IN THE COURT OF APPEALS OF THE STATE OF ALASKA

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| MARK J. KON,<br><br>Appellant,<br><br>v.<br><br>STATE OF ALASKA,<br><br>Appellee. | Court of Appeals No. A-12287<br>Trial Court No. 3AN-97-9242 CR<br><br>MEMORANDUM OPINION<br><br>No. 6575 — January 17, 2018 |

Appeal from the Superior Court, Third Judicial District, Anchorage, Philip R. Volland, Judge.

Appearances: Morgan White, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Thomas J. Aliberti, Assistant District Attorney, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge MANNHEIMER.

Mark J. Kon appeals the superior court's revocation of his probation and the court's imposition of 18 months of Kon's previously suspended sentence. For the reasons explained in this opinion, we affirm the superior court's judgement.

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

*Underlying facts*

In 1998, Kon pleaded no contest to two counts of first-degree sexual abuse of a minor involving his daughters. Kon received a composite sentence of 30 years' imprisonment with 18 years suspended.

One of Kon's conditions of probation required him to "actively participate in and successfully complete an approved sexual offender treatment program as directed by the Department of Corrections." This same condition of probation declared that Kon "[was] not to discontinue treatment without the written approval of [his] Probation/Parole Officer".

After serving his active term of imprisonment, Kon was released on probation. In September 2013, the Department of Corrections petitioned the superior court to revoke Kon's probation on the ground that he had violated the condition requiring him to engage in sex offender treatment. Here are the particulars of that petition:

Following Kon's release on probation, he was assigned to a sex offender treatment program for "deniers" — that is, for defendants who refuse to acknowledge that they had sexually abused a minor. (As we noted earlier, Kon did not plead guilty to the charges of sexual abuse; instead, he pleaded "no contest".)

When Kon attended his second session of this "deniers" group, Kon's mobile phone rang and he answered the phone call. When the group leader reminded Kon that the group rules prohibited phone calls during a treatment session, Kon became hostile. He asked the leader, "Do you want me to leave? I'll gladly leave."

The group leader responded that if Kon intended to act that way, he should leave. Kon then got up and left — exclaiming "Up yours!" and telling the group leader, "I don't give a fuck about you or your fucking program." As Kon was leaving the

building, the group leader followed him and advised him, "You might want to call your P.O." (*i.e.*, Kon's probation officer). Kon rejoined, "You call him. I don't give a shit."

Based on this evidence, the superior court found that Kon "knew well what obligation was imposed on him", that Kon's behavior in the treatment group justified his dismissal from the group, that Kon's behavior reflected a lack of "intent or desire" to engage in treatment, and that Kon therefore "did not participate in [sex offender treatment] as required".

At the ensuing sentencing hearing, the superior court found that Kon's history demonstrated "a persistent pattern of [refusal] to engage in treatment, a persistent portrayal of himself as a victim, a persistent casting of blame on others, [and] a persistent perception that others are out to get him."

The court declared that "the most pertinent fact" for sentencing purposes was Kon's continuing denial "that he is a sex offender" or that "his crimes have any basis". Because of that denial, the court found that Kon "remains an untreated offender [who] therefore [poses a] very high risk to minors in the community".

The court further declared that, given Kon's age, his attitude toward his offenses, and his history of repeatedly "assuming the role of the victim and ... blaming others for what is happening to him", Kon's potential for rehabilitation was "very low".

Based on this assessment, the superior court imposed 40 months of Kon's previously suspended jail time.

Kon filed a notice of appeal, seeking appellate review of the superior court's decision. (See Court of Appeals File No. A-11867.) In July 2014, Kon was released on bail pending the resolution of that appeal.

Four months later, in November 2014, the Department of Corrections again petitioned the superior court to revoke Kon's probation — again alleging that Kon had

failed to comply with the condition of probation that required him to engage in sex offender treatment.

At the evidentiary hearing on this allegation, Probation Officer Dwayne Hanson testified that, because Kon refused to admit that he had sexually abused his daughters, he was assigned to "deniers" treatment. This treatment program is designed to be of one month's duration. At the end of the month, defendants are asked to agree that they committed at least some aspect of the sexual behavior for which they were convicted, and to agree that they will participate in community-based sex offender treatment to deal with their inappropriate sexual behavior. If a defendant does not agree to these things, then they are discharged from treatment.

