IN THE COURT OF APPEALS OF THE STATE OF ALASKA

EVERETT MOSES, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-14053 Trial Court No. 4BE-20-00029 CR MEMORANDUM OPINION No. 7099 — April 10, 2024

Appeal from the Superior Court, Fourth Judicial District, Bethel, Nathaniel Peters, Judge.

Appearances: Lindsey Bray, Assistant Public Defender, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Kayla H. Doyle, 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 TERRELL.

Everett Moses was convicted, pursuant to a plea agreement, of third-degree sexual assault after engaging in sexual contact with two women who were

incapacitated.[1] Moses stipulated to the aggravating factor that his conduct was among the most serious conduct included in the definition of the offense[2] and agreed to a sentence of 15 years with 7 years suspended (8 years to serve) and 15 years of probation.

As part of the plea agreement, the State dismissed charges of first-degree sexual assault, second-degree sexual assault, two counts of furnishing alcohol to a minor, and incest.[3] The State also dismissed a separate case where Moses was charged with second-degree theft and second-degree burglary. Moses, however, admitted the factual allegations in the police reports and charging documents in these cases and agreed to pay restitution in the dismissed theft and burglary case. Finally, the State agreed not to bring charges based on a separate police investigation where Moses was accused of strangling his girlfriend, but Moses agreed to pay restitution to the alleged victim of this strangulation.

The parties also agreed to certain probation conditions, including that Moses would participate in sex offender treatment, pay restitution, not consume or possess alcohol, and not contact the victims. Following the preparation of the presentence report, the superior court imposed additional probation conditions at sentencing.

Moses now appeals four of his probation conditions. We see no error and affirm.

General Condition of Probation No. 5

General Condition of Probation No. 5 states, "Do not possess, control, receive, ship or transport a firearm and do not knowingly reside in a dwelling where a

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[1] Former AS 11.41.425(a)(1)(B) (2017).

[2] AS 12.55.155(c)(10).

[3] Former AS 11.41.410(a)(1) (2017), former AS 11.41.420(a)(3) (2017), former AS 04.16.051(d)(3) (2017), and AS 11.41.450(a)(3), respectively.

concealed firearm is present." In the superior court, Moses objected to the first half of this condition — concerning possession, control, receipt, shipment, or transportation of a firearm. He proposed that this portion of the condition be modified to apply only to concealed firearms to be consistent with Alaska law.[4] He argued that his current offense lacked a nexus to firearms and that prohibiting him from possessing all firearms would impede his ability to engage in subsistence hunting.

The State did not take a position on Moses's objection to the proposed probation condition, explaining that it did not object to his proposed language but also noting that, under federal law, Moses would not be allowed to possess any firearms due to his felony conviction.[5] The superior court denied Moses's objection and imposed the condition. The court noted that Moses did not object to General Condition No. 7, which required Moses to comply with all municipal, state, and federal laws. The court stated that it wanted the probation condition to be clear to Moses that federal law forbids him from possessing a firearm so that Moses would avoid possible federal charges.

Moses now renews his challenge to this probation condition. We recently addressed a similar condition in *Pete v. State*.[6] The defendant in *Pete* objected to a condition prohibiting him from possessing firearms on the grounds that the condition would impede his ability to engage in subsistence hunting. The State conceded that modifying the proposed condition would be appropriate, but the superior court declined

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[4] *See* AS 11.61.200(a)(1) (prohibiting persons who have been convicted of a felony from "knowingly possess[ing] a firearm capable of being concealed on one's person").

[5] *See* 18 U.S.C. § 922(g)(1) ("It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.").

[6] *Pete v. State*, 2024 WL 260977, at *10-11 (Alaska App. Jan. 24, 2024) (unpublished).

to modify the condition. The court suggested that the defendant could ask the superior court to modify the condition once he was on probation. On appeal, the State again conceded that the superior court should have modified the condition.

In *Pete*, we noted that the defendant had not proposed specific language for the condition.[7] We therefore construed his request narrowly as seeking a subsistence hunting exception from the prohibition on possessing firearms. We interpreted this request as predicated on the understanding that use of a firearm would violate the condition that he obey all laws and that the request was intended solely to avoid the need to return to court to modify the condition in the event that federal law changed in the future. Given that concessions from the State are entitled to "great weight," we remanded for the court to modify the condition according to this understanding.[8]

This case is distinguishable from *Pete* because, in this case, the State does not concede error on appeal, and the firearm condition is reasonably related to the protection of the public, given Moses's violent history.[9] That is, the superior court could, in its discretion, impose the probation condition prohibiting him from possessing firearms regardless of federal law. As part of the plea agreement in this case, Moses admitted to attempting to use force to engage in sexual penetration, and he agreed to pay restitution for strangling his girlfriend. His criminal history included a strangulation assault against his cousin with a rope, as well as other assaults involving domestic violence. The court could reasonably conclude that protecting the public from this pattern of serious violence justified prohibiting Moses from possessing firearms.

