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## FELONY DWI—TIME SENTENCED AND TIME SERVED

PREPARED FOR REPRESENTATIVE NORMAN ROKEBERG

BY PATRICIA YOUNG, LEGISLATIVE ANALYST



You wished to know the amount of time served by individuals convicted of felony driving while intoxicated (DWI), as compared to the amount of time sentenced. You also asked for an explanation of "good time," and you wished to know how it is calculated.

907-465-3991
907-465-3908 (fax)

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State Capitol
Juneau, AK 99801

## SUMMARY

Felony sentencing is a complex matter, generally involving a number of variables. Felony DWI offenders may be subject to presumptive sentences, which include consideration of aggravating and mitigating factors and extraordinary circumstances; they are always subject to mandatory minimum sentences. Such offenders may also face additional charges—for example, charges for refusing a breath-test, driving with a suspended or revoked license, avoiding arrest, assault, or any number of other crimes may accompany the charge of DWI. As a result, a sentence may be a composite of various convictions that a judge orders an offender to serve concurrently, consecutively, or in some combination thereof. Despite those complications, however, the very specific provisions on minimum sentences for felony DWI offenses delineated in AS 28.35.030(n) ensure that judges hand down sentences of at least those lengths, that they suspend neither the imposition of the sentence nor the execution of the minimum terms, and that they not grant probation except on the condition that offenders serve at least the prescribed minimum terms in custody.

Despite the mandatory minimum sentences, however, offenders—including felony DWI offenders—will generally serve less time than judges impose. With only a few exceptions, AS 33.20.010 requires that offenders sentenced to more than three days must be released after serving two-thirds of the sentence, unless time earned for good behavior—known as "good time"—has been revoked or reduced because of misconduct within the correctional facility. If an offender's sentence was for over two years, the one-third reduction is spent under the supervision of, and subject to conditions set by, the parole board. If an offender fails to comply with such conditions, the board may send the offender back to jail to serve all or a portion of the good time reduction.

We obtained two sets of data on the sentences of individuals convicted of felony DWI who were or are presently under the supervision of the Alaska Department of Corrections.[1] Because the information is not computerized, the project required that individuals at each state correctional facility housing felony DWI offenders sort through individual offender files and extract the sentencing information pertinent to the DWI felony. We attempted various analyses on the sentencing data for the entire cohort as well as for subsets of felony DWI offenders; eventually, however, we concluded that because of the complexity of sentencing procedures and apparent inconsistencies in the data collection process, such an analysis would provide unreliable results. After further discussions with Department of Corrections personnel, we concluded that such an analysis would also be unnecessary for the purposes of this report. According to Candace Brower, program coordinator, Department of Corrections, good time is always computed on the composite sentence, regardless of which portions are to be served concurrently and which are to be served consecutively. This means that regardless of whether a sentence represents time in

[1] Bruce Richards, special assistant with the Department of Corrections, provided us with "snapshots" of felony DWI offenders in custody as of July 19, 2000, and as of October 25, 2000. The department generated this information in anticipation of the legislature's interest in the issue. According to Mr. Richards, department personnel at the various state correctional facilities sorted through the individual files of inmates sentenced for felony DWI offenses and listed the sentence of each offender for DWI only. Following receipt of the snapshots, we randomly selected six cases and requested sentencing details for each. Additionally, we asked for details on a particular case reviewed by the Alaska Court of Appeals, *Clark v. State*. By comparing the snapshots with the specific details, we realized that in addition to occasional errors, the data were compiled inconsistently—for example, although good time was to have been deducted, we found that in some cases it had not been removed. Representatives of both the Department of Corrections and the Court System stress the complexities involved in time accounting for sentences involving multiple charges, and thus, the irregularities in data may not be surprising.

jail for a single charge or for numerous charges, calculation of good time is a constant—one-third off the total amount of jail time.

