

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

STEVEN WAYNE STEWART,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12064  
Trial Court No. 3PA-13-2755 CR

MEMORANDUM OPINION

No. 6421 — January 11, 2017

Appeal from the Superior Court, Third Judicial District, Palmer,  
Eric Smith, Judge.

Appearances: Tracey Wollenberg, Assistant Public Defender,  
and Quinlan Steiner, Public Defender, Anchorage, for the  
Appellant. Shawn D. Traini, Assistant District Attorney,  
Department of Law, Criminal Division, Palmer, and Craig W.  
Richards, Attorney General, Juneau, for the Appellee.

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

PER CURIAM.

Steven Wayne Stewart pleaded guilty, pursuant to a plea agreement, to  
felony driving under the influence. As a third felony offender, Stewart faced a

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

presumptive range of 3 to 5 years; the plea agreement left sentencing to the discretion of the superior court. At the time, Stewart was also on parole for a prior offense. Stewart pointed out that the parole board could impose up to 3 years of his remaining parole time, which would run consecutively to whatever sentence was imposed in the present case. Based on this fact, he asked the court to impose less than the maximum presumptive term of 5 years' imprisonment.

Stewart's parole officer interjected that Stewart's belief that he would receive a consecutive parole revocation sentence was "inaccurate." The parole officer stated (erroneously) that Stewart's parole time would be "automatically concurrent" unless the parole board ordered that it be served consecutively.

The superior court judge found that Stewart was a worst offender and imposed a sentence of 5 years to serve. In his sentencing remarks, the judge had the following exchange with the parole officer:

Court: It sounds, Mr. Stewart — *I'm not going to order consecutive parole. I don't see the point to that. I think the five years will do what it needs to do under the case law. So what the parole board does, obviously I can't say. But I guess you're saying [parole officer], if he waives parole, it runs concurrent ...*

Parole Officer: It does. It does run automatically.

Court: ... and that's the end of it. So, sir, without giving you legal advice, that's where you're at. (Emphasis added.)

Four months after sentencing, Stewart filed a motion to correct an illegal sentence under Criminal Rule 35(a). The motion stated that Stewart's parole officer had contacted defense counsel after the sentencing hearing to explain that he had inadvertently misled the court. The parole officer admitted that any parole time imposed in Stewart's case would necessarily run consecutively because it was related to a

different offense. This meant that, with the 3 years of parole time, Stewart would serve 8 years — 3 years more than the superior court had assumed at the time it sentenced Stewart.

The State opposed the motion, arguing that the sentence was not illegal because it fell within the presumptive range; and further argued that the parole board's subsequent actions in running the parole time consecutively did not make the sentence illegal.

The superior court denied Stewart's motion to correct an illegal sentence, noting that the "court agrees [the] state is accurate."

Stewart then moved to modify his sentence under Alaska Criminal Rule 35(b), requesting that the court reconsider its prior order and that the court hold a new sentencing hearing in light of the fact that the court "considered erroneous information at the prior sentencing hearing." The court denied the second motion, stating that the court had previously "denied [a] virtually identical motion." Stewart now challenges these rulings on appeal.

The record indicates that, based on the statements of Stewart's parole officer, the superior court believed that Stewart's parole revocation sentence would likely run concurrent to whatever sentence the court imposed. This understanding was incorrect. In *Smith v. State*, we explained that AS 12.55.127 — the statute governing consecutive sentencing — requires consecutive sentences "where a defendant is sentenced for a crime that the defendant committed after judgement was issued against the defendant for an earlier crime."<sup>1</sup> Thus, neither the sentencing judge nor the parole board had discretion to impose a concurrent sentence, and the parole officer's statement to the contrary was incorrect.

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<sup>1</sup> *Smith v. State*, 187 P.3d 511, 519 (Alaska App. 2008).

On appeal, the State now concedes that the parole officer's statement to the sentencing judge was mistaken. The State nevertheless argues that we should view the court's denial of the two defense motions as proof that the misinformation was irrelevant to the court's ultimate sentence in this case. But the record is not as clear as the State asserts. Given the ambiguity of the judge's statements at sentencing and the judge's responses to the motions for modification, we are unable to determine if the parole officer's mistaken articulation of the law influenced the sentencing judge's decision to impose a sentence of 5 years to serve. A remand is therefore appropriate.

We accordingly REMAND Stewart's case to the superior court for reconsideration of his sentence with the knowledge that Stewart's sentence must be consecutive to any jail term imposed by the parole board. We do not retain jurisdiction.