

**THE MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

Law Court Docket NO. SRP-24-439

STATE OF MAINE

Appellee

v.

KEITH MERCHANT

Appellant

On Appeal from Somerset County Unified Criminal Docket

BRIEF OF APPELLEE

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STATEMENT OF FACTS

On December 15, 2023, Defendant Keith Merchant was indicted by Grand Jury in the Somerset County District Court on eight counts. (A. 27-29.) The charges against Mr. Merchant included: Count I) Gross Sexual Assault occurring between October 1, 2021 and March 3, 2022, Class A, 17-A M.R.S. § 253(1)(B); Count II) Unlawful Sexual Contact, Class B, 17-A M.R.S. § 255-A(1)(F); Count III) Gross Sexual Assault occurring between March 4, 2022 and March 3, 2024, Class A, 17-A M.R.S. § 253(1)(B); Count IV) Unlawful Sexual Contact, Class B, 17-A M.R.S. § 255-A(1)(F); Count V) Sexual Abuse of a Minor, Class C, 17-A M.R.S. § 254(1)(A-1); Count VI) Sexual Abuse of a Minor, Class C, 17-A M.R.S. § 254(1)(A-2); Count VII) Unlawful Sexual Contact, Class D, 17-A M.R.S. § 255-A(1)(F-2); and Count VIII) Violation of Condition of Release, Class E, 17-A M.R.S. § 1092(1)(A). (A. 27-29.)

On August 13, 2024, Mr. Merchant pled guilty to all counts listed in the Indictment. (A. 7.) On August 16, 2024, the State filed its sentencing memorandum. (A. 36-41.) The State recommended a 40-year sentence consisting of 20 years on Count I; 10 years consecutive on Count III; 5 years consecutive on Count II; and 5 years consecutive on Count IV. (A. 39.) The State then requested 5 years on Counts

V and VI to be served concurrent to Count I; 364 days on Count VII concurrent to Count I; and 180 days on Count VIII concurrent to Count I. (A. 39-40.) On August 26, 2024, Mr. Merchant, with assistance of counsel, filed his sentencing memorandum. (A. 7.) In his memorandum, Mr. Merchant requested a total sentence on all counts of 15 years, with all but 10 years suspended and 8 years of probation. (A. 30.)

On August 27, 2024, the Somerset County Court (*Benson, J.*) held a sentencing hearing for Mr. Merchant. (A. 7.) During the hearing, the Court conducted a *Hewey* analysis for Count I. (*See A. 19-24.*) In setting its basic sentence, the Court began by stating that the “range of sentences available to the Court in calculating the basic sentence is between 0 and 30 years.” (A. 19.) The Court then continued, citing the age of the victim, the fact Mr. Merchant had been in a position of trust, the fact that it was not a single incident within the timeframe stated in the charge, the fact the defendant essentially bribed the victim to engage in sexual acts, the fact that the defendant carried on as though there was no risk of pregnancy, the attempt to conceal their relationship, and the fact the defendant tried to manipulate the victim to lie about their relationship after knowing she had been interviewed by law enforcement. (A. 19-21.) The Court set the basic sentence on Count I at 18 years. (A. 21.)

The Court then set the maximum term of imprisonment at 20 years, stating that “the aggravating factor of victim impact grossly outweighs the mitigating factors in this case.” (A. 23.) The factors the court relied on were the “enormous” victim impact balanced against Mr. Merchant’s prior addiction to methamphetamine, the fact Mr. Merchant had been a victim of sexual abuse himself, a brain injury resulting from a motorcycle accident, and the acceptance of a plea. (A. 21-23.)

The Court then proceeded to step three of the *Hewey* analysis and concluded that it would be “an improper exercise of the Court’s discretion to suspend any of the 20-year period of incarceration.” (A. 24.) The Court arrived at this conclusion with an awareness of the availability of supervised release. (A. 24.) Afterward, the Court in Count II sentenced Mr. Merchant to 5 years concurrent to Count I. (A. 24.) The Court then proceeded to address Count III, first recognizing that it was, “an offense based on different conduct arising from a separate criminal episode involving multiple incidents over the course of one year.” (A. 24.) The Court then conducted a separate *Hewey* analysis, imposing a consecutive 10-year sentence on Count III with none of the sentence suspended for the same reasons articulated in Count I (A. 24.) The Court then set a 10-year period of supervised release to be followed by the consecutive sentence imposed on Count III. (A. 24-25.)

