IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA, Plaintiff, vs. MICHAEL JOSEPH IDZINSKI, Defendant,	FILED in the Trial Courts State of Alaska, Third District NOV 26 2007 By _____ Deputy Case No. 3AN-06-04679 CR

ORDER FORWARDING THIS CASE TO A THREE-JUDGE SENTENCING PANEL

On October 31, 2006, defendant, Michael Idzinski ("Idzinski"), was found guilty following a jury trial of two counts of Assault in the First Degree, one count of Assault in the Second Degree, and one count of Assault in the third Degree. Sentencing of Idzinski was originally set for February 8, 2007, and then postponed. On August 13, 2007, Idzinski moved to forward his case to a three-judge sentencing panel. A hearing was held on September 6, 2007, regarding Idzinski's motion, at which time the court heard from counsel, the defendant, and Probation Officer Susan Levi. For the reasons set forth below the court GRANTS Idzinski's motion and refers his sentencing to the three judge panel pursuant to AS 12.55.175.

Facts And Proceedings

Late on February 12, 2006, Rick Pearcy (Pearcy) and Erwin Dahlman (Dahlman) were drinking at Dahlman's trailer. Both heard the noise of an apparent dog fight outside. Concerned because of recent problems with stray dogs in the neighborhood, Pearcy went to investigate. Dahlman followed a few minutes later. When Dahlman exited the trailer, he saw Pearcy exchanging angry words with a white male. The man began choking Pearcy. Dahlman tried to pull the two apart, but the other man began swinging at Dahlman. Dahlman testified the man said he knew where he lived and threatened to burn down his trailer. Dahlman also saw another man who yelled for people at the "crack house" across the street. While engaged in the struggle, Dahlman and Pearcy were "dog piled" by unknown others, apparently from the house across the street, and received serious injuries to the head and face. Dahlman testified that he was repeatedly kicked in the face by what he thought was a "steel-toe-boot" and Pearcy testified that he was hit with "something heavy," after he was kicked multiple times.

When police responded, no suspects were in the area but police used a canine unit to track footprints from the area of the assault. The footprints led to Idzinski, who was standing outside his trailer. Dahlman gave police a description of the suspect's clothing and appearance, including the color and brand of the suspect's jacket and color of his hair and mustache, which generally matched the jacket and mustache of Idzinski.

Dahlman thought the male who assaulted him was "possibly Russian," but, following the assault and with limited vision, identified Idzinski as his assailant at a show-up. Pearcy also told officers that he thought the assailants were "Russian" but also identified Idzinski during a show-up at the scene as the man who began choking him. Both Pearcy and Dahlman identified Idzinski at trial as one of their assailants

Dahlman was the most seriously injured of the two. He sustained a blow-out fracture to his orbital socket that required reconstructive surgery. At trial, Dr. Carl Rosen, an ophthalmologist, testified that Dahlman's orbital fracture required a significant amount of force and could have been caused by a foot, fist, or metal object. Although no witness could positively testify what caused Dahlman's injuries, a fire extinguisher was found at the scene of the assault a few days later. Pearcy lost a couple of teeth and suffered a dislocated jaw and concussion from the assault.

Only Idzinski was arrested and tried for the assault, despite others having been involved. Police knew the identity of at least one suspect, Senad Filan, who was believed to have fled to the Chicago area. Police were never able to identify the other assailants who "dog piled" Dahlman and Pearcy. Idzinski was tried and convicted on accomplice liability theory. No witness testified that it was Idzinski, rather than any of the others involved, who personally caused the injuries to Dahlman. Idzinski's defense was that Dahlman and Pearcy had mis-identified him.

Idzinski was convicted of two counts of Assault in the First Degree, a class A felony with a presumptive term of 7 to 11 years for a first offense,[1] one count of Assault in the Second Degree, a class B felony with a presumptive range of one-to-three years for a first offense, and one count of Assault in the Third Degree, a class C felony with a presumptive range of zero-to-two years for a first offense. The state has asked the court to impose a sentence of ten years with three years suspended (10 years/3 years) for Count I, seven years flat (7 years) on Count II (with all but one year running concurrent to Count I), for a composite sentence of eleven years with eight years to serve and three years suspended and a five year period of probation.[2] Whether or not the court would impose the state's recommended sentence, at least some portion of Idzinski's sentence on Count II must be consecutive to Count I pursuant to AS 12.55.127(b). Sentencing principles also suggest the imposition of at least a partially consecutive sentence because Idzinski's assaults involved multiple victims.[3] Thus, the minimum presumptive sentence this court could lawfully impose must be in excess of seven years to serve.[4] The court would also have authority to impose a maximum presumptive sentence of 14-22 years. Idzinski is a first felony

