IN THE SUPREME COURT OF THE STATE OF ALASKA

KELLEY MAVES, Appellant, vs. STATE OF ALASKA, DEPARTMENT OF PUBLIC SAFETY, Appellee,	)	S. Ct. Nos. S-17492

Prior Appeal No. S-16460/16470
Trial Ct. No. 3AN-15-08842CI

ADMINISTRATIVE APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT, AT ANCHORAGE
THE HONORABLE ERIC AARSETH, JUDGE

REPLY BRIEF

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Meredith Montgomery, Clerk

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Deputy Clerk

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Alaska Administrative Code
13 AAC 09.900(2) (1995)

(2) "conviction" means that an adult, or a juvenile tried as an adult under AS 47.10 or a similar procedure in another jurisdiction, has entered a plea of guilty or no contest to, or has been found guilty by a court or jury of, a criminal offense, whether or not the judgment was thereafter set aside under AS 12.55.085 or a similar procedure in another jurisdiction, or was the subject of a pardon or other executive clemency, but does not include a judgment that has been reversed or vacated by a court due to motion, appellate action, petition for writ of habeas corpus, or application for post-conviction relief under the Alaska Rules of Criminal Procedure or similar procedures in another jurisdiction;

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Alaska Statute
Section 12.55.085

Suspending imposition of sentence.

(a) Except as provided in (f) of this section, if it appears that there are circumstances in mitigation of the punishment, or that the ends of justice will be served, the court may, in its discretion, suspend the imposition of sentence and may direct that the suspension continue for a period of time, not exceeding the maximum term of sentence that may be imposed or a period of one year, whichever is greater, and upon the terms and conditions that the court determines, and shall place the person on probation, under the charge and supervision of the probation officer of the court during the suspension.

(b) At any time during the probationary term of the person released on probation, a probation officer may, without warrant or other process, rearrest the person so placed in the officer's care and bring the person before the court, or the court may, in its discretion, issue a warrant for the rearrest of the person. The court may revoke and terminate the probation if the interests of justice require, and if the court, in its judgment, has reason to believe that the person placed upon probation is

(1) violating the conditions of probation;

(2) engaging in criminal practices; or

(3) violating an order of the court to participate in or comply with the treatment plan of a rehabilitation program under AS 12.55.015(a)(10).

(c) Upon the revocation and termination of the probation, the court may pronounce sentence at any time within the maximum probation period authorized by this section, subject to the limitation specified in AS 12.55.086(c).

(d) The court may at any time during the period of probation revoke or modify its order of suspension of imposition of sentence. It may at any time, when the ends of justice will be served, and when the good conduct and reform of the person held on probation warrant it,

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Alaska Statute
Section 12.55.085, cont:

terminate the period of probation and discharge the person held. If the court has not revoked the order of probation and pronounced sentence, the defendant shall, at the end of the term of probation, be discharged by the court.

(e) Upon the discharge by the court without imposition of sentence, the court may set aside the conviction and issue to the person a certificate to that effect.

(f) The court may not suspend the imposition of sentence of a person who

(1) is convicted of a violation of AS 11.41.100 – 11.41.220, 11.41.260 – 11.41.320, 11.41.360 – 11.41.370, 11.41.410 – 11.41.530, AS 11.46.400, AS 11.61.125 – 11.61.128, or AS 11.66.110 – 11.66.135;

(2) uses a firearm in the commission of the offense for which the person is convicted; or

(3) is convicted of a violation of AS 11.41.230 – 11.41.250 or a felony and the person has one or more prior convictions for a misdemeanor violation of AS 11.41 or for a felony or for a violation of a law in this or another jurisdiction having similar elements to an offense defined as a misdemeanor in AS 11.41 or as a felony in this state; for the purposes of this paragraph, a person shall be considered to have a prior conviction even if that conviction has been set aside under (e) of this section or under the equivalent provision of the laws of another jurisdiction.

Colo. Rev. Stat.
§ 16-7-403
(1) In any case in which the defendant has entered a plea of guilty, the court accepting the plea has the power, with the written consent of the defendant and his attorney of record and the district attorney, to continue the case for a period not to exceed four years from the date of entry of a plea to a felony or two years from the date of entry of a plea to a misdemeanor, or petty offense, or traffic offense for the purpose of entering judgment

Colo. Rev. Stat.
§ 16-7-403, Cont.

and sentence upon such plea of guilty; except that such period may be extended for an additional time up to one hundred eighty days if the failure to pay restitution is the sole condition of supervision which has not been fulfilled, because of inability to pay, and the defendant has shown a future ability to pay. During such time, the court may place the defendant under the supervision of the probation department.

