IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

STATE OF ALASKA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
CURTIS CALL,	)	
	)	
Defendant.	)	
	)	Case No. 4NE-13-120 CR

FINDINGS AND REMAND ORDER

The Three-Judge Sentencing Panel (Panel) held a hearing in this case on August 6, 2015. The parties appeared and were represented by their counsel of record. The Panel found that Mr. Call had not shown by clear and convincing evidence 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. Call was indicted on two counts of Sexual Abuse of a Minor in the First Degree and one count of Sexual Abuse of a Minor in the Second Degree.[1] He entered into an agreement with the State pursuant to which he pled guilty to two reduced counts of Sexual Abuse

[1] AS 11.41.436(a)(5)(A) ("An offender commits the crime of sexual abuse of a minor in the second degree if . . . being 18 years of age or older, the offender engages in sexual contact with a person who is under 16 years of age and the victim at the time of the offense is residing in the same household as the offender and the offender has authority over the victim.").

of a Minor in the Second Degree, with a 15 year cap on time to serve and sentencing otherwise left open to the court. He also stipulated to the "most serious" aggravator.[2]

The undisputed facts underlying Mr. Call's conviction are as follows. The victim was 15 years old at the time the sexual abuse occurred. Her mother had placed her with Mr. Call's family (he is married with four children) due to serious issues that arose between her and her father – while the record is not entirely clear on this score, it appears that she may have been mentally and physically abused by him, and there was some involvement by the Office of Children's Services relating to this placement. The victim and Mr. Call took a 4-wheeler trip, during which they had intercourse in a wooded area. About a week later, Mr. Call drove his wife to Fairbanks and placed her in a psychiatric hospital because she had become suicidal. Upon his return to the home, he had intercourse with the victim in his bedroom. He was not intoxicated at the time. He told the troopers that he had fantasized about having sex with the victim before the second incident.

Mr. Call has a number of relatively old convictions for DUI from when he lived in Utah. He has no prior felonies or convictions for a sexual offense. He graduated from a substance abuse treatment program while incarcerated, but the program noted that he needed long-term residential treatment once he was released from jail, and substantial concerns were raised regarding what the program termed his "guarded" participation in group sessions.

Mr. Call's sentencing hearing was held before Fairbanks Superior Court Judge Bethany Harbison on December 17, 2014. Mr. Call requested that Judge Harbison refer the case

---

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

to the Three-Judge Panel pursuant to Collins v. State,[3] and, in the alternative, that imposition of a sentence in the presumptive range would be manifestly unjust. He relied on a sex offender assessment performed by Moreen Fried, which concluded that he was a low risk to reoffend, as well as the fact that he had graduated from a substance abuse treatment program while incarcerated. The State opposed.

Judge Harbison granted Mr. Call's request at the hearing. She found that she was required to refer the case pursuant to Collins because Mr. Call had proved by clear and convincing evidence both that he did "not have a history of unprosecuted sexual offenses, [and] that [he] has prospects for rehabilitation which, in other offenders, would be considered "normal" (or "good")."[4] Judge Harbison did note, however, that she did not find that Mr. Call had an exceptional potential for rehabilitation or that imposition of a sentence within the presumptive term would be manifestly unjust.

Both parties largely relied on their briefing (which in turn reflected the arguments made to Judge Harbison) at the hearing before the Panel. The State presented brief testimony from the victim, her mother, and a state trooper regarding the underlying facts of Mr. Call's offenses. The Panel also heard sentencing allocution comments from the victim, the victim's mother, and Mr. Call's stepmother. Mr. Call's stepmother stated that Mr. Call told her that he had been physically abused by his father and sexually abused by his brother when he was a child.

The Panel declined to hear this case and decided to return the case to the trial court for sentencing because referral is not appropriate under Collins and Mr. Call did not demonstrate that imposition of the presumptive sentence would be manifestly unjust.

---

[3] 287 P.3d 791 (Alaska App. 2012).
[4] Id. at 797.

Applicability of Collins

Collins does not apply to this case for three reasons. First, the legislature amended AS 12.55.165 in 2013 by adding a new subsection (c) that expressly overturned both the Collins decision and the logic underlying that decision.[5] That subsection applies to offenses committed before, on or after July 1, 2013.[6] The trial judge therefore lacked the authority to refer this case to the Panel pursuant to Collins.

