

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

ADAM MICHAEL MILAZZO,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11757
Trial Court No. 3AN-10-303 CR

MEMORANDUM OPINION

No. 6139 — January 28, 2015

Appeal from the Superior Court, Third Judicial District,
Anchorage, Michael L. Wolverton, Judge.

Appearances: Adam Michael Milazzo, pro se, Wasilla, for
the Appellant. Jack McKenna, Assistant District Attorney,
Anchorage, and Michael C. Geraghty, Attorney General, Juneau,
for the Appellee.

Before: Mannheimer, Chief Judge, and Allard and Kossler,
Judges.

Judge KOSSLER.

This case presents an unusual situation. In 2006, Adam Michael Milazzo was charged with second-degree murder and other offenses arising from a drunk-driving incident. He was convicted of these crimes and sentenced to prison in 2008. Then, while Milazzo was in prison serving this sentence, the State charged him with an alleged sexual assault from many years earlier — in 2002.

The sexual assault charges from 2002 were ultimately resolved by a plea agreement in 2011. Under the terms of this agreement, Milazzo pleaded guilty to a reduced charge of coercion and he received a 2-year sentence.

But at Milazzo's 2011 sentencing for coercion, neither the superior court nor the parties specified whether the bargained-for 2-year sentence was consecutive or concurrent to the sentence Milazzo was already serving for the drunk-driving homicide.

Later, when Milazzo learned that the Department of Corrections was treating his 2011 coercion sentence as consecutive to the earlier sentence, he filed a motion for clarification of the relationship between his sentences. In this motion, Milazzo asserted that his coercion sentence was, by law, concurrent — because, at the sentencing hearing on the coercion conviction, the superior court did not specify that the coercion sentence was consecutive.

The State opposed Milazzo's motion, but the State did not assert that the 2011 plea agreement required a consecutive sentence. Instead, the State argued that, under the governing sentencing law, the superior court had been required to impose the coercion sentence consecutively to the sentence Milazzo was already serving.

The superior court denied Milazzo's motion. The superior court recognized that because Milazzo committed the offense of coercion in 2002, his sentencing for this crime was governed by the pre-2004 version of AS 12.55.025(e) — *i.e.*, the version that was in effect in 2002 when Milazzo committed the offense.¹ The superior court concluded that, under former AS 12.55.025(e), Milazzo's coercion sentence was statutorily required to be consecutive to the sentence he was already serving (*i.e.*, the sentence he received for the 2006 drunk-driving homicide). The superior court ruled in

¹ See, e.g., *P.H. v. State*, 504 P.2d 837, 841 (Alaska 1972) (“[A]s a general rule, the punishment for an offense is governed by the law in effect at the time the offense is committed.”).

the alternative that even if a consecutive sentence was not statutorily required, it would exercise its discretion to impose one.

Analysis

In this appeal, Milazzo argues that the superior court's action was an unlawful increase in his 2011 sentence after it had been validly imposed. We agree.

First, the superior court was wrong in concluding that a consecutive sentence was statutorily required under former AS 12.55.025(e).

In *Wells v. State*, this Court held that former AS 12.55.025(e) mandated consecutive sentences only when the defendant was being sentenced for a crime committed *after* the defendant's sentencing for an earlier crime.² Here, Milazzo was being sentenced for a crime he committed *before* he was sentenced in 2008 for the drunk-driving homicide. Thus, former AS 12.55.025(e) did not mandate the imposition of a consecutive sentence for Milazzo's coercion conviction.

We reject the State's contention (and the superior court's rationale) that a different rule applies if the sentencings are separated by years.

We now address the superior court's alternative ruling: that if the law did not require Milazzo's coercion sentence to be consecutive, the court nevertheless could exercise its discretion to impose a consecutive sentence.

In cases where consecutive sentencing was not statutorily required under former AS 12.55.025(e), a sentencing court retained the discretion to impose a consecutive (or partially consecutive) sentence.³ But in *Baker v. State*, this Court held that where a sentencing judge had the discretion to impose either consecutive or

² *Wells v. State*, 706 P.2d 711, 715 (Alaska App. 1985).

³ *Id.* at 713-15.

concurrent sentences under former AS 12.55.025(e), if the judge wished to impose a consecutive sentence, the judge had to expressly declare the sentence to be consecutive (and make findings in support of that decision).⁴ Absent a contemporaneous statement that the sentence was consecutive, the sentence was deemed concurrent, and the sentencing court lacked the authority to later alter the sentence by declaring it consecutive.⁵

Under this Court's holding in *Baker*, Milazzo's 2011 coercion sentence was (as a matter of law) concurrent to his drunk-driving homicide sentence because the superior court failed to specify at sentencing that the coercion sentence was consecutive. The superior court had no authority to later declare that it was exercising its discretion to impose the sentence consecutively. This constituted an after-the-fact modification of Milazzo's sentence — a violation of the double jeopardy clause.⁶

Conclusion

We REVERSE the superior court's order declaring Milazzo's 2011 coercion sentence to be consecutive to the sentence he received in 2008. The superior court is directed to amend the 2011 judgment to state that Milazzo's sentence for coercion is concurrent with his 2008 sentence.

⁴ *Baker v. State*, 110 P.3d 996, 1002 (Alaska App. 2005) (interpreting *Griffith v. State*, 675 P.2d 662, 664 (Alaska App. 1984)).

⁵ *See id.* at 1002-03; *Paige v. State*, 115 P.3d 1244, 1246-47 (Alaska App. 2005) (“In *Baker*, we reaffirmed the rule that when a sentencing judge did not specify that a defendant's sentences were to be served consecutively, or when the judge's remarks, taken as a whole, did not clearly show the judge's intent to impose consecutive sentences, the sentences should be deemed to have been imposed concurrently.”).

⁶ *See Baker*, 110 P.3d at 1003.