IN THE COURT OF APPEALS OF THE STATE OF ALASKA

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| ROBERT ROMAN,<br><br>Appellant,<br><br>v.<br><br>STATE OF ALASKA,<br><br>Appellee. | Court of Appeals No. A-13710<br>Trial Court No. 4FA-17-02133 CR<br><br>MEMORANDUM OPINION<br><br>No. 7043 — February 15, 2023 |

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

Appearances: Amanda Harber, Attorney at Law, Soldotna, under contract with the Public Defender Agency, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Madison M. Mitchell, 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 ALLARD.

Robert Roman was convicted, pursuant to a plea agreement, of felony driving under the influence for which he received a sentence of 3 years to serve.[1]

[1] AS 28.35.030(n).

Following a delayed remand, Roman filed a motion for credit under AS 12.55.027(d) for time he spent on electronic monitoring prior to his plea and after his plea during the delayed remand. The superior court denied the motion for credit, finding that Roman was not entitled to any credit because he committed a new crime (third-degree weapons misconduct) while on electronic monitoring. Roman now appeals the superior court's denial of credit. For the reasons explained here, we conclude that a remand for further proceedings is required in this case.

*Factual background*

In November 2017, following his arrest for driving under the influence, Roman was released on bail conditions that included twenty-four-hour GPS electronic monitoring and SCRAM alcohol monitoring. In December 2017, Roman was arrested and charged in a separate case with committing third-degree misconduct involving weapons.[2] In May 2018, the superior court held a new bail hearing in the present case, where the court required that Roman post additional monetary bail and removed the GPS electronic monitoring requirement. But the superior court required that Roman continue to abide by the SCRAM alcohol monitoring requirements previously imposed, and stated that all other conditions of his release would remain the same.

Roman was released from jail under these conditions and, in September 2018, pleaded guilty to driving under the influence in this case. The superior court granted Roman a delayed remand, allowing him to remain out of custody on his conditions of release. Roman reported to the jail to serve his sentence on December 29, 2018, and he subsequently filed a request to receive credit for the time he had served on electronic monitoring. The superior court denied this request, finding that Roman

[2] Roman was also separately charged with violating the conditions of his release in the present case based on the same conduct.

was precluded from receiving any credit for time spent on electronic monitoring because he committed a new criminal offense while under these conditions of release.[3]

*Why we conclude that a remand is needed*

On appeal, Roman does not contest that he committed a new crime while on electronic monitoring, and he agrees that the time he spent on electronic monitoring prior to his bail hearing in May 2018 did not qualify for credit because of the commission of that new crime. But he argues that, subsequent to his bail hearing, the superior court made a new determination that Roman was suitable for bail release on electronic monitoring and the court issued a new order allowing that release. Roman asserts that he is entitled to credit for that *second* period of release, which included the time he spent on his delayed remand.

The State concedes that, under *State v. Bell*, Roman would be entitled to credit for that second period of time *if* he was on twenty-four-hour GPS-based electronic monitoring or its equivalent during that time.[4]

In *Bell*, this Court held that a defendant who has been disqualified from receiving credit because of the commission of a new crime while on electronic monitoring may nevertheless be entitled to credit for a second period of release on electronic monitoring. This Court explained that for a defendant to qualify for credit on the second period of release, the following must occur: (1) the defendant must not commit a new crime during the second period of release, (2) the second period of release must have been preceded by a *new* determination of the defendant's suitability for

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[3] *See* AS 12.55.027(d) ("A court may grant credit against a sentence of imprisonment for time spent under electronic monitoring if the person has not committed a criminal offense while under electronic monitoring[.]").

[4] *State v. Bell*, 421 P.3d 128 (Alaska App. 2018).

release on electronic monitoring, and (3) there must have been a *new* order authorizing that release.[5]

But the State argues that Roman is nevertheless not entitled to any credit for this second period of time because, at the same hearing that the superior court issued the new bail order allowing his release, the superior court also removed the twenty-four-hour GPS component of the electronic monitoring. Thus, after this hearing, Roman was no longer subject to GPS-enabled electronic monitoring that continuously tracked his location twenty-four hours a day, seven days a week. Instead, Roman was only on SCRAM monitoring, a form of electronic monitoring that monitors a defendant's alcohol use but does not continuously track their location.[6] The State asserts that SCRAM-only monitoring is insufficient to qualify as "electronic monitoring" for purposes of obtaining credit under AS 12.55.027(d).

