IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CHUDIER KHAK BANGOUT, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11859 Trial Court No. 3AN-11-13969 CR MEMORANDUM OPINION No. 6357 — July 13, 2016

Appeal from the Superior Court, Third Judicial District, Anchorage, Philip R. Volland, Judge.

Appearances: Hanley R. Robinson, under contract with the Public Defender, and Quinlan Steiner, Public Defender Agency, Anchorage, for the Appellant. Ann B. Black, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge ALLARD.

In *State v. Silvera* we recognized that a sentencing court can consider the harsh collateral consequences of deportation as a non-statutory mitigating factor that

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

potentially justifies referral to the three-judge sentencing panel in a particular case.[1] In response to our ruling, the legislature enacted AS 12.55.165(d), which eliminated a sentencing court's authority to make a referral to the three-judge sentencing panel on that basis. Alaska Statute 12.55.165(d) states that "A court may not refer a case to a three-judge panel under (a) of this section if the request for referral is based, in whole or in part, on the claim that a sentence within the presumptive range may result in the classification of the defendant as deportable under federal immigration law."

After we decided *Silvera*, but before the legislature enacted AS 12.55.-165(d), the superior court held a sentencing hearing in Chudier Khak Bangout's case. Bangout is therefore one of the few defendants sentenced under *Silvera* before the legislature enacted AS 12.55.165(d).

Bangout is a South Sudanese refugee who came to the United States with his family from a refugee camp in Ethiopia when he was five years old. He is a lawful permanent resident of the United States.

In 2012, the grand jury indicted Bangout on attempted sexual abuse of a minor in the first degree and attempted sexual abuse of a minor in the second degree following allegations that Bangout fondled and attempted to pull the pajama pants and underwear off an eight-year-old girl that he was babysitting.

At trial, Bangout was convicted of the attempted sexual abuse of a minor in the second degree, a class C felony.[2]

As a first felony offender, Bangout faced a presumptive sentencing range of 2-12 years.[3] However, because the court found the statutory aggravating factor that

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[1] *State v. Silvera*, 309 P.3d 1277, 1287 (Alaska App. 2013).

[2] AS 11.41.436(a)(2); AS 11.31.100(d)(4).

[3] AS 12.55.125(i)(4)(A).

Bangout had a juvenile adjudication for conduct that would have been classified as a felony if committed by an adult,[4] the court was authorized to impose a sentence up to the 99-year maximum.[5] (At sixteen years old, Bangout was adjudicated in California for grand theft from a person.) In addition, because Bangout's crime was a sex offense, the court was required under AS 12.55.125(o) to impose at least 2 additional years of suspended imprisonment, and to place Bangout on probation for at least 5 years.

Therefore the *minimum* sentence the judge could impose in Bangout's case (without a finding of a statutory mitigating factor or referral to the three-judge sentencing panel) was 4 years' imprisonment with 2 years suspended (2 years to serve) and 5 years of probation.

At sentencing, Bangout presented evidence through an immigration attorney that imposition of this minimum sentence would result in his deportation. The immigration attorney testified that if Bangout received the minimum sentence or higher, his offense would be elevated under federal immigration law to an "aggravated felony," which would eliminate his eligibility for discretionary relief and make him, in her opinion, ninety-nine percent likely to be deported. On the other hand, if Bangout's sentence was 364 days or less (including no suspended time and no probation), he would be eligible for discretionary relief and his chances of deportation dropped to forty-nine percent.

Bangout asserted that he would be deported to either Ethiopia, where he has no ties, or South Sudan, where he has no ties and there is a civil war. He therefore asked the sentencing court to refer his case to the three-judge sentencing panel, arguing that manifest injustice would result if the court failed to consider the non-statutory mitigating

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[4] AS 12.55.155(c)(19).

[5] AS 12.55.155(a)(1); AS 12.55.125(i)(4).

factor of the harsh collateral consequences of deportation that he would likely suffer if sentenced within the presumptive range.[6]

Superior Court Judge Philip R. Volland denied Bangout's request for a referral to the three-judge sentencing panel. He stated that this case was "not a close call" in his view and he concluded that the presumptive sentencing range was appropriate given the enormity of the crime, the impact on the young victim, and the need for rehabilitative treatment. The judge also found that Bangout's offense "was a sexual assault in progress that was interrupted" and he rejected Bangout's version of events. Judge Volland ultimately sentenced Bangout to 8 years' imprisonment with 3 years suspended (5 years to serve) and 5 years of probation.

We have independently reviewed the sentencing record and we conclude, based on that review, that the sentencing judge was not clearly mistaken when he denied Bangout's request for referral to the three-judge sentencing panel. We think it is significant that the sentence Bangout was seeking would have required a substantial reduction in the active term of imprisonment and a complete elimination of probation and its associated supervision, which the legislature has statutorily required for sex offenses.

Bangout's grand jury claim

Prior to trial, Bangout filed a motion to dismiss the indictment, arguing that a police detective gave testimony that improperly vouched for the victim's credibility during the grand jury proceeding. The superior court denied the motion in a written order, finding that the detective did not give an impermissible opinion about the victim's credibility.[7] Bangout argues that this ruling was error. Having reviewed the grand jury

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[6] AS 12.55.165.

[7] *See Thompson v. State*, 769 P.2d 997, 1003-04 (Alaska App. 1989).

transcript, we conclude that, even if the detective's challenged remarks were impermissible, they would still not require dismissal of the indictment given the other evidence presented to the grand jury.[8] We therefore reject this claim on appeal.

Conclusion

We AFFIRM the judgment of the superior court.

[8] *See Stern v. State*, 827 P.2d 442, 446 (Alaska App. 1992).