

NOTICE

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IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JOSE DANIEL COLOCHO,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12787
Trial Court No. 3AN-16-00387 CR

MEMORANDUM OPINION

No. 6892 — August 19, 2020

Appeal from the Superior Court, Third Judicial District,
Anchorage, Paul E. Olson, Judge.

Appearances: David T. McGee, under contract with the Public
Defender Agency, and Quinlan Steiner, Public Defender,
Anchorage, for the Appellant. Patricia L. Haines, Assistant
Attorney General, Office of Criminal Appeals, Anchorage, and
Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Harbison, Judge, and Coats, Senior
Judge.*

Judge HARBISON, writing for the Court.

Judge ALLARD, concurring.

Judge COATS, dissenting.

* Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska
Constitution and Administrative Rule 23(a).

In August 2016, Jose Daniel Colocho pleaded guilty, pursuant to a plea agreement, to one consolidated count of second-degree sexual abuse of a minor.¹ During the change of plea hearing, the court set sentencing for December 2016. Several months later, in mid-November, Colocho filed a motion to continue the sentencing hearing, which the superior court denied. The court conducted the sentencing hearing as originally scheduled and sentenced Colocho to 25 years with 5 years suspended (20 years to serve) and 5 years of probation.

Colocho appeals, arguing both that the superior court erred in denying his motion to continue the sentencing hearing and that his sentence is excessive. For reasons explained in this opinion, we reject these claims of error.

Factual and procedural background

In 2015, while he was living with his girlfriend and her children, Colocho repeatedly sexually abused his girlfriend's eight-year-old daughter, L.H. Colocho, who was forty-nine, forced L.H. to touch his penis, performed cunnilingus on her, penetrated her vagina and anus with his penis, and ejaculated onto her body.

Colocho was charged with eleven counts of second-degree sexual abuse of a minor for conduct that occurred over the course of one year. In August 2016, the parties reached a plea agreement under which Colocho would plead guilty to a single consolidated count of second-degree sexual abuse of a minor. As part of the plea agreement, Colocho agreed that aggravating factor AS 12.55.155(c)(10) applied to his conduct — *i.e.*, that “the conduct constituting the offense was among the most serious conduct included in the definition of the offense.” The agreement did not call for a

¹ AS 11.41.436(a)(5)(A).

specific sentence and left sentencing “open on all terms,” but Colocho agreed to serve at least 10 years.

In July 2016, after the parties reached their plea agreement but before Colocho entered his plea, the legislature passed Senate Bill 91 (S.B. 91), a criminal reform bill.² One of the provisions of S.B. 91 — a provision which changed the parole eligibility requirements for certain defendants — applied to defendants sentenced on or after January 1, 2017.³

Colocho appeared before the superior court on August 25, 2016 and entered his guilty plea. At that hearing, the court scheduled his sentencing hearing for December 16. Colocho did not object to this sentencing date.

On November 15, Colocho filed a motion to continue the sentencing hearing. In the motion, Colocho’s attorney listed two grounds for the requested continuance. First, the attorney noted that S.B. 91 would take effect on January 1, 2017, and that if the sentencing took place after that date, Colocho would be able to take advantage of favorable changes the Bill made to parole. Second, Colocho’s attorney stated that “the defense ha[d] hired an expert to review the case” and that “[d]ue to logistical issues[,] including defense counsel changing caseloads since [Colocho’s] change of plea, as well as the language barrier involved [because Colocho speaks Spanish], this is not complete.” The motion filed by Colocho’s attorney also stated in a footnote, “If the court would like additional information on the status of our expert, counsel would consider providing additional information *ex parte*.” Colocho’s attorney did not provide any explanation for why this information should be provided *ex parte*, nor did the attorney provide any legal authority for withholding the information.

² See SLA 2016, ch. 36.

³ See former AS 33.16.090 (2017).

