IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JAROD ALLEN IRVINE, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals Nos. A-12585 & A-12665 Trial Court No. 4FA-14-03735 CR MEMORANDUM OPINION No. 6889 — August 5, 2020

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Bethany Harbison, Judge.

Appearances: Cynthia L. Strout, Attorney at Law, Anchorage (A-12585), and Carolyn Perkins, Salt Lake City, Utah, under contract with the Office of Public Advocacy, Anchorage (A-12665), for the Appellant. Terisia K. Chleborad, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Wollenberg, Judge, and McCrea, District Court Judge.[*]

Judge WOLLENBERG.

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

Jarod Allen Irvine sold heroin and methamphetamine to a confidential informant in several controlled buys. Two of the buys were recorded pursuant to a *Glass* warrant.[1] The police also obtained a warrant to search Irvine's apartment, and during that search, the police discovered a concealable firearm, which Irvine was barred from having in his residence due to his felony record. As a result, Irvine was charged with, and convicted of, multiple counts of misconduct involving a controlled substance (case no. A-12585) and one count of misconduct involving weapons (case no. A-12665).

In this consolidated appeal, Irvine challenges the trial court's denial of his motion to suppress the evidence seized pursuant to the *Glass* warrant. He also argues that the trial court misstated the law when it responded to a question from the jury. For the reasons discussed in this opinion, we reject Irvine's claims and affirm Irvine's convictions.

Irvine also argues that the trial court sentenced him under the mistaken belief that it was required to impose his sentence for the weapons offense consecutively to his sentences for the drug offenses. The State concedes error on this point, and we agree that this case should be remanded for resentencing. On remand, the trial court should reconsider Irvine's composite sentence.

Underlying facts and proceedings

In February 2014, a man named C.P. was arrested for possessing methamphetamine with intent to deliver, and he began working with Fairbanks Police Officer Kevin Mepsted as a confidential informant. At Officer Mepsted's request, C.P. arranged to buy heroin and methamphetamine from a dealer he knew, Jarod Allen Irvine.

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[1] *See State v. Glass*, 583 P.2d 872 (Alaska 1978) (holding that, under the Alaska Constitution, the police must obtain a warrant before engaging in the electronic monitoring of conversations).

On several occasions, C.P. purchased either methamphetamine, heroin, or both from Irvine.

Before and after each controlled buy, C.P. was strip searched for drugs and money. He was also under police surveillance during each transaction. And during the last two controlled buys in November and December 2014, C.P. wore a wire (pursuant to a *Glass* warrant) that recorded his conversations with Irvine.

Shortly after the final buy, the police placed Irvine under arrest. In Irvine's pocket, the police found the same money that C.P. had used to purchase the methamphetamine and heroin.

By that time, the police had obtained a warrant to search Irvine's apartment. Inside the apartment, the police discovered powdered heroin, methamphetamine, baggies, and an electronic scale. The police also discovered a gun hidden in Irvine's closet among his personal possessions.

Irvine was indicted on three counts of second-degree misconduct involving a controlled substance and three counts of third-degree misconduct involving a controlled substance.[2] He was also indicted on one count of third-degree misconduct involving weapons for the firearm found in his apartment.[3]

Irvine moved to sever the weapons charge from the drug charges for trial. The trial court granted Irvine's motion, and two trials were held. The jury in the first trial returned verdicts of guilty on all of the misconduct involving controlled substances

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[2] Former AS 11.71.020(a)(1) (2014) and former AS 11.71.030(a)(1) (2014), respectively.

[3] AS 11.61.200(a)(10).

charges.[4] The jury in the second trial returned a verdict of guilty on the weapons misconduct charge.

Additional background on Irvine's motion to suppress

Before trial, Irvine filed a motion to suppress the *Glass* wire recordings. He argued that Officer Mepsted's affidavit in support of the *Glass* warrant application contained an intentional omission of fact — that C.P., the confidential informant, had a pending class C felony drug charge in Palmer for possessing heroin. Mepsted did include in his affidavit that C.P. had a prior conviction for making a false report (a crime of dishonesty) and that C.P. faced potential charges — *i.e.*, third-degree misconduct involving a controlled substance and misuse of vehicle registration — as a result of his February 2014 arrest in Fairbanks. But according to Irvine, the omission of the additional pending Palmer charge was material because it related to C.P.'s credibility and his motivation in working for the State.

The court held an evidentiary hearing at which Officer Mepsted and C.P. testified. Mepsted testified that when they first started working together in February 2014, C.P. stated that he had no pending charges other than those related to his arrest in Fairbanks. Mepsted checked the Alaska Public Safety Information Network (APSIN) for C.P.'s pending charges at that time, but he was not sure if he checked APSIN a second time before submitting his affidavit in support of the application for a *Glass* warrant in November 2014. Mepsted testified that he did not find out about the Palmer charge until C.P. contacted him the following December or January.

