IN THE COURT OF APPEALS OF THE STATE OF ALASKA

FRANK BYRON YARRA JR., Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12078 Trial Court No. 4FA-13-703 CR MEMORANDUM OPINION No. 6612 — March 28, 2018

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Michael A. MacDonald, Judge.

Appearances: Gavin Kentch, Law Office of Gavin Kentch, LLC, Anchorage, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Patricia L. Haines, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

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

Judge SUDDOCK.

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

While Frank Byron Yarra Jr. was awaiting trial, the Alaska Department of Corrections placed him in a halfway house. The halfway house staff transported Yarra to a pretrial hearing in a van. When the van stopped at a red light, Yarra opened a door and walked away. The police captured him the following day after a high-speed chase. Yarra was charged with one count of second-degree escape, and he was convicted following a jury trial.

On appeal, Yarra claims that the State presented insufficient evidence to support his conviction. But he actually raises a legal issue: whether he remained in "official detention" when the Department of Corrections transferred him to a halfway house. Because Yarra does not dispute the facts of his case, and because settled law holds that under those facts, Yarra remained in official detention, we affirm his conviction.

Yarra further argues that the superior court erred when it found that the State proved the "repeated instances of similar conduct" aggravator, and that the court also erred when it rejected Yarra's proposed "least serious" mitigator. We find no error.

Lastly, Yarra claims that the superior court erred when it sentenced him to 10 years to serve, the maximum sentence for second-degree escape. Because the judge reasonably concluded that Yarra was a worst offender, we affirm Yarra's sentence.

Background facts

While Yarra was awaiting trial on a felony theft charge, he was unable to make bail, so the superior court remanded him to the custody of the Department of Corrections (DOC). The DOC first confined him at the Fairbanks Correctional Center, and then — at Yarra's request — they transferred him to the Northstar Center, a halfway house.

As Yarra was being transported in a van from the halfway house to a pretrial hearing, Yarra opened a door of the van and walked away. Fairbanks police apprehended Yarra the following day after a high-speed chase, and returned him to custody.

Yarra was charged with second-degree escape. Following a jury trial, he was convicted of this charge. Superior Court Judge Michael A. MacDonald sentenced Yarra to serve 10 years, with no time suspended.

Yarra appeals his conviction and his sentence.

The unchallenged evidence at trial established that Yarra absconded from "official detention"

To convict Yarra of second-degree escape, the State had to prove that he absconded from official detention for a felony without lawful authority to do so.[1] The phrase "official detention" is defined in AS 11.81.900(b)(41) as "custody, arrest, [or] surrender in lieu of arrest," as well as "actual or constructive restraint under [any] order of a court in a criminal or juvenile proceeding, other than an order of conditional bail release."

Yarra's defense at trial was that, when the DOC transferred him to a halfway house, it relinquished its custody of him, and thus he was no longer under official detention when he absconded from the halfway house van.

But the evidence was undisputed that Yarra was unable to make bail on a pending felony charge, that the court remanded him to DOC custody, and that the DOC later placed him at the Northstar Center. These foundational facts establish that Yarra was under official detention when he absconded from the halfway house.

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[1] AS 11.56.310(a)(1)(B). Second-degree escape is a class B felony. AS 11.56.310(c).

A person residing at a halfway house as a condition of bail, or while on probation or parole, is not in DOC custody.[2] But when a person is in custody, and when the DOC assigns that person to a halfway house under its authority to classify and place prisoners, the person remains in DOC custody.[3] The evidence at Yarra's trial squarely placed him in this category.

Yarra represented himself at trial. He did not contest the State's evidence. Instead, Yarra argued an unfounded legal conclusion during his final summation: that when the DOC transferred him to the halfway house, it relinquished its custody of him, and thus he was no longer in official detention when he absconded.

This was not a factual issue, but a purely legal one: whether a person who has been placed in DOC custody remains in DOC custody when the DOC transfers the person to a halfway house. As noted above, our case law holds that persons placed by the DOC in halfway houses remain in official detention, and they commit the crime of second-degree escape if they abscond.

Accordingly, we conclude that the evidence was sufficient to support Yarra's conviction for second-degree escape.

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[2] *See, e.g.*, *Williams v. State*, 301 P.3d 196, 198-99 (Alaska App. 2013) (parolee); *Ivie v. State*, 179 P.3d 947, 950-51 (Alaska App. 2008) (probationer); *Beckman v. State*, 689 P.2d 500, 502-03 (Alaska App. 1984) (probationer).

[3] *See, e.g.*, *Wassillie v. State*, 366 P.3d 549, 551 (Alaska App. 2016) (upholding escape conviction for halfway house resident on pre-release furlough status); *Lewis v. State*, 312 P.3d 856, 857 (Alaska App. 2013) (upholding a conviction for second-degree escape for a felon who walked away from a halfway house); *Crosby v. State*, 770 P.2d 1154, 1155 (Alaska App. 1989) (holding that furloughed felon placed in residential drug treatment facility remained in DOC custody).

Yarra's sentencing claims

As a third felony offender, Yarra faced a presumptive sentencing range of 6 to 10 years.[4] At sentencing, the superior court found three aggravators, including that Yarra had repeated instances of conduct similar in nature to second-degree escape. The superior court also found that Yarra had not proven a proposed mitigator — that his conduct was among the least serious within the definition of second-degree escape. Lastly, the superior court, finding that Yarra was a worst offender, sentenced him to serve 10 years, the maximum sentence for Yarra's offense.[5] Yarra challenges the superior court's rulings.

