IN THE COURT OF APPEALS OF THE STATE OF ALASKA

GARETH DEMOSKI, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13916 Trial Court No. 4FA-08-01877 CR MEMORANDUM OPINION No. 7093 — February 28, 2024

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Brent E. Bennett, Judge.

Appearances: Robert John, Law Office of Robert John, Fairbanks, for the Appellant. RuthAnne Beach, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Bolger, Senior Supreme Court Justice,[*] and Mannheimer, Senior Judge.[*]

Judge ALLARD.

Gareth Demoski appeals the superior court's denial of his motion to vacate two probation conditions that restrict his contact with minors under the age of sixteen

[*] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

even though there is no evidence that he committed any crimes against children that young. We agree with Demoski that the record fails to support the contested probation conditions, and we therefore vacate those conditions.

Relevant facts

In 2009, Gareth Demoski was convicted, following a jury trial, of various felony charges based on evidence that he sexually assaulted two different women (on separate occasions).[1] Demoski was nineteen and twenty years old when he committed these sexual assaults. His victims were seventeen years old and forty-two years old.

Demoski was sentenced to serve a composite term of 38 years, 6 months, and 2 days followed by 15 years' probation. At sentencing, without objection from Demoski's defense attorney, the superior court imposed twelve general conditions of probation and twenty-seven special conditions of probation. Two of the special conditions of probation restrict Demoski's contact with minors under the age of sixteen.

As originally imposed, Special Probation Condition No. 8 prohibited Demoski from having any contact with a person under sixteen years old unless in the immediate presence of an adult who knew the circumstances of Demoski's crime and who had been approved by a probation officer and by Demoski's sex offender treatment provider. The probation condition defines "contact" as including in-person contact, written correspondence, taped conversations, electronic contact (internet or email), telephonic contact, and communication of any nature through a third party.

In addition, Special Probation Condition No. 19 prohibited Demoski from residing with any minors under the age of sixteen unless he receives written permission

[1] Demoski was originally indicted for sexually assaulting three women. However, the jury was unable to reach a verdict on the alleged sexual assault of the third woman, and that charge was ultimately dismissed. *See Demoski v. State*, 2012 WL 4480674, at *1 (Alaska App. Sept. 26, 2012) (unpublished).

from his probation officer, his sex offender treatment provider, and the parent/guardian of the minor.

Because of Special Probation Condition No. 8, the Department of Corrections restricted Demoski from having any contact or visits with his son, or even possessing photographs of his son, until the son turned sixteen (which, even now, is still many years in the future).[2]

Demoski filed a motion in the superior court, asking the court to vacate both special probation conditions that restricted his contact with minor children.[3] Demoski argued that these probation conditions failed to serve any rehabilitative or protective purpose because they lacked a nexus to his crimes. Demoski pointed out that both of his crimes were committed against women over the age of sixteen, and he asserted there was no evidence that he posed any danger to any minor children.

The superior court held an evidentiary hearing on Demoski's motion. At the evidentiary hearing, the parties agreed that the challenged probation conditions were

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[2] Under Alaska Department of Corrections Policy 810.02(VII)(E)(1)(viii), the Department may restrict or completely prohibit a person from visiting an incarcerated individual when, *inter alia*, a court order would preclude these same social interactions during the individual's probation. *See* Alaska Dep't of Corr., *Policies & Procedures*, 810.02(Procedures)(VII)(E)(1)(viii) (Jan. 31, 2013), https://doc.alaska.gov/pnp/pdf/810.02.pdf.

