sentencing criteria,[8] the court stated that its "primary concern" was public safety and isolation. The court explained that it was giving these factors the most weight because, despite the fact that Brink had previously completed treatment, his behavior subsequently escalated and his actions demonstrated that he had "dangerous propensities . . . that pose a clear risk to the public," and because "abusing children appears to be a part of [his] character." The court acknowledged Brink's attorney's arguments about his rehabilitation, and stated that "if that was the only consideration, then that would certainly . . . affect the court's determination in this matter" but the court had "other considerations." With respect to community condemnation and deterrence, the court stated that "sexual felonies are really an epidemic in [the Bethel region]," and that "anyone who has these tendencies needs to understand that this community, this court will not let children, women be victims in sexual felonies."

After making these findings, the superior court imposed 25 years with 10

[7] A note about the age of this appeal: after the final judgment was issued, Brink's attorney filed notices of appeal in each case that were 107 days late. This Court denied the attorney's motions to accept the late-filed appeal. We noted that the cause of the delay had not been adequately explained and that Brink could seek post-conviction relief if he had been denied the right to appeal based on ineffective assistance of counsel. Brink then sought such relief by filing an application for post-conviction relief, and in July 2020, the superior court granted his application, reinstating his right to appeal. After this, Brink moved to reopen his original notices of appeal.

[8] *State v. Chaney*, 477 P.2d 441, 444 (Alaska 1970), *codified in* AS 12.55.005.

years suspended for the consolidated count involving J.N. and L.S., and 60 years with 10 years suspended for the count involving C.A. The court ordered that the terms of imprisonment would be entirely consecutive to one another. This resulted in a composite sentence of 85 years with 20 years suspended — *i.e.*, 65 years to serve. Thus, the active term imposed by the court was 35 years longer than the sentence recommended by the prosecutor and the presentence report author.

This appeal followed.

Why we remand this case to the superior court

On appeal, Brink contends that his sentence is excessive. He points out that the sentences imposed for each count of second-degree sexual abuse of a minor far exceed the presumptive range, and he contends that the superior court did not make specific findings to explain such a departure.

When we review an excessive sentence claim, we independently examine the record to determine whether the sentence is clearly mistaken.[9] In doing so, we consider the sentence in its entirety, including all suspended time — although the suspended portion of the sentence is typically weighed less heavily because it is not as harsh as time to serve.[10]

In *State v. Bumpus*, the defendant claimed that his sentence was excessive, and the Alaska Supreme Court concluded that the trial court had not adequately explained the sentence it imposed.[11] The supreme court faulted the trial court for imposing an "unusually lengthy sentence" without addressing the significance attached

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[9] *See McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974).

[10] *Smith v. State*, 349 P.3d 1087, 1091 (Alaska App. 2015).

[11] *State v. Bumpus*, 820 P.2d 298, 300-03 (Alaska 1991).

to the aggravating factors and without making an explicit finding that the lengthy sentence was necessary to protect the public.[12] Based on these shortcomings, the supreme court determined that the record before it did not support the sentence imposed by the trial court, and it remanded the case for resentencing.[13]

We reach the same result here. In this case, Brink was twenty and twenty-one years old at the time of his offenses, and he was twenty-three years old at the time he was sentenced. The presumptive range for each of his convictions was 5 to 15 years. In spite of his youth and his status as a first felony offender, the superior court imposed a composite active term of imprisonment of 65 years — over twice the sentence requested by the State.

We acknowledge that Brink admitted to two statutory aggravating factors, which allowed the court to impose a sentence outside of the presumptive range (and up to 99 years). But the superior court did not address the significance attached to the aggravating factors, which were both based on conduct Brink committed when he was a minor.[14] Instead, the court provided only a limited explanation of the weight it was assigning to each *Chaney* factor, and it did not mention the presumptive range when it was explaining the sentence it selected. Indeed, the court's sentencing remarks gave little explanation for the total sentence it imposed. Given the abbreviated and

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[12] *Id.* at 304.

[13] *Id.* at 305.

[14] *See DeGoss v. State*, 768 P.2d 134, 138 (Alaska App. 1989) (holding that when a sentencing court finds that aggravating factors have been established, the court is required to explain the weight given to each aggravating factor (and any mitigating factors), and must evaluate the factors in light of the *Chaney* criteria, as expressed in AS 12.55.005, in order to determine the amount by which the presumptive sentence for the particular offense should be adjusted).

generalized nature of the superior court's sentencing remarks, we conclude that the record in this case suffers from the same shortcomings that were described in *Bumpus*.

