

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

State of Alaska)
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 Plaintiff,)
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 v.)
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 Joseph George Solomon)
)
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 Defendant.)
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Case No. 4GA-15-00010CR

DECISION AND ORDER GRANTING MOTION FOR
THREE JUDGE SENTENCING PANEL

I. INTRODUCTION

The defendant, Joseph Solomon, filed a Motion for a Three Judge Sentencing Panel, pursuant to AS 12.55.175.¹ Because the court finds any sentence within the presumptive range manifestly unjust, in light of the totality of circumstances, the motion is granted and this case is referred to the Three Judge Sentencing Panel.

II. STATEMENT OF FACTS

¹ AS 12.55.125(b)

A jury found defendant, Joseph Solomon, guilty of two counts of first-degree sexual assault and two counts of second-degree sexual assault.²

Testimony at trial indicates Solomon and the complaining witness, E.H., have conflicting accounts of the incident forming the basis of Solomon's convictions. According to E.H., on May 6, 2014, she fell asleep on her cousin, Joyce's, couch after a night of drinking and watching movies. E.H. awoke sometime between 2:30 and 4:00am bent over her cousin's bed with Solomon anally penetrating her. Upon waking, E.H. called to Joyce for help and yelled for Solomon to stop. Testimony by Joyce corroborated this account.

Joyce testified that upon entering the bedroom she saw E.H. bent over the bed with Solomon sexually abusing her from behind. Joyce further testified that Solomon pulled up his pants and ran out of the room, pushing Joyce out of the way and throwing a bottle of alcohol in the process. Joyce's testimony contradicted itself in regards to whether or not Solomon said "here's your payment" when he threw the bottle of alcohol.

Following Solomon's departure, health aides were called. At approximately 12:30pm on that same day, E.H. was flown to Fairbanks Memorial Hospital where she was examined. The

² In violation of AS 11.41.410(a)(1); AS 11.41.420(a)(1); AS 11.41.420(a)(3).

examining nurse testified that E.H. had several bruises on her extremities, injury to her genitals, and sperm in her vaginal area. The nurse also testified that the tearing and lacerations found on E.H. are possible in consensual sex.

At the time of E.H.'s examination, hours after the incident in question, a preliminary breath test recorded E.H.'s BAC at .162. E.H. is a sixty-four year old self-proclaimed alcoholic, who at trial admitted to drinking a bottle and a half of R&R before her scheduled testimony. E.H. further testified she has previously been intoxicated to the point of forgetting her actions. However, E.H. remains adamant that Solomon sexually assaulted her on the night in question.

In contrast, Solomon testified the sex was consensual and asserted E.H. initiated the intercourse in exchange for a bottle of alcohol. Solomon said this exchange was not his first sexual contact with E.H. Previously, Solomon had denied any sexual encounter.

Solomon is a thirty-five year old male with severe fetal alcohol syndrome (FASD). A 1996 Psycho-Educational Evaluation for the Yukon-Koyukuk School District listed Solomon's performance on the Wechsler Intelligence Scale for Children in

the 00.1 percentile.³ The Psycho-Educational Evaluation described Solomon as "quite friendly" and listed socialization as a personal strength.⁴ Solomon's socialization is reflected in character references submitted by residents of Nulato, the village both the defendant and victim are from.

Solomon's FASD status was most recently noted in a Sexual Offender Risk Assessment, composed by licensed clinical social worker Moreen Fried. This assessment stated Solomon experiences "impairment in executive functioning, learning, memory, self-regulation, social communication and interaction as well as daily living skills."⁵ The assessment went on to note that people suffering from FASD experience "poor judgment, lack of responsibility and thinking and self-monitoring, and an inability to perceive social/interpersonal cues resulting in relationship problems."⁶

The assessment also included reference to a traumatic brain injury (TBI) Solomon sustained in 2008, when he fell out of a moving car.⁷ According to the assessment, such an injury can lead to deficits in reasoning and understanding of social cues.⁸ The

³ Addendum to Presentence Report, July 20, 2016 at 07.

⁴ *Id.* at 09.

⁵ Addendum to Presentence Report, Feb. 05, 2018; Sex Offender Risk Assessment at 06.

⁶ *Id.* at 07.

