IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CHARLES PAUL JACOBSON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-10756 Trial Court No. 3AN-09-1975 Cr MEMORANDUM OPINION No. 5878 — September 12, 2012

Appeal from the Superior Court, Third Judicial District, Anchorage, David C. Stewart, Judge.

Appearances: Caitlin Shortell, Shortell Gardner LLC, Anchorage, for the Appellant. Kenneth M. Rosenstein, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and John J. Burns, Attorney General, Juneau, for the Appellee.

Before: Coats, Chief Judge, and Mannheimer and Bolger, Judges.

MANNHEIMER, Judge.

Charles Paul Jacobson appeals his convictions for second-degree theft (theft of an access device) and third-degree theft (theft of services valued at $50.00 or more). These convictions arose when Jacobson and some friends had a meal at an Anchorage restaurant. In payment for the meal, Jacobson presented the restaurant staff with a credit

card that did not belong to him (or to anyone else at the table). This card was issued to a person named Chaise Malanca.

The restaurant manager was suspicious of this credit card, and he asked Jacobson to produce identification. Jacobson was unable (or unwilling) to produce an ID. The manager then asked Jacobson to tell him what name was on the credit card. Jacobson was unable to do so. The manager instructed Jacobson to stay put, and he summoned the police.

When a police officer arrived at the restaurant, he questioned Jacobson about the credit card. Jacobson told the officer that "some woman" had given him the credit card earlier that day. When the officer asked Jacobson for identification, Jacobson opened his wallet, and the officer observed that Jacobson had a second credit card issued to yet another person — someone named Dennis Haroldson.

The officer contacted the bank that had issued the first credit card (the one issued to Chaise Malanca), and the bank confirmed that this card had been reported stolen. Based on this information, the officer arrested Jacobson. Jacobson and his companions never paid for the meal.

Jacobson was charged with theft for receiving Ms. Malanca's stolen credit card, and he was also charged with theft of services (*i.e.*, the restaurant meal).

At Jacobson's trial, over Jacobson's objection, the State was allowed to introduce evidence that Jacobson possessed a second credit card that was not his (*i.e.*, the card issued to Dennis Haroldson). In this appeal, Jacobson argues that it was error for the trial judge to allow the State to introduce this evidence. In addition, Jacobson argues that his convictions are not supported by sufficient evidence.

Regarding his sentencing, Jacobson argues that the sentencing judge failed to adequately explain why he found aggravating factor AS 12.55.155(c)(7), and Jacobson

also argues that the sentencing judge committed error by rejecting three of his proposed mitigating factors: AS 12.55.155(d)(2), (d)(11), and (d)(12).

In addition, Jacobson argues (1) that the sentencing judge was clearly mistaken in ruling that Jacobson was a "worst offender" for sentencing purposes, and (2) that the sentence imposed on him is excessive.

Finally, Jacobson argues that he is entitled to credit against his sentence for time that he spent on bail release in residence at the Salvation Army's adult rehabilitation program.

For the reasons explained in this opinion, we reject Jacobson's attacks on his conviction and his sentence. However, we agree with Jacobson that he is entitled to credit against his sentence for at least some of the time he spent at the Salvation Army residential program. We direct the superior court to determine exactly how much credit Jacobson is entitled to, and then to amend the judgement to include this credit.

The admissibility of the evidence that Jacobson possessed a second credit card belonging to someone else (Dennis Haroldson)

The State did not charge Jacobson with personally stealing Chaise Malanca's credit card. Rather, the State charged Jacobson with theft by receiving, for taking possession of Malanca's credit card with reckless disregard for the fact that it was stolen.

Before trial, Jacobson's attorney asked the trial judge, Superior Court Judge *pro tempore* David C. Stewart, for a protective order barring the State from introducing evidence of the second credit card found in Jacobson's wallet — the card belonging to Dennis Haroldson. The defense attorney argued that this second card was irrelevant to the charges against Jacobson. The defense attorney also asserted that evidence of this

second card was barred by Evidence Rule 404(b)(1) (*i.e.*, the rule relating to evidence of other bad acts) and that, in any event, evidence of the card should be excluded under Evidence Rule 403 because its potential for unfair prejudice outweighed whatever probative value it might have.

Judge Stewart ruled that the prosecutor could introduce evidence about Haroldson's credit card, but that the prosecutor could not refer to this card as "stolen" unless the State introduced extrinsic evidence to establish that the card was, in fact, stolen.

On appeal, in one paragraph of his brief, unsupported by citation to any legal authority (not even Evidence Rules 404(b)(1) and 403), Jacobson asserts that Judge Stewart committed error by allowing the State to introduce evidence that Jacobson possessed this second credit card at the time of his arrest. Jacobson argues that this evidence prejudiced him because the jury might have inferred that this second card was also stolen — thus bolstering the State's allegation that when Jacobson took possession of Malanca's credit card, he either knew or at least recklessly disregarded the fact that it was stolen.

