IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff,

vs.

SCOTT BOMBARD,

Defendant.

Case No. 3AN-06-2953 CR

ORDER FORWARDING THIS CASE TO A THREE-JUDGE SENTENCING PANEL

On March 3, 2008 Defendant Scott Bombard plead no contest to manslaughter in connection with the shooting death of his friend, Dustin Colgrove. His sentencing hearing was held on July 11, 2008. Dustin Colgrove's aunt, Susan Mays; parents, Barton and Tanya Colgrove; and sister, Heather Colgrove presented victim impact statements. Two letters from Mrs. Howard (Linda) Colgrove were read into the record by the court. The defense presented one witness, David Sperbeck, PhD. The court also had before it for sentencing a presentence report with addendums, including several supporting letters written on behalf of Defendant, and exhibits, which included police reports, statements, transcripts and a psychological report and update from Dr. Sperbeck. . For the reasons set forth below the court GRANTS Bombard's motion and refers his sentencing to the three judge panel pursuant to AS 12.55.175. This order supplements the court's findings on record.

Facts and Proceedings

On March 24, 2006, 16-year-old Scott Bombard and 17-year-old Dustin Colgrove were at a trailer belonging to Scott's mother Leanne Abel. Dustin and Scott were best of friends. They were planning to join the Marines together after high school graduation in the spring of 2007. Dustin and Scott were drinking beer purchased for them by Ms. Abel. When another friend of Dustin and Scott's, Christopher Dushkin, arrived at the trailer at approximately 9:30 p.m., Dustin and Scott "were walking funny... (and) had a slight stagger".[1] Dushkin, then 17 years old, drank two beers prior to the shooting. There had been no arguments or disagreements between any of the participants.

At about 11:00 p.m. Scott called Dustin and Christopher into his room. At some point Christopher playfully called Scott a "nigger"[2] and Scott pulled a .44 magnum pistol from the side of his bed. Scott's mother, Leanne Abel, had recently purchased some ammunition for Scott. The .44 had a single round in the chamber. Scott pointed the pistol at Christopher. Dustin said something to Scott and Scott then pointed the pistol at Dustin. Christopher felt something "wasn't right", because when the boys had pointed guns at each other similarly in the past, they always checked the chamber to see if it was loaded.[3] Scott failed to do so this time. Dustin reached out and hit Scott's arm to push the gun away and the cocked gun fired, hitting Dustin in the head. Scott immediately dropped the pistol.

The ensuing minutes are unclear. Scott told Christopher to leave, conveyed the situation to his mother in some fashion and Ms. Abel called 911. The 911 tape clearly

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[1] Grand Jury testimony of Christopher Duskin at p. 26.

[2] Since Christopher had moved in with Scott and his mom, the boys had jokingly used this term in playful banter with each other. GJ Transcript, p. 31. However insulting and despicable the court finds the use of this term, the boys did not use it towards each other in an offensive manner.

displays a confused mother and a distraught Scott talking to the dispatcher. He was in obvious despair but immediately took responsibility for his actions.

At sentencing, the State urged the court to find 3 aggravators; AS 12.55155(c)(4) – Use of a dangerous instrument during commission of an offense; 12.55.155 (c)(6)- 3 0r more people endangered during the offense; and 12.55.155(c)(10)-Offense was one of the most serious envisioned by the statute. Because the court used Bombard's use of a firearm as a "special circumstance" increasing his presumptive term from 5-8 years to 7-11 years, the court did not find the 12.55.155(c)(4) aggravator. The court did not find that the State proved by clear and convincing evidence that either the (c)(6) or (c)(10) applied as well.

Defendant urged the court to find 2 mitigators applicable; AS 12.55.155(d)(4)- Conduct of a youthful defendant was substantially influenced by a more mature person; and, 12.55.155(d)(8)- Offense was one of the least serious envisioned by the statute. While the court found that Ms. Abel was a "horrible parent", the court did not find her conduct substantially influenced Bombard's decisions that night. Certainly, the court did not find that Bombard's conduct was one of the least serious envisioned by the statute.

Without finding any aggravators or mitigators, the court was required to sentence Bombard to a term between 7-11 years, without the possibility of discretionary parole. Bombard is a first offender and was 18 years old at the sentencing hearing.

Legal Standard

AS 12.55.165 states:

> (a) If the defendant is subject to sentencing under AS 12.55.125 (c), (d), (e), or (i) and the court finds by clear and convincing evidence that manifest injustice would result from failure to consider relevant

[3] GJ Transcript, p. 30.

> aggravating or mitigating factors not specifically included in AS 12.55.155 or from imposition of a sentence within the presumptive range, whether or not adjusted for aggravating or mitigating factors, the court shall enter findings and conclusions and cause a record of the proceedings to be transmitted to a three-judge panel for sentencing under AS 12.55.175.