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[1] The 7-11 year term applies if the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury, among other things. *See*, AS 12.55.125(c)(2)(A).
[2] State of Alaska's Sentencing Memorandum, pg 1.
[3] *Holtzheimer v. State*, 766 P.2d 1177, 1180 (Alaska App. 1989). "Holtzheimer was convicted of serious crimes of violence committed at separate times and involving different victims. In these circumstances, the use of consecutive sentencing is certainly appropriate."
[4] The state concedes that Idzinski's convictions on Counts III and IV merge with his convictions on Counts I and II for sentencing purposes.

offender. No mitigating or aggravating factors have been urged by Idzinsk or the state which would allow the court to deviate from these presumptive terms.

DISCUSSION

Idzinski argues that the court should grant an order forwarding the case to a three-judge sentencing panel because manifest injustice would result from both a "failure to consider relevant non-statutory mitigating factors" and from the "imposition of sentence within the presumptive range" in this case.

AS 12.55.165 states:

> (a) If the defendant is subject to sentencing under AS 12.55.125 (c), (d), (e), or (i) and the court finds by clear and convincing evidence that manifest injustice would result from failure to consider relevant aggravating or mitigating factors not specifically included in AS 12.55.155 or from imposition of a sentence within the presumptive range, whether or not adjusted for aggravating or mitigating factors, the court shall enter findings and conclusions and cause a record of the proceedings to be transmitted to a three-judge panel for sentencing under AS 12.55.175.

The legislature's intent under AS 12.55.165(a) was to create "two separate bases for referral of a case from trial court to a three-judge panel for sentencing:"[5] First, where "manifest injustice would result from failure to consider relevant, non-statutory aggravating or mitigating factors in sentencing; and, second, where manifest injustice would result from imposition of a presumptive sentence [regardless of] whether or not

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[5] *Dancer v. State,* 715 P.2d 1174, 1177 (Alaska App. 1986). *See also Kirby v. State,* 748 P.2d 757, 762 (Alaska App. 1987).

... statutory aggravating and mitigating factors [had been adjusted for]."[6] The burden is on the defendant to show that one of these two forms of manifest injustice exists.

FINDINGS AND CONCLUSIONS

Idzinski Has Established that His Potential for Rehabilitation Warrants Referral to the three Judge Panel

In *Smith v. State,*[7] the Court of Appeals concluded that the defendant's lack of any prior criminal convictions, a good history of employment, scholastic achievement, strong family ties, continuing family support, and excellent pre-sentence report evaluations indicated "strong evidence of favorable potential for rehabilitation" which related directly to one of the *Chaney* criteria that should be considered in determining referral to the three-judge panel.[8]

The court of Appeals further remarked:

> While the legislature has broad discretion to restrict judicial discretion in sentencing, we do not believe that it intended to preclude realistic, individualized consideration of the need and potential for rehabilitation in cases involving first felony offenders.[9]

The court noted that prior convictions would relate directly to the defendant's potential for rehabilitation.[10]

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[6] *Id.*
[7] 711 P.2d 561 (Alaska App. 1985).
[8] *Id.* at 570.
[9] *Id.* at 572.
[10] *Id.*, FN 7.

Smith thus stands for the proposition that exceptional prospects for rehabilitation constitute a non-statutory mitigating factor that may warrant referral to the three-judge panel. "Referral to the three judge panel based on unusually favorable prospects for rehabilitation will be justified only when the accused presents clear and convincing proof that rehabilitation will actually occur."[11] A defendant has an unusually good potential for rehabilitation if the court is satisfied that the defendant can adequately be treated in the community and need not be incarcerated for the full presumptive term in order to prevent future criminal activity.[12] "Rehabilitation potential is thus the converse of dangerousness."[13]

Idzinski is 43 years old. He has no juvenile criminal history and has had only four adult misdemeanor convictions in 24 years, three of which occurred when he was ages 19 and 21.[14] His most recent conviction was thirteen years ago for reckless driving.

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[11] *Boerma v. State*, 843 P.2d 1246, 1248 (Alaska App. 1992).

