IN THE COURT OF APPEALS OF THE STATE OF ALASKA

EDWIN SANCHEZ ROSARIO, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13277 Trial Court No. 3AN-16-06355 CR MEMORANDUM OPINION No. 6922 — February 3, 2021

Appeal from the Superior Court, Third Judicial District, Anchorage, Kevin M. Saxby, Judge.

Appearances: Glenda J. Kerry, Law Office of Glenda J. Kerry, Girdwood, under contract with the Public Defender Agency, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Ryan T. Bravo, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Clyde "Ed" Sniffen, Jr., Acting Attorney General, Juneau, for the Appellee.

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

Judge WOLLENBERG.

Edwin Sanchez Rosario was charged with one count of second-degree sexual abuse of a minor and one count of third-degree sexual abuse of a minor for

conduct involving S.T., his fifteen-year-old niece.[1] At the time, Rosario was forty-eight years old, and his apartment was across the hall from S.T.'s family's apartment.

On the morning of July 25, 2016, Rosario entered S.T.'s family's locked apartment, where S.T. was alone, napping in her bedroom. Rosario climbed into S.T.'s bed, and began touching and grabbing her. S.T. tried to push him off and move his hands away, but Rosario touched S.T.'s breasts and digitally penetrated her vagina. When the police questioned Rosario about the incident, he acknowledged that what he did was wrong, but he also said that he thought S.T. had liked it and he did not understand why she had told anyone.

S.T. also reported to the police, and later testified at Rosario's sentencing hearing, that on two previous occasions, Rosario had gotten into bed with her and touched her — once on her buttocks and another time on her breasts, buttocks, and thighs. Rosario was not charged for this conduct.

Rosario waived indictment and pleaded guilty to one count of attempted second-degree sexual abuse of a minor.[2] As part of the plea agreement, Rosario stipulated to the conduct underlying the original charges, and he agreed to waive his right to a jury trial on any *Blakely* aggravators.[3] The plea agreement left Rosario's sentence open to the discretion of the sentencing judge.

The superior court sentenced Rosario to 15 years with 7 years suspended (8 years to serve). The court imposed a 5-year probationary term and adopted the probation conditions recommended in the presentence report.

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[1] AS 11.41.436(a)(1) and AS 11.41.438(a), respectively.

[2] AS 11.41.436(a)(1) & AS 11.31.100(a).

[3] *See Blakely v. Washington*, 542 U.S. 296, 303-04 (2004).

On appeal, Rosario challenges his sentence and multiple probation conditions.

Rosario's excessive sentence claim

As a first felony offender, Rosario faced a presumptive sentencing range of 2 to 12 years for his attempted second-degree sexual abuse of a minor conviction.[4] The superior court found two aggravating factors — that the conduct constituting the offense was among the most serious conduct included in the definition of the offense and that Rosario, having been convicted of a specified sexual felony, was ten or more years older than S.T.[5] Because the court found one or more aggravators, it was authorized to impose a sentence of up to 99 years.[6]

In finding the most serious aggravator, the court explained that Rosario's conduct constituted completed, rather than attempted, second-degree sexual abuse of a minor and was close to constituting first-degree sexual abuse of a minor because Rosario's apartment was across the hall from S.T.'s family's apartment and Rosario had some authority over S.T., given their familial relationship.[7]

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[4] AS 12.55.125(i)(4)(A).

[5] AS 12.55.155(c)(10) and AS 12.55.155(c)(18)(E), respectively.

[6] AS 12.55.125(i)(4).

[7] *See* AS 11.41.434(a)(3) ("An offender commits the crime of sexual abuse of a minor in the first degree if . . . being 18 years of age or older, the offender engages in sexual penetration with a person who is under 16 years of age, and . . . the victim at the time of the offense is residing in the same household as the offender and the offender has authority over the victim; or . . . the offender occupies a position of authority in relation to the victim."); *Benboe v. State*, 698 P.2d 1230, 1231 n.2 (Alaska App. 1985) ("Where the person's conduct in fact amounted to commission of a greater offense, the court may find that the conduct was among the most serious conduct included in the definition of the offense.").

At the sentencing hearing, Rosario presented the testimony of an expert in sex offender risk assessment. The expert testified that Rosario had a low risk of committing future sex offenses. He explained that Rosario showed typical belief distortions about sexual contact and that these issues are the focus of sex offender treatment.

In sentencing Rosario, the court acknowledged that Rosario had no prior criminal record and "relatively good" prospects for rehabilitation. But the court emphasized the seriousness of the offense, finding that Rosario had apparently waited until he was sure there was no one else in S.T.'s family's apartment and then assaulted S.T. in her bedroom. The court found that harm to the victim, deterrence, and community condemnation were important sentencing factors and imposed a sentence of 15 years with 7 years suspended (8 years to serve).[8]

Rosario argues that this sentence is excessive — and in particular, that the court erred in the relative weight it ascribed to the various sentencing goals.

