In the Court of Appeals of the State of Alaska
Return of Jurisdiction

To: Clerk of Court
Anchorage

Date: **7/9/19**

Re: **Leonardo John Lovette II v. State of Alaska**
Trial Court Case # **3AN-11-13405CR**
Court of Appeals No. **A-12469**

The original record on appeal is being retained by Records Management Services for storage.

Under Appellate Rules 507(b) and 512(a), jurisdiction of this case is returned to the trial courts effective **7/2/19**.

Ryan Montgomery-Sythe, Chief Deputy Clerk

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NOTICE

This is a summary disposition issued under Alaska Appellate Rule 214(b). Summary disposition decisions of this Court do not create legal precedent and are not available in a publicly accessible electronic database. See Alaska Appellate Rule 214(d).

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

LEONARDO JOHN LOVETTE II, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12469 Trial Court No. 3AN-11-13405 CR SUMMARY DISPOSITION No. 0039 —May 29, 2019

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael R. Spaan, Judge.

Appearances: Justin A. Tapp, Denali Law Group, Anchorage, under contract with the Office of Public Advocacy, for the Appellant. Elizabeth T. Burke, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Joannides and E. Smith, Senior Superior Court Judges.*

Leonardo John Lovette II was convicted, following a jury trial, of two counts of second-degree sexual abuse of a minor.[1] At sentencing, the trial court imposed

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* Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

[1] AS 11.41.436(a)(2).

a composite sentence of 38 years with 8 years suspended (30 years to serve) and 10 years of probation.

Lovette raises three claims of error on appeal.

Lovette argues first that the trial court erred when it denied his motion to suppress evidence seized from his apartment. According to Lovette, this evidence should have been suppressed because the officer's search warrant application contained material omissions. Lovette identifies two omissions on appeal: (1) the officer failed to mention "the lack of any forensic medical evidence to support the claims of sexual abuse," and (2) the officer failed to mention that there were "significant differences" in the victims' accounts. In its order denying the motion to suppress, the trial court acknowledged that this information was omitted from the search warrant application, but the court also found that inclusion of this information would not have defeated the probable cause showing that was made.[2] The trial court also found that the omissions did not constitute a "deliberate attempt to mislead" the magistrate issuing the search warrant.[3] We have reviewed the search warrant application and the trial court's order, and we find no error in the trial court's rulings on these claims.

Lovette's second argument on appeal is that the trial court erred in refusing to dismiss the grand jury indictment "due to the State's failure to collect and preserve evidence." In the trial court proceedings, Lovette's attorney argued that the State had a duty to perform a forensic medical examination on one of the victims on the night her mother took her to the hospital (rather than deferring the examination until her Alaska CARES interview almost one month later). According to Lovette's trial attorney, failure

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[2] *See Lewis v. State*, 862 P.2d 181, 186 (Alaska App. 1993).

[3] *Id.* ("A non-material omission or misstatement — one on which probable cause does not hinge — requires suppression only when the court finds 'a deliberate attempt to mislead [the magistrate].'" (quoting *State v. Malkin*, 722 P.2d 943, 946 n.6 (Alaska 1986))).

to conduct such an examination invalidated the grand jury indictment. The trial court rejected this argument, finding that no such duty existed.[4] The trial court also found that, even if an examination had been conducted and it was normal, those results would not have been automatically exculpatory given the nature of the allegations and the circumstances under which the sexual abuse was alleged to have occurred.[5] We again find no error in the trial court's rulings.

Lovette's final argument on appeal is that his sentence is excessive. At the time of sentencing, Lovette had four prior felony convictions and twenty-one prior misdemeanor convictions, six of which were for assaultive conduct. Based on this history and the underlying facts of this case, the court concluded that the focus of Lovette's sentence should be on isolation, general deterrence, and community condemnation.

When we review a sentence for excessiveness, we independently examine the record to determine whether the sentence is clearly mistaken.[6] The "clearly mistaken" standard contemplates that different judges, confronted with identical facts, will differ on what constitutes an appropriate sentence, and that a reviewing court will not modify a sentence that falls within a permissible range of reasonable sentences.[7]

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[4] *See Selig v. State*, 286 P.3d 767, 772 (Alaska App. 2012) (stating that the general rule is that "the State's duty to preserve evidence applies only to physical evidence that has actually been gathered").

[5] *See State v. Norman*, 875 P.2d 775, 777 (Alaska App. 1994) (holding that a court should not dismiss criminal charges based on the government's negligent destruction of evidence unless "it affirmatively appears that the lost evidence would have created a reasonable doubt concerning the defendant's guilt").

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

[7] *Erickson v. State*, 950 P.2d 580, 586 (Alaska App. 1997).

Having independently reviewed the record, we conclude that the sentence imposed by the superior court is not clearly mistaken.

The judgment of the superior court is AFFIRMED.