IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

STATE OF ALASKA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
TIMOTHY DANIEL TANBERG,	)	
	)	
Defendant.	)	
	)	**Case No. 4FA-16-619 CR**

MEMORANDUM AND ORDER

The Panel hearing herein proceeded as scheduled on October 5, 2018. The Panel made verbal findings, granted Mr. Tanberg's request to be made eligible to apply for discretionary parole, and imposed sentence. The Panel advised that this related Memorandum and Order addressing the Panel's decision would be forthcoming.[1]

Mr. Tanberg was convicted by a jury of committing the offense of Sexual Assault in the 1st Degree in violation of AS 11.41.410(a)(1). M.P. was the victim of his offense. He is subject to a presumptive sentence of 20-30 years per AS 12.55.125(i)(1)(A)(ii). He is not eligible for mandatory parole per AS 33.20.020(a)(3)(B). He is not eligible to apply for discretionary parole per AS 33.16.090(b)(3) unless made eligible by the Panel.

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[1] Criminal Rule 32.4(e) requires that the Panel issue written findings and conclusions when remanding a case to the referring judge for sentencing. The Rule does not expressly require that the Panel do so when it accepts a case. The Panel's view is that it should issue written findings and conclusions with respect to every case as the Panel's decisions are being collected and made publicly available and the same may be of some guidance to judges and attorneys. The written findings and conclusions are intended to set forth the Panel's analysis and the grounds for the Panel's decision, but are not intended to be an exhaustive recitation of the verbal findings made during a Panel hearing.

The Panel, as a preliminary matter and per the discussion in its October 1, 2018 Order determined that Judge MacDonald could refer this case to the Panel solely on the basis of Mr. Tanberg's request to be eligible to apply for discretionary parole after having served 10 years of his jail sentence, without necessarily finding that either basis for referral under AS 12.55.165(a) applies.[2]

The Panel in accordance with the October 1, 2018 Order, determined that Judge MacDonald's referral would be considered under AS 12.55.175(c) rather than AS 12.55.175(e).[3]

The Panel then focused on the basis of Judge MacDonald's referral to the Panel. Judge MacDonald found that manifest injustice would result if Mr. Tanberg was not eligible to apply for discretionary parole after serving 10 years of his jail sentence based on two different analyses. Judge MacDonald first applied the analysis applicable to a claim that a sentence within the applicable presumptive range, whether or not adjusted for aggravating and mitigating factors, would be manifestly unjust. He then applied the exceptional prospects for rehabilitation non-statutory mitigating factor analysis.

The parties before the Panel focused primarily on Judge MacDonald's non-statutory mitigating factor analysis and findings.

A court evaluating a defendant's prospects for rehabilitation generally considers and gives due weight to the following factors when applicable:

a. A lack of prior record (adult, juvenile)
b. A good employment history

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[2] AS 12.55.165(a) provides that a judge may refer the case to the Panel if the judge 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."

[3] ***See, Luckart v. State***, 314 P.3d 1226, 1232, 1234, 1236, 1238 (Alaska App. 2013).

c. The defendant did well in school
d. The defendant engages in extracurricular activities
e. The defendant has strong family ties
f. The defendant has continuing family support
g. The defendant has an excellent PSR evaluation
h. The defendant has expressed remorse
i. The defendant has engaged in substance abuse treatment
j. The defendant is youthful[4]

A court may also consider whether a defendant has or has not denied that he or she committed the offense at issue, or has otherwise taken responsibility for their criminal conduct with respect to the same.[5]

A defendant asserting that he or she has exceptional prospects for rehabilitation must prove by clear and convincing evidence that rehabilitation will actually occur.[6] To make such a finding a court must be able to find that: the court understands the problems that led the defendant to commit the offense and that the problems are either readily correctable or unlikely to recur. Put another way, the court must be satisfied, based on those findings, that the defendant can be adequately treated in the community and need not be incarcerated for the full presumptive term in order to prevent the defendant from engaging in future criminal conduct.[7]

The Panel found that Mr. Tanberg had not shown by clear and convincing evidence that he has exceptional potential for rehabilitation. The Panel was satisfied that it understands that the problems that led Mr. Tanberg to sexually assault M.P. are primarily related

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[4] ***See, Smith v. State***, 711 P.2d 561, 570 (Alaska App. 1985); ***Daniels v. State***, 339 P.3d 1027, 1030-31 (Alaska App. 2014).
[5] ***See, Beltz v. State***, 890 P.2d 474, 481 (Alaska App. 1999); ***Manrique v. State***, 177 P.3d 1188, 1193 (Alaska App. 2008).
[6] ***Boerma v. State***, 843 P.2d 1246, 1248 (Alaska App. 1992).
[7] ***See, Boerma***, 843 P.2d at 1248; ***Lepley v. State***, 807 P.2d 1095, 1100 (Alaska App. 1991); ***Beltz,*** 980 P.2d at 481; ***Manrique***, 177 P.3d at1193; ***Silvera v. State***, 244 P.3d 1138, 1149 (Alaska App. 2010); ***Lepley v. State***, 807 P.2d 1095, 1099-1100 (Alaska App. 1991); ***Smith v. State***, 258 P.3d 913, 917 (Alaska App. 2011).

to his Borderline Personality Disorder diagnosis.[8] But he did not show by clear and convincing evidence that the problems are readily correctible or unlikely to recur. Dr. Fried's expert opinion is that the problem is likely to recur if he is not adequately treated. Dr. Fried identified Dialectical Behavior Therapy (DBT) as an appropriate and effective treatment for Mr. Tanberg. But the Panel was not satisfied that he has shown that he presently is amenable to such treatment based on the totality of the record, including his denial that he engaged in the conduct for which he has been convicted.