But "prejudice", for purposes of Evidence Rules 404(b)(1) and 403, does not mean that the challenged evidence was unfavorable to the protesting party. Rather, the term "prejudice" refers to *unfair* prejudice — the tendency of the evidence to induce the jurors to base their decision on improper grounds. [1]

The record does not suggest that the challenged evidence was "prejudicial" in this sense. In order for the State to prove that Jacobson was guilty of second-degree theft, the State had to prove that Jacobson, when he took possession of Ms. Malanca's

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[1] *Getchell v. Lodge*, 65 P.3d 50, 57 (Alaska 2003): "[U]ndue prejudice connotes not merely evidence that is harmful to the other party, but evidence that will result in a decision being reached by the trier of facts on an improper basis."

credit card, either knew that the card was stolen or at least consciously disregarded a substantial and unjustifiable risk that it was stolen. See the definition of "recklessly" codified in AS 11.81.900(a)(3).

Jacobson's unexplained possession of yet another person's credit card was relevant because this evidence circumstantially tended to prove that Jacobson acted at least recklessly when he took possession of Malanca's credit card. This inference holds true even if the State had no extrinsic proof that this second credit card was actually stolen (that is, no proof other than the circumstances of the card's discovery in Jacobson's wallet).

As the State points out in its brief, Judge Stewart specifically instructed the jurors that "Jacobson [was] not ... charged with any crime in connection with [Haroldson's] credit card," and that this evidence "[could] not be considered ... to prove that [Jacobson was] a person of bad character or that he [had] a tendency to commit crimes." The judge told the jurors that this evidence "[could] only be considered ... for the limited purpose of deciding if it [was] more or less likely that [Jacobson] recklessly disregarded [the fact] that [Malanca's credit card] was stolen."

For these reasons, we conclude that Judge Stewart did not abuse his discretion when he allowed the State to introduce this evidence.

The sufficiency of the State's evidence to support Jacobson's conviction for second-degree theft

Jacobson argues that the evidence presented at his trial was insufficient to establish that he was guilty of second-degree theft (*i.e.*, theft of Ms. Malanca's credit card). Specifically, Jacobson argues that the evidence was insufficient to establish that he, as opposed to either of his two companions in the restaurant, was the one who

possessed the stolen credit card. In the alternative, Jacobson argues that even if the evidence was sufficient to support a finding that he possessed Malanca's credit card, the evidence was not sufficient to establish that he knew the card was stolen, or that he acted recklessly with regard to this possibility.

When we review the sufficiency of the evidence to support a verdict, we view the evidence, and all reasonable inferences arising from the evidence, in the light most favorable to the verdict. [2] Viewing the evidence at Jacobson's trial in that light, it reasonably supports the conclusions that Jacobson possessed the stolen credit card, and that he acted at least recklessly with regard to the possibility that it was stolen. Accordingly, the evidence is legally sufficient to support Jacobson's conviction for second-degree theft.

The superior court's finding of aggravator (c)(7) — the finding that Jacobson had a prior felony conviction for a more serious class of offense than Jacobson's current offense, second-degree theft

Second-degree theft is a class C felony. [3] The sentencing range for this offense is 0 to 5 years' imprisonment. [4]

Jacobson had three prior felony convictions: a felony DUI conviction from Alaska, a burglary conviction from Oregon, and another conviction from Oregon for possession of a Schedule I controlled substance. Because Jacobson had two or more previous felony convictions, his current offense was a "third felony conviction" for

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[2] *Johnson v. State*, 188 P.3d 700, 702 (Alaska App. 2008).

[3] AS 11.46.130(c).

[4] AS 12.55.125(e).

presumptive sentencing purposes,[5] and he therefore faced a presumptive sentencing range of 3 to 5 years' imprisonment.[6]

The State argued that five of the aggravating factors codified in AS 12.55.-155(c) applied to Jacobson's case: (c)(7) — that one of Jacobson's prior felonies was of a more serious class than his current offense; (c)(8) — that Jacobson had a history of aggravated or repeated instances of assaultive behavior; (c)(15) — that Jacobson had more than two prior felony convictions; (c)(19) — that Jacobson had been adjudicated a delinquent minor for conduct that would have supported a felony conviction if he had been an adult; and (c)(31) — that Jacobson had five or more prior misdemeanor convictions.

The superior court found that the State had proved all five of these aggravating factors. In this appeal, Jacobson challenges only one of the superior court's rulings: the court's finding that the State had proved aggravator (c)(7).