Even if Collins did apply to this case, referral was precluded by AS 12.55.165(b), which provides in pertinent part that a "court may not refer a case to a three judge panel based on the defendant's potential for rehabilitation if the court finds that a factor in aggravation set out in AS 12.55.155(c). . . (10) is present." The Court of Appeals held in Waskey v. State[7] that the logic of its opinion in Collins was predicated on a defendant's potential for rehabilitation and therefore that AS 23.55.165(b) could bar referral if one of the aggravating factors set forth in that section applied. As noted above, defendant stipulated to aggravator 10, which means that the trial judge was barred from referring the case to the Panel.

Finally, even if the referral were not barred, the Panel finds that Mr. Call did not demonstrate either of the Collins factors by clear and convincing evidence. The only evidence he submitted as to a lack of past unprosecuted sexual offenses was his bare allegation in an affidavit that he had no such history, which is far from sufficient under the "clear and convincing evidence" standard. And the record does not support a finding by clear and convincing evidence

---

[5] Sec. 22, ch. 43, SLA 2013.

[6] Sec. 46(b), ch. 43, SLA 2103.

[7] 2014 WL 2834897 (Alaska App. 2014), at *2, cited as persuasive authority pursuant to ***McCoy v. State***, 80 P.3d 757, 764 (Alaska App. 2002).

that he had "good" prospects for rehabilitation. The probation officer found that his prospects were "guarded", even after she was provided with Mr. Call's sex abuse assessment. That conclusion is entirely understandable, for the assessment was based almost entirely on the conversation he had with Ms. Fried – no objective tests were conducted and very little collateral information was reviewed. In addition, Mr. Call remains in need of significant additional substance abuse treatment even though he graduated from the treatment program in jail, for the program concluded that he needed residential treatment after his release and that he had been very guarded in his group meetings. It is noteworthy and significant in this respect that Mr. Call did not reveal to Ms. Fried that he had been physically abused by his father and sexually abused by his brother – a fact provided during allocution by his stepmother.

Manifest injustice

The Panel evaluated whether it would manifestly unjust to sentence Mr. Call to the presumptive term both pursuant to Collins (assuming it applied) and as an independent matter, since Mr. Call made that claim in his pleadings. 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"[8]; "The presumptive term for an offense represents the legislature's assessment of the appropriate sentence for a typical offender within that category"[9]; 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."[10]

---

[8] ***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).
[9] ***Beltz***, 890 P.2d at 480.
[10] ***Beltz***, 890 P.2d at 480. ***See also, Moore v. State***, 262 P.3d 217, 221 (Alaska App. 2011).

"Manifest injustice" is a subjective standard.[11] It has been described as meaning a sentence which is "manifestly too harsh";[12] "plainly unfair";[13] "shocks the conscience";[14] and which involves "obvious unfairness."[15] 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."[16]

Since the Panel must evaluate whether it would be manifestly unjust to sentence Mr. Call 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 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."[17]

Applying this analysis, the Panel finds that Mr. Call did not prove that it would be manifestly unjust to sentence him within the presumptive term, which is 5-15 years for each count. The trial judge in fact expressly found that it would not be manifestly unjust to do so and declined to refer the case on that basis. And there is ample support for that decision, for such a sentence would not shock the conscience. Mr. Call committed a greater offense (SAM I) than

---

[11] ***Smith***, 711 P.2d at 568-69.
[12] ***Scholes***, 274 P.3d at 500.
[13] ***Smith***, 711 P.2d at 569; ***Knipe v. State***, 305 P.3d 359, 363 (Alaska App. 2013).
[14] ***Smith***, 711 P.2d at 568.
[15] ***Lloyd***, 672 P.2d at 154; ***Smith***, 711 P.2d at 568; and ***Totemoff v. State***, 739 P.2d 769, 775 (Alaska App. 1987).
[16] ***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).

the offense to which he pled. He allowed a troubled teenager into his home, a girl some 30 years younger than he is, and then sexually abused her. He admitted that he fantasized about having sex with her prior to doing so. His second offense occurred in the marital bed immediately after he had taken his wife to a psychiatric hospital because she was suicidal. He still needs long-term residential treatment for his alcoholism. The probation officer deemed his rehabilitative prospects to be guarded. And as noted above, his sex offender assessment was far from sufficient, particularly in light of the fact that he did not reveal prior physical and sexual abuse to the assessor.

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

IT IS SO ORDERED.

Dated at Palmer, Alaska this 19th day of August 2015.

Eric Smith
Administrative Head
Three-Judge Panel

I certify that on 8-24-15
a copy of this document was sent to
☐ Def/Atty ☒ DA ☐ DPS ☐ AGO
☐ MSASAP/AASAP ☐ DMV ☐ PWP
☐ MSPI ☐ Anch Jail ☒ Other Pa mail
Deputy Clerk GLS

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