As a result, we focused our attention on several appeals of felony DWI sentences that illustrate factors that go into sentencing and the relationship of the sentence imposed to the time served. We use a recent Alaska Court of Appeals case, *Clark v. State*, as our primary example. In this case, the defendant's criminal record is long, but his sentence is relatively straightforward. Because the sentence consisted of a single charge, his case is useful for the purpose of understanding the relationship between a sentence imposed and time served for felony DWI—as well as the process of mandatory parole—without the complexities inherent in attempting to untangle the strands of a composite sentence. We also include details of three other sentences—to represent sentencing and time served in more complex felony DWI cases.

As you will see, even in complex cases, the mandatory minimums for felony DWI sentences apply, as do the calculations for good time reduction of time served. For offenders with multiple convictions—a relatively common occurrence—the good time reduction is calculated on the composite sentence and applied to the aggregate term of imprisonment. Good time is always calculated at one day off for two days served, even for complex sentences.

## PRESUMPTIVE SENTENCING AND CLASS C FELONIES

In the late 1970s, in response to wide differences among sentences for similar crimes, the Alaska legislature adopted a system of presumptive sentencing as part of an overall revision of the state's criminal code. A presumptive sentence is the prison sentence that applies if a given crime is of about average seriousness for that crime, and the offender's record is about typical for that type of offender. Lower and upper limits to the sentence are designated for less and more serious versions of the offense.[2] The purpose behind presumptive sentencing is to assure uniformity and predictability in the sentencing of repeat offenders charged with similar crimes.[3]

Under presumptive sentencing, the appropriate *sentencing range* for class C felonies (such as felony DWI) is normally zero to five years.[4] Presumptive *terms* are the starting points for sentencing within a sentencing range; they represent the legislature's judgment as to the appropriate sentence for a typical felony offender who commits a typical act within the definition of a particular offense.[5] Although most first time felony offenders are not subject to presumptive terms, case law would normally restrict the upper limit of a first time class C felony offense to two

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[2] Alaska Judicial Council, *A Guide to Alaska's Criminal Justice System*, May 1998, p. 21; available through *http://www.ajc.state.ak.us*.

[3] Senate Judiciary Committee, "Commentary on the Alaska Revised Criminal Code," *Senate Journal* Supp. No. 47, p. 148, June 12, 1978; adopted by House, *House Journal*, p. 1716, June 16, 1978. Presumptive sentencing, effective in 1980, was designed to eliminate "unjustified disparity in sentences imposed on defendants convicted of similar offenses committed under similar circumstances—disparity which is not related to legally relevant sentencing criteria."

[4] AS 12.55.125(e).

[5] *Mullin v. State*, 886 P.2d 1323, 1328 (Alaska App. 1994), cited in *Clark v. State*, 8 P.3d 1149, 1150 (Alaska App. 2000).

years; the potential sentencing range would, therefore, be from zero to two years.[6] For a defendant with at least one prior felony conviction, the presumptive term within the zero to five year range is two years; for a defendant with two prior felony convictions, the starting point is three years.[7] The law requires judges to apply the presumptive terms unless the degree of seriousness of the crime requires an adjustment of the sentence in consideration of specific aggravating and/or mitigating factors. If a judge finds that extraordinary circumstances exist such that "manifest injustice would result from . . . the imposition of the presumptive term, whether or not adjusted for aggravating or mitigating factors," then the court can send the case to a three-judge panel for sentencing.[8]

Just as there is normally no presumptive term for first time class C felonies, there is normally no mandatory minimum sentence for class C felonies, even for offenders who have multiple prior felony convictions. For the particular offense of felony DWI, however, the legislature has created a series of special mandatory minimum sentences. These minimum sentences hinge, not on an offender's prior record of felony convictions, but on the offender's record of DWI and breath-test refusal convictions within the preceding ten years.[9]

## MANDATORY MINIMUM SENTENCES FOR FELONY DWI

In 1995, Alaska lawmakers changed the classification of certain repeat convictions for DWI from misdemeanor to felony offenses and established mandatory minimum fines and sentences for first, second, and subsequent felony convictions.[10] By that act, a third conviction for DWI *within a span of five years* becomes a class C felony (AS 28.35.030[n]), as does a third conviction for refusal to submit to a chemical test for alcohol (AS 28.35.032[p]).

