IN THE COURT OF APPEALS OF THE STATE OF ALASKA

RANDY L. GIDDINGS, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12676 Trial Court No. 3PA-14-2462 CR MEMORANDUM OPINION No. 6652 — July 5, 2018

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

Appearances: Shelley K. Chaffin, Law Office of Shelley K. Chaffin, Anchorage, for the Appellant. Tamara E. DeLucia, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard and Wollenberg, Judges.

Judge WOLLENBERG.

Randy L. Giddings was indicted on two counts of second-degree sexual abuse of a minor stemming from his sexual relationship with fourteen-year-old A.S. At the time, Giddings was twenty-two years old. Both Giddings and A.S. admitted that they had engaged in a sexual relationship, and Giddings stated that he was aware that A.S.

was only fourteen years old. He told the police that he allowed A.S. to stay at his home periodically to keep her off the streets. Giddings mistakenly believed that he could legally engage in the relationship if A.S.'s biological mother consented.

Giddings subsequently pleaded guilty to a consolidated count of second-degree sexual abuse of a minor.[1] (Giddings also pleaded guilty to one count of violating conditions of release.) In exchange for his guilty plea, the State agreed to dismiss charges that were pending against Giddings in three separate cases, including charges of third-degree misconduct involving a controlled substance, second-degree hindering prosecution, third-degree theft, and false information. Giddings agreed to a sentence of 12 years with 7 years suspended (5 years to serve) and a 10-year probationary term, with the conditions of probation open to the sentencing court.

Giddings objected to a number of the probation conditions proposed in the presentence report. Following the parties' arguments, the superior court imposed thirty special conditions of probation.

Giddings now appeals several of these conditions.

The alcohol-related conditions

Giddings challenges the conditions of his probation that preclude him from consuming alcohol, possessing alcohol, or entering an establishment where alcohol is the main item for sale. He also challenges the conditions that require him to submit, at the direction of a probation officer, to testing for alcohol and to searches for alcoholic beverages. (The challenged conditions are General Condition No. 8, as well as Special

[1] AS 11.41.436(a)(1).

Condition Nos. 1, 4, 5, 7, and 8.)[2] Giddings argues that there is an insufficient nexus between these conditions and the offense for which he was convicted or the offenses dismissed pursuant to his plea agreement, as none of the offenses involved alcohol.

Trial courts have broad discretion in imposing probation conditions, so long as the conditions are reasonably related to the defendant's rehabilitation and the protection of the public and are not unduly restrictive of the defendant's liberty.[3] After reviewing the record, we conclude that the trial court did not abuse its discretion in imposing the alcohol-related conditions.

Giddings acknowledges that he had two violations for "minor consuming alcohol" in 2009, but he argues that there is no evidence that he drank to excess on those occasions. If these violations were the only evidence of Giddings's past use of intoxicants, we would agree that a remand for additional findings regarding the circumstances of those violations would be required. The statute known colloquially as the "minor consuming alcohol" statute covers a broad range of conduct, from simple possession of alcohol to consuming large amounts of alcohol to the point of impairment or even incapacitation.[4] The behavior is illegal solely because of the age of the person. Thus, standing alone, an unexplained conviction for minor consuming is not necessarily indicative of a larger issue with alcohol and would not support a complete bar on alcohol use and possession by an adult.

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[2] Giddings does not contest these conditions in so far as they prohibit consumption and possession of controlled substances, or permit warrantless searches and testing for controlled substances.

[3] *See Roman v. State*, 570 P.2d 1235, 1240 (Alaska 1977).

[4] Former AS 04.16.050 (2009) (defining the offense of "possession, control, or consumption [of alcoholic beverages] by persons under 21 years of age").

However, the superior court also found that Giddings has a "significant substance abuse problem" — in particular, an addiction to methamphetamine. At the sentencing hearing, Giddings's attorney acknowledged that Giddings "has a serious methamphetamine problem" that would likely take him a long time to resolve and for which Giddings required treatment. The court presumed that Giddings went from using alcohol to using methamphetamine and believed this presumption warranted prohibiting Giddings from using any intoxicating substances.

Relying on our decision in *Barber v. State*, Giddings challenges the trial court's conclusion.[5] In *Barber*, we held that the defendant's history of drug abuse did not support the imposition of conditions precluding his possession and consumption of alcohol.[6] The sentencing court in *Barber* theorized that people who use illicit drugs will sometimes switch to using alcoholic beverages; therefore, the court concluded that eliminating all intoxicating substances would most effectively promote the defendant's rehabilitation.[7] On appeal, we vacated the alcohol conditions, noting that even if the trial court's theory was correct, the record contained little evidence that Barber engaged in criminal activity *because of* intoxication.[8] Barber had past criminal convictions for the illicit possession of controlled substances, and we noted that the use of alcohol in place of controlled substances would not have constituted a crime.[9]

We view *Barber* as distinguishable from Giddings's case. While the correlation between Giddings's alcohol use and his drug use may not have been as direct

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[5] *Barber v. State*, 386 P.3d 1254 (Alaska App. 2016).