The prosecutor opposed Colocho's motion. The prosecutor pointed out that Colocho had not explained what kind of expert he had retained (although he speculated that the expert was a psychologist) or why the expert's testimony would assist the court. The prosecutor also argued that Colocho had not presented sufficient information to justify holding an *ex parte* hearing. The prosecutor noted that if Colocho intended to have an expert testify at the sentencing hearing, he would have to provide any expert reports to the State and make the expert available to the State. The prosecutor argued that if the court was considering granting the continuance, "at a minimum the court should inquire of defense counsel" what specific steps he took to secure an expert prior to the time that he requested a continuance, why he had not taken these steps, and how the expert would assist the court in sentencing.

With regard to S.B. 91, the prosecutor pointed out that Colocho committed his crimes prior to the enactment of S.B. 91. And the prosecutor disagreed that the changes in the Bill would affect Colocho. Additionally, the prosecutor noted that the plea agreement was negotiated in good faith under the law as it existed prior to S.B. 91, so Colocho would not be harmed by being sentenced as scheduled. The prosecutor also argued that delaying the sentencing would harm the victim by negatively impacting the victim's right to a timely disposition of the case.

In his reply, Colocho's attorney again stated that he had been through a "caseload transition," that Colocho was in custody, and that Colocho barely spoke English. The attorney provided no additional information about whether any of the parole provisions of S.B. 91 would apply to Colocho. Additionally, Colocho's attorney did not provide information about the type of expert he had hired, what the purpose of the expert would be or what efforts he had made to hire an expert or obtain the expert's report prior to the November 15 request for a continuance. Instead, the attorney remarked that he "[would] not fill out an interrogatory" absent a court order.

The superior court subsequently issued a written order denying Colocho's motion to continue sentencing.

At the sentencing hearing on December 16, after addressing proposed additions and corrections to the presentence report, Colocho's attorney told the court:

Your Honor's order [denying the motion to continue sentencing] was fairly short, and so at this time I would like to renew my request to continue sentencing, and to supplement the record, [and] request Your Honor provide its rationale for ruling the way it did.

Colocho's attorney told the court that he had approval for funding for a psychologist, that he had forwarded the case material to the psychologist and that the purpose of retaining the psychologist was to shed light on why "a man with no criminal history" would "act this way towards [someone who] was essentially his stepdaughter." The attorney told the court that the psychologist's report was not yet available, again because Colocho was in custody, because there was a language barrier, and because of the attorney's caseload transition. According to Colocho's attorney, "[A] psychologist report could have been quite helpful in a case like this, particularly when the state is asking the court not to consider rehabilitation and essentially order a life sentence for Mr. Colocho."

The court explained that it had denied the motion for a continuance because the motion did not provide any information about the expert except that Colocho's attorney had hired one to review the case. The court noted that there was no information in the motion that indicated what type of expert the attorney intended to hire or what the purpose of hiring an expert would be. The court also noted that there was an "absence of any information." The court again denied the motion to continue.

The superior court did not err in denying the motion to continue the sentencing hearing

On appeal, Colocho argues that the superior court erred in denying his motion to continue the sentencing hearing.

Colocho's first argument is that the superior court should have continued the sentencing hearing until after the effective date of S.B. 91 so that Colocho could obtain the benefit of S.B. 91's favorable sentencing provisions. But Colocho concedes that the only change in S.B. 91 that could apply to him is a change to when the parole board is required to hold a hearing on discretionary parole. While the former version of AS 33.16.130 did not set out a specific date by which a discretionary parole hearing should be held, the S.B. 91 version required the parole board to hold a hearing on discretionary parole not less than 90 days before an inmate's first discretionary parole eligibility date.⁴ This change to the procedures for holding a discretionary parole hearing did not have any impact on Colocho's sentence or his parole eligibility.

Additionally, one of the prosecutor's arguments in opposition to Colocho's request for a continuance was that granting a continuance would undermine the parties' negotiated plea agreement. According to the prosecutor, the agreement was premised on the parole laws that were in effect at the time the plea agreement was negotiated and that were still in effect on the originally agreed-upon sentencing date. Colocho did not dispute this interpretation of the agreement, and the trial court accordingly accepted the prosecutor's uncontested assertion. The trial court explained that it was denying the motion for a continuance because "the negotiated plea agreement was based on the law in effect at the time that the negotiation was done."

