IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT KENAI

STATE OF ALASKA,	)
	)
Plaintiff,	)
	)
v.	)
	)
JOHN FRANCIS JAMES HARRIS,	)
	)
Defendant.	)
	) **Case No. 3KN-17-208 CR**

MEMORANDUM

The Three-Judge Sentencing Panel ("Panel") hearing in this case was held on July 27, 2018. Per the discussion during the hearing, the Panel decided to accept the case and imposed sentence. The Panel is required, per AS 12.55.175(b) to provide "a written statement of its findings and conclusions" if the court does not make a manifest injustice finding and remands a case to the trial judge for sentencing. Neither AS 12.55.175(b) nor Criminal Rule 32.4 requires that the Panel issue such a written statement when it makes a manifest injustice finding and imposes sentence. But the Panel is doing so herein in hopes that it may provide some guidance for trial judges and attorneys.

I. ISSUE

The issue presented was whether, per AS 12.55.175(b), Mr. Harris had proven by clear and convincing evidence that manifest injustice would result from imposition of a sentence within the presumptive range, whether or not adjusted for aggravating or mitigating factors.

II. FACTS

Mr. Harris is 69 years of age. He has 39 prior convictions, including 11 for Driving Under the Influence (DUI). He has two prior felony convictions, both for DUI (2009 and 2011). He has one prior misdemeanor drug conviction[1]

Mr. Harris violated his parole and probation conditions in his 2011 felony DUI case by committing an alcohol-related Reckless Driving offense. His parole was revoked. He was released again on mandatory parole on December 11, 2014. He then resided in a transitional living facility. He completed his parole term on August 31, 2015. He apparently had completed his probation term by April 2016. He was still residing in the transitional living facility as of May 16, 2016.

Mr. Harris has physical health problems. He was prescribed a Fentanyl patch for related pain. He used the patch as prescribed. His doctor increased his prescription to 75 mcg. He had a least one 25 mcg and one 50 mcg patch remaining when he began to sue the 75 mcg patches.

Roland Zumalt moved into the transitional living facility in or about late April 2016 after being released from prison. He was 32. Mr. Harris met him. He also met Mr. Zumalt's mother when Mr. Zumalt moved in. Neither Mr. Zumalt nor his mother indicated to Mr. Harris that Mr. Zumalt had a drug problem. Mr. Harris was not otherwise aware of the same.

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[1] Mr. Harris was convicted of Promoting Detrimental Drug in the Third Degree in Hilo, Hawaii in 1998 and received 48 hours of confinement. Neither the parties not the Pre-Sentence Report (PSR) provide additional information about this offense. His record also includes misdemeanor convictions for driver's license related offenses (6), criminal contempt (Hawaii) (6), property offenses (11), and reckless driving.

Mr. Zumalt at some point in early May 2016 saw that Mr. Harris was wearing a Fentanyl patch, told him that he had had a prescription for a Fentanyl patch before being incarcerated, had an appointment the next day to see a doctor to obtain a new Fentanyl prescription, and he was having a hard time sleeping due to physical pain. He asked Mr. Harris if he would lend him patches until he saw his doctor the next day, at which time his prescription would be renewed. Mr. Zumalt appeared to know a great deal about Fentanyl. Mr. Harris agreed to do so. He gave Mr. Zumalt one 25 mcg and one 50 mcg patch. He suggested that Mr. Zumalt just use the 25 mcg patch.

Mr. Harris knew very little about Fentanyl. He expected that Mr. Zumalt would use the patches as such. He had no idea that the Fentanyl in the patch could be used other than in the patch and as applied to the user's skin. He did not know that the Fentanyl could be extracted and used or consumed by smoking it. He did not understand that Fentanyl was potentially a very dangerous controlled substance if not used as prescribed.

Mr. Zumalt had a drug problem. He was found dead in his room in the transitional living home on May 16, 2016. A Fentanyl patch and packaging were found there, as was a piece of burned aluminum foil. Mr. Zumalt had extracted the gel from a patch and smoked it. He died of from the toxic effects of the Fentanyl.

A police officer investigating Mr. Zumalt's death had contact with Mr. Harris at the transitional living facility and noticed he was wearing a Fentanyl patch. The officer asked Mr. Harris about his patch. Mr. Harris discussed his prescription. He advised that he had given the patches to Mr. Zumalt and described the related circumstances. He stated he had been stupid and should not have given the two patches to Mr. Zumalt but thought that the dose was low enough that it would not doing anything to Mr. Zumalt.

The State arrested Mr. Harris on February 18, 2017 and charged him with Manslaughter (AS 11.41.120(a)(3), Criminally Negligent Homicide (AS 11.41.130), Misconduct Involving a Controlled Substance (MICS) 2nd Degree (AS 11.71.020(a)(1)), and MICS 4th Degree (AS 11.71.040(a)(3(A)(i)). He has since been incarcerated.

