IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN

STATE OF ALASKA,	FILED in the Trial Courts State of Alaska First District at Ketchikan
Plaintiff,	JUN 17 2015
v.	Clerk of the Trial Courts
JOSHUA J. WODYGA,	By_____Deputy
Defendant.	
	Case No. 1KE-14-132 CR

MEMORANDUM AND ORDER RE: APPLICATION FOR REFERRAL TO THE THREE-JUDGE PANEL

Mr. Wodyga has filed an Application for Referral to the Three-Judge Panel. The State opposes the same. Mr. Wodyga's Application is, for the following reasons, granted.

The pertinent facts, in the court's view, are as follows:

1. The sea cucumber dive fishery is regulated by the State of Alaska, at least with respect to harvesting dates, locations, and limits. A diver participating in the fishery is required to obtain a permit from the State. The State does not otherwise regulate or certify the divers who participate in the fishery or the equipment used in the fishery.

2. The sea cucumber dive fishery in this area is a "cowboy" fishery[1] in the sense that few, if any, of the divers use breathing apparatuses intended by the manufacturer to supply air to a commercial diver, apparently due to the cost (some $10,000)[2] Many, if not most, openly[3] use less expensive ($1,000 - $1,500) modified shop compressors to supply air to a diver via an air hose. Such shop compressors are not designed to be used for this purpose and the manufacturer(s) prominently place related warning labels on the compressors.

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[1] Per Saunya Alloway's trial testimony.
[2] Per Alan Alloway's trial testimony.
[3] Such air compressors are publicly advertised for sale for use in commercial dive fisheries.

3. No evidence was presented at trial of a diver fatality associated with the use of such an air compressor other than the fatality involved in this case.

4. Mr. Wodyga Mr. Wodyga was a commercial dive fisherman on October 8, 2013. He owned and operated his own dive boat, the F/V Ostrich. He had been a commercial dive fisherman for a few years prior to 2013. He became a certified diver in 2011. He was an excellent student, in and out of the water. He took good care of his dive gear.[4] He used a shop compressor for his air supply. His compressor had a prominent warning label stating: "Danger! NEVER breathe compressed air, it can contain carbon monoxide or other contaminants. Will cause serious injury or death." He understood the importance of the air filter on the compressor. He had not properly maintained the air filter (cleaning and using vegetable oil). He had not, prior to October 8, 2013, had any problems using the shop compressor to supply air to a diver.

5. Levi Adams arrived in Ketchikan for an adventure a short time before October 8, 2013. He had qualified for a dive certification in another state but the actual certification card had not yet been issued. He looked for work in the commercial fishing industry. He handed out a business card in which he identified himself as "Skiff Man & Diver" "with experience" and "w/gear".

6. Mr. Wodyga agreed to have Mr. Adams be a second diver on the F/V Ostrich. Mr. Adams obtained the necessary State permit. Mr. Wodyga knew that Mr. Adams was certified but he also knew that Mr. Adams was an inexperienced diver, at least in Southeast Alaska. He took Mr. Adams on something of a training or acclimation dive on October 7, 2013, without incident.

7. Mr. Wodyga and Mr. Adams participated in the sea cucumber dive fishery from the F/V Ostrich on October 8, 2013. Mr. Wodyga allowed Mr. Adams to use his personal (better) dive gear which included an alternate air bottle that to be used if a problem developed with the air from the shop compressor. Mr. Wodyga had a dive tender, Wendy Widmyer, on board. Mr. Wodyga and Mr. Adams were both breathing air from the shop compressor. Mr. Wodyga surfaced when he realized he was receiving bad air and getting dizzy. Ms. Widmyer had not noticed any problems with the shop compressor. Mr. Wodyga realized after being pulled on board that Mr. Adams may be in trouble. He and Ms. Widmyer pulled Mr. Adams to the boat. Mr. Adams was unconscious. His respirator was out of his mouth. Ms. Widymer performed CPR. The Coast Guard (USCG) was contacted. The South Tongass Fire Department

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[4] Per Saunya Alloway's trial testimony.

(STFD) was contacted. STFD Lt. Rachel Scanlon responded. She arrived a few minutes later. The USCG was already on scene. Efforts to revive Mr. Adams were unsuccessful.