⁴ Compare SLA 1985, ch. 88, § 2, with former AS 33.16.130(a)(1) (2017).

Under these circumstances, we perceive no error in the superior court's order denying Colocho's request to continue the sentencing hearing to a date after the effective date of this provision of S.B. 91.

Colocho also argues that the superior court should have granted his request to continue the sentencing hearing for the alternate reason he proposed: to allow him to obtain an evaluation from an expert and to offer the expert's testimony at the sentencing hearing.

In *Rogers v. State* we assessed whether the denial of a defense motion to continue sentencing to allow for a psychiatrist to examine the defendant constituted an abuse of discretion.⁵ To answer this question we looked to the seven factors that our supreme court set out in *Salazar v. State* for determining whether to grant a continuance of a trial in order to obtain witness testimony:

1. Is the witness's proposed testimony material to the case?
2. Is the witness's testimony available from another source?
3. Is the proposed testimony cumulative?
4. What is the probability of securing the witness's presence in a reasonable time?
5. Has the requesting party acted diligently and in good faith?
6. What is the nature or degree of inconvenience to the court and to others if the proceeding is delayed? and

⁵ *Rogers v. State*, 275 P.3d 574, 577-79 (Alaska App. 2012).

7. What is the likelihood that the witness's testimony would affect the decision to be rendered?^[6]

In *Rogers*, after Rogers hired a psychiatrist who was not licensed in Alaska to perform an evaluation of him, his attorney filed a lengthy motion attacking the constitutionality of the statute requiring medical practitioners to be licensed in the state.⁷ After the superior court denied this motion, Rogers's attorney filed a motion to continue the sentencing, arguing that he needed additional time to seek reconsideration of the court's ruling and, if the court again upheld the constitutionality of the statute, to hire another psychiatrist.⁸

We noted that Rogers's attorney gave the superior court no information about the efforts (if any) he had made to have his expert obtain a temporary permit to practice medicine in Alaska, or to have Rogers evaluated by another psychiatrist who was licensed in Alaska.⁹ Under these circumstances, we concluded that the record supported the superior court's conclusion that Rogers failed to show diligence and its denial of Rogers's motion to continue the sentencing.¹⁰

We reach a similar conclusion here. Colocho's attorney did not provide the superior court with information that would allow the court to conclude that a continuance was appropriate. Even though the prosecutor's written opposition gave Colocho's attorney notice that additional information was necessary in order to obtain a

⁶ *Id.* at 578 (citing *Salazar v. State*, 559 P.2d 66, 72 (Alaska 1976)).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 579.

¹⁰ *Id.* at 578-79.

continuance, the attorney's written pleadings did not include an additional proffer.¹¹ The attorney claimed broadly that "logistical issues" including the attorney changing caseloads and "the language barrier involved" were to blame for the fact that his expert's review of the case had not been completed. But the attorney did not identify the type of expert he had hired, what the purpose of the expert would be, whether the expert had completed any work toward the evaluation, or what steps the attorney had taken to secure a timely evaluation. Instead, he flatly refused to provide this information unless he was ordered to do so by the court.

Even during the sentencing hearing, when the attorney belatedly offered additional information about his request, the information he provided was insufficient. The attorney did not explain what the expert witness's proposed testimony would be, why it was not available from another source, whether it would be cumulative, or how it would affect the court's sentencing decision. He also did not explain when the expert's report would be available so that the court could determine whether the expert would be able to testify within a reasonable time. Additionally, like the attorney in *Rogers*, Colocho's attorney did not provide any information about what efforts he had made to hire an expert prior to the date of his requested continuance (*i.e.*, the facts that would allow the court to evaluate whether he had acted diligently).¹²

Based on this record, we conclude that the superior court did not abuse its discretion when it denied Colocho's motion for a continuance.

¹¹ See *Rogers*, 275 P.3d at 579 (concluding that the trial court did not abuse its discretion in declining to continue a sentencing hearing where the defense attorney gave the court no information about the efforts he made to obtain the expert's testimony or to have the defendant evaluated by a different expert).