On the other counts, the Court sentenced Mr. Merchant to 5 years on Count IV concurrent to Count I; 2 years on Count V concurrent to Count I; 2 years on Count

VI concurrent to Count I; six months on Count VII concurrent to Count I; and 90 days on Count VIII concurrent to Count I. (A. 26.) Mr. Merchant filed a timely appeal as a result.

ISSUES PRESENTED FOR REVIEW

- I. Whether the Trial Court properly considered the relevant period of time for conduct relating to Counts I and III when setting the basic sentence, thus adhering to Mr. Merchant's double jeopardy right under the Maine and Federal Constitutions.
- II. Whether the Court adequately considered consecutive sentences prior to conducting the third step in the *Hewey* analysis on Count I.
- III. Whether Mr. Merchant's sentence of 30 years was excessive and proportionate to the offense under the Maine Constitution.

SUMMARY OF THE ARGUMENT

The sentencing court was within its discretion when it conducted its *Hewey* analysis based on the specific facts in Mr. Merchant's case. The Court began its sentencing analysis by setting the basic term of imprisonment with respect to Count I at eighteen years. (App. 21). The sentencing court did not confuse the counts nor did it mistakenly combine the allegations for purposes of sentencing. Rather the sentencing court made multiple mentions of the complexity of sentencing multi

count cases, spanning a period of time, involving mirror image conduct. The sentencing court could not have been clearer in distinguishing Counts I and III as separate incidents.

The sentencing court began its analysis by noting the possibility of concurrent or consecutive sentences and its obligation to make a determination in this specific case.

The final sentence in this matter cannot facially be determined to be excessive or disproportionate. The overall sentence is equal to the maximum possible sentence that could be imposed on each of the two Class A charges. The sentencing courts analysis in determining the basic sentence was aligned with the principals of *Hewey* and clearly articulated as to which of the appropriate factors were considered. There is insufficient evidence to support the initial challenge to disproportionality to warrant further review of comparable sentences.

ARGUMENT

In Maine, when sentencing an individual who is convicted of a felony, the court is required to follow the three-step analysis set forth in *State v. Hewey*, 622 A.2d 1151 (Me. 1993), and as codified in 17-A M.R.S. §1602. At the first step of the analysis, “the court shall determine a basic term of imprisonment by considering the particular nature and seriousness of the offense as committed by the individual.” 17-A M.R.S. §1602 (1)(A). At the second step, “the court shall determine the maximum term of imprisonment to be imposed by considering all other relevant sentencing factors, both aggravating and mitigating, appropriate to the case” including, but not limited to, “the character of the individual, the individual’s criminal history, the effect of the offense on the victim and the protection of the public interest.” 17-A M.R.S. §1602 (1)(B). At step three, “the court shall determine what portion, if any, of the maximum term of imprisonment ... should be suspended and, if a suspension order is to be entered, determine the appropriate period of probation or administrative release to accompany that suspension.” 17-A M.R.S. §1602 (1)(C).

In reviewing a sentencing court’s *Hewey* analysis, “[The Law Court] review[s] de novo for misapplication of principle the basic sentence imposed at the first step of the analysis, and [reviews] the maximum sentence and the final sentence

determined at steps two and three for an abuse of discretion.” *State v. Hansen*, 2020 ME 43, ¶27.

I. The Sentencing Court did not combine Counts I and III for purposes of setting a basic sentence on Count I.

A defendant may be sentenced to consecutive sentences subject to the requirements of 17-A M.R.S. §1608 and the double jeopardy clause of the Federal and Maine Constitution(s). The respective double jeopardy clauses prohibit “multiple punishments for the same offense.” *State v. Martinelli*, 2017 ME 217 ¶5. The allegations in Count I and Count III are clearly not the same offense or transaction. *Id.* ¶9. Nor is there any argument that the factual circumstances surrounding the eight (8) counts are in any way duplicative.

The Court properly applied the *Hewey* analysis as to Count I and incorporated those findings into Count III. Additionally, the court, pursuant to 17-A M.R.S. §1602(3) chose to impose a period of supervised release, after completing the first two steps of a *Hewey* analysis as it applied to the two controlling counts. The court conducted a proper sentencing analysis, applied the appropriate sentencing principals and issued a sentence based on consideration of all relevant factors.

The court below did not confuse or combine conduct between Counts I and III in reaching its sentencing decision. In reviewing a trial court’s *Hewey* analysis “[The Law Court] reviews de novo for misapplication of principle the basic

sentence imposed at the first step of the analysis, and the maximum sentence and the final sentence determined at steps two and three for an abuse of discretion.”

State v. Hansen, 2020 ME 43 ¶43.