[6] *Id.* at 1267.

[7] *Id.*

[8] *Id.*

[9] *Id.*

as the trial court implied (Giddings reported that he did not start using methamphetamine until three years after he stopped drinking), the record here supports a connection between Giddings's criminal conduct and his substance abuse, beyond simple possession of controlled substances.

In Giddings's trial court sentence memorandum, his attorney stated that Giddings "began experimenting with drugs during middle school and high school" and later turned to methamphetamine and "began selling methamphetamine to support his addiction." These assertions are supported by the presentence report. Giddings's attorney explained that Giddings's "untreated addiction to methamphetamine" caused him to flee from his third-party custodian, leading to the violating conditions of release charge to which Giddings pleaded as part of the agreement in this case.

Giddings's attorney also explained, both in the trial court and now on appeal, that Giddings's addiction clouded his judgment — and, coupled with his mistaken belief about the age of consent, "led [Giddings] to make poor choices regarding his relationship with [A.S.]."

The trial court could reasonably conclude, based on Giddings's substance abuse history and his expressed desire for treatment, that Giddings had a significant substance abuse problem that could best be addressed through the elimination of intoxicating substances.[10] We note that Giddings has separate probation conditions in the current case that require him to obtain a substance abuse evaluation and actively participate in and successfully complete any recommended treatment, including residential treatment of up to six months. Giddings does not challenge these conditions. We also note that while the circumstances of Giddings's minor consuming violations are unknown, the presentence report shows that these violations occurred only several

[10] *See Wood v. State*, 2011 WL 6450917, *2 (Alaska App. Dec. 21, 2011) (unpublished).

months apart, and that Giddings thereafter had multiple probation violations for failing to complete treatment. We cannot say that the trial court abused its discretion in effectively concluding that Giddings's success in treatment would be enhanced by the absence of alcohol.

We therefore affirm General Condition No. 8, and Special Condition Nos. 1, 4, 5, 7, and 8.

The restrictions on contact with minors

Giddings challenges the probation conditions that restrict his contact with minors (Special Condition Nos. 23, 24, and 25). Among other things, these conditions prohibit Giddings from having contact, engaging in work or other activities, or residing with any minor under sixteen years of age unless certain preconditions are met. Giddings argues that these conditions are overly broad and unduly restrictive of his liberty because they restrict his contact with his own children as well as his employment options, undermining his rehabilitative potential.

Probation conditions that infringe on a defendant's constitutional rights, like the right to familial association, are subject to special scrutiny to ensure that the conditions are reasonably related to the rehabilitation of the offender and the protection of the public, and narrowly tailored to avoid unnecessary interference with those rights.[11] Before imposing such conditions, the sentencing court must affirmatively consider, and have good reason for rejecting, any less restrictive alternatives.[12]

The State acknowledges that the sentencing court did not subject these conditions to heightened scrutiny and that a remand is necessary. The State notes that

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[11] *Simants v. State*, 329 P.3d 1033, 1038-39 (Alaska App. 2014) (citations omitted).

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

there was no evidence presented at the sentencing hearing as to how Giddings came to form his relationship with A.S. or whether he associated with other underage individuals, nor was there any evidence, other than the fact of the conviction itself, to justify a restriction on Giddings's contact with his own children.

Having reviewed the record, we agree with the State's concession. We therefore remand this case to the superior court for reconsideration of Special Condition Nos. 23, 24, and 25 and application of special scrutiny to ensure that any restrictions on Giddings's contact with minors are narrowly tailored to avoid unnecessary interference with Giddings's constitutional rights.

Sex offender treatment conditions

Giddings challenges the probation conditions requiring him to obtain a sex offender evaluation/risk assessment and participate in sex offender treatment (Special Condition Nos. 12, 18, 19, 20, and 21). Giddings argues that these conditions are overly broad and vague and are not narrowly tailored to meet his rehabilitation goals.

To the extent Giddings is arguing that there is an insufficient basis for requiring him to participate in sex offender treatment, we reject that argument. Giddings was charged with two counts of sexual abuse of a minor and convicted of a single consolidated count. Giddings's unlawful sexual relationship with a minor provided a sufficient basis for the sentencing judge to conclude that sex offender treatment was reasonably related to Giddings's rehabilitation and to the protection of the public.