Kon attended meetings of this treatment group during the month of October 2014. At the end of this month, he was discharged from treatment. According to the treatment records, Kon was discharged because he continued to deny that he had sexually abused his daughters in any manner, and because he declared that he would only participate in further sex offender treatment "under duress". [1]

At the evidentiary hearing, the probation officer explained that even in a "deniers" group, defendants are required to admit that they engaged in some kind of sexual offense, so that they "can then move forward [with] community-based sex offender treatment", work out a "relapse prevention plan", and work on "coping strategies to deal with high-risk situations".

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[1] Specifically, on October 30, 2014, Kon signed a document which stated: "I, Mark Joseph Kon, don't agree that I committed a sexual offense as reported in official documents such as my pre-sentencing report. I also understand that sexual offense-specific treatment is important in helping me maintain long-term community safety, and [I] agree to participate in treatment when a slot becomes available. [Signed under] duress."

The probation officer pointed out that Kon's previous revocation of probation was likewise based on his refusal to participate in a "deniers" treatment program.

At the conclusion of the hearing, the superior court found that Kon was in violation of his probation:

> *The Court*: In this case, it's evident to me that [during the past] year and a half's time, Mr. Kon has cycled back through evaluation, placement and failure, re-placement in, and once again discharge from, a deniers group — once again, discharge from the program. And for the reason [of] ... his refusal to accept or acknowledge the need for any kind of treatment.
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> He just won't ... make the transition [from complete denial] to what's necessary to step into the next phase of treatment. And I find ... by a preponderance of the evidence that he was discharged as unsuccessful from the deniers group.

The court then revoked Kon's probation and imposed 18 months of Kon's previously suspended jail time.

*Kon's arguments as to why the superior court erred in revoking his probation*

On appeal, Kon argues that the wording of his condition of probation did not give him fair notice of what kind of conduct would constitute a violation of his probation. In particular, Kon argues that the court failed to give him sufficient notice of what it meant to "actively participate in" sex offender treatment, or of what it meant to "successfully complete" that treatment.

Kon notes that these two phrases, in and of themselves, do not specify that Kon would be required to admit some of the facts of the underlying criminal offenses that led to his conviction. But the record (viewed in the light most favorable to the superior court's ruling) shows that Kon was explicitly told by his treatment provider and by his probation officer that, in order to stay in treatment, he would have to acknowledge at least some aspects of the underlying offenses. Kon has always flatly denied that he did anything improper.

(When Kon was screened for entry into the "deniers" treatment program, he apparently told the program evaluator that he would "never admit" the truth of the criminal offenses to which he pleaded no contest. There is nothing in the record to show or even suggest that Kon has altered his stance on this issue since that time.)

Thus, to the extent that there may have been a degree of ambiguity as to exactly how much of the underlying offenses Kon would have to acknowledge in order to remain in the treatment program, that ambiguity is a moot point in Kon's case.

Kon further contends that he did not willfully withdraw from sex offender treatment — that, instead, he was discharged from treatment even though he declared that he was willing to continue treatment, albeit "under duress". Kon argues that it was improper for the superior court to revoke his probation under these circumstances.

But the superior court found that Kon was discharged from treatment because of his "refusal to accept or acknowledge the need for any kind of treatment." To the extent that the superior court was required to find that Kon's violation of probation was "willful", the court's findings in Kon's case satisfied this requirement. [2]

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[2] The question of whether the law forbids a sentencing court from revoking a defendant's probation unless the court finds that the defendant acted willfully, or with some other culpable mental state, is currently unanswered. *See Wheat v. State*, unpublished, 1993 (continued...)

To the extent that Kon is arguing that he was entitled to refuse treatment because he asserts that he is factually innocent of sexually abusing his daughters, we reject that assertion. When Kon pleaded no contest to sexually abusing his daughters, he agreed that the superior court could sentence him under the assumption that he had committed these crimes (even though Kon refused to admit the truth of the allegations).[3] Thus, at the probation revocation hearing, the superior court was authorized to proceed under the assumption that Kon had sexually abused his daughters.

Proceeding on that assumption, the superior court concluded, based on Kon's refusal to acknowledge any degree of responsibility for that sexual abuse, and Kon's refusal to acknowledge his need for any kind of treatment, that Kon remained an untreated sex offender and thus presented a high risk to society.

