IN THE COURT OF APPEALS OF THE STATE OF ALASKA

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| WALTER MATTHEW JOHNSON JR.,<br><br>Appellant,<br><br>v.<br><br>STATE OF ALASKA,<br><br>Appellee. | Court of Appeals No. A-12878<br>Trial Court No. 4BE-15-00203 CR<br><br>MEMORANDUM OPINION<br><br>No. 6900 — October 21, 2020 |

Appeal from the Superior Court, Fourth Judicial District, Bethel, Charles W. Ray, Jr. and Nathaniel Peters, Judges.

Appearances: Emily Jura, Assistant Public Defender, and Beth Goldstein, Acting Public Defender, Anchorage, for the Appellant. RuthAnne B. Bergt, 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 Mannheimer, Senior Judge.[*]

Judge HARBISON.

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

Walter Matthew Johnson Jr. was convicted by a jury of first-degree assault for attacking his friend, Joseph Egoak. Despite their friendship, Johnson had long suspected that Egoak had sexually molested Johnson's daughter ten years earlier when she was four years old. On the day in question, Johnson and Egoak were drinking together, and Egoak said or did something which Johnson interpreted as an admission that Egoak had molested Johnson's daughter. Johnson then assaulted Egoak in a particularly brutal fashion. Johnson nearly ripped off Egoak's left ear and left him unconscious in a pool of his own blood. As a result of this attack, Egoak had to be hospitalized for three weeks, and he continued to suffer cognitive difficulties long after his release.

Prior to his sentencing, Johnson asked the trial judge to find the mitigating factor defined in AS 12.55.155(d)(6) — *i.e.*, that Johnson's conduct had been the result of serious provocation by the victim. The judge rejected this mitigating factor, finding that although Johnson may have *believed*, in his intoxicated state, that Egoak had admitted to the sexual molestation, Johnson had failed to prove by clear and convincing evidence that Egoak had actually confessed to this crime.

Nevertheless, the judge concluded that Johnson's case should be referred to the three-judge sentencing panel on two bases: because Johnson had extraordinary potential for rehabilitation, and because it would be manifestly unjust to sentence Johnson within the presumptive range of 5 to 9 years' imprisonment.

The three-judge panel, however, found against Johnson on both of these questions, so the panel returned Johnson's case to the trial court.

By the time the three-judge panel returned Johnson's case to the trial court, the trial judge had retired, and further sentencing proceedings were conducted by a new judge. Johnson asked the newly-assigned sentencing judge to reconsider the trial judge's

rejection of mitigating factor (d)(6), but the sentencing judge declined to reconsider this matter, noting that this mitigator had been fully litigated to the original judge.

Johnson now raises three issues on appeal.

First, Johnson argues that the superior court erred when it rejected proposed mitigating factor (d)(6) — that his assault on Egoak was the product of serious provocation. Johnson raises this issue in three separate but closely related ways. First, he argues that the original sentencing judge clearly erred when he rejected the proposed mitigator. Second, he argues that the newly assigned sentencing judge erred when he refused to reconsider the original judge's decision. And third, Johnson argues that even though the newly assigned judge stated that he was not reconsidering the original judge's ruling, the new judge ultimately made factual findings that established mitigating factor (d)(6) as a matter of law.

All of Johnson's arguments, however, are based on a misunderstanding of mitigating factor (d)(6). To prove this mitigator, a defendant must prove by clear and convincing evidence that the victim engaged in "conduct which [was] sufficient to excite an intense passion in a reasonable person in the defendant's situation, other than a person who is intoxicated, under the circumstances as the defendant *reasonably* believed them to be."[1]

In arguing that the mitigating factor applies to his conduct, Johnson emphasizes his subjective understanding of the situation, but he ignores the requirement that this understanding be reasonable, and he does not acknowledge that the trial judge rejected this mitigator precisely because the judge found that Johnson acted unreasonably.

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[1] *See* AS 11.41.115(f)(2); AS 12.55.155(d)(6) (emphasis added).

All three of the fact-finders in this case — the original sentencing judge, the three-judge panel, and the new sentencing judge — acknowledged the possibility that Egoak said or did something that led Johnson to believe that Egoak had confessed to molesting Johnson's daughter. But both the original judge and the three-judge panel also concluded that Johnson's interpretation of Egoak's conduct or statements was not reasonable under the circumstances — that it was an unreasonable conclusion fueled by Johnson's intoxication and his long-held but unsubstantiated suspicions.