The State dismissed the MICS 4 charge during or before the grand jury proceeding. The grand jury returned an indictment on the remaining three charges. The State dismissed the Criminally Negligent Homicide charge before the jury trial.

The case proceeded to trial. The jury acquitted Mr. Harris of the Manslaughter charge and convicted him on the MICS 2nd Degree charge.

Mr. Harris moved to vacate the MICS 2nd Degree conviction, arguing that the verdicts were inconsistent. The State opposed the motion. The trial judge, Kenai Superior Court Judge Jennifer Wells, denied the motion, finding that the jury could have found that the Fentanyl patches Mr. Harris gave to Mr. Zumalt was not the source of the Fentanyl that had caused Mr. Zumalt's death a few days later.

Mr. Harris is subject to a 13-20 year presumptive sentence as MICS 2nd Degree was then a Class A felony and he had the two prior felony convictions.

Mr. Harris proposed four statutory mitigating factors. Judge Wells found that one statutory mitigating factor has been proven by clear and convincing evidence - that the offense involved "small quantities of a controlled substance."[2]

Mr. Harris requested that Judge Wells refer the case to the Panel, arguing per AS 12.55.165(a) that manifest injustice would result from imposition of a sentence within the

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[2] Then AS 12.55.155(d)(13). Judge Wells relied on ***Knight v. State***, 855 P.2d 1347 (Alaska App. 1993).

presumptive sentencing range, whether or not adjusted for aggravating or mitigating factors. The State opposed the request.

Judge Wells found that it would be manifestly unjust to sentence Mr. Harris to even 6.5 years, having given full weight to the statutory mitigating factor, because: Mr. Harris is not a typical drug offender; this case does not involve a typical drug deal; his prior criminal history reflects that he poses a danger to the public, but by committing alcohol-related offenses; he had successfully completed his probation on the 2011 felony DUI conviction and had thereafter been crime free, before and after this MICS offense; he is a senior citizen with physical and cognitive infirmities; he seems to have been somewhat vulnerable to manipulation by Mr. Zumalt; he did not understand the potential lethality of Fentanyl; he did not understand that a person could extract the Fentanyl from a patch and smoke it; and, his spending much, if not all, of his remaining life in custody would not serve the AS 12.55.005 sentencing goals. So she referred the case to the panel on that basis.

Mr. Harris presented the testimony of Tamera Mapes during the Panel hearing. She testified as an expert, based on her own personal experience, with regards to the use of unlawful controlled substances, including Fentanyl.

III. DISCUSSION

"It is the legislature, not the judiciary, which establishes the punishment or range of punishments for a particular offense."[3] "The presumptive term for an offense represents the legislature's assessment of the appropriate sentence for a typical offender with that category."[4] Aggravating and mitigating factors "define the peripheries" the category of typical offenses, and

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

identify "the relatively narrow circumstances that tend to make a given case atypical and place it outside the relatively broad presumptive middle ground."[5] The Panel is intended to serve as a "safety-valve" for those exceptional cases where manifest injustice would result from imposition of a sentence that the trial judge is authorized to impose.[6]

Alaska Statute 12.55.175(b), in pertinent part, provides that the Panel may accept a referral from the trial judge and impose sentence when the Panel finds by clear and convincing evidence[7] that "manifest injustice would result . . . from imposition of a sentence within the presumptive range, whether or not adjusted for aggravating or mitigating factors."

The Alaska Court of Appeals has stated that:

> The proper procedure for the sentencing court in such a case is to, first, to calculate what the presumptive term would be after adjusting for aggravating and mitigating factors and, second, to determine whether the adjusted term would be manifestly unjust - or plainly unfair- when compared with a sentence the court might deem ideally suitable in the absence of presumptive sentencing.[8]

To make such a finding, 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."[9]

And the Panel must ultimately conclude that:

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[4] ***Beltz***, 980 P.2d at 480. (emphasis added)

[5] ***Smith v. State***, 258 P.3d 913, 920-21 (Alaska App. 2011) (quoting ***Knight v. State***, 855 P.2d 1347, 1349 (Alaska App. 1993).

[6] ***See***, AS 12.55.175(b); ***Harapat v. State***, 174 P.3d 249, 255-56 (Alaska App. 2007); ***Daniels v. State***, 339 P.3d 1027, 1033 (Alaska 2014); ***Beltz***, 980 P.2d at 480; ***Moore v. State***, 262 P.3d 217, 221 (Alaska App. 2011).

[7] ***Garner v. State***, 266 P.3d 1045, 1048 (Alaska App. 2011).

