IN THE COURT OF APPEALS OF THE STATE OF ALASKA

MICHAEL EMILIO GARDNER, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12217 Trial Court No. 3AN-12-13653 CR MEMORANDUM OPINION No. 6740 — December 5, 2018

Appeal from the Superior Court, Third Judicial District, Anchorage, Jack W. Smith, Judge.

Appearances: Lars Johnson, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. June Stein, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

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

Judge SUDDOCK.

Michael Emilio Gardner, age sixteen, was charged with two counts of first-degree sexual abuse of his five-year-old half-sister K.M. Gardner also admitted that he

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

abused his three-year-old half-sister K.K., but the State did not charge Gardner with this abuse.

Pursuant to a plea agreement, Gardner pleaded guilty to one consolidated count of second-degree sexual abuse of a minor for abusing K.M. The plea agreement called for open sentencing, and the superior court ultimately sentenced Gardner to 11 years' imprisonment with 5 years suspended (6 years to serve).

Before Gardner was sentenced, his attorney asked the sentencing judge to refer Gardner's case to the statewide three-judge sentencing panel. The judge denied this request, and Gardner now appeals the judge's decision. For the reasons we explain here, we affirm the judge's decision not to refer Gardner's case to the three-judge panel.

Gardner also appeals several conditions of his probation. He did not object to these conditions during his sentencing, so he must show plain error. We find that some of the conditions are plainly erroneous, and we vacate them. We also direct the superior court to reconsider two of Gardner's conditions of probation.

Background facts and proceedings

On December 24, 2012, Gardner's grandmother reported to the Anchorage police that K.M. and her younger sister K.K. had told her that Gardner touched them sexually. The girls were Gardner's half-sisters. At the time alleged, Gardner was sixteen years old, K.M. was five, and K.K. was three.

Gardner at first denied molesting the children, but after the police informed him of what the girls had said during their interviews, Gardner admitted that he had touched K.K. inappropriately, and that he had touched K.M. on her buttocks and vagina, and had induced her to fellate him.

Pursuant to a plea agreement, Gardner pleaded guilty to one consolidated count of second-degree sexual abuse of a minor for his conduct with K.M.[1]

Gardner faced a presumptive sentencing range of 5 to 15 years' imprisonment for this crime, but the plea agreement allowed Gardner to ask the sentencing judge to refer Gardner's case to the statewide three-judge sentencing panel — a panel that is authorized to impose sentences outside the applicable presumptive range.[2]

The terms of the plea agreement required Gardner to admit all the facts alleged in the original charging document. Thus, Gardner admitted that he had repeatedly sexually abused K.M. over a period of time, and that this sexual abuse included at least two acts of sexual penetration. Further, Gardner did not dispute that he had also engaged in repeated acts of sexual contact with his other half-sister, K.K.

At sentencing, Gardner's attorney presented two witnesses in an attempt to support the arguments that Gardner had exceptional prospects for rehabilitation, and also that it would be manifestly unjust to sentence Gardner within the applicable 5- to 15-year presumptive range. These witnesses were Dr. Mark Zelig, a forensic psychologist specializing in juvenile sex offenders, and Katrina Curry, the fiancée of Gardner's father.

Curry testified that K.M. had seen a counselor for a year, and that she no longer required treatment. Curry stated that K.M. and K.K. missed Gardner and had written him letters.

Dr. Zelig testified that the recidivism risk of juvenile sex offenders like Gardner is generally low, and that Gardner's risk of recidivism was "moderately low"

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[1] AS 11.41.436(a).

[2] AS 12.55.175.

within this already low-risk group of offenders. Dr. Zelig opined that Gardner could be most appropriately treated in the community rather than in prison.

The sentencing judge found that the State had proved aggravator AS 12.55.155(c)(10) — *i.e.*, that Gardner's conduct was among the most serious within the definition of the offense — because Gardner conceded that he had engaged in sexual penetration with K.M., and thus he was factually guilty of the higher-level offense of first-degree sexual abuse of a minor. The judge's finding of aggravator (c)(10) precluded him from referring Gardner's case to the three-judge panel on the basis of extraordinary potential for rehabilitation. *See* AS 12.55.165(b).

The judge also found several other aggravators: (c)(18)(B) — that Gardner had previously engaged in similar conduct; (c)(5) — that Gardner's victim was particularly vulnerable; (c)(18)(A) — that Gardner's offense was a crime of domestic violence; and (c)(18)(E) — that there was an age disparity of ten years or more between Gardner and his victim.

