

ALASKA SUPERIOR COURT

THREE-JUDGE SENTENCING PANEL

DECISION SUMMARY

Hearing: February 23, 2007 in Anchorage

Case No. 3AN-02-3227 CR
Defendant: Alan LaPage

Charge: Sexual Assault First Degree
AS11.41.410(a)(1) and/or
(a)(4)

Referred by: Judge Wolverton

Panel: Judge Larry Zervos
Judge Michael Jeffery
Judge Eric Smith

BACKGROUND

The Anchorage Grand Jury charged Alan LaPage with four counts of Sexual Assault in the First Degree and two counts of Sexual Assault in the Second Degree. A jury found Mr. LaPage not guilty on all counts except Count Two. Count Two alleged that Mr. LaPage, when he was working as a healthcare worker and treating a young man, engaged in fellatio with the man without his consent or at a time when the man was mentally incapable of consenting.

At sentencing, Mr. LaPage asked Judge Michael Wolverton to find that mitigating factor AS 12.55.155(d)(12) applied. This mitigator required the judge to find by clear and convincing evidence that the facts surrounding this offense and any previous offenses established that the harm caused by the defendant's conduct was consistently minor. Mr. LaPage also asked Judge Wolverton to refer this case to the statewide three-judge sentencing panel because he argued manifest injustice would occur if a non-statutory mitigator was not considered. Judge Wolverton entered no finding that the statutory mitigator applied, but he did refer the case to the three-judge panel.

FINDINGS AND CONCLUSION

The statewide three-judge sentencing panel met in Anchorage on February 23, 2007. After listening to the victim, his mother and the arguments of counsel, the panel made findings and conclusions on three issues.

First, the panel agreed with Judge Wolverton's implicit finding that Mr. LaPage did not prove that mitigating factor (d)(12) applied to his case. Although Mr. LaPage does not have any prior criminal convictions, the panel

07 MAR 16 AM 4:11 PM
FILED

found that the harm caused by this offense was not minor. The defendant was working as a healthcare worker treating a young man who had suffered a brain injury in an auto accident. The young man went into a coma and was recovering slowly from his condition when Mr. LaPage had sex with him without his consent and while treating him at a hospital. Society expects that health care providers will not take advantage of ill patients. Most people at some point in their lives will require intimate health care treatment, and for treatment to be effective, patients must trust their care providers. Mr. LaPage's act constituted a breach of the trust necessary for effective health care and for any patient's peace of mind. Also the young man and his mother told the panel that the events surrounding the assault have caused and will cause him continuing emotional difficulty.

The second issue addressed by the panel is whether Mr. LaPage had proven the factors necessary to establish the non-statutory mitigator of extraordinary prospects for rehabilitation. Generally, this non-statutory mitigator requires the panel to evaluate five factors.¹

An offender asserting that he has extraordinary prospects for rehabilitation must be a first felony offender. In addition, the offense must be out-of-character for the offender. These two factors fit Mr. LaPage's circumstances. But the panel also must be able to understand what led to the offense. Because Mr. LaPage has denied any wrongdoing, despite the jury's verdict and his admissions, there is no way to understand what motivated Mr. LaPage other than sexual exploitation or to understand why he would breach his professional standards and take advantage of a patient under his care.

The panel must also be able to find that the criminal conduct is unlikely to be repeated. The panel cannot make this finding. Mr. LaPage has made no effort to undergo treatment, he has not obtained a psychological evaluation to explain what would be needed to avoid future difficulties, and he has not provided any explanation about why this crime occurred or what motivated him. The only information made available to the panel is his denial that a crime occurred and that he passed a lie detector test. But Mr. LaPage admitted to the victim during a surreptitiously recorded conversation that he sexually assaulted the victim and the jury found that admission sufficiently compelling to convict him of this crime. Under these circumstances, Mr. LaPage's denials and the results of the lie detector test are not very reassuring and give no support for a finding that this crime is unlikely to recur.

¹ Boerma v. State, 843 P.2d 1246, 1248 (Alaska App. 1992); Kirby v. State, 748 P.2d. 757,766 (Alaska App. 1988); Smith v. State, 711 P.2d 561, 569-572 (Alaska App. 1985).

The fifth factor requires the panel to conclude that rehabilitation is likely to occur in less than the presumptive term. Given Mr. LaPage's crime free and productive past, and the large number of family and friends who support him, it may be that rehabilitation could occur in less time than the presumptive term. But Mr. LaPage's denial raises significant questions about the prospect of rehabilitation.

For these reasons, the panel concludes that the non-statutory mitigator of extraordinary prospects for rehabilitation has not been established.

The last issue raised by Mr. LaPage is that the presumptive term, eight years, is manifestly unjust. This argument is primarily based on Mr. LaPage's assertions that he is factually innocent. But as mentioned earlier, there is a jury verdict based at least in part on Mr. LaPage's admission made during a surreptitiously recorded conversation. It is not for the panel to second guess the jury's decision.

A healthcare worker, employed in a hospital, sexually assaulted a brain-damaged patient just recovering from a coma. Under these facts, an 8-year presumptive term is not "obviously unfair."²

CONCLUSION

In referring this case to the statewide three-judge panel, Judge Wolverton complied with the directive of the court of appeals to resolve any doubt about a non-statutory mitigator or manifest injustice by referring the case to the panel.³ But after due consideration, the panel concludes that the non-statutory mitigator does not apply and manifest injustice, under the facts of this case, will not occur. Therefore the panel refers the case back to Judge Wolverton for sentencing.

Distribution to:

Judge Michael Wolverton
Judge Eric Smith
Judge Michael Jeffery
Judge Stephanie Joannides
Judge Michael Thompson
Superior Court Judges

² Lloyd v. State, 672 P.2d 152, 154 (Alaska App. 1983).

³ Id. at 155.