

NOTICE

This is a summary disposition issued under Alaska Appellate Rule 214(a). Summary dispositions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d).

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ISMAEL T. BALALLO,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13393
Trial Court No. 3UN-12-00051 CR

SUMMARY DISPOSITION

No. 0208 — August 11, 2021

Appeal from the Superior Court, Third Judicial District, Unalaska, Patricia Douglass, Judge, and the Statewide Three-Judge Sentencing Panel, Trevor N. Stephens, Michael P. McConahy, and Eric A. Aarseth, Judges.

Appearances: Elizabeth D. Friedman, Law Office of Elizabeth D. Friedman, Redding, California, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Nancy R. Simel, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Harbison and Terrell, Judges.

After a jury found Ismael T. Balallo guilty of first-degree sexual assault,¹ the trial judge referred Balallo's case to the statewide three-judge sentencing panel. This panel, the first in Balallo's case, declined to adjust the sentence, rejecting his claim of

¹ AS 11.41.410(a)(1).

manifest injustice. It also declined to expand Balallo’s eligibility for discretionary parole, stating (incorrectly) that it did not have authority to do this.²

The trial judge subsequently sentenced Balallo to 25 years’ imprisonment with 5 years suspended (20 years to serve — the minimum amount of time to serve within the presumptive range).³

Balallo appealed both his conviction and his sentence. This Court affirmed his conviction, but we remanded the case to the three-judge panel for reconsideration of Balallo’s request for expanded parole eligibility.⁴ We did not resolve Balallo’s additional sentencing claim — that the three-judge panel erred in rejecting his argument that it was manifestly unjust to impose a sentence within the presumptive range — because we anticipated that Balallo would present this issue to the three-judge panel during the remand proceedings.

On remand, a second three-judge panel also found that Balallo had not established that manifest injustice would result if he were sentenced within the presumptive range and was not made eligible for discretionary parole. The panel accordingly denied Balallo’s request for expanded parole eligibility. Balallo appeals this decision, and we now affirm the panel’s decision.

This second panel was composed of a different set of judges than the first panel that had originally declined to adjust Balallo’s sentence. Both panels recognized that, in order to properly characterize a presumptive term as “manifestly unjust,” the panel was required to “articulate specific circumstances that make the defendant significantly different from a typical offender within that category or that make the

² *Luckart v. State*, 314 P.3d 1226, 1234 (Alaska App. 2013).

³ AS 12.55.125(i)(1)(A)(ii).

⁴ *Balallo v. State*, 2017 WL 3971822, at *4 (Alaska App. Sept. 6, 2017) (unpublished).

defendant's conduct significantly different from a typical offense.”⁵ But while the original three-judge panel found that Balallo was “significantly different” from a typical offender, the three-judge panel that considered the case on remand did not rely on this finding.

On appeal, Balallo argues that the second three-judge panel was bound by the first panel's “significantly different” finding. But this is not the law. As we have previously explained, a resentencing judge is free “to reevaluate the entire case in light of the law we found applicable in order to decide it” and “to exercise [] independent judgment under the circumstances.”⁶ We accordingly reject Balallo's claim that the second three-judge panel was bound by factual findings made by the original panel.⁷

Balallo next argues that the three-judge panel erred by not ordering an updated presentence report prior to its hearing on remand. But Balallo did not request an updated presentence report and therefore must show plain error.⁸ There is no

⁵ *Beltz v. State*, 980 P.2d 474, 480 (Alaska App. 1999).

⁶ *Gnegy v. State*, 729 P.2d 895, 896 (Alaska App. 1986).

⁷ Additionally, Balallo appears to be under the impression that a finding that he is “significantly different” from the typical offender would mandate a sentence outside the presumptive range. This is incorrect. Although a judge must articulate specific circumstances that make the defendant significantly different from a typical offender or that make the defendant's conduct significantly different from a typical offense in order to find that a manifest injustice would result from imposition of the presumptive range, the ultimate question is whether a sentence within the presumptive range would be manifestly unjust under the totality of the circumstances, viewed in light of the *Chaney* criteria. *See Kirby v. State*, 748 P.2d 757, 761-62 (Alaska App. 1987). Here, the second three-judge sentencing panel considered the totality of the circumstances and concluded that a sentence within the presumptive range without enhanced parole eligibility would not be manifestly unjust.

⁸ *Cf. State v. Ranstead*, 421 P.3d 15, 21-22, 23 (Alaska 2018) (concluding that failure to object to presentence report probation recommendations resulted in an unpreserved claim (continued...))

requirement that a court order an updated presentence report when a case is remanded for resentencing. Moreover, Balallo provided the panel with documentation that, while incarcerated, he had had no writeups and had participated in all rehabilitative programs made available to him, and the panel acknowledged this in its decision. Under these circumstances, the panel's failure to order an updated presentence report was not plain error.

Balallo also argues that the three-judge panel failed to consider his argument that, because Balallo is not a U.S. citizen, he is "facing certain deportation" and is likely to be detained upon his release from custody in this case. But sentencing judges need not address every detail of the parties' arguments in their sentencing remarks.⁹ Moreover, the panel's remarks, both oral and written, reflect its awareness that Balallo was not a U.S. citizen. We accordingly reject this claim of error.

Balallo's penultimate claim is that the three-judge panel violated his due process rights because it did not give him notice of the standard under which it would evaluate his request for expanded parole eligibility. But the record reflects that the parties and the three-judge panel clearly understood what Balallo was required to establish: manifest injustice would result were he sentenced within the presumptive range and not made eligible for discretionary parole. We accordingly find no merit to this claim.

⁸ (...continued)
of error).

⁹ *Cf. Evans v. State*, 574 P.2d 24, 26 (Alaska 1978) ("The trial court need not recite the goals of sentencing as long as it is clear that it has considered those goals.").

Finally, Balallo argues that the three-judge panel was clearly mistaken in not expanding his parole eligibility.¹⁰ Given the seriousness of the sexual assault and the absence of any explanation for why the assault occurred and was not likely to reoccur, we cannot conclude that the panel was clearly mistaken when it declined to expand Balallo's parole eligibility.

We AFFIRM the decision of the statewide three-judge sentencing panel.

¹⁰ See *Winther v. State*, 749 P.2d 1356, 1360 (Alaska App. 1988) (“We will disturb [the three-judge panel’s substantial discretion] only where we are satisfied that its exercise was clearly mistaken.” (quoting *McClain v. State*, 519 P.2d 811, 813 (Alaska 1974))).