IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DANIEL GERRICK JACKSON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11989 Trial Court No. 3AN-12-10681 CR MEMORANDUM OPINION No. 6473 — May 24, 2017

Appeal from the Superior Court, Third Judicial District, Anchorage, Philip R. Volland and David R. Wallace, Judges.

Appearances: Megan M. Rowe, Denali Law Group, P.C., 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 MANNHEIMER.

In October 2012, Daniel Gerrick Jackson was in custody at the Parkview Center halfway house — a "community residential center" under contract with the Alaska Department of Corrections. Jackson was awaiting trial on felony charges

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

(second-degree forgery and attempted theft), and he also faced a petition to revoke his probation from prior felony convictions in 2010 (theft and fraud).

When Jackson was transferred to the Parkview Center, he was given an "intake packet" and a "resident handbook" which informed him that it was a crime for him to leave the Center without permission. However, in the resident handbook, the statutory reference that accompanied this warning was incorrect.

The handbook cited AS 11.56.340 as the legal authority supporting the assertion that Jackson would commit a crime if he left the Center without permission. But AS 11.56.340 was the statute defining the misdemeanor offense of "unlawful evasion". Jackson was in custody on felony charges, so if he absconded from the Parkview Center, he was subject to prosecution under a different statute, AS 11.56.310, for the felony offense of second-degree escape.

One day, the Parkview authorities caught Jackson in possession of "spice", an illegal drug. He was sent to the television room and told to wait there until the Anchorage police arrived to transport him to jail. Instead, Jackson fled the Parkview Center through an emergency door (activating the alarm in the process).

Jackson remained on the run for a little over seven weeks, until the police received an anonymous tip concerning his whereabouts. The police located Jackson and confronted him. Jackson repeatedly gave the officers a false name and a false social security number, but he failed to deceive the officers. He was arrested and ultimately charged with the felony offense of second-degree escape (as well as the separate offense of giving false information to the police).

Jackson's claim that he should have been allowed to litigate a "mistake of law" defense to the jury at his trial

Before trial, Jackson asked the superior court to dismiss the felony escape charge. Jackson pointed out that the Parkview handbook contained the wrong statutory reference. Jackson argued that, based on the handbook's reference to AS 11.56.340, and based on other things that the Parkview staff told him, he mistakenly concluded that he would only be guilty of a misdemeanor if he absconded from the halfway house. And Jackson claimed that he detrimentally relied on this mistaken information when he made his decision to abscond.

Following an evidentiary hearing, the superior court denied Jackson's motion to dismiss the felony charge — in part, because the court disbelieved Jackson's testimony about his supposed reliance on mistaken information about the level of his crime.

The superior court stated that it "[did] not find Jackson's testimony credible." The court found that "Jackson did not rely on the information in the [Parkview] handbook", and that "[he] made the decision to leave [Parkview] based on considerations other than what level of penalty would follow from his actions."

Jackson's trial started the next week. On the first morning of trial, Jackson's defense attorney asked the trial judge (1) to let him introduce evidence of the mistaken information in the Parkview intake packet, and (2) to let him litigate a "mistake of law" defense to the jury. The court denied these requests.

In this appeal, Jackson argues that the superior court committed error when it refused to let him litigate a "mistake of law" defense to the jury, and when it refused to let him introduce evidence of the mistaken information in the Parkview handbook.

The superior court properly refused to let Jackson litigate a mistake of law defense to the jury. It is well-settled in Alaska that a mistake of law defense is litigated to the judge, not the jury. *Cornwall v. State*, 915 P.2d 640, 646-47 (Alaska App. 1996); *Ostrosky v. State*, 704 P.2d 786, 792 (Alaska App. 1985). Similarly, the related defense of entrapment is also tried to the judge, not to the jury. *Yates v. State*, 681 P.2d 1362, 1364 (Alaska App. 1984).

Because a mistake of law defense is tried to the court rather than the jury, and because Jackson litigated his mistake of law claim to the superior court at a pre-trial evidentiary hearing, Jackson is bound by the superior court's pre-trial finding that he *did not* rely on the mistaken information about the level of the offense when he made his decision to abscond from the Parkview Center. This finding, which was based on the testimony at the evidentiary hearing, defeats Jackson's claim of mistake of law unless he can show that the finding is clearly erroneous.

In his brief to this Court, Jackson does not address the superior court's finding of fact. Instead, without mentioning the superior court's contrary finding, Jackson simply asserts that he "reasonably relied" on the misinformation in the Parkview handbook. Such a conclusory assertion is not sufficient to demonstrate that the superior court's contrary finding of fact was clearly erroneous.

For these reasons, we reject Jackson's claims relating to his proposed mistake of law defense, as well as his alternative theory of "entrapment by estoppel".

(For these same reasons, we do not reach the question of whether Jackson would have had a valid defense to the felony escape charge if he *had* relied on the information in the Parkview handbook.)

Jackson's claim that his sentencing judge should have referred Jackson's case to the statewide three-judge sentencing panel

Second-degree escape is a class B felony,[1] and the superior court found that Jackson was a third felony offender for presumptive sentencing purposes, based on Jackson's conviction in Texas for aggravated sexual assault in 1989 and Jackson's conviction in Alaska for second-degree theft in 2010. As a third felony offender convicted of a class B felony, Jackson faced a presumptive sentencing range of 6 to 10 years' imprisonment.[2]

Jackson contended that any sentence within this presumptive range would be manifestly unjust, and he therefore asked the sentencing judge to refer his case to the statewide three-judge sentencing panel.[3] The judge rejected Jackson's request.