⁷ *Id.*

⁸ *Id.* at 07-08.

deficits experienced by individuals with FASD and TBI correspond to the findings of the STABLE 2007 assessment, which aims to identify dynamic variables to guide treatment.⁹ In this assessment, Solomon scored a 10 out of 26, placing him in the moderate risk category.¹⁰ Significant variables for Solomon were poor social influences, lack of relationship stability, feelings of social rejection, lack of concern for others, impulsivity, and poor problem solving.¹¹

In a second assessment, aimed at predicting sexual and violent recidivism in sex offenders, Solomon placed in the low to moderate category of recidivism.¹² On the STATIC 2002-R scale of -2 to 13, Solomon scored a 3.¹³ Solomon scored a 2 due to his age and a 1 given the fact that his victim was unrelated.¹⁴

Solomon has no prior convictions and denies all allegations of sexual assault. At trial, Solomon asserted he is physically incapable of forcing himself on E.H. because he suffers from severe rheumatoid arthritis and has a bad hip. Solomon's bad hip

⁹ *Id.* at 08. (assessing dynamic variables such as social influences, intimacy deficits, general and sexual self-regulation, sexual preoccupation, and compliance with supervision).

¹⁰ *Id.* at 07. (Applicability to Solomon's case is unclear as STABLE has not been replicated for accuracy with Alaska Native sex offenders).

¹¹ *Id.* at 07

¹² *Id.* (grouping risk factors into five domains: age, persistence of sexual offending, deviant sexual interest, relationship to victim(s), and general criminality).

¹³ *Id.*

¹⁴ *Id.*

was mentioned by Joyce when she testified that she does not think Solomon walks much because of this injury.

Solomon remains adamant that the sexual encounter between him and E.H. was consensual. According to Solomon, both he and E.H. had been drinking when E.H. asked to have sex with him in exchange for more alcohol. She then proceeded to get on top of Solomon and remained in control of the situation for the entire sexual encounter.

Oral Argument on the motion to refer to a three judge panel took place on August 24, 2018. Moreen Fried testified at that hearing. In addition to his FASD and TBI, she noted that Solomon may also have organic brain damage related to a history of huffing. These three forms of brain damage manifest in similar ways and cannot be distinguished. The two main categories of sex offender are core personality offenders and situational offenders. Core personality offenders cannot be treated. Situational offenders are distressed about what they've done, have a desire not to act that way, and are generally treatable. Although Solomon is a situational offender his amenability to treatment is limited by his brain damage.

Ms. Fried expressed the opinion that Solomon had a genuine belief that his actions were not a sexual assault but rather and

even exchange of alcohol for sex. His brain damage limits or prohibits his ability to empathize and show remorse for his actions. This cognitive limitation contributes to his lack of understand of normal cues and could explain his belief that this was consensual set based on an exchange of alcohol for sex.

III. DISCUSSION

As a first time felony sexual assault offender, Solomon faces a presumptive term of 20 to 30 years for both counts 1 and 2.¹⁵ Counts 3 and 4 merge with counts 1 and 2 for sentencing. Under AS 12.55.127(c)(2)(E) it is mandatory that 6.25 years of that sentence be consecutive between the two counts (one fourth of the presumptive term calculated from the middle of the presumptive term.) Therefore the Solomon's sentencing range is 26.25 to 36.25 years. Solomon asserts that this presumptive range would be manifestly unjust and requests referral to a three-judge panel, pursuant to Criminal Rule 32.4(a) and AS 12.55.165.¹⁶ This request is granted following an assessment of the totality of circumstances and a finding of manifest injustice as applied to Solomon.

The legislative goal behind presumptive sentencing is to eliminate unjustified sentencing disparity by imposing

¹⁵ AS 12.55.125(i)(1)(A)(ii)

¹⁶ Defendant's Request for Referral to Three-Judge Panel, Mar. 19, 2018.

reasonable sentencing uniformity.¹⁷ When enacting this objective sentencing system, the legislature recognized that certain cases may arise where a subjective judgment of the sentencing court is more appropriate.¹⁸ The three-judge panel was created for those cases and serves as a "safety valve" for the presumptive sentencing system.¹⁹

Pursuant to AS 12.55.165(a), a sentencing court may refer a presumptive sentencing case to the three-judge panel for two reasons.²⁰ "First, referral is warranted in situations where manifest injustice would result from failure to consider relevant, nonstatutory aggravating or mitigating factors in sentencing; and, second, where manifest injustice would result from imposition of a presumptive sentence, whether or not adjusted for statutory aggravating and mitigating factors."²¹

The first scenario, concerning non-statutory factors, reflects a legislative recognition of the court's common law power to develop the law.²² This power is subject to both legislative and constitutional limitations.²³ If a factor is specifically rejected for inclusion in AS 12.55.155(d), the

¹⁷ *Dancer v. State*, 715 P.2d 1174, 1182 (Alaska App. 1986).

¹⁸ *Lloyd v. State*, 672 P.2d 152, 154 (Alaska App. 1983).