(2) Prior to entry of a plea of guilty to be followed by deferred judgment and sentence, the district attorney, in the course of plea discussion as provided in sections 16-7-301 and 16-7-302, is authorized to enter into a written stipulation, to be signed by the defendant, the defendant's attorney of record, and the district attorney, under which the defendant is obligated to adhere to such stipulation. The conditions imposed in the stipulation shall be similar in all respects to conditions permitted as part of probation. Any person convicted of a crime, the underlying factual basis of which included an act of domestic violence, as defined in section 18-6-800.3 (1), C.R.S., shall stipulate to the conditions specified in section 16-11-204 (2) (b). In addition, the stipulation may require the defendant to perform community or charitable work service projects or make donations thereto. Upon full compliance with such conditions by the defendant, the plea of guilty previously entered shall be withdrawn and the charge upon which the judgment and sentence of the court was deferred shall be dismissed with prejudice. Such stipulation shall specifically provide that, upon a breach by the defendant of any condition regulating the conduct of the defendant, the court shall enter judgment and impose sentence upon such guilty plea. When, as a condition of the deferred sentence, the court orders the defendant to make restitution, evidence of failure to pay the said restitution shall constitute prima facie evidence of a violation. Whether a breach of condition has occurred shall be determined by the court without a jury upon application of the district attorney and upon notice of hearing thereon of not less than five days to the defendant or the defendant's attorney of record. Application for entry of judgment and imposition of sentence may be made by the district attorney at any time within the term of the deferred judgment or within thirty days thereafter. The burden of proof at such hearing shall be by a preponderance of the evidence, and the

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Colo. Rev. Stat.
§ 16-7-403, Cont.

procedural safeguards required in a revocation of probation hearing shall apply.

(3) When a defendant signs a stipulation by which it is provided that judgment and sentence shall be deferred for a time certain, he thereby waives all rights to a speedy trial, as provided in section 18-1-405, C.R.S. (Repealed and renumbered as C.R.S. § 18-1.3-102 (Sec. 1, Ch. 318, Session Laws of Colorado 2002).

SECONDARY AUTHORITIES

REPLY BRIEF OF APPELLANT

I. THE PROCEDURES EMPLOYED UNDER AS 12.55.085 ARE NOT SIMILAR TO THE PROCEDURE EMPLOYED UNDER COLO. REV. STAT. § 16-7-403.

The State reliance on the underlying facts of Maves' case appears intended as justification for application of the ASORA to Maves because he deserves to be punished. (Aple's Br., pp. 1-2). But, while the ASORA is punishment, the issue here is not whether Maves deserves to be punished; rather, the issue is whether the "procedures" employed under AS 12.55.085 are similar to the procedures employed under Col. Rev. Stat. § 16-7-403.[1] In *Doe 2018*, this Court held that the elements of the offenses had to be categorically alike with no significant differences.[2] In this case, the regulation at issue says that the "procedures" have to be similar.[3] Therefore the question is whether the "procedures" employed under AS 09.55.085 and Col. Rev. Stat. § 16-7-403 are ". . . categorically alike with no significant differences."[4]

The State also says that Maves pled no contest to two offenses and that he received a deferred sentence pursuant to Colorado's deferred sentencing statute, Col. Rev. Stat. § 16-7-403, and was placed on probation for four years. (Aple's Br., p. 2). This is an

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1. *See State v. Doe* (Doe 2018), 425 P.3d 115, 120 (Alaska 2018) (the Court looks to the law at issue ". . . rather than to the specific facts underlying the crime. . .."
2. *Id., at* 119-120.
3. 13 AAC 09.900(a)(2) (1995).
4. *Doe 2018*, at 121.

incorrect interpretation of the facts and Colorado law. (APLNT's Br., pp. 13-14). Under the Colorado statute both the judgment and sentence are deferred. (R. 283). Moreover, the defendant is not "placed on probation," although he may be placed under the supervision of probation authorities. Col. Rev. Stat. § 16-7-403(1) (R. 42). Probation like conditions may be imposed but they are imposed by the stipulation agreed to by the defendant and the prosecutor. Col. Rev. Stat. § 16-7-403(2) (R. 42). The State also says that Maves' suspended jail sentence was lifted in July 2002. (Aple's Br., p. 2). While this is technically correct, it is clear that Maves' felony case was handled under Colorado's deferred judgment and sentence statute and, although he successfully completed the terms, the plea was never withdrawn and the charge was not properly dismissed. (R. 44-54). After the Colorado court had been notified of this error, the Colorado court corrected the error by allowing withdrawal of the plea and dismissal of the felony count, with prejudice. (R. 44-54).

