IN THE COURT OF APPEALS OF THE STATE OF ALASKA

LEWIS EDWARD HARRIS II, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13073 Trial Court No. 3AN-10-00032 CR MEMORANDUM OPINION No. 6902 — October 21, 2020

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael D. Corey, Judge.

Appearances: Bradly A. Carlson, The Law Office of Bradly A. Carlson LLC, under contract with the Public Defender Agency, and Samantha Cherot, 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, and Wollenberg and Harbison, Judges.

Judge ALLARD.

In 2010, Lewis Edward Harris II pleaded guilty to a consolidated count of second-degree sexual abuse of a minor for offenses he committed against three young

girls. Pursuant to a plea agreement, he was sentenced to 15 years with 8 years suspended (7 years to serve), and a 10-year term of probation.

One of Harris's probation conditions (Special Condition 15) prohibited him from possessing sexually explicit material, including child pornography. The condition stated, in pertinent part,

> The probationer shall not at any time possess, have on their person, have in their residence, or in their vehicle any sexually explicit material, which includes but is not limited to child erotica, sexually graphic animé, adult and/or child pornography.

In December 2016, Harris was suspended from his sex offender treatment program for viewing and masturbating to sexually explicit material of "young looking actresses." Harris's probation was revoked based on this conduct, and the trial court imposed three days of previously suspended time for the probation violation.

Nine months later, in September 2017, just before a scheduled polygraph examination, Harris admitted to his probation officer that he had viewed child pornography on his cell phone on eight to ten separate occasions. Harris was described as "pretty savvy" with computers and had his own start-up company where he worked with computers on a daily basis. Harris admitted that, after viewing the child pornography and masturbating to it, he would delete the content that he viewed as well as his internet history and the web browser. When the police searched Harris's cell phone, they were unable to find any remaining files containing child pornography.

Based on Harris's admissions, the State filed a second petition to revoke Harris's probation for violating Special Condition 15 by possessing child pornography. After listening to the testimony from Harris's probation officer and the police detective, the superior court found that Harris had violated Special Condition 15 and the court sentenced Harris to serve 4 years of his remaining 8 years of suspended time.

Harris now appeals, raising two claims. First, Harris argues that the superior court erred when it found that he violated Special Condition 15. Second, Harris argues that, even if the probation violation was properly found, the superior court was clearly mistaken when it imposed 4 years to serve for the violation.

Did the superior court err when it found that Harris possessed child pornography?

Harris argues that the superior court erred when it found that he "possess[ed]" child pornography in violation of Special Condition 15. According to Harris, he only "viewed" child pornography; he did not "possess" it.

In support of his argument, Harris cites to this Court's opinion in *Worden v. State*, which held that the then-existing version of AS 11.61.127 — the Alaska Statute prohibiting the knowing "possession" of child pornography — "[did] not criminalize merely viewing images of child pornography on a computer."[1] Alaska Statute 11.61.127 was amended after *Worden* and now explicitly prohibits "knowingly access[ing]" child pornography on a computer.[2]

But *Worden* is readily distinguishable from Harris's case. In *Worden*, a forensic examination of Worden's computer revealed multiple images of child pornography in the computer's browser cache files.[3] As the forensic examiner explained at Worden's trial, "when a person uses a computer to access a site on the Internet, the computer automatically stores the images from the web page in the browser cache." But, as was also acknowledged, "[m]ost people do not know that these temporary internet files are being stored on their computer when they access the Internet." In Worden's

---

[1] *Worden v. State*, 213 P.3d 144, 147-48 (Alaska App. 2009).

[2] SLA 2010, ch. 18, § 6; AS 11.61.127.

[3] *Worden*, 213 P.3d at 145.

case, there was no evidence that Worden was aware that the images were stored in his computer's browser cache or that he had the ability to access them.[4]

In contrast, here, there is evidence that Harris was "computer savvy" and that he was aware of the browser cache files containing child pornography. Indeed, Harris admitted to deleting the web browser and all its contents after viewing the child pornography images. The State characterizes this as an admission that Harris "possessed" these contents prior to deleting them.[5] We agree, and we therefore conclude that the superior court did not err in finding a probation violation in this case.

(We also note that Harris's conduct violated more than just Special Probation Condition 15. As already mentioned, the Alaska Legislature amended AS 11.61.127 after *Worden* was decided and the statute now explicitly prohibits "knowingly access[ing]" child pornography on a computer.[6] Notwithstanding Harris's arguments regarding "possession," there is no dispute in this case that Harris knowingly accessed child pornography on a computer and that he did so with the intent to view that material. Given this, Harris was also in violation of General Probation Condition 9, which required Harris to "[c]omply with all municipal, state, and federal laws.")

Did the superior court err when it imposed 4 years to serve?

---

[4] *Id.* at 147.

[5] *Cf. United States v. Tucker*, 305 F.3d 1193, 1204-05 (10th Cir. 2002) (finding sufficient evidence to support a conviction for possession of child pornography, despite the defendant's claim that he merely viewed the child pornography on a web browser, where the browser automatically saved the images to a browser cache file, and the defendant deleted the images from the cache file after each computer session).

[6] SLA 2010, ch. 18, § 6; AS 11.61.127.

Harris also challenges the superior court's decision to impose 4 years to serve for Harris's probation violation. When we review a sentence for excessiveness, we independently examine the record to determine if the sentence is "clearly mistaken," which is a deferential standard of review that accepts that "reasonable judges, confronted with identical facts, can and will differ on what constitutes an appropriate sentence."[7] It is only when the sentence falls outside the "zone of reasonableness" that a sentence should be reversed as clearly mistaken.[8]

Having independently reviewed the record in this case, we conclude that the superior court's sentence was not clearly mistaken. Harris admitted to viewing child pornography on eight to ten separate occasions. If prosecuted for this felony-level conduct, Harris would have faced a presumptive sentencing range of 12 to 20 years' imprisonment with a maximum of 99 years for each instance of viewing.[9]

This was also Harris's second probation violation involving pornographic images, and his treatment provider stated that Harris had a long-standing relapse pattern of viewing pornographic or lewd materials depicting women acting as children. Although the treatment provider testified that community-based treatment was preferable to incarceration-based treatment, the provider believed that Harris's community-based rehabilitation potential was "guarded," due in part to Harris's conduct. In focusing the sentence on the need for isolation rather than rehabilitation, the superior court noted the treatment provider's remarks, especially the remarks concerning Harris's "guarded" rehabilitation potential. Although we find the sentence is at the high end of reasonable

---

[7] *Erickson v. State*, 950 P.2d 580, 586 (Alaska App. 1997).

[8] *McClain v. State*, 519 P.2d 811, 813 (Alaska 1974).

[9] *See* AS 12.55.125(i)(4)(E).

sentences that could be imposed for this serious violation, we conclude that it is nevertheless supported by the record and is not clearly mistaken.

The judgment of the superior court is AFFIRMED.