8. The State Medical Examiner, Dr. Gary Zientek, determined that carbon monoxide poisoning and drowning were the causes of Mr. Adams's death.

9. The State charged Mr. Wodyga with Manslaughter and Criminally Negligent Homicide. He pled not guilty to both counts. The jury trial was held on January 12 – 16, 2015. The jury found Mr. Wodyga not guilty on the Manslaughter charge and guilty on the Criminally Negligent Homicide charge.

10. Criminally Negligent Homicide is a Class B felony offense. The applicable presumptive jail term is 1-3 years.

11. Mr. Wodyga does not believe that he did anything wrong and that he was wrongfully convicted. He has stated as much on social media. It appears that he has some difficulty in general accepting responsibility for his actions as evidenced by his blaming a former employer for his being fired from that job and his mental health care provider for his not completing the related program.

12. Mr. Wodyga committed a Burglary 2nd Degree on February 21, 2000, shortly after he turned 18 years of age, when he broke into a grocery store and stole cigarettes. He received a Suspended Imposition of Sentence (SIS). His probation was revoked in September 2002, and 15 days were imposed, but he maintained his SIS. The remainder of his prior criminal record consists of a MICS 6th Degree conviction in 2009 for which he was fined $100. He has no juvenile record.

13. Mr. Wodyga submitted a number of letters for consideration at sentencing from his family members, friends, and employer. They attest that he is a family man who is caring, helpful, generous, and well-thought of by his peers. He is married and has children. He is the primary financial supporter for his family. He has the strong support of his family. He generally has a good employment history. He performed well academically in high school and subsequently had received vocational certifications.

14. Mr. Wodyga had some substance abuse issues and some mental health issues when he was younger. The record reflects that these are not present concerns.

15. Mr. Wodyga has not expressed any empathy for Mr. Adams's family in court or in his court filings.

16. Mr. Adams's family has been devastated by his death. He was a beloved son and brother, a young man with a sense of self who loved the outdoors and had an adventurous spirit. He appears to have personified the statement by J.R.R. Tolkien that "not all who wander are lost." His family already has had to deal with the catastrophic injury to and later death of Mr. Adams's older brother several years ago, and a very serious injury subsequently sustained by his sister while serving our country in the military.

17. Mr. Wodyga proposed the mitigator set forth at AS 12.55.155(d)(9): "the conduct constituting the offense was among the least serious conduct included in the definition of the offense." The court found that it was a close question but that this mitigator had not been proven by clear and convincing evidence. The court had difficulty conceptually applying the mitigator given the relative infrequency of such cases and the relative lack of "comparables."[5]

The court begins its analysis by recognizing that: "It is the legislature, not the judiciary, which establishes the punishment or range of punishments for a particular offense"[6]; "The presumptive term for an offense represents the legislature's assessment of the appropriate sentence for a typical offender within that category"[7]; and, the availability of the Three-Judge Sentencing Panel ("Panel") as a "safety-valve" does "not authorize sentencing judges to disregard the legislature's assessment concerning the relative seriousness of the crime or the general appropriateness of the prescribed penalty."[8]

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[5] The court must compare Mr. Wodyga's conduct in committing the Criminally Negligent Homicide with that of others committing this offense. ***See, Aveoganna v. State***, 757 P.2d 75, 77 (Alaska App. 1988). "Conduct" in this context "includes the defendant's mental state and motive, as well as the consequences (or potential consequences) of the defendant's conduct." ***Joseph v. State***, 315 P.3d 678, 684 (Alaska App. 2013) (citations omitted).

[6] ***Beltz v. State***, 980 P.2d 474, 480 (Alaska App. 1999). ***See also, Scholes v. State***, 274 P.3d 496, 503 (Alaska App. 2012) and ***Dancer v. State***, 715 P.2d 1174, 1179-80 (Alaska App. 1986).

[7] ***Beltz***, 890 P.2d at 480.

[8] ***Beltz***, 890 P.2d at 480. ***See also, Moore v. State***, 262 P.3d 217, 221 (Alaska App. 2011).