Turning to Judge MacDonald's other basis for referral to the Panel - it would be manifestly unjust for Mr. Tanberg to be sentenced within the presumptive range, whether or not adjusted for aggravating or mitigating factors, if he was not eligible to apply for discretionary parole after serving 10 years. He employed the analysis that would be applied under AS 12.55.165(b) (and AS 12.55.175(b)) - a judge, in order to find that manifest injustice would result from imposition of a sentence within the presumptive range, whether or not adjusted for aggravating factors, must be able to "articulate circumstances that make the defendant significantly different from a typical offender or that make the defendant's conduct significantly different from a typical offense." [9] He found that Mr. Tanberg had shown by clear and convincing evidence that such manifest injustice would occur for a number of reasons based on Mr. Tanberg's history, his Borderline Personality Disorder diagnosis, his sex offender risk assessment results, the availability of DBT in the community (but not in custody), the efficacy of DBT, and consideration of the ***Chaney*** sentencing criteria.

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[8] This finding is based largely on Dr. Fried's expert testimony before Judge MacDonald.

[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 v. State***, 262 P.3d 217, 221 (Alaska App. 2011); ***Dancer v.***

The Panel did not agree with all of Judge MacDonald's findings but did agree that Mr. Tanberg had shown by clear and convincing evidence that manifest injustice would result if he were not eligible to apply for discretionary parole after serving 10 years (one-half of the low end of the presumptive range) if he satisfies certain conditions while incarcerated.[10]

The Panel in this regard found that Mr. Tanberg was different from the typical sex assault offender based on: his Borderline Personality Disorder diagnosis and Dr. Fried's expert testimony concerning the significance of the diagnosis; Dr. Fried's expert testimony that DBT is the appropriate course of treatment for Mr. Tanberg; her expert testimony that DBT is an effective form of treatment, that it is the "gold standard" treatment for such persons; and, her testimony that DBT is available in the community.

The Panel, as noted above, has material concerns about Mr. Tanberg's amenability to treatment, including DBT. The Panel concluded that those concerns would be substantially mitigated, if not eliminated, if he were ordered to apply for, participate in, and successfully complete substance abuse treatment and sex offender treatment (or DBT if DOC begins to offer it) if made reasonably available to him while incarcerated.[11] So the Panel imposed related conditions on his eligibility to apply for discretionary parole.

State, 715 P.2d 1174, 1177 (Alaska App. 1986); ***Aveoganna v. State,*** 757 P.2d 75, 77 (Alaska App. 1988)

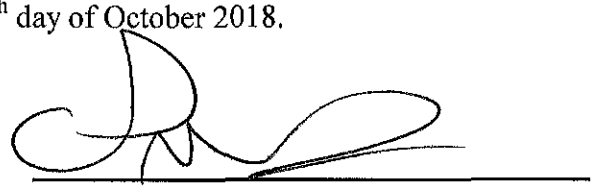
[10] It reasonably appeared to the Panel during the hearing that Mr. Tanberg, the State, and the author of the PSR all believed that a sentence of 20 years to serve was appropriate under the circumstances and should, and likely would, be imposed.

[11] Dr. Fried testified that DBT, rather than sex offender treatment, was the preferred course of treatment for Mr. Tanberg, but she also testified that completing sex offender treatment while incarcerated would not hurt, and she ultimately recommended that he do so. She also testified that he should complete substance abuse treatment while incarcerated.

The Panel accordingly decided that Mr. Tanberg will be eligible to apply for discretionary parole after serving 10 years if he satisfies said treatment conditions. The Panel then imposed sentence and a written Judgment has been issued consistent with the foregoing.[12]

IT IS SO ORDERED.

Dated at Ketchikan this 17th day of October 2018.



Trevor Stephens
Superior Court Judge
Three-Judge Panel

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[12] The Panel notes that it appears that this is the first case referred to the Panel solely on the basis of a request for discretionary parole eligibility. The Panel has not had the opportunity to address whether such a referral may be based on an analysis that differs from those employed here by Judge MacDonald. The Panel notes that it had some difficulty understanding a request for referral only on the discretionary parole issue based on a finding of a non-statutory mitigating factor which finding, in and of itself could result in the defendant being sentenced below the bottom of the presumptive range and in this case, if found, could have resulted in a sentence as low as 10 years to serve being imposed.