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[7] *Id.* at *11.

[8] *Id.* (quoting *Schlagel v. State*, 13 P.3d 275, 276 (Alaska App. 2000)).

[9] *See State v. Ranstead*, 421 P.3d 15, 19 (Alaska 2018) (allowing for probation conditions "reasonably related to . . . the protection of the public" and "not . . . unduly restrictive of liberty" (quoting *Roman v. State*, 570 P.2d 1235, 1240 (Alaska 1977))).

We acknowledge that the superior court's stated reason for imposing the condition was not Moses's history of violence, but rather, to clarify that federal law prohibits Moses from possessing a firearm. In *Pete*, the State conceded that a prohibition on possessing firearms would not be appropriate absent federal law, and it agreed to a remand to modify the probation condition so that the defendant would be allowed to possess firearms for subsistence purposes immediately upon any change in federal law.[10] Without an agreement by the State to remand to litigate the issue now, the proper recourse for Moses is to file a motion to modify the condition if federal law changes.[11] We have affirmed this same probation condition in other cases for the reason relied on by the superior court, and do so here.[12]

On appeal, Moses also argues that the probation condition erroneously went beyond federal law by prohibiting him from possessing *any* firearm. He notes that federal law specifically makes it a crime to "possess in or affecting commerce, any firearm or ammunition" or to "receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce," and he argues that the probation condition should similarly be limited based on a nexus to interstate commerce.[13] Moses did not make this argument in the superior court and therefore must show plain error.[14] A probation condition is plainly erroneous "if the sentencing court erred in imposing it and if this error '(1) was not the result of intelligent waiver or a

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[10] *See Pete*, 2024 WL 260977, at *11.

[11] *See* AS 12.55.090(b) ("Except as otherwise provided in (f) of this section, the court may revoke or modify any condition of probation, change the period of probation, or terminate probation and discharge the defendant from probation.").

[12] *See, e.g.*, *Barry v. State*, 925 P.2d 255, 256-58 (Alaska App. 1996).

[13] 18 U.S.C. § 922(g)(1).

[14] *Ranstead*, 421 P.3d at 23.

tactical decision not to object; (2) was obvious; (3) affected substantial rights; and (4) was prejudicial.'"[15]

As we have explained, the record supports a reasonable conclusion that a probation condition prohibiting Moses from possessing all firearms was necessary to protect the public, regardless of federal law.[16] Therefore, the court did not plainly err by prohibiting Moses from possessing any firearm, as opposed to any firearm with a nexus to interstate commerce.

Special Conditions of Probation Nos. 8 and 9

Special Condition of Probation No. 8 states, "The probationer shall advise all adult members of the household in which he is residing of his sexual conviction, even when the residence is temporary. The probation officer may discuss the circumstances of the offender's sexual conviction with any adult household member." And Special Condition of Probation No. 9 similarly states, "The probationer shall inform all persons with whom he has a dating or sexual relationship of the probationer's sexual conviction. Persons required to be informed will be determined in consultation with the approved treatment provider and the probation officer." Moses objected to these conditions, arguing that they violated his rights to privacy and association and that they were not necessary because household members and people in dating or sexual relationships with him could find information about his conviction on CourtView and the sex offender registry.

The State argued that the conditions were necessary to allow Moses's future household members and romantic or sexual interests to make informed decisions about whether to associate with Moses, and the superior court agreed. The court

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[15] *Id.* (quoting *Adams v. State*, 261 P.3d 758, 764 (Alaska 2011)).

[16] *See Ranstead*, 421 P.3d at 19.

concluded that the conditions implicated Moses's right to privacy only minimally, if at all, given that the information would already be available to the public. The court concluded that the conditions did not interfere with his right to association because they did not limit his ability to associate and instead merely allowed for people to decide whether to associate with him. Applying special scrutiny because of the possible infringement on the right to privacy,[17] the court concluded that the conditions were necessary to protect the public and that there were no less restrictive alternatives. The court reasoned that the burden should not be on Moses's household members or romantic or sexual partners to look up Moses's sex offender status. The court added that even if the household members or partners were going to look Moses up, Moses would need to give them his full name with an accurate spelling, and Moses had been known to use an alias.