C.P., in contrast, testified that Mepsted knew about the Palmer charge in June because Mepsted contacted him shortly after his arrest on that charge while he was

[4] The jury acquitted Irvine on a charge of providing false information.

still in custody. Thereafter, C.P. was released on bail, and several months later, C.P. engaged in the controlled buys from Irvine. C.P. talked to Mepsted about the Palmer charge again in January, but Mepsted no longer wanted to work with him.

After the hearing, the trial court issued a written order. The court found that the State had failed to show that the omission was merely negligent, noting that the application for the *Glass* warrant was filed almost six months after C.P. was charged in Palmer and that there were "significant inconsistencies" in the officer's testimony. The court also found that "a non-negligent police officer would [have] re-run the APSIN report when he was writing his affidavit in order to ensure accuracy" and that the "pending charges would have been apparent to him at that time even if he had not learned of the charges from [C.P.]." Ultimately, the court found that the officer acted recklessly in omitting any mention of C.P.'s pending drug charge in Palmer, but that the officer did not intentionally try to mislead the magistrate judge.

The court then assessed whether probable cause remained after the omitted information was added to the *Glass* warrant application. The court found that probable cause still existed because "[t]he additional felony drug charge does not significantly increase [C.P.]'s unreliability when considered in conjunction with the included more serious potential felony drug charge, potential charge for a crime of dishonesty, prior conviction for a crime of dishonesty, and [C.P.'s] role as a [confidential informant]" prior to the *Glass* warrant in this and other cases. Accordingly, the court denied the motion to suppress.

Why we affirm the trial court's denial of Irvine's motion to suppress

In *State v. Malkin*, the Alaska Supreme Court held that

> once the defendant has pointed out specifically that statements in the [search warrant] affidavit are false, together

> with a statement of reasons in support of the assertion of falsehood, the burden then shifts to the state to show by a preponderance of the evidence that the statements were not made intentionally or with reckless disregard for the truth.[5]

If the officer intentionally misstated or omitted information — that is, if the officer deliberately attempted to mislead the court when applying for the warrant — then the warrant is invalidated.[6] If the officer recklessly misstated or omitted information, then the existence of probable cause must be reassessed after the misstatements are excised from, or the omitted information is added to, the affidavit.[7] We will uphold a trial court's finding that an officer recklessly, rather than intentionally, omitted or misstated facts unless we are convinced the finding is clearly erroneous.[8]

On appeal, Irvine argues that the trial court erred when it found that Officer Mepsted's omission was not intentional. Having reviewed the record in this case, we conclude that the trial court's determination that the officer's omission was reckless — but not a deliberate attempt to mislead the magistrate — is supported by the record.[9] We therefore find no clear error.[10]

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[5] *State v. Malkin*, 722 P.2d 943, 946 (Alaska 1986).

[6] *Id.* at 946 n.6; *Lewis v. State*, 862 P.2d 181, 186 (Alaska App. 1993).

[7] *State v. Anderson*, 73 P.3d 1242, 1246 (Alaska App. 2003); *Lewis v. State*, 9 P.3d 1028, 1033 (Alaska App. 2000).

[8] *Anderson*, 73 P.3d at 1245.

[9] *See Lewis v. State*, 862 P.2d at 186-87; *Gustafson v. State*, 854 P.2d 751, 756 (Alaska App. 1993).

[10] Irvine also cursorily argues that the State should be required to prove the officer's lack of intent by clear and convincing evidence, rather than by a preponderance of the evidence. This claim is inadequately briefed. In any event, the Alaska Supreme Court adopted the (continued...)

Irvine briefly contends that even if the omission was reckless, the court nonetheless erred when it denied his motion to suppress because adding the omitted information to the warrant application defeats probable cause. But the information the officer did include in the affidavit — including the possibility of more serious drug charges arising out of C.P.'s Fairbanks arrest and C.P.'s prior conviction for a crime of dishonesty — alerted the magistrate to C.P.'s motive to cooperate with the State and his potential unreliability. We agree with the trial court that C.P.'s additional felony drug charge did not so significantly increase the potential for C.P.'s unreliability as to preclude a finding of probable cause, particularly given the information regarding C.P.'s prior role as a confidential informant in this case and others.[11]

Accordingly, we affirm the trial court's denial of Irvine's motion to suppress.

