IN THE COURT OF APPEALS OF THE STATE OF ALASKA

STEPHEN HENRY NICKOLI, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12336 Trial Court No. 3PA-10-2937 CR MEMORANDUM OPINION No. 6643 — June 20, 2018

Appeal from the Superior Court, Third Judicial District, Palmer, Eric Smith, Judge.

Appearances: Kelly R. Taylor, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Brittany L. Dunlop, Assistant District Attorney, Palmer, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

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

Judge MANNHEIMER.

On October 29, 2010, twenty-four-year-old Stephen Henry Nickoli completed his probation supervision from a second-degree burglary conviction. The next morning, Nickoli returned to his adoptive parents' home and he entered the

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

bedroom where his seven-year-old niece was sleeping with her mother. Nickoli grabbed the girl, covered her mouth to stop her from making any noise, and carried her to his own bedroom. He then held her down and raped her.

During this attack, the girl struggled and screamed. Nickoli tried to stifle these screams by choking her, but the girl's screams alerted her grandfather. The grandfather came into Nickoli's room and stopped the sexual assault.

Nickoli was charged with first-degree sexual abuse of a minor, first-degree sexual assault, and kidnapping.[1] He ultimately pleaded guilty to first-degree sexual abuse, and the State agreed to drop the other charges. As part of the plea agreement, Nickoli admitted two aggravating factors — that his niece was a particularly vulnerable victim, and that his conduct was among the most serious included in the definition of the offense.[2]

Because Nickoli was a second felony offender, he faced a presumptive sentencing range of 30 to 40 years' imprisonment.[3] And because Nickoli stipulated to the two aggravators, the superior court was authorized to sentence him up to a maximum of 99 years.[4]

In his sentencing remarks, Superior Court Judge Eric Smith acknowledged that Nickoli suffers from fetal alcohol syndrome, with attendant intellectual disabilities and impulsivity. The judge also found that Nickoli was "sincerely and deeply repentant for what he did." Nevertheless, the judge declared that Nickoli's offense was "a pretty

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[1] AS 11.41.434(a)(1), AS 11.41.410(a)(1), and AS 11.41.300(a)(1)(C), respectively.

[2] AS 12.55.155(c)(5) and AS 12.55.155(c)(10), respectively.

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

[4] *See* AS 12.55.125(i)(1); AS 12.55.155(a)(1).

horrific crime" because it "wasn't just a rape [and it] wasn't just sexual abuse". Rather, it was the violent rape of a seven-year-old child who was a member of Nickoli's family.

Judge Smith also stated that, "from the standpoint of rehabilitation", he found it relevant that Nickoli committed this offense just after completing an earlier felony probation.

Based on this, and on the seriousness of the offense, Judge Smith concluded that the two most important sentencing criteria in Nickoli's case were re-affirmation of societal norms and isolation of the offender. [5] Judge Smith also concluded that, "[given] the nature of the crime, the nature of the victim, and the relationship between Mr. Nickoli and the victim", Nickoli's case warranted a sentence at the upper end of the applicable 30- to 40-year presumptive range.

The judge sentenced Nickoli to 60 years' imprisonment with 20 years suspended — *i.e.*, 40 years to serve.

In this appeal, Nickoli contends that this sentence is excessive. We have examined the record, and we conclude that this sentence is not clearly mistaken — *i.e.*, that it is within the range of sentences that reasonable judges might impose under these facts. [6]

In a separate argument, Nickoli challenges the conditions of his probation that refer to "sexually explicit material". (These provisions (1) bar Nickoli from possessing "sexually explicit material", (2) prohibit him from entering any establishment whose primary business is the sale of "sexually explicit material", and (3) require Nickoli

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[5] *See* AS 12.55.005.

[6] *See State v. Hodari*, 996 P.2d 1230, 1232 (Alaska 2000) (quoting *Erickson v. State*, 950 P.2d 580, 586 (Alaska App. 1997)).

to submit to searches of his residence, his vehicle, and his computer, cell phone, and other electronic devices for the presence of "sexually explicit material".)

Nickoli is not allowed to challenge these conditions of probation at this juncture. This is the second time that Nickoli's case has been in front of us. When Nickoli originally appealed his sentence to us, he did not challenge these conditions of his probation. *See Nickoli v. State*, unpublished, 2014 WL 7005579 (Alaska App. 2014). Now that Nickoli has been re-sentenced and his case has returned to us, he is not allowed to expand his appellate claims by attacking conditions of probation that he could have attacked earlier. *See Hurd v. State*, 107 P.3d 314, 327-29 (Alaska App. 2005).

That being said, it is clear from this Court's prior decisions that the phrase used in the challenged conditions of probation, "sexually explicit material", is unconstitutionally vague.[7] Because of this, the State may face difficulties if it ever seeks to revoke Nickoli's probation for violation of these conditions. Under AS 12.55.090(b), the State is free to ask the superior court to revisit and modify these conditions of probation.

The sentencing decision of the superior court is AFFIRMED.

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[7] *Beasley v. State*, 364 P.3d 1130, 1132 (Alaska App. 2015); *Diorec v. State*, 295 P.3d 409, 417 (Alaska App. 2013).