Given these circumstances, the superior court could justifiably conclude that, even though Kon declared himself ready to proceed with treatment "under duress", Kon's attitude toward his offenses and toward the treatment program ensured that further treatment would not be successful — that Kon would remain (in the court's words) "an extremely high-risk offender". Thus, the court was authorized to revoke Kon's probation.

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[2] (...continued)
WL 13156672 at *2 (Alaska App. 1993). One of the appeals currently pending before this Court, *Charles v. State*, File No. A-12119, raises this issue.

[3] *See Ashenfelter v. State*, 988 P.2d 120, 123 (Alaska App. 1999); *Scott v. State*, 928 P.2d 1234, 1238 (Alaska App. 1996).

*Kon's challenges to his sentence*

As we explained earlier in this opinion, when the superior court revoked Kon's probation, the court ordered Kon to serve 18 months of his previously suspended jail time. Kon argues that this sentence is excessive.

The record shows that the sentencing judge gave considerable thought to Kon's sentence — primarily, because Kon committed this latest violation of probation while he was on bail release pending the appeal of his *previous* revocation of probation from eight months before. (That earlier probation revocation was likewise based on Kon's refusal to engage in sex offender treatment.)

On that previous occasion, the judge had imposed 40 months of Kon's suspended jail time. The judge concluded that he should not impose another sentence of similar length, but the judge also stated that he was "not willing to simply release Mr. Kon back [on] probation and [into] the community" so that Kon could "try ... treatment through the deniers group again." The judge declared that this would be "just a waste of time. ... I think all that's going to happen is we're going to be back in the same situation in another couple of months."

The judge then explained that he had decided to sentence Kon to serve 18 months because he believed that this sentence would appropriately communicate to Kon that the court "wasn't going to tolerate excuses about treatment any more", and because this sentence might motivate Kon to "significantly advance his participation in institutional treatment" while he was back in prison.

We have independently reviewed the record, and we uphold the judge's sentencing decision because it is not clearly mistaken. [4]

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[4] *See McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974) (an appellate court is to (continued...)

When the judge imposed this sentence of imprisonment, he also added several new probation conditions that were proposed by the Department of Corrections. However, the judge did not explain why he believed that these new conditions of probation were appropriate.

On appeal, Kon challenges these new conditions of probation on the basis that the judge offered no explanation for them. Kon notes that, under the Alaska Supreme Court's decision in *Roman v. State*,[5] probation conditions must be reasonably related either to a defendant's rehabilitation or to the prevention of future criminal acts. Kon argues that *Roman* impliedly requires a sentencing judge to affirmatively state the justification for any condition of probation.

But some of Kon's new conditions of probation are clearly justified by the existing record in this case. We therefore will limit our discussion to the conditions of probation that Kon specifically identifies and challenges.

As part of the first new condition of probation, the court ordered Kon to submit to "plethysmograph assessment". Kon challenges this condition as unlawfully intrusive, and the State concedes that the superior court must reconsider this requirement. We accept the State's concession of error. See our discussion of this issue in *Ranstead v. State*, unpublished, 2016 WL 2944797 (Alaska App. 2016).

The second, third, and fourth new conditions of probation all deal with Kon's possession of "sexually explicit material". Kon challenges these three conditions on the basis that the phrase "sexually explicit material" is unconstitutionally vague. The State concedes that the superior court must reconsider these three conditions of

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[4] (...continued)
affirm a sentencing decision unless the decision is clearly mistaken).

[5] 570 P.2d 1235, 1240 (Alaska 1977).

probation. Again, we accept the State's concession. See our decision in *Diorec v. State*, 295 P.3d 409, 412, 414-15 (Alaska App. 2013).

Finally, Kon challenges the fifth new condition, which requires him to obtain his probation officer's permission to open or maintain an account with any Internet provider, and to otherwise obtain his probation officer's permission before he accesses the Internet in any fashion. The State concedes that the superior court must reconsider this condition and potentially limit its reach. Again, we accept the State's concession. See our discussion of this issue in *Dunder v. State*, unpublished, 2009 WL 1607917 (Alaska App. 2009).

*Conclusion*

We AFFIRM the revocation of Kon's probation and the 18-month sentence that he received. However, we REMAND this case to the superior court with directions to reconsider the specific conditions of probation that we have discussed in this opinion.

We do not retain jurisdiction of this case.