¹⁹ *Dancer*, 715 P.2d at 1179.

²⁰ AS 12.55.165(a).

²¹ *Dancer*, 715 P.2d at 1177.

²² *Id.* at n.3.

²³ *Id.*

legislature has effectively placed a limitation on the sentencing courts ability to propose it as a non-statutory mitigating factor.²⁴ "The trial court should not propose the same mitigating factor to the three-judge panel without complying with the limitations; to do so is to suggest a common law development inconsistent with legislation."²⁵

AS 12.55.155(d)(20) specifically rejects fetal alcohol syndrome as a mitigating factor in sexual assault cases. This rejection is a legislative limitation that prevents this court from proposing the defendant's FASD as a non-statutory mitigating factor. AS 12.55.155(d)(18) rejects mental disease or defect as a mitigating factor in sexual assault case. Mental disease or defect as defined in AS 12.47.130 appears to include both TBI and organic brain damage from huffing. ". . . after the legislature has expressly rejected a particular circumstance for inclusion as a statutory mitigating factor, a sentencing court can no longer treat this same circumstance as a non-statutory mitigator."²⁶

Although the legislature is clear that FASD, and mental defects should not on their own be mitigating factors in sexual assault, AS 12.55.155(d)(18)&(20) do not indicate a legislative

²⁴ *Totemoff v. State*, 739 P.2d 769, 776 (Alaska App. 1987).

²⁵ *Id.* at 776-67.

²⁶ *State v. Seigle*, 394 P.3d 627, 636 (Alaska App. 2017).

desire to deem them altogether irrelevant for sentencing purposes.²⁷ As such, defendant's mental defects are relevant to the second basis for referral to the three-judge panel; whether imposition of a presumptive sentence results in manifest injustice regardless of adjustment for aggravating and mitigating factors.²⁸

When a defendant asserts a sentence within the presumptive range is manifestly unjust, the sentencing judge must determine whether the lowest allowed sentence within this range is clearly mistaken under AS 12.55.005.²⁹ If the sentencing judge finds the presumptive range manifestly unjust, the case must be referred to a three-judge panel.³⁰

A finding of manifest injustice is particular to a defendant and is based on the totality of the circumstances.³¹ Relevant circumstances include the defendant's background, education, character, prior criminal history, and the seriousness of the offense.³² These circumstances are to be weighed in consideration of the Chaney sentencing goals of

²⁷ See *Duncan v. State*, 782 P.2d 301, 304 (Alaska App. 1989).

²⁸ *Totemoff* 739 P.2d at 777.

²⁹ AS 12.55.005

³⁰ *Dancer* 715 P.2d at 1183.

³¹ *Seigle*, 394 P.3d at 635.

³² *Id.* at 637.

"rehabilitation, deterrence, isolation, and affirmation of community norms."³³

Often, an assessment of the totality of the circumstances requires consideration of circumstances that, when considered in isolation, would not warrant a deviation from the presumptive sentencing range.³⁴ Thus, a circumstance legislatively precluded from rising to the level of a non-statutory mitigator is still considered when a defendant asserts the sentence is manifestly unjust as applied to him.³⁵ For a judge to characterize the presumptive sentence manifestly unjust requires specific circumstances that significantly differentiate the defendant from a typical sexual assault offender, or circumstances that significantly differentiate the defendant's conduct from a typical sexual assault offense.³⁶

Low intellectual functioning is a legitimate factor to consider, but must be weighed in light of the victim's age and seriousness of the crime to determine if there is clear and convincing evidence of manifest injustice.³⁷

In *Knipe*, the first-time felony offender had a history of special education placement and was suspected of suffering from

³³ *Id.*; *State v. Chaney*, 477 P.2d 441, 443-44 (Alaska 1970).

³⁴ *Seigle*, 394 P.3d at 635.

³⁵ *Id.*

³⁶ *See Beltz* 980 P.2d at 480.

³⁷ *See Knipe v. State*, 305 P.3d 359, 361 (Alaska App. 2013).

fetal alcohol effect (FAE).³⁸ Based on these factors, the defendant asserted the presumptive range was manifestly unjust as applied to him.³⁹ The sentencing judge acknowledged these factors were legitimate, but ultimately denied defendant's request for referral due to the severity of the sexual assault and the age of the victim. Knipe's victim was his three-year old cousin, who required surgery and two layers of sutures after he sexually penetrated her.⁴⁰

In contrast, Solomon's victim was an unrelated adult female who did not require surgery. Solomon himself is medically diagnosed with FASD, a more serious condition than FAE. In addition, Solomon has a TBI as well as possible brain damage from huffing. The more serious nature of Solomon's intellectual impairments, weighed in light of Solomon's offense, differentiates his case from Knipe and makes a finding of manifest injustice more appropriate.