¹² See *Salazar*, 559 P.2d at 73 (holding that counsel's diligence is a critical factor in determining whether a continuance is warranted).

Colocho's sentence was not mistaken

Colocho was convicted of one consolidated count of second-degree sexual abuse of a minor, encompassing multiple acts of completed sexual penetration, and he agreed that the “most serious” aggravating factor under AS 12.55.155(c)(10) applied to his conduct. As a first felony offender, Colocho faced a presumptive range of 5 to 15 years to serve and a maximum term of imprisonment of 99 years.¹³

The superior court sentenced Colocho to 25 years with 5 years suspended. On appeal, Colocho argues that this sentence is clearly mistaken for two reasons.

First, Colocho argues that, even though the changes that S.B. 91 made to parole were not in effect at the time of his sentencing, the superior court should have entered a sentence that comported with these upcoming changes to the law. In making this argument, Colocho relies on *Sundberg v. State*.¹⁴ In *Sundberg* we held that when a defendant’s conduct corresponds exactly to conduct prohibited by a specific provision of a new sentencing code, the defendant generally should be sentenced within the range of sentencing provided by the new code, even before the effective date of that provision.¹⁵

But as we have explained, Colocho concedes that the only change in S.B. 91 that could apply to him is a procedural requirement that the parole board hold a hearing on discretionary parole not less than 90 days before an inmate’s first discretionary parole eligibility date. This change has nothing to do with the range of available sentences or with other substantive sentencing provisions. Accordingly, our decision in *Sundberg* has no bearing on the circumstances of this case.

¹³ AS 12.55.125(i)(3)(A); AS 12.55.155(h).

¹⁴ *Sundberg v. State*, 652 P.2d 113 (Alaska App. 1982).

¹⁵ *Id.* at 116.

Second, Colocho argues that his sentence is excessive. But even though Colocho was sentenced for one count of second-degree sexual abuse of a minor, the count was a consolidated count encompassing multiple acts of completed sexual penetration. He specifically admitted to conduct that included multiple instances of first-degree sexual abuse of a minor, including performing cunnilingus on L.H. and vaginally and anally penetrating her with his penis. Additionally, as part of the plea agreement, Colocho agreed that his conduct was among the most serious conduct included in the definition of second-degree sexual abuse of a minor, and the superior court found that this aggravator should be given significant weight.

In imposing Colocho's sentence, the superior court noted that the victim was very young, that Colocho had a position of trust and authority over her, and that Colocho engaged in a pattern of grooming behavior over a one-year period of time. Additionally, the court found that Colocho was not a youthful offender and that, when confronted, Colocho attempted to blame the child for his conduct. For these reasons, the court concluded that individual deterrence and community condemnation also should be given significant weight in its analysis of the *Chaney* criteria.

We have independently reviewed the record in this case, and we conclude that the superior court did not err in finding that a sentence of 20 years to serve was justified.

For these reasons, we reject Colocho's claims regarding his sentence and conclude that Colocho's sentence was not clearly mistaken.

Conclusion

The judgment of the superior court is AFFIRMED.

Judge ALLARD, concurring.

I agree with the majority that it was not an abuse of discretion for the superior court to deny the continuance request given the lack of information provided in the request. I am nevertheless troubled by the fact that Colocho's sentencing went forward without any sex offender risk assessment or similar evaluation, and I note that a resentencing may be appropriate in a later petition for post-conviction relief if Colocho can show that such an evaluation would have been favorable.

Judge COATS, dissenting.

Contrary to the majority’s opinion, the record in this case shows that Jose Daniel Colocho’s attorney diligently requested a continuance of his sentencing hearing in order to allow him to consult with an expert to assist him with sentencing issues. And, even assuming that Colocho’s counsel was not diligent or otherwise failed in setting out his request, our case law would require the superior court to sanction counsel rather than punish Colocho. For these reasons, I would reverse the superior court’s order denying the continuance and remand for the court to resentence Colocho.