On appeal, Jackson presents four separate arguments why his case should have been referred to the three-judge panel.

First, Jackson contends that any sentence within the 6- to 10-year presumptive range would be manifestly unjust because he was misled by the information in the Parkview handbook into thinking that he would face a much lesser sentence if he absconded — no more than 1 year's imprisonment. But as we have already explained, the superior court expressly found that Jackson did not rely on this mistaken information when he made his decision to abscond from the Parkview Center.

Second, Jackson argues that it is unfair for him to bear the full punishment for his act of escape, since he was later acquitted of the underlying charges for which he was being held in custody at the Parkview Center. But at Jackson's sentencing hearing,

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1 *See* AS 11.56.310(c).

2 *See* AS 12.55.125(d)(4) (pre-2016 version).

3 *See* AS 12.55.165.

the sentencing judge expressly acknowledged this fact and declared that he had mitigated Jackson's sentence because of it. More particularly, the judge stated that, because of Jackson's later acquittal on the underlying charges, the judge had decided not to increase Jackson's sentence based on the three aggravating factors that the State had proved. [4]

Third, Jackson argues that it was unfair to sentence him for escape within the presumptive range for a third felony offender because he purportedly received an excessive sentence for one of his previous felony convictions — the aggravated sexual assault conviction from Texas.

Jackson never presented this argument to the sentencing court, so he must now show that it was plain error for the sentencing judge to ignore this purported basis for sending Jackson's case to the three-judge panel.

We find no plain error. Even assuming the truth of Jackson's assertion that his Texas sentence was excessive, it is unclear how this leads to the conclusion that Jackson should receive an atypically lenient sentence for his act of escape. But more importantly, the record does not plainly show that Jackson received an excessive sentence for the aggravated sexual assault in Texas.

Jackson's Texas conviction arose from an episode that occurred while he was being held in a juvenile facility on charges of aggravated robbery and aggravated sexual assault. According to the Texas police reports, Jackson sexually assaulted one of the house parents at his juvenile facility, using a plastic knife to threaten her. The State of Texas petitioned the court to allow Jackson to be prosecuted as an adult for this armed

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[4] The superior court found that the State had proved aggravating factors AS 12.55.155(c)(7) (*i.e.*, that Jackson had a prior felony conviction that was of a more serious classification than his current offense of escape), 155(c)(8) (*i.e.*, that Jackson's criminal history included repeated or aggravated instances of assaultive behavior), and 155(c)(20) (*i.e.*, that Jackson was on felony probation at the time he committed the escape).

sexual assault, and Jackson ultimately pleaded guilty to aggravated sexual assault. He received a sentence of 15 years to serve.

Since Alaska law now prescribes a presumptive range of 25 to 35 years' imprisonment for a first felony offender convicted of first-degree sexual assault if the defendant used a dangerous instrument,[5] Jackson's sentence of 15 years' imprisonment for the aggravated sexual assault in Texas is not plainly excessive.

And based on this same record, we reject Jackson's related argument that, because he was not tried by a jury in Texas, his Texas conviction should not count as a "previous conviction" for purposes of determining Jackson's status as a third felony offender in the present case.

As we have already explained, Jackson pleaded guilty to the Texas sexual assault charge. Had Jackson not pleaded guilty, he would have been entitled to a jury trial — either in juvenile court[6] or, if he was waived to adult status, in adult criminal court. Thus, Jackson was not denied a jury trial; rather, he waived his right to a jury trial when he pleaded guilty.

Finally, Jackson argues that there was a flaw in his *other* previous felony conviction — *i.e.*, his 2010 Alaska conviction for second-degree theft — and that, because of this flaw, it was unfair for Jackson to be sentenced within the presumptive range for a third felony offender.

Jackson is referring to the fact that, after he was sentenced in the present case, he was allowed to withdraw his guilty plea to the earlier second-degree theft charge

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[5] *See* AS 12.55.125(i)(1)(B).

[6] Under the Texas Family Code, Texas Statutes § 54.03(c), the trial in a juvenile delinquency case "shall be by jury" unless the minor waives the right to a jury trial.

(apparently because he entered that plea based on mistaken information about the penalty range for second-degree theft).

Jackson was later re-convicted of this felony theft charge, but Jackson argues that his felony theft conviction should no longer count as a "previous" conviction for presumptive sentencing purposes in his present escape case, because the date of his re-conviction for theft is now *subsequent* to the date when he committed his act of escape.

We rejected an analogous argument in *Tyler v. State*, 24 P.3d 1260, 1262-63 (Alaska App. 2001), and the Alaska Supreme Court rejected an analogous argument in *McGhee v. State*, 951 P.2d 1215, 1217-19 (Alaska 1998). Based on *Tyler* and *McGhee*, we conclude that, because Jackson was re-convicted of the same felony theft charge, his theft conviction remains a "previous conviction" for purposes of determining his sentence for escape.

In sum, the superior court did not commit error when it rejected Jackson's request to send his case to the three-judge panel. And for the reasons we have explained, we reject Jackson's related argument that his sentence for escape is excessive. Jackson's sentence of 6 years to serve — which was the low end of the applicable presumptive range at the time of Jackson's offense — is not clearly mistaken. [7]

Conclusion

The judgement of the superior court is AFFIRMED.

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[7] *See McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974) (an appellate court is to affirm a sentencing decision unless the decision is clearly mistaken).