IN THE COURT OF APPEALS OF THE STATE OF ALASKA

PHILLIP W. TILLOTSON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12448 Trial Court No. 4FA-11-1216 CR MEMORANDUM OPINION No. 6638 — June 6, 2018

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

Appearances: J. Adam Bartlett, Attorney at Law, under contract with the Office of Public Advocacy, 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 ALLARD.

Phillip W. Tillotson was indicted on multiple counts of first-degree sexual abuse of a minor and one count of second-degree sexual abuse of a minor based on

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

allegations that he engaged in multiple acts of sexual penetration of an eight-year-old child on two separate occasions. As a first felony offender, Tillotson faced a presumptive range of 25 to 35 years for the first-degree sexual abuse of a minor charges and 5 to 15 years for the second-degree sexual abuse of a minor charge.[1]

Tillotson subsequently pleaded guilty, pursuant to a plea agreement, to a single count of second-degree sexual abuse of a minor with an agreed-upon sentence of 30 years with 18 years suspended (12 years to serve). Because this agreed-upon sentence exceeded the applicable presumptive range for second-degree sexual abuse of a minor, this sentence could not be lawfully imposed without a statutory aggravator under AS 12.55.155(c). However, the plea agreement did not include any stipulations as to any statutory aggravators. At the change-of- plea hearing, the trial court never addressed this deficiency in the plea agreement, although Tillotson appears to have informally agreed that the offense was committed against a member of the same household — which would constitute an aggravating factor under AS 12.55.155(c)(18)(A).[2]

Two years later, Tillotson filed a *pro se* motion to correct an illegal sentence.[3] The State agreed that Tillotson's sentence was illegal without a statutory aggravator. However, the parties disagreed regarding how to remedy this problem. Tillotson argued that he should be allowed to retain the benefits of the plea agreement, and the illegal sentence should be corrected by giving him a lower sentence that was within the applicable presumptive range. The State argued that Tillotson was not entitled to seek a lower sentence because the agreed-upon sentence was a material part of the bargained-for exchange. The State pointed out that the email exchanges between the

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[1] *See* AS 12.55.125(i)(1)(A)(i); AS 12.55.125(i)(3)(A).

[2] The child victim was the daughter of Tillotson's roommate.

[3] *See* Alaska R. Crim. P. 35(a).

parties showed that neither party had contemplated resolving this case within the 5- to 15-year presumptive range that Tillotson was now arguing should apply. Indeed, Tillotson's original plea offer (which the prosecutor rejected as too lenient) was to plead guilty to second-degree sexual abuse of a minor with a sentence of 20 years with 10 years suspended — a proposed sentence that, like the sentence ultimately imposed, required proof of a statutory aggravator. The State therefore argued that Tillotson's only available remedy, if he wanted to argue for a lower sentence than the one imposed, was to seek rescission of the plea agreement as a whole.[4]

The superior court agreed with the State that Tillotson was not entitled to selective enforcement of the aspects of the plea agreement that were beneficial to him while seeking rescission of those aspects that were not. The court therefore ruled that if Tillotson wanted to challenge his sentence as unlawful and to argue for a sentence that was lower than the agreed-upon sentence, he was required to seek rescission of the plea agreement as a whole. Tillotson now appeals that ruling.

On appeal, Tillotson argues that the superior court erred when it ruled that rescission of the plea agreement was the only available remedy for the illegal sentence imposed in his case. Tillotson argues that "rescission is too harsh a remedy" and that "the agreement can be salvaged" by re-sentencing Tillotson to a new, lower sentence within the presumptive range. We disagree. Contrary to Tillotson's claims on appeal, there is nothing ambiguous about the plea agreement in this case. The record makes clear that the agreed-upon sentence was a material part of the bargain. We therefore agree with the superior court that Tillotson is not entitled to challenge this material aspect of his plea agreement without seeking rescission of the plea agreement as a whole.

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[4] *See, e.g.*, *Woodbury v. State*, 151 P.3d 528, 532 (Alaska App. 2007); *Grasser v. State*, 119 P.3d 1016, 1018 (Alaska App. 2005).

The judgment of the superior court is AFFIRMED.