IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT KETCHIKAN

STATE OF ALASKA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
JOSHUA WODYGA,	)	
	)	
Defendant.	)	
	)	**Case No. 1KE-14-132 CR**

FINDINGS AND REMAND ORDER

The Three-Judge Sentencing Panel (Panel) held a hearing in this case on September 21, 2015. The parties appeared and were represented by their counsel of record. The Panel found that Mr. Wodyga had not shown by clear and convincing evidence that he had an exceptional potential for rehabilitation or that manifest injustice would result from his being sentenced within the applicable presumptive range, as adjusted for any aggravators or mitigators. Related oral findings were stated. The following written findings are being provided per AS 12.55.175(b).

Mr. Wodyga was convicted of Criminally Negligent Homicide.[1] The facts underlying his conviction are as follows. Mr. Wodyga participates in the sea cucumber dive fishery, which, other than the requirement to obtain a permit, is largely unregulated by the state. Many of the participants in this fishery use less expensive modified shop compressors to supply air to the diver via an air hose. These compressors are not designed for this purpose, and there is a warning label to this effect on the compressor which states: "Danger! NEVER breath

compressed air, it can contain carbon monoxide or other contaminants. Will cause serious injury or death." Mr. Wodyga used such a compressor, with that warning label, on his boat. The evidence at trial indicated that he had not properly maintained the air filter as he had not adequately cleaned it, and he used vegetable oil for lubrication. He had not, however, had any problems with the compressor.

Mr. Wodyga entered into an arrangement with the victim, Levi Adams, to be a second diver on his boat. Mr. Adams represented himself to be an experienced diver, but he in fact did not have very much experience as a diver; and he had no experience diving in Southeast Alaska for sea cucumbers. Mr. Wodyga nevertheless was aware that Mr. Adams was not very experienced.

The two men went out diving on October 8, 2013. The first dive occurred without incident. But on the second dive, Mr. Wodyga was forced to return to the surface when he realized he was receiving bad air and getting dizzy. He did not see Mr. Adams, so he and his deckhand pulled Mr. Adams from the water. Mr. Adams was unconscious. Mr. Wodyga tried CPR and called the Coast Guard, but neither he nor the emergency responders were able to revive Mr. Adams. The medical examiner determined that the cause of death was carbon monoxide poisoning and drowning.

Mr. Wodyga was charged with Manslaughter and Criminally Negligent Homicide. The case was tried to a jury, which acquitted him of Manslaughter and convicted him of Criminally Negligent Homicide. Criminally Negligent Homicide is a Class B felony, with a presumptive term of 1-3 years.

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[1] AS 11.41.130.

Mr. Wodyga has a history of substance abuse and some mental health issues, all of which had been resolved prior to this incident. He also had been convicted of Burglary II in 2000 and received an SIS. That conviction was set aside. He presently has a diagnosis of PTSD caused by the death of Mr. Adams. He attended one treatment session, but did not like the way his therapist treated him, so he left. He remains untreated for PTSD.

After Mr. Adams' death, Mr. Wodyga did not immediately reenter the fishery. He later decided that he needed to do so, and so he obtained another compressor just like the one he used when Mr. Adams died. He used that compressor for diving notwithstanding the fact that a similar compressor was responsible for killing Mr. Adams. Mr. Wodyga testified at the hearing before the Panel that he planned to continue to dive, but he was only going to use commercial equipment. He did not, however, identify any concrete steps he had taken in this regard.

Mr. Wodyga did not express any empathy for Mr. Adams' family or show any remorse for what happened at any time prior to the hearing before the Panel. Indeed, he put a rant on Facebook after he was convicted in which he accused Mr. Adams' family of forcing his prosecution and essentially blamed them for his conviction. Mr. Wodyga did, however, credibly state at the hearing before the Panel that this was an error of judgment and that the family bore no responsibility for what happened. He also (finally) apologized at that time.

Mr. Wodyga's sentencing hearing was held before Ketchikan Superior Court Judge Trevor Stephens on May 4, 2015. Judge Stephens rejected Mr. Wodyga's request that he find the "least serious" mitigator.[2] Mr. Wodyga specifically declined to request a referral to the

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[2] AS 12.55.155(d)(9).