Bombard argues that the court should grant an order forwarding the case to a three-judge sentencing panel because manifest injustice would result from both a "failure to consider relevant non-statutory mitigating factors" and from the "imposition of sentence within the presumptive range" in this case.

Pursuant to AS 12.55.125 (c), the court may refer a case to the three judge panel under two separate basis: first, where manifest injustice would result from failure to consider relevant, non-statutory aggravating or mitigating factors in sentencing; and, second, where manifest injustice would result from imposition of a presumptive sentence regardless of whether or not statutory aggravating and mitigating factors had been adjusted for. The court is guided by the case of *Harapat v. State*, 174 P.3d 249 (Alaska App. 2007).

It is defendant's burden to show that one of these two forms of manifest injustice exists.

FINDINGS AND CONCLUSIONS

Bombard's Extraordinary Potential for Rehabilitation

Scott Bombard was 16 years of age with no juvenile record at the time of this accidental shooting. His actions were clearly reckless, but not malicious. There is no evidence of any ill feelings between him and the victim. To the contrary, Bombard and the victim were best of friends. They attended school together since their middle school years. They were in Junior ROTC together. Both planned to join the Marine Corp upon

graduation. Bombard accepted responsibility for the shooting and displayed deep regret and remorse from the moment he spoke to the 911 dispatch operator. He remains genuinely remorseful.

Bombard was seen by Dr. David Sperbeck, a forensic psychologist well known to the court in part for his almost quarter century consulting with the Department of Corrections. He completed a comprehensive forensic psychological evaluation dated September 23, 2006. Dr. Sperbeck re-examined Bombard on February 5, 2008 and prepared a follow-up assessment on April 15, 2008. Most importantly to this court, although there is some "evidence of substance abuse proneness" (in remission at the time of the second evaluation), there is "no evidence of significant emotional or personality psychopathology" to interfere with Dr. Sperbeck's finding that Bombard **"appears to have an extraordinary potential for rehabilitation".** For the reasons stated on page 4 of Dr. Sperbeck's report dated April 15, 2008, the court agrees. The court is mindful of Dr. Sperbeck's opinion that there are few, or none, rehabilitative programs available to Bombard while incarcerated.

The court is also positively influenced by the April 22, 2008 letter of Ms. Gina Pastos, principal of the Continuation Program of the Anchorage School District. She has known Bombard for 3 years, pre and post shooting, and eloquently describes his transformation, lack of "deviant mind-set", and prospects for rehabilitation.

The court concludes that Bombard has established by clear and convincing evidence that he has unusually strong prospects for rehabilitation, a non-statutory mitigator that this court cannot consider in fashioning a sentence for Bombard- only the three judge panel can.

When evaluating this case in light of the in light of the *Chaney* sentencing criteria, this court concludes that adjustment of the presumptive term is required. Bombard has no history of criminal conduct. This incident appears to be out of character. There is therefore no need to isolate him further to deter future criminal conduct. His psychological evaluation, his actions since the shooting, and the support reflected letters attached to the presentence report suggest that he will be a productive member of the community when not incarcerated.

While the court has emphasized Bombard's rehabilitative prospects, the court does not ignore the need for community condemnation and deterrence of others. This shooting was the third time in approximately 6 months that young people, substances and guns led to horrific results. Community condemnation of assault can be affirmed with a sentence equivalent or even substantially greater to the presumptive term, but with a period of time suspended below the presumptive term or, at least, the granting of eligibility for discretionary parole. To the extent that societal condemnation of assault needs to be affirmed by a sentence in Bombard's case, it is this court's belief that this can be accomplished by a suspended term of imprisonment. In this court's view, seven years of incarceration or any greater term would deter the prospects of Bombard returning to a productive life. It does not appear to this court that Bombard needs to be incarcerated either to protect the public or to deter him from criminal conduct in the future. This court finds Bombard is an excellent candidate for supervised probation or parole. Manifest injustice will result if Bombard's unusually positive prospects for rehabilitation are not allowed to mitigate the presumptive terms of the imprisonment he faces.

CONCLUSION

Bombard's actions led to a tragic, irreplaceable loss for the Colgrove family. The court does not believe that defendant would even be on the court's radar if he had the advantage of being raised by the Colgroves rather than his own highly dysfunctional family. The fact that Bombard does use his upbringing as an excuse (it is not), is to his credit. He has demonstrated substantial improvement while in the structured home of his grandparents, which bodes well for his success as a probationer/parolee.

For the reasons stated herein, and stated previously on the record, the court finds, by clear and convincing evidence, that Defendant Bombard has an extraordinary potential for rehabilitation and that it would be clearly mistaken to impose the lowest available sentence on the defendant. This case will be referred to the three judge sentencing panel.

ENTERED this 16th day of July, 2008, in Anchorage, Alaska.

Hon. Patrick J. McKay
Judge of the Superior Court

I certify that on 7.16.08
a copy of the above was mailed to each of the following at their addresses of record:
DAO Goodwin/B. Doherty
K. Nixon/Administrative Assistant