Why we reject Irvine's challenge to the court's response to a jury question regarding the meaning of the term "reside"

Irvine was charged with third-degree weapons misconduct for residing in a dwelling knowing that there was a concealable firearm in the dwelling and having been

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[10] (...continued)
preponderance of the evidence standard in *Malkin*, and we have no authority to reverse that decision. *Malkin*, 722 P.2d at 946; *see also Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 43-44 (Alaska 2007) ("Vertical stare decisis requires that courts of lower rank follow decisions of higher courts" and "lower courts generally cannot overrule decisions of higher courts[.]").

[11] *See generally Hart v. State*, 397 P.3d 342, 344 (Alaska App. 2017) (recognizing that, when a warrant is based on information provided by a police informant, the State must demonstrate both the basis of the informant's knowledge and the informant's reliability).

previously convicted of a felony.[12] At trial, Irvine testified that his friend stored the firearm in the closet of his apartment without his knowledge.

During deliberations, the jury posed the following question: "For Mr. Irvine to 'reside' in a dwelling with a concealable firearm, must he be physically present in the dwelling at the same time as the firearm?" The court responded, in relevant part: "For Mr. Irvine to 'reside' in a dwelling with a concealable firearm, he does not need to be physically present in the dwelling at the same time as the firearm but the dwelling must be his permanent residence." (The court also repeatedly instructed the jury that Irvine had to "knowingly" reside in the dwelling, "knowing" that the concealable firearm was present there.)

On appeal, Irvine challenges the court's response to the jury's question regarding the term "reside." But the court's instruction reflects the common meaning of "reside," and Irvine cites no legal authority or legislative history in support of the proposition that a person must be physically present at their residence in order to be deemed to "reside" there.[13] In fact, Irvine's argument contains virtually no legal analysis.

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[12] AS 11.61.200(a)(10). The statute sets out an exception for a person who has written authorization to live in a dwelling in which there is a concealable weapon "from a court of competent jurisdiction or from the head of the law enforcement agency of the community in which the dwelling is located[.]" *Id.*

[13] *See* Webster's New College Dictionary 965 (3d ed. 2008) (defining "reside" to mean "[t]o live in a place for a permanent or extended time"); *cf. Dirks v. State*, 386 P.3d 1269, 1270 (Alaska App. 2017) ("[A] person continues to 'possess' their household belongings even though the person is physically away from home.").

Given the facts of this case and Irvine's failure to brief this issue in any meaningful way, we reject Irvine's claim.[14]

Why we remand this case for resentencing

The court imposed a composite sentence of 29 years to serve — 26 years for the six controlled substance misconduct convictions and 3 years for the weapons misconduct conviction. On appeal, Irvine raises two primary challenges to his sentence.

First, Irvine argues that the court mistakenly believed that it was required to impose a consecutive sentence for his weapons misconduct conviction. The State concedes that the trial court was mistaken. We have independently examined this claim, and we agree.[15]

Irvine proceeded to sentencing on the weapons misconduct offense after he had already been sentenced on the controlled substances offenses at an earlier hearing. In the court's sentencing remarks on the weapons misconduct offense, the court stated that it was prohibited by AS 12.55.127(a) from imposing the sentence concurrently to Irvine's sentence for the drug offenses. Under AS 12.55.127(a), "[i]f a defendant is required to serve a term of imprisonment under a separate judgment, a term of imprisonment imposed in a later judgment, amended judgment, or probation revocation shall be consecutive."

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[14] *See Peterson v. Mutual Life Ins. Co. of New York*, 803 P.2d 406, 410 (Alaska 1990) ("Where a point is not given more than a cursory statement in the argument portion of a brief, the point will not be considered on appeal.").

[15] *See Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972) (requiring an appellate court to independently assess any concession of error by the State in a criminal case).

As a third felony offender, Irvine faced a presumptive range of 3 to 5 years for the weapons misconduct conviction.[16] The court opined that the presumptive range was "unfortunate" because it did not believe that an additional period of incarceration was necessary to protect the public or deter Irvine given the substantial sentence imposed in the related drug case. Nonetheless, given the court's view of the law, the court ordered Irvine to serve an additional 3 years' incarceration.

But as we explained in *Smith v. State*, with the exception of consecutive sentencing required by AS 12.55.127(c), a consecutive sentence is only required when the defendant is sentenced for a crime that the defendant committed after the issuance of a judgment against the defendant for an earlier crime.[17] Because Irvine committed the weapons misconduct before the judgment was issued against him for the drug convictions, the court was not required to impose consecutive sentences. We therefore remand Irvine's case to the trial court for resentencing on the weapons misconduct conviction.