Panel, but Judge Stephens informed the parties that he thought a referral might be warranted. He gave the parties an opportunity to brief the issue, after which he issued a written order referring the case to the Panel. He found that Mr. Wodyga had an exceptional potential for rehabilitation and that imposition of the presumptive term would be manifestly unjust.

At the hearing before the Panel, Mr. Wodyga presented character testimony from a friend of his and testified on his own behalf. He testified at length about the incident, showing remorse and, as noted above, absolving the victim's family of any blame and indicating an intention only to use commercial gear in the future. The Panel found this testimony credible. The Panel also heard sentencing allocution comments from the victim's parents.

The Panel declined to hear this case and decided to return the case to the trial court for sentencing because Mr. Wodyga did not demonstrate by clear and convincing evidence either that he had an exceptional potential for rehabilitation or that imposition of the presumptive sentence would be manifestly unjust.

Exceptional Potential for Rehabilitation

AS 12.55.175(b) provides that the Panel may accept a referral if it "finds that manifest injustice would result from failure to consider relevant aggravating or mitigating factors not specifically included in AS 12.55.155". An exceptional potential for rehabilitation is one of these factors.[3] To establish this factor, a defendant must prove by clear and convincing

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[3] See e.g., ***Smith v. State***, 258 P.3d 913, 917 (Alaska App. 2011).

evidence[4] that he or she "can adequately be treated in the community and need not be incarcerated for the full presumptive term in order to prevent future criminal activity."[5]

> Such a prediction of successful treatment and non-recidivism should only be made when the sentencing court is reasonably satisfied both that it knows why a particular crime was committed and that the conditions leading to the criminal act will not recur--either because the factors that led the defendant to commit the crime are readily correctable or because the defendant's criminal conduct resulted from unusual environmental stresses unlikely ever to recur.[6]

Relevant factors in this regard include a defendant's prior criminal or juvenile record, if any; his or her employment and educational history; the extent of the defendant's family ties and continuing family support; whether he or she is youthful; any substance abuse by the defendant; the evaluation from the presentence report; and whether the defendant has expressed any remorse for his or her conduct.[7] A defendant's denial of responsibility or a failure to express remorse may well mean that the defendant does not have an exceptional potential for rehabilitation.[8] On the other hand, the fact that a defendant expresses remorse, has better than average prospects for rehabilitation, and has no significant need for rehabilitation does not necessarily mean that that defendant has an exceptional prospect for rehabilitation.[9]

The Panel found that Mr. Wodyga did not demonstrate by clear and convincing evidence that he has an exceptional potential for rehabilitation. The Panel finds that the crime

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

[5] ***Smith***, 258 P.3d at 917 (citation omitted).

[6] ***Id.***, quoting ***Beltz v. State***, 980 P.2d 474, 481 (Alaska App. 1999).

[7] ***Smith v. State***, 711 P.2d 561, 570 (Alaska App. 1985).

[8] ***Beltz***, 980 P.2d at 481; ***Manrique v. State***, 177 P.3d 1188, 1193 (Alaska App. 2008).

[9] ***Silvera v. State***, 244 P.3d 1138, 1149-50 (Alaska App. 2010).

was committed due to Mr. Wodyga's negligence in adequately maintaining a compressor that itself was not appropriate for use to supply oxygen to a diver and due to his willingness to allow Mr. Adams to participate in the fishery notwithstanding his inexperience. But the Panel cannot say, by clear and convincing evidence, that this crime will not recur. Mr. Wodyga has been gainfully employed in the fishery; he has extensive support from his family and friends; and he has successfully overcome his substance abuse issues. He also credibly expressed genuine remorse for what had happened, and he credibly testified that he intended to use commercial equipment in the future. But he did not identify any concrete steps he had taken to do so, and his willingness to use the same type of compressor that caused the death of Mr. Adams indicates to the Panel that he has not demonstrated a concrete plan to switch to that equipment – all he has done is promise "to make a change." Mr. Wodyga also has taken no steps to treat his PTSD, which given his testimony, clearly still remains a substantial problem for him.

Taken together, these factors do indicate that Mr. Wodyga has a good, perhaps even quite good potential for rehabilitation. But he did not demonstrate, by clear and convincing evidence, at least, that his prospects were excellent or that his conduct will not recur.