But the court must also recognize that the Alaska Court of Appeals has counseled that if the question of referring a case to the Panel is a close one, "any doubt on the part of the superior court should be resolved in favor of referring the case to the three-judge panel."[9]

A trial court can refer a case to the Panel under one or both of two legal theories. First, that it would be manifestly unjust to sentence a defendant within the presumptive sentencing range, whether or not adjusted for aggravators or mitigators.[10] Second, that manifest injustice would result from failure to consider an aggravating or mitigating factor not listed in AS 12.55.155.[11] The defendant bears the burden of proving either or both theories by clear and convincing evidence.[12] Mr. Wodyga apparently is proceeding under both theories.[13]

"Manifest injustice" is a subjective standard.[14] It has been described as: meaning a sentence which is "manifestly too harsh";[15] "plainly unfair";[16] "shocks the conscience";[17] and which involves "obvious unfairness."[18]

With regards to the first theory, the fairness of the presumptive term is the focal point. The proper procedure is for the court to first determine the presumptive term after applying any applicable aggravators and mitigators and then to decide if the adjusted presumptive term would be manifestly unjust "when compared with a sentence the court might

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[9] ***Daniels v. State***, 339 P.3d 1027, 1033 (Alaska App. 2014) (citing ***Harapat v. State***, 174 P.3d 249, 255-56 (Alaska App. 2007) and ***Lloyd v. State***, 672 P.2d 152, 155 (Alaska App. 1983)).

[10] AS 12.55.165(a). Statutory aggravating factors are set forth at AS 12.55.155(c) and statutory mitigating factors at AS 12.55.155(d).

[11] AS 12.55.165(a).

[12] AS 12.55.165(a).

[13] The court notes that it also has the authority to *sua sponte* refer a case to the Panel.

[14] ***Smith***, 711 P.2d 561, 568-69 (Alaska App. 1985).

[15] ***Scholes***, 274 P.3d at 500.

[16] ***Smith***, 711 P.2d at 569; ***Knipe v. State***, 305 P.3d 359, 363 (Alaska App. 2013).

[17] ***Smith***, 711 P.2d at 568.

deem ideally suitable in the absence of presumptive sentencing."[19] "The question to be answered is whether [the] lowest allowed sentence would still be clearly mistaken under the sentencing criteria first announced . . . in ***State v. Chaney*** (477 P.2d 441 (1970)) and now codified in AS 12.55.005.[20] A court, in order to make such a finding, must be able to "articulate specific circumstances that make the defendant significantly different from a typical offender within that category or that make the defendant's conduct significantly different from a typical offense."[21]

With regards to the second theory, the focus is not on whether sentencing within the presumptive range would be unjust but rather on whether the failure to consider a non-statutory mitigator would be manifestly unjust.[22] Under this theory, the "sentencing court must evaluate the importance of the non-statutory factor in light of the traditional sentencing goals: rehabilitation, general and specific deterrence, protection of the public, and community condemnation or reaffirmation of societal norms."[23]

The Alaska Appellate Courts have recognized that unusually favorable or exceptional prospects for rehabilitation as a non-statutory mitigator. A defendant pursuing this theory must prove by clear and convincing evidence that the defendant will be rehabilitated.[24]

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[18] ***Lloyd***, 672 P.2d at 154; ***Smith***, 711 P.2d at 568; and ***Totemoff v. State***, 739 P.2d 769, 775 (Alaska App. 1987).
[19] ***Smith***, 711 P.2d at 569.
[20] ***Shinault v. State***, 258 P.3d 848, 851 (Alaska App. 2011) (quoting ***Harapat***, 174 P.3d at 254).
[21] ***Beltz***, 890 P.2d at 480. ***See also, Knipe***, 305 P.3d at 363; ***Smith***, 258 P.3d 913, 920-21 (Alaska App. 2011); ***Moore***, 262 P.3d at 221; ***Dancer***, 715 P.2d at 1177; and, ***Aveoganna,***, 757 P.2d at 77.
[22] ***Smith***, 711 P.2d at 569.
[23] ***Smith***, 711 P.3d at 569 (Citing ***State v. Chaney***, 477 P.2d 441, 443-44 (Alaska 1970) and AS 12.55.005).
[24] ***Boerma v. State***, 843 P.2d 1246, 1248 (Alaska App. 1992).