Colocho entered into a plea agreement, where he pleaded guilty to one consolidated count of second-degree sexual abuse of a minor.¹ As part of the plea agreement, Colocho agreed that “the conduct constituting the offense was among the most serious conduct included in the definition of the offense.”²

Colocho entered his guilty plea on August 25, 2016. The court scheduled his sentencing hearing for December 16.

But on November 7, 2016, the prosecutor filed a sentencing memorandum arguing for what was effectively a life sentence: “It is the State’s position that [the] defendant [who was 50 years old] should remain in [the] Department of Corrections custody until his death.” On November 15, shortly after receiving the State’s sentencing memorandum, Colocho moved to continue the sentencing hearing.

The main argument in Colocho’s motion to continue the sentencing hearing was that Colocho’s attorney needed the continuance to allow him to consult with an

¹ AS 11.41.436(a)(5)(A).

² AS 12.55.155(c)(10).

expert to assist him with sentencing issues. Colocho's attorney argued that, since the prosecution was now asking for a life sentence, he needed the advice of an expert witness to assist him in preparing for sentencing. He stated that "the defense has hired an expert to review the case" but that a continuance was needed due to "logistical issues" including that the defense attorney had changed caseloads since the time of the change of plea and that there was a language barrier because Colocho spoke Spanish. The attorney stated that "[i]f the court would like additional information on the status of our expert, [he] would consider providing additional information *ex parte*."

The prosecutor opposed Colocho's motion. The prosecutor argued that the defense attorney had not provided sufficient information to show that he had acted diligently or how the expert would assist the court at sentencing. The prosecutor noted that, if Colocho intended an expert to testify, he would have to provide a report to the State and make the expert available to the State. And the prosecutor argued that before it granted a continuance, the court should inquire of Colocho what specific concerns the defense attorney had that he believed an expert could address, what specific steps the defense attorney took to secure an expert, why no such steps were ever taken earlier, why the defense attorney allowed Colocho to take a plea if he had concerns for Colocho's mental health (assuming the expert retained was a psychologist) and how the expert would assist the court in sentencing.

In his reply, Colocho's attorney again emphasized that he had been through a "caseload transition," that Colocho was in custody, and that Colocho "barely [spoke] English." He stated that he would not answer an interrogatory absent a court order.

The court denied the motion to continue sentencing on November 28.

At the sentencing hearing on December 16, Colocho's attorney renewed his request for a continuance. The attorney stated that he had received approval for funding

for a psychologist and had forwarded the case material to the psychologist. He explained that the purpose of retaining the psychologist was to elucidate why a man with no criminal history would “act this way [toward someone] who was essentially his stepdaughter.” The attorney pointed out again that the report had been delayed because Colocho was in custody, because of the language barrier, and because of the caseload transition. Colocho’s attorney said, “I think a psychologist report could have been quite helpful in a case like this, particularly when the state is asking the court not to consider rehabilitation and essentially order a life sentence for Mr. Colocho.” The court explained that it had denied the motion for a continuance because the only information it had was that the expert had been retained.

The right to an expert witness is constitutionally protected and constitutes one of the “basic tools of an adequate defense.”³ And it was fundamentally unfair to preclude Colocho from having the opportunity to have an expert witness testify on his behalf in his case. As Colocho’s attorney pointed out, the prosecutor was arguing that Colocho should spend the rest of his life in prison. And yet, as the attorney intimated, Colocho had no prior criminal record and the facts of his current offense seemed totally out of character with his prior history. It was apparent to the attorney that Colocho’s sentence would turn on his prospects for rehabilitation. Although Colocho’s motion ideally might have contained more information, it was apparent in context that Colocho had retained a psychologist who would deal with a critical issue at sentencing: Colocho’s prospects for rehabilitation.

The record shows that Colocho’s attorney acted diligently. Upon finding that the prosecutor was recommending that Colocho should receive a sentence that would

³ *Crawford v. State*, 337 P.3d 4, 38 (Alaska App. 2014) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 76-77 (1985)).

result in his spending the rest of his life in prison, Colocho's counsel filed a motion for a continuance. And counsel explained why he needed extra time. Counsel explained that his office had "caseload issues," and that Colocho spoke very little English, which made the case much more difficult, in addition to the fact that Colocho was in custody.