Manifest injustice

The Panel may also accept a referral pursuant to AS 12.55.175(b) if it finds that "manifest injustice would result . . . from imposition of a sentence within the presumptive range, whether or not adjusted for aggravating or mitigating factors". The Panel recognizes in this context that: "It is the legislature, not the judiciary, which establishes the punishment or range of punishments for a particular offense"[10]; "The presumptive term for an offense represents the

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[10] ***Beltz v. State***, 980 P.2d 474, 480 (Alaska App. 1999). ***See also, Scholes v. State***, 274 P.3d 496, 503 (Alaska App. 2012) and ***Dancer v. State***, 715 P.2d 1174, 1179-80 (Alaska App. 1986).

legislature's assessment of the appropriate sentence for a typical offender within that category"[11]; and, the availability of the Panel as a "safety-valve" does "not authorize sentencing judges to disregard the legislature's assessment concerning the relative seriousness of the crime or the general appropriateness of the prescribed penalty."[12]

"Manifest injustice" is a subjective standard.[13] It has been described as meaning a sentence which is "manifestly too harsh";[14] "plainly unfair";[15] "shocks the conscience";[16] and which involves "obvious unfairness."[17] In order to make a finding of manifest injustice, the Panel must be able to "articulate specific circumstances that make the defendant significantly different from a typical offender within that category or that make the defendant's conduct significantly different from a typical offense."[18]

Since the Panel must evaluate whether it would be manifestly unjust to sentence Mr. Wodyga within the applicable presumptive range, the Panel's focal point necessarily is the fairness of the presumptive term. The proper procedure for the Panel to follow is to first calculate what the presumptive term would be, after applying any aggravators and mitigators and

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[11] ***Beltz***, 890 P.2d at 480.
[12] ***Beltz***, 890 P.2d at 480. ***See also, Moore v. State***, 262 P.3d 217, 221 (Alaska App. 2011).
[13] ***Smith***, 711 P.2d at 568-69.
[14] ***Scholes***, 274 P.3d at 500.
[15] ***Smith***, 711 P.2d at 569; ***Knipe v. State***, 305 P.3d 359, 363 (Alaska App. 2013).
[16] ***Smith***, 711 P.2d at 568.
[17] ***Lloyd***, 672 P.2d 152, 154 (Alaska App. 1983); ***Smith***, 711 P.2d at 568; and ***Totemoff v. State***, 739 P.2d 769, 775 (Alaska App. 1987).
[18] ***Beltz***, 890 P.2d at 480. ***See also, Knipe***, 305 P.3d at 363; ***Smith***, 258 P.3d at 920-21; ***Moore***, 262 P.3d at 221; ***Dancer***, 715 P.2d at 1177; and, ***Aveoganna v. State***, 757 P.2d 75, 77 (Alaska App. 1988).

then determine if the same would be manifestly unjust "when compared to a sentence the court might deem ideally suitable in the absence of presumptive sentencing."[19]

Applying this analysis, the Panel finds that Mr. Wodyga did not prove that it would be manifestly unjust to sentence him within the presumptive term. The Panel finds that the key criteria here are general deterrence and affirmation of societal norms. As Mr. Adams' parents pointed out, it is very important to send a message to the sea cucumber dive fishery that the use of inappropriate air compressors to supply oxygen to the divers is an incredibly dangerous thing to do, as the kind of accident that occurred here could happen at any time. The community expects that this very dangerous fishery will be conducted in as safe a manner as possible. Imposition of a sentence below the presumptive term would be utterly inconsistent with these considerations, especially in light of Mr. Wodyga's failure adequately to maintain the very dangerous equipment he decided to use.

Given all of the above, the Panel remands the case to Judge Stephens for sentencing pursuant to AS 12.55.175(b).

IT IS SO ORDERED.

Dated at Palmer, Alaska this 24th day of September, 2015.

Eric Smith
Administrative Head
Three-Judge Panel

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Deputy Clerk CA

[19] ***Smith v. State***, 711 P.2d 561, 569 (Alaska App. 1985). ***See also, Shinault v. State***, 258 P.3d 848, 850-51 (Alaska 2011).