This means proving that the defendant "can adequately be treated in the community and need not be incarcerated for the full presumptive term in order to prevent future criminal activity."[25]

> Such a prediction of successful treatment and non-recidivism should only be made when the sentencing court is reasonably satisfied both that it knows why a particular crime was committed and that the conditions leading to the criminal act will not recur – either because the factors that led the defendant to commit the crime are readily correctable or because the defendant's criminal conduct resulted from unusual environmental stresses unlikely ever to recur.[26]

In assessing a defendant's rehabilitative prospects the factors the court may consider include:

1. The defendant's prior criminal record (adult and juvenile)
2. The defendant's employment history
3. Whether the defendant did well in school
4. Whether the defendant is or was engaged in extracurricular activities
5. Whether the defendant has strong family ties
6. Whether the defendant has continuing family support
7. Whether the defendant has received a favorable PSR evaluation
8. Whether the defendant has expressed remorse
9. Whether the defendant is youthful
10. Whether the defendant has engaged in substance abuse (if an issue)[27]

The court may consider a defendant's continued denial of the offense, not taking responsibility for his or her criminal conduct, and/or not explaining the conduct.[28] The court is not required to find that a defendant has unusually favorable or exceptional prospects for rehabilitation even if the defendant expresses remorse, has better than average prospects for rehabilitation, and has no significant need for rehabilitation.[29]

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[25] ***Smith***, 258 P.3d at 917 (quoting ***Beltz***, 980 P.2d at 481, quoting ***Lepley v. State***, 807 P.2d 1095, 1100 (Alaska App. 1991)).

[26] ***Smith***, 258 P.3d at 917 (quoting ***Beltz***, 980 P.2d at 481).

[27] ***See, Smith***, 711 P.2d at 570; ***Daniels***, 339 P.3d at 1030-31.

[28] ***See, Beltz***, 980 P.2d at 481; ***Manrique v. State***, 177 P.3d 1188, 1193 (Alaska App. 2008).

[29] ***See, Silvera v. State***, 244 P.3d 1138, 1149-50 (Alaska App. 2010); ***Lepley***, 807 P.2d at 1099.

The court finds that Mr. Wodyga has shown by clear and convincing evidence that he has unusually favorable prospects for rehabilitation for the following reasons:

1. The court is reasonably satisfied that it knows why this crime was committed. Mr. Wodyga used a modified shop compressor to supply air to Mr. Adams and failed to adequately maintain the related filter. He followed something of an informal industry norm, at least among a significant part of the area dive fishery fleet with respect to the former.

2. The court is reasonably satisfied that the conditions leading to his criminal act will not occur. It is highly unlikely that the same conditions would recur because the sentencing court almost certainly will forfeit the shop compressor at issue and order (including as a probation condition) that he not use such a compressor to supply air for human consumption. Moreover, it is highly unlikely that, if permitted, he engage in the same conduct again given what happened in this case and the personal risk he would be running if he did.

3. This is not a case in which the court could or would order any rehabilitative program. Mr. Wodyga's conduct did not involve anger issues, mental health issues, or substance abuse issues. This is not a case that involved cognitive problems or which raises a concern about criminal thinking such that related therapy may be in order.

4. Mr. Wodyga has no juvenile record. He has a relatively minimal adult record. He committed the Burglary shortly after turning 18 but apparently managed to keep his SIS, despite one probation revocation. And he has the B misdemeanor MICS 6 conviction from 2009.

5. Mr. Wodyga did well while in school. He has obtained vocational certifications.

6. Mr. Wodyga has strong family ties and support.

7. Mr. Wodyga has strong support from his friends and employer.

8. Mr. Wodyga has a generally stable employment history. He is the main financial support for his family.

The court recognizes that Mr. Wodyga has not accepted responsibility for his conduct. This does not change the court's view for two reasons. First, it appears he is contemplating an appeal. Second, this is a negligence case involving a unique set of

circumstances – the use of a shop compressor in generally the same manner as many other participants in the fishery, there is no evidence he had any problems in the past with the air from the compressor, there is no evidence of a similar problem having occurred elsewhere in the fleet, he subjected himself to the very same unperceived risk that Mr. Adams was subjected to, and, in his view, he had provided Mr. Adams with a portable air supply that could have been used when the problem developed.

The court also recognizes that Mr. Wodyga has not expressed remorse with respect to the ultimate result that, regardless of whether he believes he is legally at fault, Mr. Adams died. This is unfortunate and likely does reveal something negative about Mr. Wodyga as a person. But the lack of remorse does not diminish his rehabilitative prospects given the factors and circumstances referenced above. Put another way, the lack of remorse is highly unlikely to contribute to future criminal conduct and does not appear to reflect that there is a heightened risk that he will engage in future criminal conduct.