[12] *Id.*

[13] *Kirby v. State*, 748 P.2d 757, 765 (Alaska App. 1987). In *Boerma*, the Court of Appeals interpreted *Kirby* to also hold that "the defendant's proof must enable the sentencing court to find, first, that it understands the problems that led the defendant to engage in criminal misconduct, and second, that those problems are either readily correctable or unlikely to recur". *Boerma*, at 1248. While this court does not fully understand what caused Idzinski's conduct on the night of February 12, 2006, it is confident that it will not recur.

[14] Idzinski's pre-sentence report reflects a conviction for Offensive Words in a Public Place in 1983 (one day jail term), a conviction for Possession of a Dangerous Weapon in 1985 (30 days in jail and one year of probation), and a conviction for False Identification to a Peace Officer in 1985 (two days in jail and one year of probation). His conviction for Reckless Driving in Alaska resulted in a 30-day suspended sentence and a fine. The state urged the court to consider Idzinski's more recent "police contacts" in evaluating his potential for rehabilitation. The "police contacts" were not part of Idzinski's pre-sentence report, nor verified by any extrinsic evidence. The court does not believe it is appropriate to place any weight on these reports, unverified and unexplained as they are. "Sentencing courts should be wary of relying on a record of 'police contacts'". *State v. Short*, 96 P.3d 526, 528 (Alaska App. 2004).

None of his prior convictions are for assaultive conduct. Idzinski has strong family ties and a lengthy employment history.[15] He has no substance abuse problems and was not under the influence of alcohol or drugs at the time of the assault. By all appearances, Idzinski's behavior on the night of February 12, 2006, was an anomaly.

At the hearing held September 6, 2007, Idzinski displayed genuine remorse in addressing the court and appeared visibly shaken by his incarceration since trial. To the extent that incarceration is designed to deter a defendant from future criminal conduct, the court believes that Idzinski's incarceration to date has already had the effect of doing so. Significantly, at the hearing on September 6th, Probation Officer Susan Levi, who authored Idzinski's pre-sentence report, told the court that in her opinion nothing further would be gained by Idzinski's continued incarceration.[16] Officer Levi opined that probationary supervision for Idzinski would adequately protect the public and better advance the sentencing goal of rehabilitation. Based on these facts, Idzinski has established by clear and convincing evidence that he has unusual prospects for rehabilitation.

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[15] Idzinski has been in a common law relationship with Roberta Turner-Idzinski for seventeen years. They have two teenage children. He was most recently employed by SMG of Alaska, Inc. He has two brothers and two sisters, one of whom lives in Alaska.

[16] The court places considerable weight on PO Levi's recommendation. Officer Levi is a probation officer with considerable experience who has appeared in front of this court on numerous occasions. It is the court's belief on the basis of its experience with Officer Levi that she would not lightly make such a recommendation.

When this factor is considered in light of the *Chaney* sentencing criteria, this court concludes that adjustment of the presumptive term would otherwise be appropriate.[17] In this court's view, seven years of incarceration or any greater term would deter the prospects of Idzinski returning to a productive life. It does not appear to this court that Idzinski needs to be incarcerated either to protect the public or to deter him from assaultive or other criminal conduct in the future. To the extent that societal condemnation of assault needs to be affirmed by a sentence in Idzinski's case, it is this court's belief that this is accomplished by a suspended term of imprisonment. It is also evident from PO Levi's remarks to the court that Idzinski can be adequately supervised in the community. For these reasons, manifest injustice will result if Idzinski's unusual prospects for rehabilitation are not allowed to mitigate the presumptive terms of the imprisonment he faces.

Idzinski was tried and convicted on a theory of accomplice liability. As such, Idzinski is criminally responsible as if he were a principal.[18] However, for sentencing purposes, there is no statutory mitigating factor pertinent to Idzinski that allows the court to consider that five or six other individuals have escaped criminal liability for the assaults on Pearcy and Dahlman, any one of whom might have been the individual who personally caused the serious injuries to both victims. AS 12.55.155(d)(2) allows the

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[17] "[O]nce the court finds the mitigating factor of unusual prospects for rehabilitation, it should evaluate the factor's impact on an appropriate sentence . . . in light of the *Chaney* sentencing criteria to determine whether the presumptive term should be adjusted." *Kirby*, at 765.