The law instructs judges to count prior convictions for DWI or breath-test refusals *within the preceding ten years* in order to determine the appropriate minimum sentence for the felony (AS 28.35.030[o][4]). For a class C felony DWI, the law requires a fine of not less than $5,000 and imprisonment as follows:

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[6] Because the court has held that a first offender should normally receive a more favorable sentence than the presumptive sentence for a second offender, the potential range for a first class C felony offender would normally be from zero to two years. Suzanne D. DiPietro, "The Development of Appellate Sentencing Law in Alaska," *Alaska Law Review*, Vol. 7, No. 2, December 1990, p. 283, citing *Austin v. State* 627 P.2d 657 (Alaska App. 1981).

[7] AS 12.55.125(e). Sentencing of Imprisonment for [class C] Felonies.

[8] AS 12.55.165. Extraordinary Circumstances. AS 12.55.175. Three-Judge Sentencing Panel.

[9] AS 28.35.030(o)(4), and *Clarke v. State*, at 1151.

[10] Chapter 80 SLA 1995, effective September 13, 1995, made a third or subsequent DWI or breath test offense within five years a class C felony.

**Table 1: Mandatory Minimum Sentences for Felony DWI**

| Number of Prior Convictions for DWI within Preceding 10 Years<br>AS 28.35.030(o)(4) | Mandatory Minimum Time Sentenced<br>AS 28.35.030(n)(1) |
|---|---|
| 2 | 120 days |
| 3 | 240 days |
| 4 or more | 360 days |

**Notes and Sources:** Under AS 28.35.030(n), a person is guilty of a class C felony if convicted for driving while intoxicated and has previously been convicted two or more times within the five years preceding the date of the current offense. Although designation of the crime as a felony hinges on convictions for similar crimes *within the preceding five years*, the mandatory minimum sentences hinge on convictions for such crimes *within the preceding ten years*. Convictions for additional charges could increase the sentences imposed. Second and subsequent felony offenders would also be subject to presumptive terms under AS 12.55.125-175.

The law also provides that the court may suspend neither the imposition of the sentence nor the execution of the minimum term. Further, the court may not grant probation except on the condition that the offender serve the minimum term of imprisonment first.[11]

Whereas a presumptive term represents the legislature's judgment on the typical or average sentence, a mandatory minimum represents the legislature's judgment concerning the "minimum sentence . . . appropriate for [an] offender whose conduct is the least serious contemplated by the definition of the offense."[12] Because a more specific sentencing statute—such as the mandatory minimums established for felony DWI—takes precedence over the general sentencing statute, a mandatory minimum would modify a sentencing range and presumptive term that would otherwise apply.[13]

Thus, this specific offense—felony DWI—is governed both by the usual rules of presumptive felony sentencing codified in AS 12.55.125-175, and by the mandatory minimum sentences established in AS 28.35.030(n). The minimum sentences listed in AS 28.35.030(n) represent the absolute minimum amount of jail time that a felony DWI offender will be sentenced to serve under any circumstances, as noted recently in *Clark v. State* by the Alaska Court of Appeals.

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[11] AS 28.35.030(n). The law contains additional requirements; we have only listed those directly related to an offender's term of imprisonment. Although throughout this report we refer to "imprisonment," and other terms generally understood to mean "jail," we note that some offenders officially so described may actually be in halfway houses, treatment centers, or on electronic monitoring. According to Bruce Richards, special assistant with the Department of Corrections, the actual placement of a third time DWI offender is based on a risk assessment conducted by the department. Depending on the assessment, an offender may be eligible for alternative placement under AS 33.30.101 and AS 33.30.161. An otherwise eligible inmate would be allowed to apply for such placement after serving one-third of the original sentence less the one-third reduction in good time. For example, according to Mr. Richards, an offender sentenced to three years would be eligible to apply after serving one-third of two years (the three-year sentence less the one-year good time reduction).