But the sentencing judge bears primary responsibility for determining the priority and relationship of the various sentencing objectives in a given case.[9] The sentencing judge also has discretion to determine the weight to give an aggravating or mitigating factor.[10]

Here, S.T. was assaulted in her bedroom by a close family member, and she testified that this was not the first time Rosario had abused her. Although Rosario was convicted of attempted second-degree sexual abuse of a minor, he actually stipulated to conduct that constituted a completed offense. The court therefore concluded that

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[8] *See* AS 12.55.005 (setting out factors for a court to consider at sentencing).

[9] *Asitonia v. State*, 508 P.2d 1023, 1026 (Alaska 1973).

[10] *Machado v. State*, 797 P.2d 677, 689 (Alaska App. 1990).

Rosario's offense was very serious in comparison to other crimes of attempted sexual abuse. The court acknowledged Rosario's good prospects for rehabilitation, but concluded those prospects were outweighed by other considerations.

When we review an excessive sentence claim, we independently examine the record to determine whether the sentence is clearly mistaken.[11] The "clearly mistaken" standard contemplates that different reasonable judges, confronted with identical facts, will differ on what constitutes an appropriate sentence, and that a reviewing court will not modify a sentence that falls within a permissible range of reasonable sentences.[12]

We have independently reviewed the sentencing record in this case, and we conclude that the sentence imposed is not clearly mistaken.

Rosario's challenges to his probation conditions

Special Condition No. 5: This probation condition requires Rosario to actively participate in Alaska Department of Corrections-approved treatment as directed by the probation officer. The condition also requires Rosario to sign and abide by all conditions of any required treatment program, "which will include regular periodic polygraph examination and may include physiological and/or psychological testing, as well as other methods of ongoing assessment."

Rosario argues that Special Condition No. 5 could authorize residential treatment, and that the condition is illegal because it fails to set a maximum term for

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[11] *McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974).

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

required residential treatment.[13] We do not interpret this condition as authorizing residential treatment.[14] Accordingly, the condition is not illegal.

Rosario also argued that Special Condition No. 5 is vague and overbroad. Rosario did not raise this argument in the superior court, and he must therefore show plain error.[15] Plain error is an error that "(1) was not the result of intelligent waiver or a tactical decision not to object; (2) was obvious; (3) affected substantial rights; and (4) was prejudicial."[16]

We have previously upheld probation conditions with requirements that defendants complete "other Department-approved programs" and "other methods of ongoing assessment."[17] In doing so, we noted that a probation officer's discretion to order further treatment is limited by AS 12.55.100, which authorizes a probation officer to mandate a probationer's participation in the treatment plan of a rehabilitation program only if the program is "related to the defendant's offense or to the defendant's rehabilitation."[18] We reach the same conclusion here: Rosario's probation officer may

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[13] *See* AS 12.55.100(c) (providing that a program of inpatient treatment must be authorized, and may not exceed a maximum term of inpatient treatment specified, in the judgment); *Christensen v. State*, 844 P.2d 557, 558-59 (Alaska App. 1993) (holding that a probation condition requiring residential treatment if recommended by a substance abuse evaluation was illegal because it failed to set a maximum period for such treatment).

[14] *See Giddings v. State*, 2018 WL 3301624, at *4 (Alaska App. July 5, 2018) (unpublished).

[15] *State v. Ranstead*, 421 P.3d 15, 23 (Alaska 2018).

[16] *Id.* (quoting *Adams v. State*, 261 P.3d 758, 764 (Alaska 2011)).

[17] *Diorec v. State*, 295 P.3d 409, 414-15 (Alaska App. 2013); *Giddings*, 2018 WL 3301624, at *4.

[18] *Diorec*, 295 P.3d at 414-15; *Giddings*, 2018 WL 3301624, at *4; *see also* AS 12.55.100(a)(2)(E).

not require Rosario to participate in a treatment program unless the program is related to his offense or to his rehabilitation.

Given this construction, this condition is not obviously vague or overbroad and is therefore not plainly erroneous. As the State notes in its brief, Rosario may seek judicial review if he objects to a specific treatment requirement.[19]

We therefore affirm Special Condition No. 5.

Special Condition No. 6: This probation condition requires Rosario to sign releases of information authorizing the exchange of information between his assessment provider, treatment provider, polygraph examiner, and Alaska Department of Corrections staff members, as well as "other individuals who are identified by the probation officer as having an essential role in supervision and treatment in the community, including, but not limited to[,] medical/mental health/psychiatric providers, physiological assessment technicians, and clinicians providing treatment to victims and/or family members." Rosario argues that this condition unduly infringes on his privacy and that it is overbroad.

In the superior court, Rosario challenged only the portion of the condition that authorizes the release of information to clinicians providing treatment to victims and family members. Thus, this is the only portion of the condition that Rosario preserved for appellate review.[20]

In *Giddings v. State*, we considered a challenge to a substantially similar condition of probation.[21] We found that the superior court could properly conclude that

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[19] *See Giddings*, 2018 WL 3301624, at *4.