Giddings also specifically challenges the condition in Special Condition No. 21 requiring him to submit to regular polygraph examinations. This condition stems from AS 12.55.100(e)(1)(A), which requires a defendant convicted of a sexual offense "to submit to regular periodic polygraph examinations" as a condition of probation.

Giddings argues that this condition violates his constitutional privileges against self-incrimination.[13]

We have previously considered and rejected this argument. In *Diorec v. State*, we held that the polygraph requirement did not present a realistic hazard of self-incrimination in light of the State's representation that the Department of Corrections expressly advises probationers, prior to administering the polygraph, that (1) they may assert their privilege against self-incrimination and refuse to answer any question if the requested information would tend to incriminate them, and (2) their probation will not be revoked for valid assertions of that privilege.[14]

Here, the prosecutor confirmed that such an advisement is given to probationers subject to the polygraph condition. And the superior court explicitly conditioned the polygraph requirement on Giddings's receiving these warnings and assurances. The court stated that it expected the Department of Corrections to abide by its representation that Giddings would not be required to incriminate himself during the polygraph examinations.

With these provisos, we affirm the provision requiring Giddings to submit to polygraph examinations. As the superior court stated, if a dispute arises in the future as to whether Giddings has validly invoked his privilege against self-incrimination during a polygraph examination, the superior court can resolve the dispute at that time.[15]

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[13] *See* U.S. Const. amends. V, XIV; Alaska Const. art. I, § 9.

[14] *Diorec v. State*, 295 P.3d 409, 413-14 (Alaska App. 2013); *see also Minnesota v. Murphy*, 465 U.S. 420, 426, 430 (1984) (holding that the State cannot make waiver of the privilege against self-incrimination a condition of probation; a probationer may validly refuse to answer any question that would tend to incriminate him, unless the State grants him immunity); *Gyles v. State*, 901 P.2d 1143, 1148 (Alaska App. 1995) (discussing *Murphy*).

[15] *See Diorec*, 295 P.3d at 414.

Other testing requirements

Giddings challenges another aspect of Special Condition No. 21, which requires that he participate in "Alaska DOC approved programming as directed by the probation officer," which "may include plethysmograph assessment, physiological and/or psychological testing, as well as other methods of ongoing assessment." Giddings argues that this requirement is vague and overbroad. He also contests the inclusion of plethysmograph testing, arguing that it violates his constitutional rights to liberty, privacy, and due process.

We reject Giddings's challenge to the general requirement that he participate in other programming at the direction of his probation officer. We upheld a similar requirement in *Diorec*, which required Diorec to complete "other Department-approved programs."[16] We noted that the probation officer's discretion to order further treatment is limited by AS 12.55.100, which authorizes a probation officer to mandate a probationer's participation in the treatment plan of a rehabilitation program only if the program is "related to the defendant's offense or to the defendant's rehabilitation."[17] Moreover, we do not interpret this condition as authorizing inpatient treatment.[18]

As the superior court noted, and as the State acknowledges, Giddings can seek judicial review if he objects to a specific treatment requirement.

With regard to plethysmography, Giddings argues that it is an invasive and unreliable form of testing.[19] Giddings also notes that several federal courts have vacated

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[16] *Id.*

[17] *Id.* at 414-15 (discussing former AS 12.55.100(a)(5) (now renumbered as AS 12.55.-100(a)(2)(E)).

[18] *See* AS 12.55.100(c); *Hester v. State*, 777 P.2d 217, 219 (Alaska App. 1989).

[19] Plethysmograph testing is a procedure that "involves placing a pressure-sensitive (continued...)

conditions requiring plethysmography or at least required trial courts to provide ample, detailed justifications on the record for imposing the condition.[20]

We agree that plethysmograph assessment is sufficiently invasive and demeaning as to implicate a liberty interest and to require special scrutiny.[21] While the State argues that there are valid rehabilitative goals in requiring Giddings to submit to plethysmograph assessments, the State acknowledges that this condition is subject to special scrutiny and that the superior court did not apply this heightened level of scrutiny.

We therefore remand Special Condition No. 21 to the superior court to reconsider and apply special scrutiny to the plethysmograph provision.

Release of information condition

Giddings challenges Special Condition No. 22, which requires him to sign releases of information authorizing the exchange of information between his assessment

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[19] (...continued)
device around a man's penis, presenting him with an array of sexually stimulating images, and determining his level of sexual attraction by measuring minute changes in his erectile responses." *United States v. Weber*, 451 F.3d 552, 554 (9th Cir. 2006) (internal quotations omitted).