The court finds that a closer question is presented with respect to the first theory. The court finds that Mr. Wodyga has shown by clear and convincing evidence that a referral to the Panel should also be made on this basis for the following reasons:

1. It is somewhat difficult to assess whether Mr. Wodyga is a typical or atypical offender for this offense due to the relative rarity of such cases and the wide variety of conduct that could result in a conviction for the same. It is the court's recollection that at sentencing the parties argued that the typical Criminally Negligent Homicide case involves a defendant who was an impaired driver. If that is true, then Mr. Wodyga's is an atypical offender for this offense. He did not abuse a substance, alcohol or anything else. He did not engage in conduct that, in and of itself, was illegal, whether or not another person was injured or died (i.e. DUI).[30]

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[30] The court does not that the USCG apparently imposed an administrative fine of $7,000 for safety-related violations, per the PSR.

And his conduct was significantly different than that involved in the typical such offense.

2. Also, Mr. Wodyga's conduct is significantly different from that involved in the typical such offense inasmuch as in using the modified shop compressor to provide air to Mr. Adams, the primary causal factor[31] in his being found guilty it appears, he did what many others in the commercial dive fishery in the area were doing, apparently without similar problems having occurred (although it generally recognized that commercial diving is a dangerous occupation). And he subjected himself to the same unperceived risk, actually to a higher risk as he gave his air canister to Mr. Adams.

3. Focusing on the ***Chaney*** sentencing criteria:

   a. Isolation is not a primary sentencing goal. Mr. Wodyga does not need to be incarcerated in order to protect the public from him.

   b. A sentence of one year or more to serve is not necessary for Mr. Wodyga's rehabilitation. This is not the type of case in which a defendant would be ordered to participate in and successfully complete a rehabilitative program, for example a batterer's intervention program, a sex offender treatment program, a mental health treatment program, or a substance abuse treatment program.

   c. Individual deterrence may be an important sentencing goal in this case but it appears that it could be primarily achieved with suspended jail time and that a sentence of one or more years to serve would not be necessary to effectively serve this goal.

   d. General deterrence is likely entitled to more weight in this case than in most as it appears that a message must be sent to the other dive boat operators using such modified shop compressors that such use is improper, dangerous, and potentially criminal.[32] But it appears that that a sentence in

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[31] The air provided by the shop compressor was saturated with carbon monoxide and that was a causal factor in Mr. Adams's death. The maintenance of the compressor's filter, or lack thereof, appears to have been a substantial factor in allowing the carbon monoxide to enter the air hose. The court is here commenting on the use of the shop compressor.

[32] The court notes that it is not aware of any effort by the State of Alaska, or any other government, to regulate the equipment used in the commercial dive fisheries.

this case of a year or more of jail time is not necessary to serve that sentencing goal. A felony conviction and a lesser sentence would appear to suffice.

5. With regards to community condemnation, the community generally strongly condemns any conduct, including negligent conduct, which results in the loss of a life. And there is a need to reaffirm a societal norm that people should not act negligently, particularly when the scope of the risk includes serious injury and death. These are the sentencing criteria which may most merit the imposition of a sentence within the presumptive range. But the court must be mindful of the circumstances surrounding the negligence, discussed above, and it is not clear that imposition of at least one year of jail time is necessary to serve this goal.[33]

Given the above, the court is referring this case to the Panel on both theories. The Panel will schedule a hearing and notify the parties of the same in the relatively near future.

IT IS SO ORDERED.

Dated at Ketchikan, Alaska this 17th day of June 2015.

Trevor N. Stephens
Superior Court Judge

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[33] The court noted during the sentencing, and again notes, that no jail sentence the court could impose, even 3 years (the most that the court could impose on Mr. Wodyga given the lack of aggravators) or the maximum possible sentence of 10 years that could be imposed on a defendant who committed this offense and had prior qualifying felony convictions and/or against whom aggravators had been proven, or even the maximum 99 year sentence that could be imposed on a defendant convicted of Murder in the 1st Degree or Murder in the 2nd Degree would be in any way commensurate to the value of Mr. Adams's life and that no lesser sentence would detract from or reduce the value of his life.