Having considered all of these circumstances, the sentencing judge concluded that it would not be manifestly unjust to sentence Gardner within the applicable 5- to 15-year presumptive sentencing range. The judge therefore denied Gardner's request for a referral to the three-judge sentencing panel. However, the judge imposed an active term of imprisonment near the bottom of the presumptive range: 6 years to serve (11 years with 5 years suspended).

Under AS 33.16.090(a)(2), Gardner is ineligible for discretionary parole during this 6-year sentence, but he will be released on mandatory parole after serving four years of this sentence (assuming that he does not forfeit any good time credit).

With one exception, the judge imposed all of the conditions of probation proposed in the presentence report.

This appeal followed.

Imposition of a sentence within the presumptive range was not manifestly unjust

Gardner argues that, given the facts of his case, it was manifestly unjust for him to receive a sentence within the applicable 5- to 15-year presumptive range — and that the sentencing judge accordingly should have referred Gardner's case to the three-judge panel for imposition of a lower sentence.

When a defendant argues for referral to the three-judge panel based on an assertion that it would be manifestly unjust to impose a sentence within the prescribed presumptive range, the sentencing judge "must undertake an analysis of the lower end of the sentencing range allowed by the presumptive sentencing law," and then ask "whether this lowest allowed sentence would still be clearly mistaken under the sentencing criteria first announced by the supreme court in *State v. Chaney*."[3] As we have already explained, Gardner's sentencing judge concluded that an active term of imprisonment of 5 years or more would not be manifestly unjust in Gardner's case.

Gardner argues that the judge erred by failing to fully consider Gardner's youth, his low risk of recidivism (as attested by Dr. Zelig), and Gardner's good rehabilitative prospects. But the record shows that the sentencing judge did, in fact, consider all these factors. Indeed, the judge explicitly acknowledged his duty to do so.

Nothing in the judge's sentencing remarks suggests that he particularly disagreed with Dr. Zelig's conclusions that Gardner's conduct was to some degree the product of Gardner's social immaturity, coupled with Gardner's father's reckless decision to lodge him in a common bedroom with the two girls; that Gardner's risk of recidivism was low; and that Gardner's prospects for rehabilitation were quite favorable.

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[3] *Harapat v. State*, 174 P.3d 249, 254 (Alaska App. 2007).

But the judge concluded that these favorable factors were counterbalanced by the aggravated nature of Gardner's conduct — *i.e.*, his multiple acts of sexual penetration and sexual contact with two very young victims.

The judge noted that, by entering into the plea agreement and pleading guilty to second-degree sexual abuse of a minor, Gardner avoided a much higher sentencing range (because his conduct would have supported two convictions for the greater offense of first-degree sexual abuse of a minor). The judge implicitly agreed with the prosecutor's argument that, while it might have been manifestly unjust to sentence Gardner within the presumptive range for first-degree sexual abuse (the crime with which Gardner was initially charged), it was not manifestly unjust to sentence Gardner within the presumptive range for the reduced charge of second-degree sexual abuse.

The record supports the sentencing judge's conclusion that Gardner's underlying conduct was aggravated in many respects, and we agree with the sentencing judge that it was reasonable to assess Gardner's claim of "manifest injustice" in light of the fact that Gardner's plea bargain significantly reduced his sentencing exposure for that underlying conduct. Had Gardner been facing an active term of imprisonment of 30 years or more, his claim of manifest injustice might have more force. But instead, Gardner faced a sentencing range of 5 to 15 years. Given that reduced presumptive sentencing range, and given the facts of Gardner's case, we conclude that the sentencing judge was not clearly mistaken when he declined to refer Gardner's case to the three-judge sentencing panel.[4]

[4] *McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974).

Why we vacate or direct the superior court to reconsider several conditions of Gardner's probation

Gardner challenges several of his probation conditions. He did not object to any of these probation conditions at his sentencing. Accordingly, we review these challenged conditions for plain error.

General Condition 5 prohibits Gardner from possessing weapons. Gardner objects to the final clause of this condition, which requires him to "submit to any search for the aforementioned weapons." Gardner argues that this consent-to-search requirement is improper under the supreme court's decision in *Roman v. State* because the search requirement is not reasonably related to Gardner's offense or to his rehabilitation.[5]

In *Boles v. State* and *Dayton v. State*, we struck nearly identical search provisions because the record gave no indication that the defendant had used weapons for criminal purposes in the past, or that weapons played any role in the defendant's crime — and thus, the search provisions failed the *Roman* test.[6] Similarly, in Gardner's case, the record does not indicate that Gardner has ever used a weapon for criminal purposes. We accordingly conclude that the consent-to-search clause of Gardner's probation condition constitutes plain error, and we vacate it.