Maves' Colorado case was not a suspended imposition of sentence and his conviction was not set aside upon successful completion of probation. (Aple's Br., p. 21). Maves entered a plea and both the judgment and sentence were deferred. (R. 44-54). No judgment was ever entered so no judgment was ever set aside. *Id.* Instead, upon successful completion of his conditions, Maves was

allowed to withdraw his plea and the charges were dismissed with prejudice.[5]

The State's interpretation of 13 AAC 09.900(a)(2) is flawed. (Aple's Br., pp. 21-22); (R. 447-448). The clear language of the Regulation demonstrate that it envisions a "judgment" that was set aside and no judgment was entered by Colorado. Under Colo. Rev. Stat. 16-7-403(1), judgment is not entered and the case is continued for up to four years. (R. 42). If the defendant complies with conditions imposed, then under Colo. Rev. Stat. 16-7-403(2) the plea is withdrawn, no judgment is ever entered and the charges are dismissed with prejudice. *Id.* When properly interpreting 13 AAC 09.900(a)(2) and comparing the procedures employed under AS 12.55.085 and Colo. Rev. Stat. § 16-7-403 it is clear that the procedures employed under each of the two provisions are not categorically alike and there are significant differences.[6]

Under AS 12.55.085, the trial court has broad discretion to grant or deny a suspended imposition of sentence.[7] Under Colo. Rev. Stat. § 16-7-403, the trial court's discretion is limited and there must be a written agreement between the prosecutor and the

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[5]. Colo. Rev. Stat. § 16-7-403 (Amended in 2002 and relocated to section 18-1.3-102).

[6]. *Doe 2018*, 425 P.3d at 120-121.

[7]. *Nattrass v. State*, 554 P.2d 399, 401 (Alaska 1976) (the decision whether to suspend imposition of sentence is left to the discretion of the sentencing court).

defendant.[8] AS 12.55.085 allows for suspended imposition of sentence but the judgment of conviction is entered by the Court and the conviction may be appealed.[9] Under Colo. Rev. Stat. § 16-7-403 no judgment of conviction is entered and an appeal may not be filed.[10] A deferred judgment under Colorado law is not the equivalent of a SIS under Alaska law because no sentence has been imposed or suspended. (Aplnt's Br., pp. 11-16). Rather, a deferred judgment is a continuance of the defendant's case thereby deferring judgment of conviction and judgment may only be issued if the defendant fails to abide by prescribed conditions.[11]

Clearly, the procedures employed under AS 12.55.085 and Colo. Rev. Stat. 16-7-403 are not categorically alike because there are significant differences. One of those differences is illuminated by the very Regulation at issue - 13 AAC 09.900(2). That Regulation envisions that there be a "judgment" that is set aside by procedures similar to the procedures employed under AS 12.55.085. The Regulation says:

> "conviction" means that an adult, or a juvenile tried as an adult . . . whether or not the **judgment** was thereafter

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[8]. *People v. Ward-Garrison*, 72 P.3d 423, 425 (Colo. App. 2003) (a trial court lacks authority under these statutory provisions to act unilaterally to modify the terms of such an agreement without the district attorney's consent. *citing People v. C.G.*, 12 P.3d 861 (Colo. App. 2000)).

[9]. *Starkey v. State*, 382 P.3d 1209, 1210 (Alaska App. 2016).

[10]. *People ex rel. K.W.S.*, 192 P.3d 579, 581 (Colo. App. 2008).

[11]. *People v. Kazadi*, 284 P.3d 70, 75 (Colo. App. 2011) *affirmed by Kazadi v. People*, 291 P.3d 16 (Colo. 2012).

> set aside under AS 12.55.085 . . . but does not include a **judgment** that has been reversed or vacated by a court due to motion. . .. (emphasis added).

Under AS 12.55.085 a judgment of conviction is actually entered and then later set aside. Under Colo. Rev. Stat. 16-7-403 no judgment of conviction was ever entered and prosecution was suspended and the plea later withdrawn. The procedures are not categorically alike and the trial court erred in its analysis.

II. 13 AAC 09.900(a)(2) (1995) IS INVALID AND WAS INVALID AT ITS INCEPTION.

The State argues that 13 AAC 09.900(a)(2) was properly adopted because the legislature gave the agency broad authority to adopt regulations necessary to carry out the purpose of the ASORA. (Aple's Br., p. 9).[12] However, the legislature did not give the agency the authority to adopt regulations that would expand the scope of the legislation and fill in the holes left by the legislature.[13]

It's clear that 13 AAC 09.900(a)(2) was not necessary to carry out the purpose of the ASORA.[14] The evidence clearly shows that 13 AAC 09.900(a)(2) was aimed at adding approximately 185 individuals convicted of sex offenses in the early 1980's to the list of persons required to register. (R. 400; 451). These individuals had their convictions set aside under AS 12.55.085 and there was a

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[12]. *Citing* AS 18.65.087(a) (1994).