Moses renews his challenge to these probation conditions. In *Diorec v. State*, we considered a probation condition similar to Special Condition No. 8 — *i.e.*, a condition that required the defendant to inform his household members about his conviction and allowed his probation officer to discuss the circumstances of his crime with them.[18] We concluded that the condition did not infringe on the defendant's rights to travel and association and that the condition was directly related to the protection of the public.

We likewise conclude, in this case, that Moses's right to association is not infringed. Moses notes that neither of the women he sexually assaulted in this case were members of his household and that he was not in a sexual or dating relationship with

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[17] *See Roman v. State*, 570 P.2d 1235, 1241 (Alaska 1977) ("Conditions that unquestionably restrict otherwise inviolable constitutional rights may properly be subject to special scrutiny to determine whether the limitation does in fact serve the dual objectives of rehabilitation and public safety." (quoting *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975))).

[18] *Diorec v. State*, 295 P.3d 409, 415 (Alaska App. 2013).

either. But the sexual assaults occurred in Moses's home while the victims were in vulnerable positions. Members of Moses's household and people with whom he is in sexual or dating relationships are likely to be in similarly vulnerable situations around Moses. Additionally, one of the sexual assault victims in this case was related to Moses. Moses had previously committed assaults that were domestic violence crimes, including the strangulation assault with a rope against his cousin. And the plea agreement in this case resolved a case charging Moses with strangling his girlfriend. Requiring Moses to inform household members and dating or sexual partners of his criminal conviction is therefore reasonably related to the protection of the public.

To the extent that this condition minimally implicates Moses's right to privacy — an argument that was not made in *Diorec* — the superior court in this case found that there were no less restrictive alternatives. The court reasoned that any alternative would require people associating with Moses to look up his criminal history and would require that they know enough information about him to do so. These conditions satisfy special scrutiny, and the superior court did not err in imposing them.

On appeal, Moses also argues that the phrase "dating or sexual relationship" in Special Condition No. 9 is unconstitutionally vague. Again, Moses did not make this argument in the superior court and therefore must show plain error. In *Bates v. State*, we concluded that the phrases "adults or minors who are dating or who have dated" and "adults or minors who are engaged in or who have engaged in a sexual relationship" are not unconstitutionally vague for purposes of Alaska Evidence Rule 404(b)(4).[19] We explained that these phrases have a "sufficiently certain meaning . . . provid[ing] an ascertainable standard for trial judges to use when the judges are asked to decide whether Evidence Rule 404(b)(4) applies to a defendant's case."[20]

[19] *Bates v. State*, 258 P.3d 851, 859 (Alaska App. 2011).

[20] *Id.*

Given this conclusion in *Bates*, we conclude that "dating or sexual relationship" as used in this probation condition is not unconstitutionally vague because the phrase provides an ascertainable standard for Moses, his probation officer, and the superior court regarding whom Moses must inform of his conviction. Therefore, the imposition of a probation condition using the phrase "dating or sexual relationship" was not plainly erroneous.

General Condition of Probation No. 6

Finally, General Condition of Probation No. 6 states, "Do not knowingly associate with a person who is on felony probation unless prior written permission to do so has been granted by a probation officer of the Department of Corrections." Moses argues that this condition infringes on his right to association and is not reasonably related to his criminal conduct. Moses cites statistics that Alaska Native people are overrepresented in the criminal justice system and that most people in his village are Alaska Native. He also cites studies on reintegration of offenders that suggest that offenders can benefit from inter-offender engagement and peer-assisted programs. Because he makes these arguments for the first time on appeal, he must show plain error.

We rejected this same plain error argument in *Fancyboy v. State*.[21] The defendant in *Fancyboy* made "a number of new factual assertions," including that there were high rates of felony convictions among Alaska Natives and a high percentage of people where he lived were Alaska Native.[22] We nevertheless explained,

> As a general matter, courts have the authority to restrict a probationer's association with those who would encourage the probationer to engage in criminal conduct. Such

[21] *Fancyboy v. State*, 2021 WL 1997485, at *2-3 (Alaska App. May 19, 2021) (unpublished).

[22] *Id.* at *2.

> conditions are reasonably related to the goals of promoting rehabilitation and protecting public safety. While the fact that a person has a prior felony conviction is not a perfect proxy for determining whether that person is likely to be engaged in criminal activity, we cannot say, on the record before us, that the trial court's reliance on this proxy was obvious error.[23]

We reach the same conclusion here. Because we conclude that this condition is reasonably related to Moses's rehabilitation, it was not plain error to impose this condition. The condition confers appropriate discretion on probation officers to make exceptions and allow association with felons, particularly if the probation officer does not have a reason to suspect the convicted felon of current criminality.

Conclusion

The judgment of the superior court is AFFIRMED.

[23] *Id.* at *3.