[20] *See, e.g.*, *United States v. McLaurin*, 731 F.3d 258, 261-62 (2d Cir. 2013) (vacating a plethysmography condition because the procedure was not "narrowly tailored to serve a compelling government interest" and noting "there is a line at which the government must stop. Penile plethysmography testing crosses it.") (internal quotations omitted); *Weber*, 451 F.3d at 568-69 (requiring that courts conduct a "thorough on-the-record inquiry into whether the degree of intrusion caused by [plethysmograph] testing is reasonably necessary" to accomplish the goals of the relevant sentencing statute and "involves no greater deprivation of liberty than is reasonably necessary given the available alternatives") (internal quotations removed).

[21] *See Weber*, 451 F.3d at 568-69.

provider, treatment provider, and Alaska Department of Corrections staff members, as well as other individuals identified by the probation officer as having "an essential role in [Giddings's] supervision and treatment." Giddings argues that this condition unduly infringes on his privacy.

At Giddings's sentencing, his attorney conceded that Giddings had a serious methamphetamine problem. In light of Giddings's conviction for engaging in a sexual relationship with a minor, and his admitted drug abuse problem, the superior court determined that substance abuse treatment and sex offender treatment were both warranted. The superior court could properly conclude that the release of information between different providers was reasonably related to Giddings's rehabilitation and the protection of the public, and that it was necessary if the probation officer was to successfully monitor Giddings's progress in treatment and supervise his reintegration into society.[22]

However, the condition also permits the probation officer to authorize the release of information to clinicians providing treatment to Giddings's victim, A.S. We fail to see why this portion of the condition is necessary in light of Giddings's right to privacy, and no specific rationale for this provision was offered by the State in the trial court. Accordingly, we affirm Special Condition No. 22, with one exception: we strike the phrase "clinicians providing treatment to the victim."

Notification conditions

Finally, Giddings challenges two conditions of his probation that require him to notify others of his sexual offending history.

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[22] *See, e.g.*, *United States v. Dupes*, 513 F.3d 338, 344-45 (2d Cir. 2008); *United States v. Lopez*, 258 F.3d 1053, 1057 (9th Cir. 2001); *United States v. Cooper*, 171 F.3d 582, 587 (8th Cir. 1999).

First, Special Condition No. 26 requires Giddings to advise all members of any household in which he resides of his sexual offending history and permits his probation officer to discuss Giddings's sexual offending history with his household members. Giddings argues that this condition is overly broad and unduly restricts his right to association.

We upheld a similar condition of probation in *Diorec*, noting that the requirement was directly related to the protection of the public because the defendant's crime was committed against another household member.[23] Giddings concedes that A.S. did "sometimes" stay at his home, but argues that she was not a household member. However, the record demonstrates that A.S. did live with Giddings, and during that time, they engaged in an unlawful sexual relationship. Because Giddings's crime was committed against a minor with whom he lived (even if temporarily), this condition was within the sentencing court's discretion.

We note that the condition originally proposed in the presentence report required Giddings to inform members of his household of *all* his criminal history. The court rejected this broader condition, concluding that it would unreasonably burden Giddings's right of association. We uphold the court's decision and affirm Special Condition No. 26.

Second, Special Condition No. 28 requires Giddings to disclose his sexual offending history to persons with whom he maintains a "significant personal relationship" as well as any person with whom he is "closely affiliated" in a club or employment situation. We vacated a similar probation condition in *Smith v. State*,

[23] *Diorec*, 295 P.3d at 415.

concluding that the language "significant relationship" and "closely affiliated" provided constitutionally inadequate notice of when disclosure was required.[24]

The State concedes that these terms are vague and must be clarified in light of our prior decisions. We therefore vacate Special Condition No. 28. The court may reimpose this condition on remand with additional clarification of the terms "significant personal relationship" and "closely affiliated."

Conclusion

We REMAND this case to the superior court for reconsideration of, and application of special scrutiny to, Special Condition Nos. 23, 24, and 25 (age restriction conditions) and the plethysmograph requirement within Special Condition No. 21. Additionally, we direct the superior court to STRIKE the phrase "clinicians providing treatment to the victim" from Special Condition No. 22 (releases of information). Finally, we VACATE Special Condition No. 28. The court may reimpose this condition on remand with additional clarification of the terms "significant personal relationship" and "closely affiliated."

With those exceptions, we AFFIRM the superior court's judgment.

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[24] *Smith v. State*, 349 P.3d 1087, 1095 (Alaska App. 2015) (citing *Whiting v. State*, 2014 WL 706268, at *2-3 (Alaska App. Feb. 19, 2014) (unpublished)).