[20] *See Ranstead*, 421 P.3d at 20-22.

[21] *Giddings*, 2018 WL 3301624, at *5.

the release of information between different providers was necessary for, and reasonably related to, the defendant's rehabilitation and the protection of the public.[22] However, we struck a requirement that this information also be released to the victim's clinician in light of the defendant's right to privacy.[23]

The State concedes that the superior court erred in requiring Rosario to authorize the release of information to the treatment providers of victims and family members without specific findings as to why the provision was necessary. This concession is well-founded.[24] We also fail to see why this portion of the condition is necessary in light of Rosario's right to privacy, and no specific rationale for this provision has been offered by the State.[25] Accordingly, we strike the phrase "clinicians providing treatment to victims and/or family members" from Special Condition No. 6.

Rosario also argues that the remainder of the condition is overbroad. First, Rosario contends that any release of information from his treatment provider should be limited to information regarding his "assessment and progress." But as we noted, we have previously upheld similar requirements on the ground that the exchange of information between different providers was reasonably necessary for the probation officer to successfully monitor the defendant's progress in treatment and supervise his reintegration into society.[26] We find no plain error on this ground.

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[22] *Id.*

[23] *Id.*

[24] *See Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972) (requiring an appellate court to independently assess whether a concession of error "is supported by the record on appeal and has legal foundation").

[25] *See Giddings*, 2018 WL 3301624, at *5.

[26] *Id.*

Second, Rosario argues that the condition potentially permits the probation officer to share private information with a wide array of people, including "employers, landlords, neighbors, [and] family members," and that the wording of the condition could be used to obtain information from his doctor, or a counselor Rosario might see for couples counseling, even though such information is unrelated to his rehabilitation or to the protection of the public. But the probation officer's authority is limited by the language of the condition itself, which limits the release of information to those individuals who have an "essential role" in Rosario's supervision and treatment and clarifies what sort of person occupies such an essential role. We agree with Rosario that it would be improper for a probation officer to use this condition to obtain information from Rosario's employer or landlord, or from a medical provider who is treating Rosario for reasons unrelated to his supervision and treatment for his offense, and we do not read the condition as authorizing the exchange of such information. Read in this manner, and in the absence of an objection, we find no plain error.

Accordingly, we strike the phrase "clinicians providing treatment to victims and/or family members" from Special Condition No. 6, but we affirm the remainder of the condition.

Special Condition No. 7: This probation condition requires Rosario to enter and successfully complete any Alaska Department of Corrections-approved program, including but not limited to "cognitive restructuring therapy," if deemed appropriate by the probation officer and sex offender treatment provider. Rosario argues that the meaning of "cognitive restructuring therapy" is unclear and that the condition is overbroad. The condition also requires Rosario to sign releases of information to enable the programs to exchange information with the probation officer and sex offender treatment provider. He argues that this requirement unduly infringes on his privacy.

In the superior court, Rosario objected only that the meaning of "cognitive restructuring therapy" was unclear. Thus, this is the only portion of the condition that Rosario preserved for appellate review.[27]

The meaning of "cognitive restructuring therapy" is indeed unclear from the record, as the superior court approved the condition without making any specific findings about this phrase. We are therefore unable to review the court's decision to include "cognitive restructuring therapy" in the types of Department-approved programs that Rosario's probation officer and sex offender treatment provider may require.[28] We remand for further proceedings on this issue.

Rosario did not raise any other objections to this probation condition in the superior court, and he must therefore show plain error with respect to the remainder of the condition.[29] As we noted earlier, we have previously upheld requirements that defendants complete "other Department-approved programs" against overbreadth challenges.[30] And we have upheld requirements for releases of information against right-to-privacy challenges.[31] Rosario cannot show plain error. We therefore affirm the remainder of Special Condition No. 7.

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[27] *See State v. Ranstead*, 421 P.3d 15, 20-22 (Alaska 2018).

[28] *Cf. Clifton v. State*, 2019 WL 11093436, at *4-5 (Alaska App. Feb. 6, 2019) (unpublished) (vacating a probation condition that lacked any evidentiary support in the record, where the defense attorney objected to the condition and the court failed to make specific findings).

[29] *Ranstead*, 421 P.3d at 23.

[30] *Diorec v. State*, 295 P.3d 409, 414 (Alaska App. 2013).

[31] *See Giddings v. State*, 2018 WL 3301624, at *5 (Alaska App. July 5, 2018) (unpublished).

Conclusion

We STRIKE the phrase "clinicians providing treatment to victims and/or family members" from Special Condition No. 6, and we REMAND for further consideration of Rosario's objection to the phrase "cognitive restructuring therapy" in Special Condition No. 7. With those exceptions, the judgment of the superior court is AFFIRMED.