

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
 Plaintiff,)
)
 v.)
)
 CHRISTOPHER SCOTT DELAPP,)
)
 Defendants.)
)
 _____) Case No. 3AN-10-05947 CR

ORDER FORWARDING CASE TO THREE-JUDGE SENTENCING PANEL

On November 15, 2010, defendant, Delapp, pled guilty to the crime of possession of child pornography. Sentencing of Delapp was originally set for February 4, 2011 and was postponed several times. On February 25, 2011 Delapp moved to forward his case to a three-judge sentencing panel. Hearings were held on June 3, 2011 and July 22, 2011 where the court heard from counsel, the investigating detective, and Doctors Smith and Lazar. The Court also was in possession of presentence report with addendums and exhibits, which included police reports, interview transcripts, letters supportive of Delapp and a psychological report from Dr. Smith. For the reasons set for below, supplementing the Court's oral findings of July 22, 2011 the court GRANTS Delapp's motion and refers his sentencing to the three judge panel pursuant to AS 12.55.175.

I) Facts

On March 16, 2010 the defendant's daughter reported to the Anchorage Police Department that she had discovered child pornography on the defendant's computer. APD received a search warrant for Delapp's residence, where APD members found and seized USB drives and a laptop computer. At the police station Delapp stated that he thought he possessed about 200 images and videos of nude pre-pubescent children. Delapp pled guilty to possession of child pornography, and has requested that his case

be forwarded to a three judge panel for sentencing. The defendant argued that the conduct he engaged in was among the least serious conduct included in the definition of the offense under AS 12.55.155(d)(9). Delapp also argued that the non-statutory mitigating factor of "extraordinary potential for rehabilitation" requires sending the matter to a three judge panel.

II) Discussion

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 of referral of a case from trial court to a three-judge panel for sentencing"¹ First, where "manifest injustice would result from failure to consider relevant, non-statutory aggravating or mitigating factors in sentencing; and, second, where manifest injustice could result from imposition of a presumptive sentence [regardless of] whether or not statutory aggravating and mitigating factors [had been adjusted for]."² The burden is on the defendant to show that one of these two forms of manifest injustice exists by clear and convincing evidence.

Delapp argued his conduct was both least serious and he possessed an extraordinary potential for rehabilitation.³

¹ *Dancer v. State*, 715 P.2d 1174, 1177 (Alaska App. 1986). See also *Kirby v. State*, 748 P.2d 757, 762 (Alaska App. 1987).

² *Id.*

³ Regarding least serious, Delapp possessed 113 images which his counsel argued was, in his experience, less than the normal amount possessed in this type of case. The State cited *Ferrick v. State*, *State v. Parker* and *McKechnie v. State* as instances where the defendant possessed fewer images than the defendant in the current matter and the courts denied the least serious mitigator.

In determining whether or not to apply the least serious mitigator the court looks at the defendant's age, number of images, length of time collecting the images, and the inability to quit viewing the illegal images. In this matter the defendant possessed more than the sixty images assumed by the Court in *Parker*. The Court finds over one hundred images to be in the heartland of the offense. The images were collected over the period of at least four years.

Rehabilitation

In *Smith v. State*,⁴ 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 Charley criteria that should be considered in determining referral to the three-judge pane.⁵

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.⁶

The court noted that prior convictions would relate directly to the defendant's potential for rehabilitation.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."⁸ 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.⁹

Dr. Richard Lazur, a DOC approved sex offender treatment professional, treated Delapp. Dr. Lazur has treated some 200 offenders, although the vast majority of such offenders were "hands on" offenders. Dr. Lazur testified before this Court that Delapp

Further, he admitted that he had previously destroyed a similar collection, and had collected the current material since, thus exhibiting his inability to stop viewing the material. The Court also takes notice of the fact that he left the USB drives out allowing his daughter to find them. With these facts the Court cannot find that the defendant proved by clear and convincing evidence that the defendant's conduct was among the least serious under AS 12.55.155(d)(9).

⁴ 711 P.2d 561 (Alaska App. 1985).

⁵ *Id.* at 570.

⁶ *Id.* at 572.

⁷ *Id.*, FN 7.

⁸ *Boerma v. State*, 843 P.2d 1246, 1248 (Alaska App. 1992).

⁹ *Id.*

has taken responsibility for his behaviors, which is unusual, and he is doing a great job in treatment. In his report Dr. Lazur concurred with Dr. Smith's professional opinion that Delapp appears "to pose a very low risk of sexual recidivism."¹⁰ Further, Dr. Lazur stated that, "Delapp shows outstanding potential for rehabilitation, to stop his untoward behaviors, and not to put anyone in danger."¹¹

Dr. Lazur also testified that he did not find Delapp was only in treatment to avoid harsh consequences. The Court also heard testimony from Dr. Smith which it found to be helpful but not as persuasive as Dr. Lazur, the defendant's treating psychologist. The State cross-examined each witness called by Delapp but did not present any psychological evidence. Both doctors testified Delapp could be treated in the community (Delapp is currently being treated by Dr. Lazur) and is not a danger to reoffend if not incarcerated.

II) Decision

The Court notes that Delapp is a 42 year old man, is steadily employed and has no prior criminal record. He pled guilty of possessing child pornography, and has taken responsibility for his actions. The only testimony before this Court regarding the potential for rehabilitation is very positive in favor of rehabilitation. This Court finds no need to isolate Delapp for 2 years, and believes that deterrence and community commendation can be achieved through a lesser period of incarceration. While deterrence and community condemnation are important parts of any *Chaney* analysis the Court believes they can be satisfied without imposing the presumptive term. If this Court had sentenced the defendant without the constraints of AS 12.55.125(i)(4) it would have been a sentence of more than the presumptive term with all but a year suspended. It would also have imposed a term of probation to assure the defendant's conduct was monitored. While the reprehensible nature of the images shocks the conscience of the Court, it weighs the testimony of Dr. Lazur and finds Delapp's potential for rehabilitation to be extraordinary and established by clear and convincing evidence.

¹⁰ *Exhibit B, 2.*

¹¹ *Id.*

Because the Court finds a manifest injustice would result from failure to consider the relevant, non-statutory mitigating factor, the extraordinary potential for rehabilitation, the motion to forward the matter to a Three-Judge Panel is hereby GRANTED.

7/26/11
Date

Michael R. Spaan
Michael R. Spaan
Superior Court Judge

I certify that on 7/28/11
a copy of the above was mailed
to each of the following at their
addresses of record. DAO Athens

AV Tetlow
A. Vigil – Administrative Assistant

Honorable Eric Smith