[12] *Middleton v. Anchorage*, 673 P.2d 283, 284 (Alaska App. 1983), cited in *Clarke v. State*, at 1150.

[13] *Clark v. State*, at 1151.

## RECENT ALASKA CASE—*CLARK V. STATE*

The Alaska Court of Appeals recently examined the issue of sentencing of felony DWI offenders in *Clark v. State*, 8 P.3d 1149 (Alaska App. 2000). The sentence under appeal in this case arose from Johnny Clark's 1998 conviction for driving while intoxicated.[14] Because Clark had two prior convictions for DWI within the preceding five years, his offense was a class C felony. Because he had five prior DWI or breath-test refusal convictions within the preceding ten years, he was subject to the mandatory minimum sentence of 360 days. Because he also had two felonies among his total of 31 prior criminal convictions, he was subject to presumptive sentencing as a third felony offender. The court sentenced Clark to a three-year presumptive term with an additional six months to serve and another 18 months suspended based on his history of assaultive behavior.[15] Johnny Clark appealed the judgment of sentence.

In its discussion of the sentencing issues involved, the appeals court noted as follows:

> The felony version of DWI is relatively new . . . Because DWI has traditionally been a misdemeanor, many defendants prosecuted under the felony provision of the statute will be first felony offenders even though they have many prior DWI convictions within the preceding ten years. *The minimum sentences listed in the statute guarantee that these first felony offenders will receive the stated amount of jail time.*
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> For example, Clark had four or more prior convictions for DWI and/or breath-test refusal within the ten years preceding his current offense. (To be precise, Clark had five prior convictions.) Because of these prior convictions, Clark was subject to a mandatory minimum sentence of 360 days' imprisonment.[16] *This would be true even if Clark had had no prior felony convictions and had not faced a presumptive term.*
>
> In this case, Clark had two prior felony convictions, so his presumptive term of imprisonment was 3 years. But the minimum sentence specified in AS 28.35.030(n) still applied. Even if [the judge] had found mitigating factors and had wanted to impose no jail time, or even if [the judge] had referred Clark's case to the three-judge sentencing panel and the three-judge panel had concluded that Clark deserved little or no jail time, Clark would still have to receive a minimum of 360 days to serve. . . . *A sentence of 360 days was the absolute minimum that Clark could receive under any circumstance.*[17]

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[14] According to Dwayne McConnell, district attorney, 3rd Judicial District, Johnny L. Clark was originally charged with four offenses. In exchange for a no contest plea to felony DWI, the State dropped charges for refusing a breath-test and driving with a revoked license. The fourth charge was eventually dismissed.

[15] That is, Clark was sentenced to five years' imprisonment with 3½ years to serve and 1½ years suspended. The additional time represented an adjustment for an aggravating factor—in this case, the defendant's history of assaultive behavior (AS 12.55.155[c][8]).

[16] See AS 28.35.030(n)(1)(C).

[17] *Clark v. State*, at1151-2, emphasis added; we have included a copy of this decision as Attachment A.

Under the law, the court could suspend neither the imposition nor the execution of the minimum sentence. Additionally, the court—even had it wished to do so—could not grant probation except on the condition that Clark serve at least the minimum amount of time.

Despite these restrictions, however, Clark—like most offenders—would be eligible for a one-third reduction in his time if he followed the rules of the correctional facility. This reduction in sentence is known as "good time." The law requiring good time reductions (AS 33.20.010) results in most offenders serving less time than judges impose.

## REDUCTION OF PRISON SENTENCES FOR "GOOD TIME"

"Good time" is credit—or time-off—for good behavior while in prison. Except under very specific circumstances, all prisoners with sentences of more than three days are entitled to early release under good time if they follow the rules of a correctional facility.[18] The law requires the Department of Corrections to deduct good time from sentences imposed—one day off for every two days served. Therefore, unless an offender loses all or a portion of good time through misbehavior, he or she will be released after serving two-thirds of a sentence—even a mandatory minimum sentence.

