IN THE COURT OF APPEALS OF THE STATE OF ALASKA

SHAUN PATRICK MILLER, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12292 Trial Court No. 3AN-14-5468 CR MEMORANDUM OPINION No. 6600 — March 7, 2018

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael L. Wolverton, Judge.

Appearances: Laurence Blakely, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Javier G. Diaz, Assistant District Attorney, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

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

Judge SUDDOCK.

Shaun Patrick Miller pleaded guilty to one count of second-degree misconduct involving a controlled substance, a class A felony.[1] At sentencing, Miller

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

[1] Former AS 11.71.020(a)(1), (d) (2014).

proposed two statutory mitigating factors: AS 12.55.155(d)(12), consistently minor harm; and (d)(13), small quantities of a controlled substance. The judge rejected these mitigators and sentenced Miller to 8 years' imprisonment with 3 years suspended, 5 years to serve, a sentence within the presumptive range for his offense. Miller appeals the rejection of his proposed mitigators. After reviewing the record, we conclude that Miller failed to prove the mitigators by clear and convincing evidence.

Also at sentencing, Miller requested that a standard probation condition — that he not associate with felons — be modified to permit him to associate with close family members, including his mother. The judge denied Miller's request on the ground that Miller could later move the court for relief if his probation officer unreasonably enforced the condition. Because Miller has a liberty interest in associating with close family members, we direct the judge to determine whether the probation condition was narrowly tailored to achieve the State's interest in Miller's rehabilitation and the protection of the public while maintaining Miller's right of familial association to the extent possible.

Background facts and proceedings

On June 19, 2014, the Anchorage police department received a tip that two people were using drugs in a green 1994 Buick. When the police arrived, they observed that the two occupants of the car had "pockmarked faces and scabs, which are commonly associate[d] with heavy drug use." Both occupants gave false identities to the police. Miller was one of these two people; he had outstanding arrest warrants for two pending drug and weapons charges.

The officers observed a methamphetamine pipe in the car's ash tray and a butane lighter in the center console. They also saw foil that had apparently been used to smoke heroin. When the officers searched Miller, they found 10.83 grams of heroin,

ziplock baggies containing hydromorphone and alprazolam (Xanax) pills, and $745 in cash.

A search of the vehicle after it was impounded revealed marijuana, a stolen .45 caliber pistol, .45 caliber ammunition, a .38 caliber revolver, and a holster. A Sentry safe rested on the back seat of the car. When officers forced it open, they found fifty-six suboxone packets, a plastic bag with sublingual suboxone strips, and two watches, one of which was a Rolex.

In Miller's sentencing memorandum, he requested that the judge find that he qualified for the "small quantities" mitigator, (d)(13). He argued that the 10.83 grams of heroin found on him when he was arrested constituted a small quantity. Miller noted that 10.83 grams of heroin weighs less than two U.S. quarters.

At sentencing, Anchorage Police Detective Randy Adair testified about drug prices and sales in the illicit drug market. Based on his experience, Detective Adair thought it likely that Miller had purchased from his supplier either a half ounce (approximately fourteen grams) or half of a "Mexican ounce" (half of twenty-five grams) of heroin, standard quantities of sale in the heroin market. The detective further opined that Miller had probably sold some of this half ounce, which would have generated the $745 in cash also found on Miller.

Detective Adair testified that a typical heroin dosage is a "nifty" (0.1 grams), and that a light heroin user might consume two nifties per day: one in the morning and one in the evening. Detective Adair estimated that the value of Miller's remaining 10.83 grams of heroin was approximately $1500 - $2000.

Detective Adair further explained that the suboxone strips found in Miller's car, sometimes used medically to wean users off of heroin, may be employed by a heroin user for a different purpose: as a temporary substitute for heroin when it is unaffordable or unobtainable.

On cross-examination, Detective Adair testified that Miller was likely selling heroin to support his own habit, and that he was probably not living an "outlandishly grand lifestyle."

Superior Court Judge Michael L. Wolverton ruled that Miller had failed to prove the "small quantities" mitigator, finding that "based upon Detective Adair's testimony, this was kind of a right down the middle amount."

Miller also requested the court to find the "consistently minor harm" mitigator, (d)(12). Miller's criminal history included numerous prior offenses. Relevant priors included a third-degree theft conviction, as well as drug and weapons misconduct charges that were pending at the time of his arrest in this case. In that other case, Miller pleaded guilty to third-degree misconduct involving a controlled substance (possession with intent to distribute schedules IIA and IIIA controlled substances),[2] and to second-degree misconduct involving weapons for possessing a weapon during the commission of a felony drug offense.[3]

The judge rejected the "consistently minor harm" mitigator, ruling that "[to establish this mitigator] I would have to find that the facts surrounding the commission of this offense indicated that the conduct was consistently minor, and I just can't do that [given] the facts in this case."

Rejection of the mitigators was not error

When we review the trial court's rejection of a mitigating factor, we review the sentencing judge's factual findings for clear error, and then we review de novo

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[2] Former AS 11.71.020(a)(1) (2014).