[3] Demoski initially attacked the two probation conditions by filing a *pro se* motion to correct illegal sentence under Alaska Criminal Rule 35(a), arguing that, given the facts of his case, the court lacked the authority to impose the contested probation conditions. Although one might argue that Criminal Rule 35(a) was not the proper procedural vehicle in these circumstances, the prosecutor did not object to Demoski using this procedural vehicle, and the State does not object to it on appeal. We therefore express no opinion as to whether a motion to correct illegal sentence under Criminal Rule 35(a) was appropriate under these circumstances. *See also* AS 12.55.090(b) (authorizing the court to modify any condition of probation).

subject to special scrutiny because they infringed on Demoski's rights to liberty, privacy, and freedom of association, including familial association.[4]

Demoski presented two witnesses at the evidentiary hearing. Demoski's mother verified that the Department of Corrections had refused to allow Demoski to see his son or to even receive photos of his son because of the challenged probation conditions. Demoski's sister testified that she did not believe that Demoski posed any danger to minors, and she further testified that she would feel perfectly safe leaving him alone with any of her four daughters (whose ages ranged from four to twenty-one years old), even knowing the details of his offenses. Demoski's sister also testified regarding the cultural importance of funeral and memorial potlatches, explaining that these large gatherings typically included children (and would therefore be difficult for Demoski to attend under the current probation conditions).

The State did not present any witnesses or any other evidence in support of the challenged probation conditions.

At the conclusion of the hearing, the superior court denied Demoski's request to vacate the two probation conditions, but the court agreed to modify the conditions to allow Demoski to have contact with his biological son and also his nieces (the children of Demoski's sister). This appeal followed.

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[4] *See Simants v. State*, 329 P.3d 1033, 1038-39 (Alaska App. 2014) ("A probation condition that infringes a defendant's constitutional rights by restricting the defendant's family associations is reviewed with special scrutiny. The court must find that such a condition is both 'reasonably related to the rehabilitation of the offender and protection of the public' and 'narrowly tailored to avoid unnecessary interference with [the defendant's] family relationships.'" (citing *Diorec v. State*, 295 P.3d 409, 412, 414 (Alaska App. 2013))).

Why we vacate the challenged probation conditions

A sentencing judge has broad authority to fashion conditions of probation.[5] However, probation conditions must be "reasonably related" to one of Alaska's constitutional sentencing goals — including the rehabilitation of the offender or the protection of the public — and they must also "not be unduly restrictive of liberty."[6]

We have previously addressed the propriety of probation conditions that restrict a defendant's contact with minors in two unpublished cases involving defendants who were convicted of sex offenses, but whose offenses did not involve underage victims. In both cases, we concluded that it was error to impose the challenged probation conditions.

In the first case, *Bodfish v. State*, the defendant, who was thirty-one years old, was convicted of second-degree sexual assault for sexually penetrating a seventeen-year-old girl while she was incapacitated.[7] At sentencing, even though the superior court acknowledged that there was no evidence that Bodfish had engaged in sexual activity with minors younger than sixteen, the superior court imposed (over Bodfish's objection) a special condition of probation that prohibited Bodfish from "being employed or performing volunteer work in which he would be in contact with girls under the age of sixteen."[8]

On appeal, this Court vacated the challenged condition of probation. We explained:

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[5] *Johnson v. State*, 421 P.3d 134, 138-39 (Alaska App. 2018).

[6] *State v. Ranstead*, 421 P.3d 15, 19-20 (Alaska 2018) (citing *Roman v. State*, 570 P.2d 1235, 1240 (Alaska 1977)).

[7] *Bodfish v. State*, 2006 WL 829743, at *1-2 (Alaska App. Mar. 29, 2006) (unpublished).

[8] *Id.* at *2.

> The record does not establish that Bodfish engaged in any criminal conduct with underage girls. Yet the probation condition appears to place a stringent condition on Bodfish's opportunities for employment. . . . [At least] at this point, the record does not establish a sufficient basis to impose the probation condition. We accordingly vacate the probation condition, and direct the superior court to reconsider whether the evidence supports that condition.[9]

The second case, *Ranstead v. State*, also involved a defendant who was convicted of second-degree sexual assault for sexually penetrating a victim who was incapacitated.[10] At sentencing, the superior court imposed a number of probation conditions that restricted Ranstead's contact with minors and limited his employment and residence options to places not frequented by children.[11] The superior court concluded that these conditions were appropriate because Ranstead's victim, although an adult, was significantly younger than Ranstead.[12] (Ranstead was thirty-four years old at the time of the sexual assault; the victim was twenty-one years old.[13])

On appeal, this Court vacated the challenged probation conditions, concluding that the restrictions were "unrelated to the facts of the case and unnecessarily restrict[ed] Ranstead's freedom of association."[14] We noted that there was no evidence that Ranstead posed a threat to minor children, and we concluded that

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[9] *Id.* at *3.