Colocho's attorney indicated that he would consider providing more information *ex parte* upon request. And there was good reason for the attorney to be guarded about the information that he provided. Many of the questions posed in the prosecutor's opposition concerned the privileged work product of Colocho's attorney. The work product privilege encompasses any impressions counsel had of Colocho's mental health and any deliberations regarding Colocho's mental health.⁴ And Colocho would be required to provide the State with the expert's reports and make the expert available to the State only if he intended to call the expert at the sentencing hearing.⁵ That is, if Colocho's attorney, after reviewing the expert's evaluation, decided not to rely on it and not to call the expert at the sentencing hearing, he would not be required to provide any information to the State.

It is reasonable to infer that it would be time consuming and require considerable effort to find a psychologist who could handle the combination of the language barrier and Colocho being in custody, and to also make a persuasive case on behalf of Colocho. And it is understandable for a defense attorney to want to reveal as little as possible about the difficulties of finding someone who could help the defendant's case. The attorney would probably not want to imply that he was having great difficulty

⁴ See Alaska R. Civ. P. 26(b)(3); *Lowery v. State*, 762 P.2d 457, 459 (Alaska App. 1988) ("At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." (quoting *U.S. v. Nobles*, 422 U.S. 225, 238 (1975))).

⁵ Alaska R. Crim. P. 16(c)(4).

finding someone who would testify favorably for his client, thereby undercutting the credibility of the expert he chose to call. Given that this was Colocho's first motion for a continuance and was filed soon after the State announced it was seeking an effective life sentence, I believe Colocho's attorney provided an adequate basis to justify a continuance.

While I do not believe the record shows Colocho's counsel provided the court with too little information to justify a continuance, to the extent that he did, "our decisions and those of the supreme court have consistently discouraged the use of sanctions that might affect the merits of a criminal case by prejudicing the rights of a party, whether that party be the defendant or the state."⁶ Even when an attorney displays a lack of diligence that might warrant sanctions by the sentencing court, it is an abuse of discretion for the court to require the defendant to proceed with the sentencing hearing when there is no indication that the lack of diligence is attributable to the defendant personally.⁷

In her concurring opinion, Chief Judge Allard states that she is "troubled by the fact that Colocho's sentencing went forward without any sex offender risk assessment or similar evaluation." It is troubling. Our prior cases would strongly suggest that the court impose monetary sanctions on Colocho's attorney rather than deny Colocho a "basic tool[] of an adequate defense" on the crucial issue at sentencing.

This was the first, and only, requested continuance of a sentencing hearing in a case that did not go to trial. All continuances inconvenience the court, the parties,

⁶ *Fox v. State*, 685 P.2d 1267, 1270 (Alaska App. 1984).

⁷ *See Cuautle v. State*, 2011 WL 5825388, at *10 (Alaska App. Nov. 16, 2011) (unpublished); *Maalona v. State*, 2010 WL 2473789, at *2 (Alaska App. June 16, 2010) (unpublished).

the victims, and the public to some degree. But this request for a continuance was not especially burdensome.

Balanced against this is Colocho's constitutional right to the assistance of an expert witness to ensure that he had the opportunity to have a fair sentencing hearing. Colocho was facing the possibility of spending the rest of his life in prison. The key issue at sentencing was Colocho's prospects for rehabilitation. And yet he was deprived of the opportunity to present an expert witness on this issue.

Colocho was forced into sentencing without the opportunity to present an expert witness on his prospects for rehabilitation. At sentencing, the superior court found that Colocho's potential for rehabilitation was "questionable at this point" and that Colocho had not shown that he had "any particularly favorable prospects for rehabilitation."

I conclude that, by denying Colocho's motion for a continuance to obtain an expert witness, the superior court prejudiced Colocho's opportunity to have a fair sentencing hearing. Accordingly, I dissent from the opinion of the Court upholding the superior court's decision to deny the continuance.