[3] AS 11.61.195(a)(1).

whether the mitigator applies under the facts of the case.[4] The defendant has the burden to prove a mitigating factor by clear and convincing evidence.[5] Once proven, the weight that a sentencing court places on that mitigator is reviewed under the clearly mistaken standard.[6]

To establish the "consistently minor harm" mitigator, (d)(12), a defendant must prove by clear and convincing evidence that "the facts surrounding the commission of the offense and any previous offenses by the defendant establish that the harm caused by the defendant's conduct is consistently minor and inconsistent with the imposition of a substantial period of imprisonment."[7]

The presentence report indicated that Miller was found in possession of heroin, pills, and two forms of suboxone. The presentence report also indicated that the Buick where the police found Miller contained a stolen handgun and two stolen watches. When he was arrested, Miller was on bail release for pending drug and weapons charges, and he had outstanding arrest warrants for failing to appear on those charges. By the time of sentencing in the present case, Miller had pleaded guilty and been sentenced on these offenses.

Miller did not explain the nature and extent of his drug sales; why he possessed a stolen handgun and two stolen watches; whether any of his customers habitually committed theft in order to finance their habits; or whether he had ever assaulted a customer during a drug deal gone bad. Nor did he testify to the facts and circumstances of his prior offenses.

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[4] *Michael v. State*, 115 P.3d 517, 519-20 (Alaska 2005).

[5] *Simants v. State*, 329 P.3d 1033, 1036 (Alaska App. 2014).

[6] *Lepley v. State*, 807 P.2d 1095, 1099 n.1 (Alaska App. 1991).

[7] AS 12.55.155(d)(12).

Miller bore the burden of proof to establish the absence of significant harm or risk of harm from his criminal activities.[8] We agree with the sentencing judge that, on these facts, Miller failed to prove by clear and convincing evidence that the harm caused by his conduct was consistently minor.

With respect to the "small quantities" mitigator (d)(13), we held in *Pocock v. State* that a "typical" drug case is one where the quantity involved in the case is "uncharacteristically small when compared to the broad middle ground of conduct encompassed by the statute defining the offense."[9] Relying on Detective Adair's testimony that Miller possessed approximately 100 doses of heroin with a street value of approximately $1500, the sentencing judge found that Miller's case fell within the broad middle ground of conduct by drug dealers.

In *Stewart v. State*, we noted that the sale of twenty-two grams of heroin was a "substantial commercial transaction."[10] Miller possessed approximately one-half that amount at the time of his arrest, and he would have realized a substantial sum of money had he successfully sold all that he had. While Detective Adair testified that Miller was perhaps selling heroin in order to finance his own consumption, Miller did not testify to how much of the 10.83 grams he would have personally consumed, if any.

Based on these facts and circumstances, the judge did not err when he concluded that Miller failed to establish the "small quantities" mitigator by clear and convincing evidence.

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[8] *See State v. Parker*, 147 P.3d 690, 693 (Alaska 2006).

[9] *Pocock v. State*, 270 P.3d 823, 824-25 (Alaska App. 2012) (citing *Knight v. State*, 855 P.2d 1347, 1349 (Alaska App. 1993)).

[10] *Stewart v. State*, 756 P.2d 900, 906 (Alaska App. 1988).

The challenged condition of probation

At sentencing, Miller requested that a proposed probation condition barring him from associating with felons without the consent of his probation officer be amended to accommodate contact with several of his family members who have felony convictions. The State agreed that such contact should potentially be allowed, but that Miller's probation officer should be empowered to forbid contact with an individual family member if that contact proved to be problematic. But the court instead adopted the probation condition as originally proposed in the presentence report — leaving the matter within the discretion of the probation officer, subject to judicial review for abuse of this discretion.

On appeal, Miller argues that this probation condition infringes on his constitutional right to associate with his family members. Miller cites *Simants v. State*, where we held that a restriction on a defendant's right to associate with a defendant's family requires special scrutiny, and that such a restriction must be "narrowly tailored to avoid unnecessary interference with the defendant's family relationships."[11] We required sentencing courts to "affirmatively consider, and have good reason for rejecting, any less restrictive alternatives."[12]

The State concedes that the judge did not make adequate factual findings to support this condition of probation. The State recommends that the case should be remanded for an evidentiary hearing on the matter. We agree that the judge failed to adequately determine whether the condition could be more narrowly tailored, consistent

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[11] *Simants v. State*, 329 P.3d 1033, 1038 (Alaska App. 2014) (quoting *Diorec v. State*, 295 P.3d 409, 414 (Alaska App. 2013)).

[12] *Id.* at 1039 (quoting *Peratrovich v. State*, 903 P.2d 1071, 1079 (Alaska App. 1995)).

with Miller's specific family circumstances. We accordingly direct the judge to reconsider this matter.

Conclusion

We AFFIRM the superior court's rejection of the two challenged mitigators, but we REMAND this case to the superior court for reconsideration of the challenged condition of probation. We do not retain jurisdiction.