

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

FILED in the Trial Courts
State of Alaska, Third District

STATE OF ALASKA,

Plaintiff,

vs.

CHARLES EGBE,

Defendant.

JUL 23 2008

Clerk of Trial Courts

By Deputy

3AN-07-8904CR

ORDER REFERRING SENTENCING TO THREE-JUDGE PANEL

On February 21, 2008, defendant Charles Egbe was found guilty following a jury trial of Robbery in the first Degree.

Mr. Egbe requested his sentencing be forwarded to a three-judge panel on May 23, 2008. The State opposed. A presentence hearing was conducted on June 27, 2008 where the court took evidence and heard argument on proposed statutory and non-statutory mitigators as well as the three-judge panel issue.

Statutory Mitigators

Mr. Egbe proposed three statutory mitigators.

1. **Minor Role**: The defendant, although an accomplice, played only a minor role in the commission of the offence. AS 12.55.155(d)(2)

Egbe established this mitigator by clear and convincing evidence.

Egbe's role was that of an accomplice to a robbery. He was not proactive in the event and he did not initiate the robbery. He did not lay hands on the victim. He did not direct traffic nor give orders or direction to his co-defendants. Based upon the evidence produced before this court, Egbe appeared to be more of a

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passive participant. He held the door, gave some verbal encouragement and arrived and departed with the group.

The robbery could have been completed without out the participation of Egbe. Egbe did not act in a critical role even though he did clearly assist in the completion of the offense as something that he wanted to see completed.

2. Least Serious: The conduct constituting the offense was among the least serious conduct included in the definition of the offense. AS 12.55.155(d)(9)

This mitigator was not established by clear and convincing.

A BB gun was used, but it was very realistic looking. The fear by Mr. Lin was no different than if it had been a real firearm. It is doubtful that the fear felt by Mr. Lin is mitigated at all by knowledge after the fact that the gun was a BB gun. The threat of using a firearm, even though false, created compliance by Mr. Lin.

3. Minor Harm: The facts surrounding the commission of the offense and any previous offense by the defendant establish that the harm caused by the defendant's conduct is consistently minor and inconsistent with the imposition of a substantial period of jail time. AS 12.55.155(d)(13)

This mitigator was not established by clear and convincing.

A similar analysis as that for the "least serious" mitigator is used. Mr. Lin's fear was real. Physical force was used on Mr. Lin. The conduct as a whole falls squarely within the definition of robbery where only a threat is needed.

Non-Statutory Mitigators-Extraordinary Prospects of Rehabilitation

Egbe bears the burden to show that he has an extraordinary potential for rehabilitation.

Egbe does have a good, not great, but good work history. He does have strong family support and a family that has positive expectations of him. Egbe appears to

respect and want to meet his families expectations of him. This is important because the desire to receive family approval is typically a much stronger motivation than that of a judge or probation officer telling a defendant what he should do with his life.

Egbe has no apparent substance abuse issues. He earned a High School diploma. He has stated definite plans to further his education and work career.

Regarding his judgment and character, Egbe, probably for tactical reasons is unwilling to take full responsibility for his decision to participate in the robbery. The incident at the football game with sister has at least two sides. Regardless of which side you believe, I did not hear any good reason why physical violence was necessary and why Egbe couldn't have walked away with his sister. Despite those concerns, Egbe's work ethic, support of family, decision to protect his sister – even if a bad choice to use fists, High School degree, no drug or alcohol problems all equal a solid foundation in character and judgment. Mr. Egbe knows how to conduct himself in a proper manner, his choice now is learning that character means putting family, job, and education ahead of pride. In other words, he needs to walk away from those that tempt him to do what he knows is wrong.

Based upon a totality of the evidence presented to me, I find by clear and convincing evidence that probation will work and that Mr. Egbe will be rehabilitated to include, furthering his education, improving his work experience, continuing to receive and respect the support of his family, and being a law-abiding citizen and productive member of this community.

