

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

State of Alaska,
Plaintiff,
vs.
Richard Jared Zacharoff,
Defendant.

CASE NO: 3ST 10-23 CR

ORDER OF REFERRAL TO THREE-JUDGE PANEL

The above case is referred to the three-judge sentencing panel under Alaska Statute 12.55.165 - 175.

This case was tried to a jury. Subsequently a presentence report was prepared. The court conducted sentencing proceedings on September 27, 2011, with neuropsychologist Dr. Nan Truitt testifying. The court now finds by clear and convincing evidence that manifest injustice would result from imposition of the presumptive term of 7 to 11 years without the sentencing court being able to consider a non-statutory mitigating factor regarding the defendant's potential for rehabilitation. The court also finds that manifest injustice would result from imposition of the presumptive term even if no mitigating factor can be considered, due to the extraordinary circumstances of the case. The court deems a proper sentence of time to serve is half or less of the presumptive term for the crime, with the remainder of the presumptive term suspended. The formal presentence report recommends that defendant receive only a "moderate period of time to serve", and notes that all of the circumstances point to defendant being a youthful first offender who is a good candidate for probation. Additionally Dr. Truitt

finds that the defendant has very good rehabilitation prospects, both subjective and objective.

The court directs that the record of the proceedings be transmitted to the State of Alaska three-judge sentencing panel for consideration under AS 12.55.175. In so doing, the court is not overlooking that several sentencing goals must be balanced when any sentence is considered. This court has no intention to ignore the other *Chaney* goals and focus only on rehabilitation. Rather, this referral seeks permission from the three-judge panel to weigh and balance the defendant's good potential for rehabilitation along with the other goals, or to urge the three-judge panel to do so. The court also asks the three-judge panel to consider the manifest injustice of the prescribed presumptive term given the extraordinary circumstances of the crime, even though the court is well aware that the three-judge panel is not permitted to re-write the juvenile waiver law. *Smith v State*, ___ P.3d ___, Op. No. 2318, Alaska App., July 1, 2011.

The court made extensive oral findings on the record at the close of the proceedings September 27, 2011. The court believes the three-judge panel will have access to such transcript. The court noted in its oral findings that it had a unique opportunity during the three-week trial in this case to observe at length all of the following-- the defendant, the victim, their families, and the community, including the community's potential as a rehabilitation location for defendant. The facts that came out at trial also are important in suggesting these potentials and in underscoring the probation officer's and Dr. Truitt's opinions about the defendant's good potential for rehabilitation.

The court at trial heard all of the substantial facts surrounding the crime and the individuals involved. These facts are set forth in the presentence report. The facts show that the assault resulted from a fairly "innocent" situation. Seventeen-year-old Jared Zacharof, the defendant, was home "minding his own business", visiting with two other teen friends late in the evening. No drinking was involved. An elder sister, who was visiting Saint Paul from out of town, came to the home intoxicated and wanting a ride to a bonfire. The defendant was asked or told by his father to use his father's truck to give a ride to his sister. (The father did not want to go out himself, and he did not want his intoxicated daughter to drive herself in his truck.) It turned out, unanticipated by the father or the defendant, that the sister had a male companion with her (the victim in the case) who had not come into the house with the sister but was waiting outside the house to share the ride that the sister was getting.

As soon as the ride started, the victim, who also was very intoxicated, repeatedly taunted the defendant and his friends, who came along too. (The victim also had grown up in Saint Paul and knew the defendant and his girlfriend.) The teens, who included the defendant's girlfriend, were repeatedly and provocatively insulted, leading to shouting and to the defendant stopping the car, trying to get the intoxicated sister and male companion out of the truck, refusing to give them a ride any further, given the deterioration of the situation. During the posturing and fighting that resulted after the truck was stopped, the defendant grabbed a metal pipe from the truck and struck the victim in the head twice, doing serious injury.

This thoughtless and destructive action of the defendant was defended at trial as self-defense, or defense of third parties, but the jury did not accept this defense. To the court, it appeared the action of striking the victim so viciously to stop the victim's behavior was not unlike that of a small child biting a sibling because the child in the heat of the moment could think of no other way to try to attack/defend.

The report and testimony of neuropsychologist Dr. Nan Truitt is comprehensive and compelling. She concludes that the defendant has a very good potential for rehabilitation for a number of reasons. First, the defendant's aggression was reactive. Secondly, he has learned already from this incident, and now he is both physically and mentally more mature. Third, he has substantial family and community support. Fourth, he does not have serious issues with addiction, anti-social personality, adolescent conduct disorder or the like. Finally, but not less importantly, he is respectful of authority, not a bully, and not fascinated with guns or violence. He is viewed as just a "nice kid" with borderline MMR (Mild Mental Retardation) issues, perhaps related to FASD. (He may suffer to some degree from Fetal Alcohol Spectrum Disorders, although he attended school with his peers without any extreme social problems, and while incarcerated post-trial completed his GED.) He appears to adapt well and to learn social skills with normal behavior modification techniques, although the academic parts of school are a struggle for him. Dr. Truitt's report and testimony underscore the otherwise good nature and promise the defendant has as an individual in his community and in our society.

The record is clear and convincing that defendant is an excellent candidate for probation services. He does not need to be incarcerated for 7 years to get motivated to change or to learn that his reaction of using the metal pipe in the situation was extremely wrong. The court notes that three-and-a-half years in the life of a 17 year old is 20% of his life, whereas the presumptive sentence of 7 years in the life of a 35 year old is the same 20%. In terms of how much time is warranted to deter an offender or reaffirm societal norms, such percentage consideration is relevant.

The court also deems restitution very worthy of consideration in circumstances like those in this case. The victim is seeking restitution for time lost from work, and perhaps other losses. (His medical expenses were covered.) The community is small, and whether defendant is paying restitution will be noticed, and will be part of the healing. The defendant now has completed high school and can work. He is described as a diligent worker from a community with work opportunities. The sooner he is on probation, the sooner he can go to work to compensate his victim.

The three-judge panel exists to address extraordinary circumstances and manifest injustice. This referral is premised both on the finding that the sentencing court should be able to consider the defendant's excellent potential for rehabilitation, and on the finding that even without considering this potential for rehabilitation, "manifest injustice" would result from sentencing this young, never before convicted, defendant to 7 to 11 years, given the circumstances as to how the crime came about. All of the goals of sentencing are more than adequately met by a sentence of half that amount, or less, with the rest of the time suspended and the defendant placed on supervised probation

The Alaska Constitution deems that sentences shall be based on the principal of reformation and the need to protect the public. A probationary type of sentence meets those goals here. All the professionals involved in the case so far believe the defendant should receive a probationary type of sentence more than a lengthy sentence to incarceration.

Dated at Palmer, Alaska this 29 day of September, 2011.

Beverly W. Cutler
Beverly W. Cutler
Superior Court Judge Pro Tem

I certify that on 9/29/11
a copy of this order was mailed or delivered to:
J. Darnell, DA (Anch)
O. Phelan, APO
Clerk: am