Prior to addressing the specific counts, the court stated “The court’s analysis, in this case in particular, is complicated by the fact that there are multiple episodes of criminal conduct in this case for which the Court must impose sentences and the question of whether consecutive sentences should be imposed on one or more count under title 17-A, Section 1608.” (App. 18-19). Further acknowledging the complexity of this sentencing and in consideration of the principled application of the *Hewey* analysis, the court stated “The Court notes that the calculation of the basic sentence is complicated by the fact that there are at least two, if not really, multiple, incidents of gross sexual assault that the Court has to consider in imposing sentence. And the Court will begin its analysis by focusing on Count I, the first of the two gross sexual assaults counts in the indictment.” (App. 19).

Mr. Merchant’s reliance on a single sentence, out of context, to show that the court below combined conduct in completing the first step of a sentencing analysis for Count I is misleading. The court below was acutely aware of the difficulties in sentencing a case that involved distinct criminal episodes, over an extended period of time. The complete range of time alleged in the indictment was October 1, 2021 through July 31, 2023; a period of several years. (App. 27-29). Specifically, the

court below, when addressing sentencing for Count III stated “The Court notes in addressing Count III that it is an offense based on different conduct arising from a separate criminal episode involving multiple incidents over the course of a year.” (App. 24).

Following the sentence determination for Count I, the court clearly, and appropriately considered whether any portion should be suspended. After reciting the statutory purposes and goals of sentencing, the court stated “[T]he court concludes that it would be an improper exercise of the Court’s discretion to suspend any of the 20-year period of incarceration. The Court arrives at this conclusion being aware of the availability of supervised release, with the intention of imposing a period of supervised release rather than probation.” (App. 24).

Then and only then did the court move on to Count III¹ with the statement “The Court next addresses the appropriate sentence for Count III, the other gross sexual assault count. The Court notes in addressing Count III that it is an offense based on different conduct arising from a separate criminal episode involving multiple incidents over the course of a year.” (App. 24). Clarifying even further, the court continued “Count I involves multiple incidents over the course of one

¹ Prior to addressing Count III, the court imposed a five (5) year sentence on Count II, concurrent with the sentence in Count I. There are no issues on appeal relating to Counts II, or IV through IIX)

year, and Count III involves multiple incidents over the course of another year.”

(*Id.*).²

The record below makes it clear that the court was acutely aware of the distinction between Count I and III. There is simply no basis for a double jeopardy claim nor is there a misapplication of the principals of sentencing.

II. The court clearly considered consecutive sentences prior to imposing a final sentence.

Before specifically addressing sentencing in Count I, the court recited the three step process outlined by *State v. Hewey* concluding with the following; “The Court’s analysis, in this case in particular, is complicated by the fact that there are multiple episodes of criminal conduct in this case for which the Court must impose sentences and the question of whether consecutive sentences should be imposed on one or more count under Title 17-A, Section 1608.” (App. 18-19). Following the first two steps of the courts analysis in Count I, the court acknowledged the intent to impose a period of supervised release.

“In order to ensure that its final sentence accurately reflects the court’s determination of an appropriate sentence for multiple offenses, a sentencing court should make its decision about concurrent or consecutive imposition before it

² There are no issues on appeal regarding the adequacy of the plea and the court clearly had information sufficient to show a factual basis for the plea pursuant to M.R.U.Crim.P. 11(e).

undertakes the third step of the *Hewey* analysis.” *State v. Stanislaw II*, 2013 ME 43 ¶16. See also 17-A M.R.S. §1602(3).

While it is not clear from the record that the court had made a decision regarding the imposition of concurrent or consecutive sentences prior to completing the third step of its analysis, it is clear the court had considered the issue. In imposing the sentence on Count III, the court made clear its understanding that Count III “is a separate series of incidents.”

Following the first two steps in Count I, the court articulated the decision, “bearing in mind the purposes of sentencing” to not suspend any of the sentence and further noted an intent to utilize the intensive supervision option available under 17-A M.R.S. §1881.

In determining the appropriate sentence for Count III, the court noted that it’s “general sentencing conclusions reached in arriving at the sentence in Count I would also apply to Count III” before imposing a sentence of 10 years, none of which would be suspended. (App. 25).

The determination of the maximum sentence and final sentence in the last two steps of the *Hewey* analysis, on appeal, will be reviewed for abuse of discretion. *State v. Stanislaw II*, 2013 ME 43 ¶17.