In support of this claim, the State cites to the concurrence in *Belknap v. State*.[7] In *Belknap*, this Court held that a defendant was entitled to counsel to litigate his claim that his SCRAM-only monitoring was sufficiently restrictive to qualify for credit under AS 12.55.027(d). Because Belknap had not received counsel to litigate this claim, we remanded Belknap's case for appointment of counsel and re-litigation of this claim with counsel.[8] However, a separate concurrence by the author of this decision noted that Belknap "face[d] an uphill battle" in demonstrating that SCRAM-only monitoring was sufficient to qualify as "electronic monitoring" for purposes of obtaining credit under

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[5] *Id.* at 131, 133.

[6] *See Belknap v. State*, 426 P.3d 1156, 1159 (Alaska App. 2018) (describing the defendant's claim that his SCRAM-only monitoring program was "sufficiently restrictive to be considered 'electronic monitoring' . . . because Belknap was subject to multiple random breath tests on a daily basis and those random breath tests also automatically recorded his GPS location").

[7] *Id.* at 1161-62 (Allard, J., concurring).

[8] *Id.* at 1160-61 (majority opinion).

AS 12.55.027(d) because the legislative history suggested that the legislature intended "electronic monitoring" to include twenty-four-hour GPS monitoring or its functional equivalent.[9]

The State relies on the *Belknap* concurrence to argue that SCRAM-only monitoring is not comprehensive enough to qualify as "electronic monitoring," and that, therefore, the superior court's denial of credit for the time Roman was on SCRAM-only monitoring should be upheld even though the court's stated basis for its denial — that Roman had committed a new crime while on electronic monitoring — did not apply to that time period.

In response, Roman argues that this Court has not yet decided if SCRAM-only monitoring qualifies for credit under Alaska law. Roman also argues that there is no need to litigate this question in his case because, according to Roman, "the trial court considered and rejected the argument that Roman was not subject to electronic monitoring," and he claims that the superior court's finding of fact that he was on electronic monitoring is supported by the record and should therefore govern the outcome of this appeal.

But the record is more ambiguous than either Roman or the State acknowledges. In its original opposition to Roman's motion for credit, the State argued it was "unclear" whether Roman's SCRAM-only monitoring qualified as "electronic monitoring" for purposes of obtaining credit under AS 12.55.027(d). Roman never responded to this argument, and the superior court did not address this argument because it agreed with the State's alternative argument that Roman was not entitled to any credit because he had committed a new crime while on electronic monitoring. Thus, contrary to Roman's argument on appeal, it is not accurate to state that the superior court "found" that Roman's SCRAM-only monitoring qualifies as "electronic monitoring." Instead, it is more accurate to state that the superior court never reached

[9] *Id.* at 1161-62 (Allard, J., concurring).

this question because it believed that the new crime preclusion applied to the entire time for which Roman was requesting credit.

In any event, whether Roman's SCRAM-only monitoring qualifies as "electronic monitoring" for purposes of obtaining credit under AS 12.55.027(d) is not simply a matter of historical fact. Instead, it is a mixed question of fact and law. That is, although it is a factual question regarding what restrictions SCRAM-only monitoring entails in a given case, it is a legal question whether the legislature intended for such restrictions to qualify as "electronic monitoring" for purposes of obtaining credit under AS 12.55.027(d).

Because the nature of Roman's SCRAM-only monitoring is unclear, and because the superior court never directly addressed the underlying legal question of whether Roman's SCRAM-only monitoring qualifies as "electronic monitoring" for purposes of obtaining credit under AS 12.55.027(d), we conclude that a remand to allow the parties to fully litigate these issues is required.

*Conclusion*

For the reasons explained here, we REMAND this case to the superior court for further proceedings. On remand, Roman should be given an opportunity to introduce additional evidence establishing the restrictiveness of the SCRAM-only monitoring to which he was subject, and the parties may litigate the legal question left open by the *Belknap* decision and concurrence. We do not retain jurisdiction.