IN THE COURT OF APPEALS OF THE STATE OF ALASKA

BRYON MICHAEL MELTON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13271 Trial Court No. 3PA-16-02215 CR MEMORANDUM OPINION No. 6891 — August 19, 2020

Appeal from the Superior Court, Third Judicial District, Palmer, Vanessa H. White, Judge.

Appearances: Richard K. Payne, Denali Law Group, Anchorage, under contract with the Office of Public Advocacy, for the Appellant. Shawn D. Traini, Assistant District Attorney, Palmer, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges.

Judge HARBISON.

Bryon Michael Melton drove his truck onto the wide shoulder of a road, crossing over the white fog line and striking and killing a juvenile pedestrian. Melton was indicted for manslaughter and criminally negligent homicide and was charged by information with driving without a license.

Melton entered into a plea agreement with the State to resolve his case. In accordance with the plea agreement, Melton entered a plea of guilty to criminally negligent homicide, and the State dismissed the counts of manslaughter and driving without a license. The State also dismissed an unrelated misdemeanor case. Additionally, as required by the agreement, Melton stipulated that the aggravating factor set out in AS 12.55.155(c)(10) applied to his conviction — *i.e.*, that his conduct was among the most serious within the definition of the offense. In other respects, the sentencing decision was left to the discretion of the superior court.

Melton had no prior felony convictions. Ordinarily, a first felony offender convicted of criminally negligent homicide is subject to a presumptive range of 1 to 3 years.[1] But because Melton's victim was under sixteen years old, Melton faced a presumptive sentencing range of 2 to 4 years for this offense.[2] And because he stipulated to an aggravating factor, the maximum sentence that could be imposed was 10 years.[3]

At the sentencing hearing, the judge imposed a sentence of 7 years with 5 years suspended (2 years to serve) — a sentence that was outside of the presumptive range. However, in her sentencing comments, the judge suggested that the parties had not established a factual basis for the stipulated aggravating factor, and the State did not propose any other aggravating factors. Specifically, the judge remarked, "[A]lthough there's a stipulation to the aggravator, I don't know what the factual basis would be for that." Given these comments, it is unclear why the judge gave the aggravating factor any weight.

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[1] AS 12.55.125(d)(1).

[2] AS 12.55.125(d)(2)(A).

[3] *See* AS 12.55.125(d).

Under Alaska law, when the facts for establishing an aggravating or mitigating factor are "in dispute and reasonable people could differ on the question of whether the evidence establishes clearly and convincingly the existence of a factor, the court may accept a stipulation regarding it."[4] But before accepting the stipulation, the court "must independently review the record to ensure that there is a factual basis for the proposed aggravator or mitigator."[5]

On appeal, Melton argues that the superior court imposed an illegal sentence and that the case must be remanded with instructions requiring the court to impose a sentence within the presumptive range. In other words, the remedy he asks for is resentencing without the aggravating factor.

While we agree with Melton that the case should be remanded in light of the court's apparent finding that there was no factual basis for the aggravating factor, the specific remedy Melton seeks is unavailable to him. As we explained in *Woodbury v. State*, when "a defendant wishes to challenge an already consummated plea agreement as being unlawful, the defendant must seek rescission of the agreement — not selective enforcement of only those provisions favorable to the defendant."[6]

We accordingly conclude that, while Melton's sentence must be vacated, the parties on remand shall have the opportunity to provide the superior court with a factual basis to support the existence of the stipulated aggravating factor. If the parties are unable to provide a sufficient basis to establish the aggravating factor, the court shall give the parties an opportunity to withdraw from the agreement, or alternatively to agree

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[4] *Connolly v. State*, 758 P.2d 633, 638 (Alaska App. 1988).

[5] *Id.*

[6] *Woodbury v. State*, 151 P.3d 528, 532 (Alaska App. 2007); *see also Grasser v. State*, 119 P.3d 1016, 1018 (Alaska App. 2005).

to proceed to sentencing without the aggravating factor. But if the court determines that there is a sufficient factual basis for the aggravating factor, the court shall resentence Melton, explaining what weight, if any, it gives to the aggravating factor.

Conclusion

For the reasons explained in this opinion, we VACATE Melton's sentence and REMAND this case to the superior court for further proceedings consistent with this opinion.