Second, Irvine argues that his sentence of 26 years for selling small amounts of controlled substances to C.P. is excessive. Irvine was subject to a presumptive sentencing range of 15 to 20 years for the three counts of second-degree controlled substances misconduct (a class A felony), and a presumptive sentencing range of 6 to 10 years for the three counts of third-degree controlled substances misconduct (a class B felony).[18] These convictions related to three controlled buys involving C.P., as well as two counts of possessing controlled substances with the intent to distribute.

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[16] *See* AS 11.61.200(I); former AS 12.55.125(e)(3) (pre-July 2016 version).

[17] *Smith v. State*, 187 P.3d 511, 519 (Alaska App. 2008).

[18] *See* former AS 12.55.125(c)(4) (pre-July 2016 version) and former AS 12.-55.125(d)(4) (pre-July 2016 version), respectively.

Because the court was not required to run any of the sentences on the drug convictions consecutively, the minimum sentence Irvine faced for all of these offenses was 15 years.[19] (The court found that the small quantities mitigating factor applied to two of Irvine's class A felony drug convictions, which permitted the court to downwardly depart from a 15-year sentence as to these two convictions.[20] But the absence of a mitigator applicable to the third class A felony conviction meant that the court could not impose a sentence below 15 years for that offense.)

The court found that two aggravating factors applied to Irvine's offenses: that Irvine had a history of repeated incidents of assaultive behavior and that Irvine had three or more prior felony convictions.[21] Additionally, the court found, in accordance with the *Neal-Mutschler* rule, that a sentence longer than 20 years, the maximum sentence of Irvine's most serious offense, was necessary to protect the public given Irvine's long criminal history.[22]

Ultimately, the court imposed a composite sentence of 18 years for the class A felony convictions and a composite sentence of 8 years for the class B felony convictions, to run consecutively. Accordingly, Irvine's total composite sentence for the controlled substance misconduct convictions is 26 years to serve.

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[19] *See* AS 12.55.127 (as interpreted in *Smith*, 187 P.3d at 519).

[20] *See* AS 12.55.155(d)(13).

[21] *See* AS 12.55.155(c)(8) & (c)(15), respectively.

[22] *See Phelps v. State*, 236 P.3d 381, 393 (Alaska App. 2010) (holding that "the *Neal-Mutschler* ceiling is simply a starting point or guide for analyzing the proper severity of a defendant's composite sentence — and that a composite sentence greater than the *Neal* ceiling can sometimes be justified by sentencing goals other than the particular goal of protecting the public"); *Powell v. State*, 88 P.3d 532, 537 & n.9 (Alaska App. 2004); *see also Neal v. State*, 628 P.2d 19, 21 (Alaska 1981); *Mutschler v. State*, 560 P.2d 377, 381 (Alaska 1977).

Irvine argues that the trial court erred by running the composite sentences on the class A and class B felony drug convictions consecutively — and by ascribing too much weight to the prior assaultive conduct aggravator. Relying on our decision in *Capwell v. State*, Irvine argues that his prior misdemeanor assault convictions bore no relationship to his offenses in this case.[23]

We reject Irvine's argument regarding his prior criminal history. It is clear from the record that the court was concerned about the danger that Irvine posed to the public, given his entire criminal history. The court could properly consider Irvine's criminal history — and Irvine's likelihood of recidivism — when imposing a sentence within the applicable presumptive range. Having reviewed the sentencing record, we disagree with Irvine's argument that the trial court overly emphasized his assaultive history.

But we are unable to discern from the record why the court ran Irvine's sentences on the class A and class B felony convictions completely consecutively, particularly given the court's recognition that a 26-year sentence was exponentially greater than any sentence Irvine has been ordered to serve previously.[24]

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[23] *See Capwell v. State*, 823 P.2d 1250, 1255 (Alaska App. 1991) (rejecting the argument that a judge should not have found an aggravating factor because there was no apparent connection between the prior offense and the offense for which the defendant was being sentenced, but acknowledging that "a complete lack of relationship between a defendant's prior, more serious felony and his current felony might be a reason for the sentencing judge not to rely heavily on this aggravating factor[.]").

[24] The court also stated that it could exceed the top end of the presumptive range applicable to the class B felonies because of the two aggravating factors, but that it chose not to do so. But because Irvine was a third felony offender, the high end of the presumptive sentencing ranges he faced by virtue of his convictions was the same as the maximum statutory penalties for those crimes. *See* AS 12.55.125(c) & (d). We are uncertain whether this mistaken view of the applicable sentencing range affected the court's determination of (continued...)

Because we are already remanding this case for resentencing with respect to the weapons misconduct conviction, we think it is appropriate for the court to reconsider Irvine's composite sentence.

Conclusion

We AFFIRM Irvine's convictions, but we VACATE the judgments and remand Irvine's case to the superior court for resentencing. We do not retain jurisdiction.

[24] (...continued)
the appropriate sentence.