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

[9] ***Beltz***, 980 P.2d at 480. ***See also, Knipe v. State***, 305 P.3d 359, 363 (Alaska App. 2013); ***Smith***, 258 P.3d at 920-21; ***Moore***, 262 P.2d at 221; and, ***Dancer***, 715 P.2d at 1177.

> the sentence, taking into account all of the appropriate sentencing considerations, including the defendant's background, his education, his character, his prior criminal history, and the seriousness of his offense, would be obviously unfair in light of the need for rehabilitation, deterrence, isolation, and affirmation of community norms.[10]

The Panel found that Mr. Harris is not a typical offender within the category of offenders who commit MICS 2nd Degree offenses. He is not a drug dealer. He had not been a drug dealer. This was a one-time delivery. And the Panel found that Mr. Harris's conduct was significantly different from that involved in a typical MICS 2nd offense. He had a valid prescription for Fentanyl patches. He thought he was providing medicine to an acquaintance which acquaintance had been prescribed the medication (Fentanyl) in the past, would be prescribed it again the following day, and was in need of it in the meantime. He received nothing in return. He had no idea that Mr. Zumalt abused controlled substances or that that he would or could consume the Fentanyl in a non-prescribed manner.

The Panel agreed with Judge Wells that the "small quantity" mitigating factor applies.[11] The Panel found that a 6.5 year sentence would be obviously unfair. The Panel, in addition to its above-stated findings, noted that: Mr. Harris has a very serious criminal record, but it reflects that he is a danger to the public when he consumes alcohol and this offense did not involve alcohol; and, he apparently had gotten his life back on track since last being released from jail. The Panel found that the most important sentencing goal under the circumstances is

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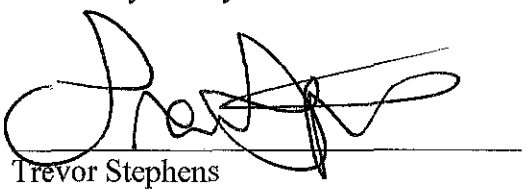
[10] ***Moore***, 262 P.3d at 221 (quoting ***Totemoff v. State***, 739 P.2d 769, 775 (Alaska App. 1987)).

[11] Though the ***Knight*** analysis has been called into question. ***See, Dollison v. State***, 5 P.3d 244, 247-48 (Alaska App. 2000); ***Hoekzema v. State***, 193 P.3d 765, 772 (Alaska App. 2008). The quantities nonetheless appear to have been "small" for purposes of this mitigating factor. ***See, Pocock v. State***, 270 P.3d 823, 824-26 (Alaska App. 2012). The Panel notes that the quantities appear to be at the lowest level under the 2016 U.S. Sentencing Guideline Manual.

general deterrence.[12] The Panel found that sentencing goal could be achieved with a sentence of three years to serve.

So the Panel, based on all of the foregoing, found that Mr. Harris had shown by clear and convincing evidence that manifest injustice would result if he were sentenced to serve a sentence within the presumptive range, as adjusted for aggravating or mitigating factors.[13]

Dated at Ketchikan, Alaska this 30th day of July 2018.



Trevor Stephens
Superior Court Judge
Administrative Head

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[12] The Panel did not find that community condemnation was particularly strong given the record in this case which reflects that during voir dire a material number of potential jurors indicated that they would consider providing prescription medication to a friend in need. Isolation received some weight given Mr. Harris's extensive criminal record, but this offense was unlike any he had committed in the past. The Panel did not find that rehabilitation was an important consideration this case did not involve Mr. Harris abusing a controlled substance and, as noted, he is not a drug dealer and is not part of the criminal drug milieu. The Panel instead focused on general deterrence - deterring others similarly situated to Mr. Harris from sharing their prescription medications, particularly a potentially very dangerous substance such as Fentanyl. This would also serve to reaffirm a societal norm that such sharing of prescribed medication should not occur.

[13] The Panel notes that the outcome would have been the same if the "small quantities" mitigating factor did not apply as the Panel would have still found that the 3 year sentence was appropriate given the facts and applicable law and so a sentence of 13 years would have been even more obviously unfair. The Panel also notes that Mr. Harris had argued that the Panel should place material weight on the facts that the legislature amended the MICS statutes for offenses committed on or after July 12, 2016, and that the offense he committed is now a B felony offense (relying on ***State v. Stafford***, 129 P.3d 927 (Alaska App. 2006)) and that the two prior felony offenses for presumptive purposes were felony DUI's, which involved misdemeanor conduct that was a felony only because of it was repeated such conduct. The Panel did not find either argument persuasive. The Panel recognizes that the legislature took the action it did. The Panel did not find that ***Stafford*** mandates that it sentence Mr. Harris as though he had been charged under the revised statute. The Panel did not find the DUI argument persuasive.