In the superior court, the State argued that Jacobson's Oregon conviction for possessing a Schedule I controlled substance was a higher class of felony than his current offense, second-degree theft.

As we have explained, second-degree theft is a class C felony, with a maximum penalty of 5 years' imprisonment. Under Oregon law at the time of Jacobson's drug conviction, possession of a Schedule I controlled substance was classified as a class B felony, and it carried a maximum penalty of 10 years' imprisonment. However, under Alaska law, possession of a Schedule I controlled substance constitutes the offense of fourth-degree controlled substance misconduct, AS 11.71.040(a)(3)(A). This offense is (and was) only a class C felony — the same class of offense as Jacobson's second-degree theft. *See* AS 11.71.040(d).

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[5] AS 12.55.185(17).

[6] AS 12.55.125(e)(3).

Jacobson does not discuss any of this in his brief. Instead, he adverts to the contention that he advanced in the superior court: the contention that his Oregon drug conviction could not properly be considered a felony because he received a sentence of only 30 days to serve. In an argument comprising a single sentence, Jacobson asserts that we should reverse the superior court's ruling on aggravator (c)(7) because the sentencing judge "did not explain his analysis [of why] the Oregon [drug] conviction *was a felony*". (Emphasis added)

In other words, Jacobson faults the superior court for failing to explain that his Oregon drug offense qualified as a "felony" because of the 10-year maximum penalty that might have been imposed for the offense, rather than the particular lesser sentence that Jacobson himself received.

AS 12.55.145(a)(1)(B) declares that an out-of-state conviction constitutes a prior felony conviction for purposes of our presumptive sentencing laws if the out-of-state offense had "elements similar to those of a felony defined as such under Alaska law at the time the offense was committed". In Alaska, a crime is categorized as a felony or a misdemeanor based on the maximum penalty provided for that crime. AS 11.81.900(b)(24) defines "felony" as "a crime for which a sentence of imprisonment for a term of more than one year is authorized". As our supreme court explained in *Planned Parenthood of Alaska v. Campbell*, 232 P.3d 725, 730 n. 25 (Alaska 2010), this means that the classification of an offense as a "felony" hinges on the sentence that *might* have been imposed, "rather than [on the sentence] actually imposed."

Accordingly, if possession of a Schedule I controlled substance *could be punished* by imprisonment for one year or more under Alaska law, the equivalent Oregon offense is a "felony" for presumptive sentencing purposes even though individual defendants might receive sentences of less than one year. And, as we have already explained, Alaska law declares that possession of a Schedule I controlled substance

constitutes the offense of fourth-degree controlled substance misconduct — a class C felony that can be punished by up to 5 years' imprisonment. [7]

We conclude that this is an adequate explanation of why the superior court rejected Jacobson's position and, instead, ruled that Jacobson's drug possession conviction from Oregon was a "felony" for purposes of Alaska's presumptive sentencing laws.

Jacobson's claim that the superior court committed error by rejecting three of his proposed mitigating factors

At sentencing, Jacobson proposed six mitigating factors under AS 12.55.155(d): (d)(1) — that the offense was principally accomplished by someone else, and that Jacobson "manifested extreme caution or sincere concern for the safety or well-being of the victim"; (d)(2) — that Jacobson played only a minor role in the offense; (d)(3) — that Jacobson committed the offense "under some degree of duress, coercion, threat, or compulsion ... that significantly affected [his] conduct"; (d)(9) — that Jacobson's conduct was among the least serious within the definition of the offense; (d)(11) — that, following his commission of the present offenses, Jacobson provided assistance to the authorities in identifying, apprehending, or prosecuting other people who had committed criminal offenses; and (d)(12) — that the facts surrounding Jacobson's current offenses, and the facts surrounding Jacobson's previous offenses, establish that the harm caused by his criminal conduct "is consistently minor and inconsistent with the imposition of a substantial period of imprisonment".

The superior court ruled in Jacobson's favor on mitigator (d)(9) (conduct among the least serious), but the court rejected the other five mitigators.

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[7] *See* AS 12.55.125(e).

On appeal, Jacobson abandons his claims regarding mitigators (d)(1) and (d)(3), but he asserts that the superior court should have ruled in his favor on the three remaining mitigators. In a single paragraph of his brief, without citing any pertinent portion of the superior court record, and without citing any legal authority, Jacobson asserts that "the [sentencing] court was clearly mistaken" in rejecting mitigators (d)(2), (d)(11), and (d)(12). Jacobson asks this Court to "reexamine the record" to see whether the evidence supports these three mitigators.