What is a just sentence for Egbe?

It is this court's position, considering the presence and nature of the statutory mitigator as well as the facts supporting the non-statutory mitigator, that a just sentence would be five (5) years with four (4) years suspended, and one year of active jail.¹ Egbe would be placed on probation for 5 years with a recommendation that he be released from probation early at the three (3) year point if he has no probation violation at that point.

This sentence would provide Egbe a substantial opportunity to exhibit the prospects for rehabilitation that this court has found exist. Although he would have a relatively short-time of incarceration, this is necessary to adequately address the need for community condemnation (against the use of violence in public) and reaffirmation of societal norms (validate the fear and stress suffered by Mr. Lin as a result of this robbery). The suspended jail time would also support the goals of community condemnation and reaffirmation of societal norms, and would act as a deterrent to Egbe. Frankly, if Egbe performs poorly, he should serve a 5-year sentence.²

This court does not have the discretion to sentence Egbe to the term of imprisonment that it feels is appropriate. Even with finding the statutory

¹ Egbe does not qualify for a suspended imposition of sentence pursuant to AS 12.55.085(f)(1). I make no recommendation against an SIS.

² The court certainly does not expect the defendant to perform poorly. To the contrary, the court is convinced the defendant will succeed on probation. However, as pointed out in this court's discussion of the defendant's character, he is free to make the wrong choices.

mitigator, this court can only reduce the five to eight year presumptive term³ to a two and a half (2.5) year presumptive sentence.⁴

This court is of the opinion that a sentence of five years with two and a half (2.5) years suspended and two and a half years (2.5) to serve would be inconsistent with Egbe's strong rehabilitation potential and in fact undermine any efforts to rehabilitate Egbe.⁵ Whether the inconsistency of a 2.5 year sentence towards the rehabilitation of Egbe constitutes a manifest injustice is a close call. When a decision such as this is a close call, it is appropriate to let a three-judge panel determine a defendant's sentence.⁶

There is a second justification for sending Egbe's sentencing to a three-judge panel. If a court is of the opinion that some adjustment should be made to the sentence because of the non-statutory mitigator, then the sentencing must be forwarded to a three-judge panel.⁷ Even if this court was satisfied that a sentence of five years with 2.5 years suspended was just, Egbe would still have to serve that time as a presumptive sentence. As such, Egbe would not be eligible for discretionary parole until he served the entire 2.5 years but with credit for good time.⁸ A three-judge panel can make some adjustment so that Egbe could become eligible for discretionary parole at an earlier date.⁹ Some adjustment should be

³ AS 12.55.125(c)(1)

⁴ AS 12.55.155(a)(2)

⁵ While an extended active jail time is inconsistent with rehabilitation, substituting a substantial amount of Community Work Service is entirely consistent with that goal and is also consistent with the goals of community condemnation, reaffirmation of society and deterrence of defendant.

⁶ Harapat v. State, 174 P.3d 249, 255 (Alaska App. 2007).

⁷ Harapat v. State, 174 P.3d at 254.

⁸ AS 33.16.090 (b)(2)

⁹ AS 33.16.090 (b)(3)

made as a result of the non-statutory mitigator. As such, referral to the three-judge panel must occur.

IT IS ORDERED that the sentencing of Charles Egbe is referred to the three-judge panel pursuant to AS 12.55.165 and CR 32.4. A copy of this order will be provided to the Clerk of Court who will then have 30 days to transmit all necessary documents to the three-judge sentencing panel.

Dated at Anchorage, Alaska this 23rd day of July 2008.



Eric A. Aarseth
Superior Court Judge

*I certify that on July 23, 2008 a copy was
mailed to: DA-Athens/PD-Moudy/Superior
Court Judge Stephanie Joannides*

N. Mc *Clerk
of Court*
Nancy M. McKewin, Judicial Assistant

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