This interpretation of the evidence — agreed upon by four separate judges — is supported by the record and is not clearly erroneous.

Johnson also argues that the newly assigned sentencing judge failed to understand the full scope of his discretion to review the factual findings made by the original sentencing judge. We disagree. The newly assigned sentencing judge's comments on this issue reveal that he understood that he had the discretion to review the original judge's factual findings, and that he declined to exercise that discretion in part because Johnson had failed to provide a substantial reason to believe that the original judge's findings were incorrect. This was a reasonable ruling under the circumstances and not an abuse of discretion.[2]

We therefore reject Johnson's various challenges to the superior court's rulings on mitigator (d)(6).

Next, Johnson argues that the three-judge panel erred when it concluded that it would not be manifestly unjust to sentence Johnson within the applicable presumptive range. The three-judge panel acknowledged Johnson's commendable post-

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[2] *See West v. Buchanan*, 981 P.2d 1065, 1067 (Alaska 1999) (explaining that the law of the case doctrine embodies the principle that courts generally disfavor reopening matters that have been decided, but that one trial court judge has the authority to overrule another if the moving party convinces the new judge that the earlier ruling was obviously erroneous).

offense efforts toward rehabilitation, and that Johnson's assault was prompted by his honest but unreasonable belief that Egoak had sexually molested Johnson's daughter. But the panel nonetheless concluded that Johnson had failed to prove manifest injustice by clear and convincing evidence.

The panel reached this conclusion based on Johnson's criminal history, which included prior convictions for first-degree criminal trespass, second-degree harassment, fourth-degree assault, and driving under the influence. The panel noted that Johnson's criminal conduct, and in particular his assaultive conduct, was becoming more frequent and more violent as he grew older. The panel also noted that Johnson's assault on Egoak was particularly vicious and brutal. Based on these factors, the panel concluded that the minimum sentence within the prescribed presumptive range — 5 years — did not "shock the conscience." We have reviewed the record and the three-judge panel's findings, and we conclude that the panel's determination was not clearly mistaken.[3]

Finally, Johnson argues that the sentencing court erred when it failed to redact references in the presentence report to the purported fact that a guardianship was established for Egoak after the assault, even though the sentencing court acknowledged that no guardianship had been established.

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[3] *See Winther v. State*, 749 P.2d 1356, 1360 (Alaska App. 1988). Even though Johnson acknowledges that our existing case law requires us to review the three-judge panel's manifest injustice determination under the "clearly mistaken" standard of review, Johnson argues that we should overrule our prior cases and review the three-judge panel's ruling in his case de novo. Under the doctrine of *stare decisis*, we will overrule precedent only if we are "clearly convinced" that the precedent was "originally erroneous" or that it is "no longer sound because of changed conditions," and that "more good than harm would result from a departure from precedent." Johnson fails to acknowledge or address these requirements. We therefore decline to reconsider the question of what standard of review governs our review of the three-judge panel's rulings on whether a sentence would be manifestly unjust.

The State does not argue this issue on the merits, but instead argues that this claim was not preserved because Johnson only raised this issue in front of the original trial judge and did not renew his objection in front of the new sentencing judge. But Johnson was not required to renew his objection in order to preserve this claim for appeal. Johnson undisputedly raised this objection and received a ruling on it from the original trial judge, and we accordingly conclude that the issue was preserved for our review.[4]

We further conclude that the court's failure to make the requested redactions was error. In its written order, the superior court specifically found that the presentence report contained passages which mistakenly suggested that the assault left Egoak so incapacitated that a guardian was appointed for him. The court further found, based on these mistaken passages in the presentence report, that the presentence report writer likely misperceived the severity of Egoak's injuries.

We have previously noted that presentence reports "follow a defendant through parole and probation and are often used in legal proceedings far removed from the original sentencing."[5] Given the undisputed inaccuracy in Johnson's presentence report, it was error for the superior court to fail to correct the misstatements.

We therefore REMAND this case to the superior court for the limited purpose of removing the mistaken references to a purported guardianship from the presentence report. In all other respects, we AFFIRM the judgment of the superior court.

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[4] *See Worthy v. State*, 999 P.2d 771, 775 (Alaska 2000) (holding that failure to renew a pretrial motion to introduce evidence did not constitute waiver on appeal). *But cf. West v. State*, 923 P.2d 110, 114 (Alaska App. 1996) (holding that a failure to renew a pretrial motion for change of venue after voir dire constituted waiver).

[5] *Davison v. State*, 307 P.3d 1, 3 (Alaska App. 2013) (internal citations omitted).