[13]. Alaska Manual of Legislative Drafting, p. 39 (2019) ("As to drafting technique, a drafter should not include a provision for adopting regulations for the sole reason that there might be a need for the agency to fill in "holes" in the new law. The only "holes" left in a bill should be those that are there deliberately because the technical nature of the program involved requires agency expertise to interpret and administer it with regulations. Policies and guidelines for the agency should be clearly established in the bill being drafted. Agency regulations should only be necessary to implement those policies.").

[14]. Notably, AS 12.55.085 was amended to add subsection (f) in 1988 and the amendment precluded grant of an SIS to one convicted of a sex offense. *See* §§ 1, 2 ch 36 SLA 1988.

dispute as to whether they were required to register under the 1994 version of the ASORA.

The Court of Appeals did uphold the validity of 13 AAC 09.900(a)(2) in *State v. Otness*[15], however the Court of Appeals got it wrong. The adoption of 13 AAC 09.900(2) was not reasonably necessary to carry out the purposes of the ASORA. The regulation was adopted solely for the purpose of filling a hole left by the legislature and it was not necessary to carry out the purpose of the ASORA.

In *Otness*, the Alaska Court of Appeals did uphold the validity of 13 AAC 09.900(a)(2) based, in part, on its prior holding in *Patterson v. State*.[16] But the underlying legal foundation of *Otness* has collapsed based on more recent cases. In *Patterson* the Court of Appeals held that the ASORA was not punitive but regulatory. Subsequently, this Court decided *Doe v. State*[17] and held that the ASORA was penal and could not be applied retroactively without violating the ex post facto clause of the Alaska Constitution.[18] *Otness* got it wrong and 13 AAC 09.900(a)(2) was not reasonably necessary to carry out the purposes of he ASORA and adoption of the

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15. *State v. Otness*, 986 P.2d 890, 891-92 (Alaska App. 1999).
16. *Patterson v. State*, 985 P.2d 1007 (Alaska App. 1999).
17. *Doe v. State*, 189 P.3d 999 (Alaska 2008).
18. Because AS 12.55.085 was amended to add subsection (f) in 1988, no sex offender granted an SIS would be required to register in Alaska because their offense was committed prior to the effect date of the ASORA.

regulation was intended as an expansion of the ASORA to a small group of offenders not covered by the Legislature. Because it was not necessary and it unreasonable expanded the scope of the ASORA, the regulation is void.

Here the legislature did not make the ASORA applicable to persons whose convictions were set aside (in the early 1980's) under prior AS 12.55.085. DPS thought the ASORA should be expanded to reach those individuals left out by the legislature. Maves argues he cannot be subject to enforcement under the text of the 1994 version of the statute, and thus, 13 AAC 09.900(a)(2) has amended and expanded the reach of the statute. Regulations that expand the reach of the authorizing statute are invalid and are not necessary to implement the legislation.[19]

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[19]. *State v. Alyeska Pipeline Serv. Co.*, 723 P.2d 76, 78-79 (Alaska 1986).

III. THE ATTORNEY FEE ISSUE SHOULD BE DECIDED TO AVOID UNNECESSARY BURDEN AND EXPENSE.

Maves filed a motion to supplement points on appeal to include the issue of attorney fees because the trial court ruled on the State's motion without response from Maves. (R. 373; R. 500-501). The motion to supplement was granted on August 14, 2019. On August 8, 2014 the trial court granted reconsideration and allowed Maves to file an opposition to fees. (R. 499). However, the trial court has not ruled on the motion for fees. The State now argues that the issue is not yet ripe for review because the trial court has stayed the issue pending this Court's decision on the merits. (Aple's Br., pp. 23-24).

This Court has the inherent authority to decide an issue if the decision would avoid unnecessary delay, expense or hardship.[20] A decision on the question of attorney fees could avoid an unnecessary delay, expense and hardship and is therefore ripe for review.

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[20]. *Univ. of Alaska v. Nat'l Aircraft Leasing*, 536 P.2d 121, 122-23 fn. 4 (Alaska 1975); *Mundt v. Nw. Expls.*, 963 P.2d 265, 267 (Alaska 1998).

CONCLUSION

The procedures employed under AS 12.55.085 are not similar to the procedure employed under Colo. Rev. Stat. § 16-7-403.

Alternatively, the State's adoption of the 1995 version of 13 AAC 09.900(a)(2) exceeded the scope of the enabling legislation and authority to adopt regulations under the Administrative Procedures Act and the regulation was arbitrary and capricious because it was aimed at a specific group left out by the legislature.

The trial court's order awarding fees to the State should be vacated regardless of the success in this appeal.

DATED this 14th day of February 2020.

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