[10] *Ranstead v. State*, 2016 WL 2944797, at *1 (Alaska App. May 18, 2016), *rev'd in part on other grounds*, 421 P.3d 15 (Alaska 2018).

[11] *Id.* at *5.

[12] *Id.*

[13] *Id.*

[14] *Id.*

the record therefore did not justify these conditions.[15] We also noted there was "substantial federal case authority" addressing the validity of probation conditions that restrict a probationer's contact with minor children, and we noted that this case law generally required sentencing courts to conduct "an individualized assessment" of whether such a condition was appropriate for the defendant, even in cases where the defendant was convicted of child-centered crimes such as sexual abuse of a minor or possession of child pornography.[16]

Here, as Demoski points out, there has been no "individualized assessment" that would justify the challenged probation conditions. When the superior court denied Demoski's motion to vacate these conditions, the court did not address the facts of Demoski's case or the personal characteristics of Demoski as an offender; rather, the court spoke only generically about the need to protect vulnerable children. The court pointed to nothing in the record that suggested that Demoski posed a danger to children under the age of sixteen.

On appeal, the State argues that the challenged probation conditions are justified because one of Demoski's victims was seventeen years old. But the legislature has established sixteen years old as the normal age of sexual consent, thereby creating a line of demarcation between instances of sexual assault where the victims are sixteen years old or older and instances where the victims are younger than sixteen. Thus, in *Bodfish*, we vacated a similar probation condition even though the age difference between Bodfish and his victim was much greater than in Demoski's case. Bodfish was

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[15] *Id.* at *5-6.

[16] *Id.* at *5; *see also United States v. LeCompte*, 800 F.3d 1209, 1216-17 (10th Cir. 2015); *United States v. Bender*, 566 F.3d 748, 754 (8th Cir. 2009); *United States v. Heckman*, 592 F.3d 400, 412 (3d Cir. 2010); *United States v. Voelker*, 489 F.3d 139, 155 (3d Cir. 2007); *United States v. Duke*, 788 F.3d 392, 403 (5th Cir. 2015).

thirty-one years old and his victim was seventeen years old.[17] In contrast, Demoski was only two years older than his seventeen-year-old victim.

The State also argues that Demoski may have sexually assaulted another victim who may have been under the age of eighteen. The State bases this argument on the fact that Demoski was charged with sexually assaulting a third woman, although the jury hung on that charge and Demoski was never convicted of committing this assault.

The State is correct that when a sentencing court imposes conditions of probation, the court can rely on uncharged conduct or even conduct of which the defendant has been acquitted.[18] But there is nothing in the record to suggest that this is what the sentencing court did in Demoski's case.

At Demoski's original sentencing, the judge did not make any findings related to this alleged third sexual assault. Instead, the sentencing judge specifically stated that he was not sentencing Demoski based on that charge. Likewise, the judge who presided over Demoski's post-trial challenge to his probation conditions made no findings regarding any aspect of this alleged third sexual assault. Indeed, the State never offered any evidence about the third woman's age — not at Demoski's trial, his original sentencing, or later when Demoski challenged the probation conditions. The only evidence in the record before us pertaining to this woman's age is the testimony given by Demoski's mother who testified (accurately) that no one at Demoski's trial ever testified about this woman's age. The State's argument regarding the alleged third sexual assault victim is therefore speculative and unsupported by the record.

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[17] *Bodfish v. State*, 2006 WL 829743, at *1-2 (Alaska App. Mar. 29, 2006) (unpublished).

[18] *Brakes v. State*, 796 P.2d 1368, 1372 (Alaska App. 1990).

Conclusion

In sum, we agree that the challenged probation conditions are subject to special scrutiny and conclude the evidence is insufficient to justify them. We accordingly VACATE those conditions.