Based on an assessment of the totality of circumstances, imposing the presumptive sentence of 26.25 to 36.25 years would be manifestly unjust as applied to Solomon.

Solomon is a 35 year old learning disabled male with severe FASD, a traumatic brain injury (TBI), possible organic brain

³⁸ *Id.*

³⁹ *Id.* at 363.

⁴⁰ *Id.* at 360.

damage from huffing, debilitating rheumatoid arthritis, and a bad hip. A 1996 Psycho-Educational Evaluation recorded Solomon scored in the 00.1 percentile of the Wechsler Intelligence Scale for Children.⁴¹ This means that in a pool of 999 other students his age, Solomon would have the lowest intellect.⁴² Solomon's cognitive impairments likely increased in 2011, when he fell out of a moving car and sustained a TBI.

Licensed clinical social worker, Moreen Fried, evaluated Solomon On June 7, 2017, and found defendant's FASD resulted in an impairment of executive functioning, learning, memory, self-regulation, social communication, interaction, and daily living skills.⁴³ Ms. Fried's report stated that individuals with FASD experience an inability to perceive social/interpersonal cues and that individuals with a TBI can experience deficits in reasoning, social regulation, and problem solving skills.⁴⁴ Ms. Fried drew a correlation between Solomon's deficits and his offense.⁴⁵

The cognitive level Solomon functions at, as a result of his FASD and TBI, falls far below the typical IQ of a person his

⁴¹ See Addendum to Presentence Report, July 20, 2016 at 07.

⁴² *Id.*

⁴³ Addendum to Presentence Report, Feb. 05, 2018; Sex Offender Risk Assessment at 06.

⁴⁴ See *id.* at 07-08.

⁴⁵ *Id.* at 08.

age.⁴⁶ Solomon's severe learning impairments reflect a circumstance indicating he is significantly different than a typical offender of sexual assault. While FASD or other mental defects on their own do not warrant a deviation from the presumptive sentencing range, viewing this differentiating circumstance in conjunction with the totality of circumstances indicates it would be manifestly unjust to impose the presumptive sentence on Solomon.

Solomon has no criminal history, the incident in question was an isolated occurrence that involved alcohol, and the victim is someone whom the defendant claims to have had previous sexual contact with. Neither the alcohol nor previous history excuses the behavior of the defendant. However, in combination with Solomon's severely compromised mental condition, they affect his ability to appreciate the nature of his actions.

Assessing the totality of circumstances in light of the *Chaney* goals of sentencing further bolsters a finding of manifest injustice as applied to Solomon.

Imposing the presumptive range on Solomon does not have a deterring benefit. Due to Solomon's FASD related traits, which include poor judgment and difficulties linking events with

⁴⁶ *Id.* at 03-04. (At 35 years old, Solomon has difficulty reading and says he often struggles understanding what people are saying).

resulting consequences, it is highly unlikely a presumptive range would achieve specific deterrence.

In regards to general deterrence, it would be unfair to impose a presumptive sentence on Solomon, for the purpose of deterring others, since he is significantly different than your typical offender.

While Solomon's incurable mental state may prevent him from having extraordinary rehabilitative potential, both his Psycho Educational Evaluation and his Sex offender risk assessment indicate he does not pose a significant threat to the community. In his educational evaluation, Solomon was recorded as being quite friendly with a personal strength of socialization.⁴⁷ In his sex offender risk assessment, Solomon placed in the low to moderate category of recidivism, scoring a 3 on a scale of -2 to 13.⁴⁸ The low threat Solomon poses to the public is further reflected in the numerous character reports submitted by community members in support of Solomon.

IV. CONCLUSION

Circumstances indicate Solomon is significantly different than the typical sex offender. In light of the totality of circumstances surrounding his case, it would be manifestly

⁴⁷ Addendum to Presentence Report, July 20, 2016 at 07-08.

⁴⁸ Addendum to Presentence Report, Feb. 05, 2018; Sex Offender Risk Assessment at 06.

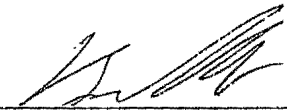
unjust to impose the presumptive sentence on Solomon. As such, this case is referred to a three-judge panel to determine the appropriate sentencing.

V. ORDER

Accordingly,

IT IS HEREBY ORDERED that the motion for referral to the three-judge panel is granted.

DATED at Fairbanks, Alaska, this 27 day of September, 2018.



Ben A. Seekins
District Court Judge

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