[18] AS 11.16.110.

court to consider as a mitigating factor that "the defendant, although an accomplice, played a minor role in the commission of the offense." But in Idzinski's case, the court cannot conclude that Idzinski's role was only "minor" since Pearcy's testimony has an assailant, likely Idzinski, initially choking Dahlman. But the evidence of Idzinski's particular role in the assault ends there. No evidence at trial indicated by whom or how Dahlman in particular sustained the serious injuries he did, although Dahlman and Pearcy's testimony established that as many as five or six individuals simultaneously assaulted them. In this court's view, it appears manifestly unjust to, on the one hand, allow mitigation of a sentence when an accomplice is found to have played a minor role, but not, on the other hand, allow mitigation when the state cannot establish the accomplice's precise role in causing serious injury or using a dangerous instrument in an assault, and when so many other individuals are known to have been involved, all of whom have escaped criminal liability. Though Idzinski did not advance this mitigating factor, this court believes it should apply in Idzinski's case.

The state argues that the three-judge panel is intended only for the extraordinary defendant. The State claims that this court should not refer Mr. Idzinski's case to the three-judge panel due to the three-judge panel's function as a "safety valve" as well as by reason of manifest injustice being something that "shock[s] the

conscience."[19] But in *Lloyd v. State,*[20] the Court of Appeals noted that since the three-judge panel is the only body with the authority to apply a non-statutory mitigator, referral should be made "where the issue of manifest injustice appears to be a close one."[21] In this case Idzinski has established by clear and convincing evidence that manifest injustice would result if his potential for rehabilitation is not allowed to mitigate his sentence.

Imposition of the Presumptive Term
Will Result In Manifest Injustice
In Light of the *Chaney* Sentencing Criteria

Referral to the three-judge sentencing panel is also appropriate if this court finds that imposition of the presumptive sentence would result in "manifest injustice" considering the *Chaney* sentencing criteria.[22] To apply this standard, the Court of appeals in *Dancer v. State*[23] stated the trial court should "compare the presumptive sentence with sentences generally received for similar conduct."[24] The court suggested that it is also appropriate to consider the appropriate sentence for any lesser-included

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[19] State's Opposition to Motion to Forward Case to Three-Judge Sentencing Panel, pg 4.
[20] 672 P.2d 152 (Alaska App. 1983).
[21] Id., at 155.
[22] *Lloyd v. State,* 672 P.2d 152, 155 n. 3 (Alaska App. 1983). "We think that a sentencing judge must consider the *Chaney* sentencing criteria in determining the existence of manifest injustice. [citation omitted] If consideration of these criteria leads a judge to conclude that it is clearly necessary to impose a sentence either above or below the limits permissible by use of the applicable presumptive term, adjusted for any aggravating or mitigating factors, then a finding of manifest injustice will be appropriate."
[23] 715 P.2d 152 (Alaska App. 1983).
[24] *Dancer,* 715 P.2d at 1177 (citing *Pears v. State,* 698 P.2d 1198, 1202-04 (Alaska 1985).

offense which the defendant's conduct most nearly approximates.[25] In *Kirby v. State,*[26] the court also directed that the sentencing judge "must compare the defendant's conduct, background and experience with other individuals sentenced for similar crimes".[27]

In Idzinski's case the state has cited to numerous cases where sentences for first degree assault of a first felony offender approximate that urged as a sentence here. But these cases are all distinguishable in important ways from Idzinski's for sentencing purposes. In fact, they do more to show why, in comparison to other first felony offenders convicted of first degree assault, Idzinski's presumptive sentence would be unjust.

In *Hamilton v. State,*[28] the defendant, a first felony offender, was sentenced to ten years to serve following conviction of first degree assault and two other C felonies. But Hamilton's assault was carefully planned and unprovoked and the sentencing judge concluded that she was "close to being a worst offender" and that her potential for rehabilitation was "guarded." In *Kraus v. State,*[29] the defendant was sentenced to eight years to serve for first degree assault with a dangerous weapon. In upholding the sentence, the Alaska Supreme Court noted "Kraus' mental and emotional

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[25] *Id.* at 1177.
[26] 748 P.2d 757 (Alaska App. 1987).
[27] *Id,* at 762.
[28] 2001 WL 1057881 (Alaska App.)(unpublished opinion).
[29] 604 P.2d 12 (Alaska 1979).

disorders and past lawless conduct are such as to warrant the imposition of a sentence providing for a significant degree of incarceration".[30] In *Bullington v. State,*[31] the defendant was convicted of first degree assault using a dangerous weapon (feet) and was sentenced to 12 years to serve. But at Bullington's sentencing, the trial judge found five aggravating factors.