There is no abuse of discretion. The sentencing court had already considered consecutive sentences before even beginning the analysis on Count 1, and in

reaching the final step, made clear in its intent to impose a consecutive sentence with supervised release in lieu of probation. There is no abuse of discretion and the sentencing court's analysis at each step addressed the relevant considerations in light of the factual basis for the plea. *Stanislaw* simply states that the sentencing court "should make its decision about concurrent or consecutive" before undertaking the third step. *Stanislaw II*, 2013 ME 43 ¶16. There was no prejudice to Mr. Merchant, there was no abuse of discretion nor was there misapplication of the principles of sentencing.

III. The Sentencing Court's imposition of consecutive sentences, totaling 30 years, was not disproportionate nor excessive.

Mr. Merchant was sentenced on Count I of the indictment to 20 years incarceration and on Count III he was sentenced to 10 years incarceration, consecutive (App. 12). Count I and Count III are both Class A crimes, each punishable by up to 30 years incarceration. 17-A M.R.S. §1604(1)(A).

Article I, section 9 of the Maine Constitution provides that "all penalties and punishments shall be proportioned to the offense." Determination of whether a sentence is disproportionate utilizes a two part test; first comparing the gravity of the offense with the severity of the sentence then comparison with sentences of similar conduct within the same jurisdiction. Only if the first step reveals an inference of "gross disproportionality" will the second step be undertaken. *State v. Hansen* 2020 ME 43 ¶33 (citing *State v. Stanislaw II*, 2013 ME 43).

A class A crime is punishable by up to 30 years imprisonment. 17-A M.R.S. §1604. The combined sentence in this case does not exceed the maximum sentence possible for any single count.

In reaching the base sentence for Count I, the court considered the age of the victim, the position of trust held by Mr. Merchant and that he “grossly – and that’s an understatement – abused that position of trust.” (App. 20). Additional factors the court considered included the multiple occasions, bribery of the victim, disregard for her safety, and manipulation of the victim. (App. 20-21). The sentencing court, in setting the base sentence noted “in the view of the Court, suggest this is not – as bad as it is, and it is extremely bad – the very worst sort of gross sexual assault, warranting on Count I, a sentence of between 25 and 30 years.” (*Id.*). As in *Hansen*, where the court considered the age of the victim and manner in which the offenses were committed, this was not a misapplication of principal in setting the basic sentence. *Hansen*, 2020 ME ¶30.

Similar to *Hansen*, this court found the aggravating factors “grossly outweighs the mitigating factors in this case...” (App. 23). In considering Count III, the court relied on the same analysis as applied to a separate and distinct event sharing the same basic considerations, aggravating and mitigating factors. (App. 24-25).

There is no inference of gross disproportionality in the sentences imposed in this case. The gravity of the offense, as discussed by the court in setting the basic sentence, combined with the aggravating factors, with two convictions for Class A Gross Sexual Assault (as well as two counts of Unlawful Sexual Contact, Class B, two counts of Sexual Abuse of a Minor, Class C, one count of Unlawful Sexual Contact Class D) warranted the sentence. Again, in comparison to *Hansen*, the defendant was in a position of trust in relation to the victim and her family, engaged in repeated conduct, and manipulated the victim. The combined sentence of 30 years is not disproportionate.

Making the controlling sentences on Count I and Count III consecutive was well within the discretion of the sentencing court and there is no abuse of discretion. The court made it clear that Count I and Count III were separate events. The sentencing court was in the best position to identify the nature of the events as well as all other factors to be considered under 17-A M.R.S. §1608.

While it is “rare for the basic sentence “to be appropriately set at or near the statutory maximum,” a sentencing court may properly set the basic sentence at or near the maximum if its “analysis demonstrates that the defendant’s crime was considered to be among the most serious ways n which the crime might be committed.” *State v. Hansen* 2020 ME 43 ¶29, (citing *State v. Stanislaw*, 2011 ME 67, ¶¶ 12, 13, 21).

The Sentencing court here properly considered the appropriate factors and placed the basic sentence for Count I at 20 years and for Count III at 10 years. Neither are facially disproportionate, nor is the considered decision to make those sentences consecutive.

There is no basis to reach the second step of the analysis regarding excessive sentences.

CONCLUSION

For the above reasons, the appeal should be denied.

Respectfully Submitted,

Dated: _____

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CERTIFICATE OF SERVICE

I, Michael H. Madigan, Assistant District Attorney, hereby certify that an electronic version of the within Brief for Appellee was sent to Appellant's Attorney, addressed as follows:

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The State has sent a native.pdf file for submission to the court (at lawcourt.clerk@courts.maine.gov) pursuant to M.R.App.P. 7(c)(1) and (2)

Pursuant to M.R.App.P. 7(c)(4), the State will forward, upon notice of acceptance, ten printed copies to the Clerk of the Law Court and one copy to counsel for the Appellant.

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