

NOTICE

*Memorandum decisions of this court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.*

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

STATE OF ALASKA,	)	
	)	
Appellant,	)	Court of Appeals No. A-11350
	)	Trial Court Nos. 3KN-08-600 CR,
v.	)	3KN-10-736 CR, 3KN-11-408 CR,
	)	3KN-11-1490 CR & 3KN-11-1532 CR
	)	
ROCKFORD E. DERRY,	)	<u>MEMORANDUM OPINION</u>
	)	
Appellee.	)	
_____	)	No. 6073 — July 30, 2014

Appeal from the Superior Court, Third Judicial District, Kenai,  
Anna Moran, Judge.

Appearances: Hanley Robinson, Assistant Public Defender, and  
Quinlan Steiner, Public Defender, Anchorage, for the Appellant.  
Ann B. Black, Assistant Attorney General, Office of Special  
Prosecutions and Appeals, Anchorage, and Michael C.  
Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley,  
District Court Judge.\*

Judge ALLARD.

As part of a plea agreement, Rockford E. Derry pleaded guilty to felony  
DUI and violating conditions of his release and admitted to two petitions to revoke

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\* Sitting by assignment made pursuant to article IV, section 16 of the Alaska  
Constitution and Administrative Rule 24(d).

probation. In exchange, the State dismissed a weapons charge and a failure to appear charge. Under the plea agreement, the superior court could award Derry up to ninety days of credit under AS 12.55.027 for time he served in a treatment program.<sup>1</sup>

At the time he changed his plea, Derry was waiting for a bed at the Jonathan Wainwright Residential Rehabilitation Program operated by the U.S. Department of Veterans Affairs in Walla Walla, Washington. Sentencing was delayed so that Derry could participate in and successfully complete the twenty-eight-day Walla Walla program. In addition to successfully completing that program, Derry also completed a residential treatment program for post-traumatic stress disorder at a veteran's facility in Tacoma, Washington.

Upon Derry's return to Alaska, the parties could not agree on whether both treatment programs qualified for credit under AS 12.55.027. To qualify for credit under AS 12.55.027, a treatment program must impose "substantial restrictions on a person's liberty that are equivalent to incarceration."<sup>2</sup> Among other restrictions, the participant must "be confined at all times to the grounds of the facility or be in the physical custody of an employee of the facility, except for court appearances, meetings with counsel, and work required by the treatment program and approved in advance by the court."<sup>3</sup>

Initially, the State's position was that the Walla Walla program qualified for credit under AS 12.55.027 but the Tacoma program did not. However, as more

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<sup>1</sup> See AS 12.55.027(a) (a court may grant a defendant credit toward a sentence of imprisonment for time spent in a treatment program); *see also* *Nygren v. State*, 658 P.2d 141, 146 (Alaska App. 1983), *superseded by statute as stated in* *McKinley v. State*, 275 P.3d 567, 567-68 (Alaska App. 2012).

<sup>2</sup> AS 12.55.027(c).

<sup>3</sup> AS 12.55.027(c)(2).

became known about the Walla Walla program — specifically, the fact that the participants were allowed to leave the facility unaccompanied on three-hour daily passes — the State also objected to any credit being given for the Walla Walla program.

At sentencing, Derry withdrew his request for credit for the Tacoma program. However, he continued to request credit for the twenty-eight-day Walla Walla program, emphasizing that he had entered the Walla Walla program with the understanding that he would receive credit against his sentence for his participation.

The superior court found that “on paper” the Walla Walla program did not qualify for credit under AS 12.55.027 because of the liberal pass policy. However, the court also found that, had it been aware of this pass policy when it first ordered Derry to the program, it would have drafted the order differently — that is, the court would have ordered that Derry be restricted from using the passes, or it would have approved Derry “for an occasional three-hour pass for work-related therapy to walk to the store and back.” Based on this finding, the court issued an order retroactively approving the passes as “work-related therapy.” The court then sentenced Derry under the terms of the plea agreement and granted him twenty-eight days of jail-time credit for the time he spent at the Walla Walla treatment program.

The State appeals, asserting that the superior court lacked the authority to grant credit under AS 12.55.027 in this manner. We agree that the superior court erred in retroactively approving Derry’s unaccompanied absences from his treatment program as “work-related therapy” and in granting Derry credit for a treatment program that did not otherwise comply with the requirements of AS 12.55.027. We note that there is no indication from the record that Derry did not take advantage of the program’s liberal pass

policy. Nor is there any indication that the daily passes were considered “work-related therapy” by the program.<sup>4</sup>

We sympathize with the superior court’s concern that defendants in Derry’s position should be encouraged to successfully complete treatment programs. By all accounts, the treatment Derry completed, including the PTSD program he attended, helped him a great deal. The superior court judge commented that Derry had been part of her case load for a long time and that “this [was] the best [she’d] ever seen him[.]”

We likewise sympathize with the superior court’s concern that Derry had been led to believe by both parties and by the court that he would be receiving credit for the time spent at the Walla Walla program. Indeed, the record indicates that, prior to the dispute over the Tacoma program, everyone involved assumed (mistakenly as it turned out) that the Walla Walla program qualified for credit under AS 12.55.027. This mistaken belief is evident at the change of plea hearing, the subsequent hearings held to facilitate Derry’s participation in the program, and the initial hearings after his return from the program.

On appeal, Derry asserts that because he entered and completed the program with the belief that he would receive credit for the program as part of his plea agreement, the State should be equitably estopped from challenging his request for credit. But it is unclear from the record whether the prosecutor promised Derry that he would receive credit for the Walla Walla program or whether this promise was made part of the plea agreement. It may be that the prosecutor (like the court) simply assumed that

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<sup>4</sup> Cf. *State v. Fortuny*, 42 P.3d 1147, 1151-52 (Alaska App. 2002) (*Nygren* credit may be granted for time spent in a facility that offers work-related passes if the passes are designed to be “a means of fostering rehabilitation and reducing recidivism”).

the defense attorney had properly investigated the Walla Walla program and determined that it would qualify for credit under AS 12.55.027.

We recognize, however, that the parties have not had an opportunity to directly litigate this question of equitable estoppel. Nor have they been given an opportunity to explore other potential equitable avenues for relief in this case, including but not limited to, a potential motion by Derry to withdraw his plea.<sup>5</sup> Accordingly, we remand the case to allow the parties to litigate these issues in the superior court.

### *Conclusion*

The superior court's order granting Derry twenty-eight days of jail-time credit under AS 12.55.027 is REVERSED and the case is REMANDED for proceedings consistent with this decision. We do not retain jurisdiction.

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<sup>5</sup> See *Boyd v. State, Dep't of Commerce & Econ. Dev., Div. of Occupational Licensing*, 977 P.2d 113, 116-17 (Alaska 1999) (to invoke equitable estoppel against the State, a party must show reasonable detrimental reliance); *Lapp v. State*, 220 P.3d 534, 542 (Alaska App. 2009) (same); see also *Perry v. State*, 928 P.2d 1227, 1228 (Alaska App. 1996) (a trial court may, in its discretion, grant a motion to withdraw a plea prior to sentencing for a "fair and just" reason).