Likewise, in *Johnson v. State,*[32] the defendant was sentenced to six years to serve for Assault in the First Degree. But in that case the sentencing judge found two aggravating factors, including a criminal history of prior assaultive conduct.[33] In *Redman v. State,*[34] the defendant was also sentenced to six years to serve for first degree assault. But in Redman's case the court found one aggravating factor and concluded that Redman's prospects for rehabilitation were guarded.

In each of the cases discussed above, none of the defendants were convicted as an accomplice, as in Idzinski's case. The only accomplice case cited by the state is *Smith v. State,*[35] where the defendant, convicted of first-degree assault and third-degree assault, was sentenced to five years to serve. But Smith's was a

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[30] *Id,* at 13.
[31] 1999 WL 34000703 (Alaska App.)(unpublished opinion).
[32] 1994 WL 16196203 (Alaska App.)(unpublished opinion).
[33] Although twenty-two years of age, Johnson had a significant juvenile history and a history of substance abuse.
[34] 1997 WL 184774 (Alaska App)(unpublished opinion).
[35] 2000 WL 1350598 (Alaska App.)(unpublished opinion).

preplanned assault where he continued to support the assault on the second victim after assaulting the first.

Comparing Idzinski's case to reported cases has some limitations. "[S]entencing has traditionally been an inexact process, and individual judges have always tended to differ in determining what sentence is appropriate in any given case."[36] Also, "individual cases will almost always be distinguishable on their facts."[37] It is also difficult to characterize the "typical" defendant who commits first degree assault, using a dangerous weapon. But what can be said from a review of the above cases is that the "typical" defendant convicted of first degree assault using a dangerous weapon is not an accomplice, and that sentences in the range of seven-to-eight years to serve have been for offenders with aggravated circumstances, a criminal record of significance, or guarded prospects for rehabilitation. Idzinski's case bears none of those characteristics.[38]

As discussed *infra*, consideration of the *Chaney* criteria leads this court to conclude that imposition of the presumptive term in Idzinski's case will lead to manifest injustice. There was no evidence produced at trial which established conclusively that Idzinski was the participant in the assaults on Dahlman and Pearcy who actually

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[36] *Lloyd* at 155.
[37] *Kirby v. State*, 748 P.2d 757, 763 (Alaska App. 1987).
[38] *Kirby* instructs that what is important is "the examination of all sentences involving similar crimes . . . not the sentence imposed in any single case". *Id.* But this is a difficult comparison in Idzinski's case because his personal participation in the crime, though sufficient for accomplice liability, was never clear from the evidence at trial.

wielded a dangerous weapon. Idzinski has no history of assaultive conduct. His only conviction in the last twenty-two years has been for reckless driving. This assault appears to be out of character. There is therefore no need to isolate him further to deter future assaultive conduct. His strong family ties and employment history suggest that he will be a productive member of the community when not incarcerated. Moreover, community condemnation of assault can be affirmed with a sentence equivalent to the presumptive term, but with a period of time suspended. Accordingly, and in consideration of other sentences for first degree assault imposed on other first felony offenders, the court concludes that imposition of the presumptive term will result in manifest injustice, and that referral to the three-judge panel is warranted.

CONCLUSION

Referral of the case to the three-judge panel does not, as the State argues, allow Idzinski to "get way with" his criminal conduct."[39] Mr. Idzinski will not go unsentenced. The three-judge panel may not even accept jurisdiction of Idzinski's case and refer it back to this court for sentencing. Meanwhile, Mr. Idzinski will be in jail doing his time. The greater harm in this case would be for this court to sentence Idzinski to the presumptive term, believing it to be unjust, without allowing consideration by the three-judge panel.

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[39] State's Opposition, pg 11.

Accordingly, and for the reasons explained above, Idzinski's Motion to Forward Case to Three-Judge Panel is GRANTED. These findings, and a record of the proceedings before this court, shall be forwarded to the three-judge sentencing panel.

ENTERED this 26th day of November, 2007, at Anchorage Alaska.

Philip R. Volland
Superior Court Judge

The undersigned hereby certifies that on Nov 27 2007, a true copy of the foregoing was mailed | delivered to:

DAO | PDA Christie
Judge Joannides | Clerk of Court C. McAllen