Both this Court and the Alaska Supreme Court have repeatedly emphasized the importance of a thorough explanation for the sentence imposed.[15] We have recognized that such an explanation "contributes to the rationality of the sentence, facilitates the reviewing court's evaluation of the propriety of the sentence, and fosters public confidence in the criminal justice system."[16] In explaining its sentence, a trial court need not use any particular words, but it must be evident that the court considered how its sentence satisfies the goals of sentencing.[17]

In the present case, the superior court was authorized to impose a sentence of between 5 and 99 years' imprisonment — an extremely broad grant of authority which gave the court nearly unbridled discretion in making its sentencing decision. And it ultimately chose a severe sentence that was far outside of what the defense attorney, the prosecutor, and the presentence report author deemed necessary and the presumptive range.[18] Under these circumstances, given the court's authority to impose a sentence

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[15] *See, e.g.*, *Fletcher v. State*, 532 P.3d 286, 309 (Alaska App. 2023).

[16] *Houston v. State*, 648 P.2d 1024, 1027 (Alaska App. 1982); *see also Perrin v. State*, 543 P.2d 413, 418 (Alaska 1975).

[17] *See Perrin*, 543 P.2d at 417-18.

[18] Sentencing is governed by the principle of parsimony, which provides that a "defendant's liberty should be restrained only to the minimum extent necessary to achieve the objectives of sentencing." *Pears v. State*, 698 P.2d 1198, 1205 (Alaska 1985); *see also ABA Standards for Criminal Justice: Sentencing* § 18-2.4 (3d ed. 1994) ("Sentences authorized and imposed, taking into account the gravity of the offenses, should be no more severe than necessary to achieve the societal purposes for which they are authorized."); *id.* at § 18-6.1(a) ("The sentence imposed should be no more severe than necessary to achieve the societal purpose or purposes for which it is authorized.").

within a wide applicable range, detailed findings were necessary to permit a meaningful review of why the court exercised its discretion as it did.

We conclude that the remarks in this case were insufficient to explain why the court imposed a sentence so far above the presumptive range, and are therefore not robust enough for a meaningful review by this Court. We accordingly remand this matter for further proceedings.

On remand, if the superior court determines that there was a sufficient basis to impose such a lengthy sentence, it shall provide a clear explanation of its reasoning, including why a sentence that departs so dramatically from both the presumptive range and from the State's recommended sentence is warranted by the facts of this case. But if the court determines that there was an insufficient basis to impose the original sentence, the court shall resentence Brink.

An additional issue requiring clarification on remand

We also wish to note one other point of confusion in the record that requires clarification on remand. As we have indicated, the superior court imposed entirely consecutive sentences for Brink's two convictions. However, the court did not explain why it did not impose at least partially concurrent sentences.

As we mentioned, neither party addressed the extent to which the sentences would be served consecutively (*i.e.*, whether they would be fully or only partially consecutive) during Brink's change of plea hearing. And although the written "Rule 11 Offer" form stated that "[a]ll sentences on all counts are consecutive unless indicated otherwise," it also stated that sentencing for Brink's two offenses would be left "open" to the court.

Furthermore, it appears that the court was operating under a mistaken understanding that the law required imposition of entirely consecutive sentences in

Brink's cases. In its sentencing memorandum, the State cited AS 12.55.127(a) to assert that the superior court was required to impose consecutive sentences for Brink's two convictions. And the presentence report also stated that, under AS 12.55.127, the sentences were required to be entirely consecutive. The statute that the State and the presentence report relied upon for this proposition, AS 12.55.127(a), states: "If a defendant is required to serve a term of imprisonment under a separate judgment, a term of imprisonment imposed in a later judgment, amended judgment, or probation revocation shall be consecutive."

But AS 12.55.127(a) is inapplicable to the sentences imposed in Brink's cases. Because the two cases were joined for trial, the judgments were issued at the same time, and neither was based on a crime that was committed after the judgment for the other crime was issued.[19] Instead, under AS 12.55.127(c)(2)(F), the court was only required to impose at least one day of the sentences (for the two convictions) consecutively.

We accordingly direct the superior court on remand to consider whether it had the authority to impose partially concurrent sentences, and if so, to consider whether partially concurrent sentences may be appropriate here.[20]

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[19] *See Smith v. State*, 187 P.3d 511, 515 (Alaska App. 2008) (holding that AS 12.55.127(a) only requires consecutive sentences when the defendant is sentenced for a crime that the defendant committed after judgment was issued against the defendant for an earlier crime).

[20] *See Phelps v. State*, 236 P.3d 381, 386 (Alaska App. 2010) (noting that "multiple offenses normally ought to be punished more harshly than single offenses, but not through the stacking of the individual sentences" (internal quotation marks and citation omitted)).

Conclusion

This case is REMANDED to the superior court for further proceedings consistent with this opinion. We retain jurisdiction.