This sort of "briefing" is not adequate to preserve Jacobson's claims. To paraphrase what we said in *Pierce v. State*, 261 P.3d 428, 433 (Alaska App. 2011), it is not this Court's job to figure out how the evidence presented to the superior court, in combination with the applicable law, might conceivably justify a ruling in Jacobson's favor on any or all of these three proposed mitigators. Rather, it is Jacobson's attorney's job "to frame an argument ... contain[ing] a proposed factual and legal analysis of [Jacobson's] case, and to seek [our] ruling on that argument." *Ibid.*

For this reason, we conclude that Jacobson has waived any argument with respect to the superior court's rulings on mitigators (d)(2), (d)(11), and (d)(12).

Jacobson's argument that the superior court was clearly mistaken in finding him a "worst offender" for sentencing purposes

At sentencing, the superior court declared that Jacobson was a "worst offender" because of his extensive criminal history, which included convictions for four felonies and twenty-five misdemeanors — among them, assault, burglary, felony DUI, forgery, and domestic violence. The superior court observed that Jacobson had not demonstrated any ability to reform himself, or any "real determination to get into treatment [for his alcoholism] and take advantage of [that] treatment."

On appeal, Jacobson argues that the superior court was clearly mistaken in categorizing him as a "worst offender". This issue is moot.

Under Alaska law, a "worst offender" finding is required only when the court sentences a defendant to the maximum penalty for their offense. Here, Jacobson was convicted of second-degree theft (as well as a lesser crime). He faced a maximum penalty of 5 years' imprisonment for the second-degree theft conviction alone, but the superior court imposed a composite sentence of only 50 months' imprisonment — slightly over 4 years to serve. Because Jacobson did not receive a maximum sentence, it is a moot question whether the superior court was justified in classifying Jacobson as a "worst offender". [8]

Jacobson's claim that his sentence is excessive

Jacobson's brief contains an additional section in which he contends that his composite sentence is excessive. However, in this section of his brief, Jacobson makes no attempt to analyze the facts of his case, the goals of sentencing under Alaska law (see AS 12.55.005), or previous sentencing decisions of this Court or the Alaska Supreme Court. Instead, Jacobson simply argues that his sentence must be excessive because the superior court (1) rejected his proposed mitigators, (2) found in favor of the State on the proposed aggravators, and (3) concluded that Jacobson was a "worst offender" for sentencing purposes.

Because Jacobson's "excessive sentence" claim is simply a repetition and amalgamation of the various sentencing claims that we have already rejected, we likewise reject Jacobson's claim that his composite sentence is excessive.

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[8] *See Pusich v. State*, 907 P.2d 29, 34 (Alaska App. 1995).

Jacobson's judgement should be amended so that it explicitly grants him credit against his sentence for time he spent, as a condition of bail, at the Salvation Army's residential treatment program

At Jacobson's sentencing hearing, the superior court stated that Jacobson should receive credit against his sentence for some or all of the time he spent in the Salvation Army's adult rehabilitation program as a condition of bail. Specifically, the court stated that Jacobson "will get credit, up through today, at a minimum, ... for the time [he] spent in the rehabilitative program."

Jacobson points out that his written judgement does not specifically grant Jacobson this credit, nor does it specify exactly how much credit Jacobson should receive.

A defendant is entitled to credit for time spent in a residential treatment program as a condition of pre-trial or pre-sentencing bail if the treatment program meets the requirements of AS 12.55.027(c), and if the sentencing court is furnished with a certification from the program director that the defendant participated in the program and complied with its requirements.

AS 12.55.027(c) declares that time spent in a treatment program will not qualify for credit against the defendant's sentence unless "the treatment program ... impose[s] substantial restrictions on a person's liberty that are equivalent to incarceration", and the defendant "[is] confined at all times to the grounds of the facility", with certain narrow exceptions. As this Court recently held in *McKinley v. State*, 275 P.3d 567, 573 (Alaska App. 2012), this statute must be interpreted according to its language, and not according to the previous law on this issue — the *Nygren* line of cases.

More particularly, we held in *McKinley* that, given the way the Salvation Army's treatment program was structured, and given the strictures of AS 12.55.027(c),

a defendant would not be entitled to full credit against their sentence for all of the time spent in the Salvation Army program, but only for the initial stage of the program, when residents are "confined at all times to the grounds of the facility". *Id.* at 567-68, 574.

Although it is clear from the record that Jacobson spent some ten weeks at the Salvation Army program, we can not determine exactly how much credit Jacobson should receive against his sentence. We therefore direct the superior court to (1) evaluate the conditions of Jacobson's residence at the Salvation Army program, (2) assess how much credit Jacobson should receive against his sentence, and then (3) amend Jacobson's judgement to specify this credit.

Conclusion

Jacobson's convictions and his sentence are AFFIRMED, but we direct the superior court to amend Jacobson's judgement so that it reflects the precise amount of credit that Jacobson should receive against his sentence.