The "repeated instances of similar conduct" aggravator

Of the three aggravating factors found by the superior court, Yarra contests only one: he asserts that the superior court erred when it found that the State had proven the "repeated instances of similar conduct" aggravator.[6] He argues that he had only one prior conviction for an offense similar to escape. Yarra asserts that, because of this error, he is entitled to be resentenced.

In addition to Yarra's 2004 conviction for unlawful evasion for leaving a halfway house, he also has a 2005 conviction for felony eluding a police officer who attempted to stop him for erratic driving. And — just prior to his escape in this case — Yarra was arrested on a warrant for absconding on a felony charge in his then-pending theft case.

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[4] AS 12.55.125(d)(4).

[5] AS 12.55.125(d).

[6] AS 12.55.155(c)(21).

We need not decide whether these prior offenses amount to conduct similar to second-degree escape. The superior court sentenced Yarra within the presumptive range, so his claim of error is moot.[7] The superior court did not need to find any aggravators to lawfully impose the sentence it imposed.[8] Additionally, the court found two aggravators that Yarra does not contest.[9] Accordingly, Yarra is not entitled to be resentenced on this basis.

The "least serious" mitigator

Yarra contends that the superior court erred when it rejected his proposed "least serious" conduct mitigator.[10] At the sentencing hearing, and in his sentencing pleadings, Yarra supported his "least serious" mitigator argument primarily with reference to *Lewis v. State*, 312 P.3d 856 (Alaska App. 2013). Noting that this Court concluded that Lewis had established the least serious mitigator, Yarra compared Lewis's actions with his own:

> [Lewis] walked away, [he] was told he was being sent back to ... to jail, [and] he walked away from the building. He ran from the building. He was in escape status for less than 24 hours. He did not commit another crime. I was signed out of the building. I was gone for less than 24 hours. I did not commit another crime. I was not convicted of another crime.

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[7] *See Byford v. State*, 352 P.3d 898, 906 (Alaska App. 2015); *Carlson v. State*, 128 P.3d 197, 197-98, 211-12 (Alaska App. 2006) (citing *State v. Gibbs*, 105 P.3d 145, 148 (Alaska App. 2005)).

[8] *See Byford*, 352 P.3d at 906; *Carlson*, 128 P.3d at 198.

[9] *See Cleveland v. State*, 143 P.3d 977, 987-88 (Alaska App. 2006) (existence of a single *Blakely*-exempt aggravating factor authorizes a trial court to exceed the presumptive term).

[10] AS 12.55.155(d)(9).

The superior court rejected this proposed mitigator. The court found that, among other things, Yarra's "running from the vehicle [after his escape from the halfway house] created a significant public danger [and that] police pursuit [of escapees] presents public danger[.]"

More specifically, the superior court observed that, after Yarra absconded from the halfway house van, "Yarra was [later] found fleeing from the police in a high-speed chase in a stolen vehicle. He ran from the vehicle. Rightly or wrongly, that reckless and outrageous conduct led to shots being fired. It is foreseeable that fleeing felons will precipitate shots from police if they lead the police on a high-speed chase."

In making these findings, the judge explained that he relied both on the record in the instant case and on the record in the case that arose after Yarra's escape, in which Yarra was charged with first-degree vehicle theft.

On appeal, Yarra does not challenge the judge's factual findings at the sentencing hearing. The record supports the conclusion that Yarra's conduct after his escape resulted in risk to the community and to police officers. The record also supports the conclusion that Yarra, unlike Lewis, did not voluntarily turn himself in. The judge's findings are not clearly mistaken, and they defeat Yarra's proposed mitigator.

The judge's worst offender finding is supported by the record

At Yarra's sentencing, a trooper testified to the frequency with which persons absconded from halfway houses in Alaska. Then, during his sentencing argument, the prosecutor referred to an incident in Fairbanks that occurred two weeks previously. This incident ended in a twelve-hour standoff, during which the surrounding area was "shut down." Yarra now complains that the judge improperly increased his sentence because of this unrelated incident.

During his sentencing remarks, the judge stated that the car chase leading to Yarra's capture created a significant public danger. The judge then briefly mentioned the incident involving the escape of another detainee two weeks earlier, in order to highlight the danger of escape. The judge next turned to the specific hazards that Yarra created after his escape. The judge referred to Yarra's flight from the police (as a passenger in a stolen vehicle), and to the shots that the police fired at Yarra as he fled from the vehicle on foot after it was stopped.

We have reviewed the record, and we find no indication that the judge increased Yarra's sentence because of the unrelated incident involving a different escapee.

Indeed, the maximum sentence that the judge imposed is fully justified by the judge's finding that Yarra is a worst offender, a finding that Yarra does not challenge. During his sentencing remarks, the judge stated:

> [T]he rehabilitation potential of the defendant is zero. The criminal history is as bad as it can be. ... Mr. Yarra's of a mind that he will begin to re-offend the day he's released without regard to whatever sentence is imposed in this case. ... Twenty-four convictions, 11 felony convictions, is a level of criminal misconduct that the community will not tolerate. ... There is a significant desire and need to isolate Mr. Yarra from the public. He's a danger to the public. He's a danger to police. He puts police in a position where they ... risk their own safety and are forced into a position to perhaps even shoot a fleeing felon. Mr. Yarra's conduct is unrelenting and dangerous. If he were released, he would re-offend. If he re-offends, he would flee if he could.

The judge's finding that Yarra is a worst offender was based on Yarra's criminal record and his conduct after the escape. This finding is well-supported by the record. We conclude that the 10-year sentence imposed on Yarra is not clearly mistaken.

Conclusion

We AFFIRM the judgment of the superior court.