General Condition 7 prohibits Gardner from drinking alcoholic beverages to the point where his blood alcohol level exceeds the legal limit for driving — even when Gardner is not operating a motor vehicle or engaging in any other activity (such as possessing a firearm) that would be criminal if he was impaired by alcohol.

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

[6] *Boles v. State*, 210 P.3d 454, 455 (Alaska App. 2009); *Dayton v. State*, 120 P.3d 1073, 1084-85 (Alaska App. 2005).

Again, Gardner argues that this condition is not reasonably related to his offense or his rehabilitation. Gardner has no history of excessive alcohol consumption. In fact, at Gardner's sentencing hearing, the judge ruled that the record did not support a finding that Gardner had drug or alcohol issues, and the judge therefore struck a proposed probation condition that would have required Gardner to enroll in substance abuse treatment programs if directed to do so by his probation officer.

Because the record does not reveal a connection between Gardner's alcohol consumption and his criminal conduct or his rehabilitation, it was plain error to limit Gardner's alcohol consumption beyond situations where alcohol impairment would make Gardner's conduct criminal. We therefore vacate this probation condition.

Special Condition 2 limits Gardner's contacts with minor females under sixteen years of age, unless this contact is in the presence of an approved adult who has been apprised of the circumstances of Gardner's crime, including the "assault cycle" of the crime. It is unclear to us what the term "assault cycle" means. We therefore direct the superior court to either clarify this term or remove it from the probation condition.[7] In all other respects, we conclude that this probation condition does not constitute plain error.

Special Condition 5 requires Gardner to participate in treatment programs as directed by his probation officer. Gardner argues that this condition is vague as to what types of treatment his probation officer is authorized to require. We construe Special Condition 5 as referring to sex-offender treatment programs and the types of treatment that routinely accompany these programs. Thus construed, the probation condition is not vague as to its scope, and it is justified by the facts of Gardner's case.

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[7] *See Smith v. State*, 349 P.3d 1087, 1094-95 (Alaska App. 2015).

Gardner also challenges Special Condition 5 on the ground that it authorizes plethysmograph testing. A plethysmograph assessment is sufficiently intrusive and demeaning as to implicate a liberty interest and to require special scrutiny.[8] The sentencing judge committed plain error by failing to apply special scrutiny to this clause of Special Condition 5. We accordingly vacate this clause of the probation condition, and we direct the sentencing judge to reconsider it, applying the appropriate standard.

Special Condition 7 requires Gardner to enroll in a residential mental health or substance abuse facility if ordered to do so by his probation officer. But as we have already explained, Gardner's sentencing judge affirmatively rejected another proposed probation condition that would have required Gardner to enroll in substance abuse treatment programs if directed to do so by his probation officer. The judge's inclusion of an analogous requirement in Special Condition 7 appears to have been an oversight.

The sentencing judge did not identify his basis for requiring Gardner to submit to residential mental health treatment. But in any event, this condition of probation constitutes plain error because the sentencing judge did not specify a maximum duration of this residential treatment. Instead, the judge left this to the discretion of unidentified therapists. This is an illegal sentence under Alaska law.[9] Accordingly, we vacate Special Condition 7 in its entirety.

Gardner challenges other conditions of his probation, but we find no plain error in these other probation conditions.

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[8] *United States v. Weber*, 451 F.3d 552, 568-69 (9th Cir. 2006); *see also id.* at 570-71 (Noonan, J., concurring and criticizing plethysmograph testing as a human rights violation).

[9] *Christensen v. State*, 844 P.2d 557, 559 (Alaska App. 1993).

Conclusion

We uphold the sentencing judge's decision not to refer this case to the three-judge sentencing panel.

With respect to Gardner's conditions of probation, we vacate the consent-to-search provision of General Condition 5, as well as General Condition 7 and Special Condition 7 in their entirety. We direct the superior court to either clarify the term "assault cycle" in Special Condition 2 or delete this term from the probation condition. We construe Special Condition 5 as limited to sex offender treatment programs, and we direct the superior court to reconsider the clause of Special Condition 5 that requires Gardner to submit to plethysmograph testing.

In all other respects, the judgment of the superior court is AFFIRMED.

We do not retain jurisdiction of this case.