Corrections facility personnel generally consider good time to be an important prison management tool—giving offenders incentive to cooperate with institutional rules. According to a representative of the Department of Corrections, most offenders in Alaska receive the reduction.[19]

Assuming that felony DWI offenders receive the full good time credit allowable, the amounts of time served, as compared to the mandatory minimum sentences imposed, are listed in Table 2.

[18] AS 33.20.010. Computation of Good Time.

[19] Bruce Richards, special assistant, Alaska Department of Corrections, (907) 269-7394.

## Table 2: Good Time Reductions to Mandatory Minimum Sentences for Felony DWI

| Number of Prior Convictions for DWI within Preceding 10 Years<br>AS 28.35.030(a)(4) | Mandatory Minimum Time Sentenced<br>AS 28.35.030(n)(1) | Maximum Potential Good Time Reduction<br>(no. of days x .33)<br>AS 33.20.010 | Minimum Potential Time Served |
|---|---|---|---|
| 2 | 120 days | 40 days | 80 days |
| 3 | 240 days | 80 days | 160 days |
| 4 or more | 360 days | 120 days | 240 days |

**Notes and Sources:** Under AS 28.35.030(n), a person is guilty of a class C felony if convicted for driving while intoxicated and has previously been convicted two or more times within the five years preceeding the date of the current offense. The mandatory minimum sentences represent minimum sentences imposed for felony DWI offenses, with prior convictions for DWI or breath-test refusal within the preceding ten years. The time served represents the minimum amount of time a first time felony DWI offender would spend in jail for that particular crime, assuming the offender earned the maximum good time credit allowable. Conviction for additional charges could increase the sentences imposed. Second and subsequent felony offenders would also be subject to presumptive terms under AS 12.55.125-175. Good time is always based on the total sentence and calculated at one day off for two days served. Candace Brower, program coordinator, Department of Corrections.

In our example case, *Clark v. State*, Clark was to spend three and one-half years, or approximately 1278 days, in jail. Assuming that he followed the facility rules, he could expect to be released after serving two and one-third years, or approximately 852 days. According to information provided by the Department of Corrections, Clark's felony DWI offense occurred in Seward, on July 4, 1998. He was released on November 2, 2000, after serving 852 days, or two-thirds of his 1278-day sentence, in jail.[20]

Under AS 33.20.040, an offender getting out on a good time reduction is released unconditionally if the original sentence was for less than two years. If the sentence was for two years or more, however, an offender getting out on a good time reduction spends the balance of the sentence under the supervision of the parole board, on what is known as *mandatory parole*. In Clark's case, because his original sentence was in excess of two years, he was released to serve his 426 days of good time earned on *mandatory parole*, subject to conditions set by the parole board.

[20] Clark came under the supervision of the Department of Corrections on July 18, 1998. Although the Department of Corrections computer database does not record the time Clark served in Seward's community jail, such time would nevertheless be included in the time accounting calculations of his sentence. Because 852 days elapsed between the date of the offense (day 15,526 on the perpetual calendar used for time accounting purposes) and the date of release (day 16,378), we assume that Johnny Clark was jailed in Seward at the time of his crime. We refer to Clark's sentence as "approximate" time because time accounting of sentences involves a number of factors; that Clark's time appears to "work out" with such neatness is perhaps attributable to his having a single charge, and therefore, a single sentence, in this particular case. According to Bruce Richards, some of the most complicated litigation arises over time accounting issues.

## MANDATORY PAROLE

*Mandatory parole* is a right under AS 33.20.040, and is not related to the privilege of *discretionary parole* that prisoners may earn under AS 33.16.090. According to the *1992 Annual Report to the Governor and the Alaska Legislature* produced by the Alaska Sentencing Commission, *discretionary parole* is parole as most people think of it---a process wherein a prisoner applies for release based on his or her record while in prison and his or her plans for creating and maintaining a law-abiding life outside of prison.[21]

According to the Alaska Judicial Council's *Guide to Alaska's Criminal Justice System*, although the parole board cannot refuse to release on mandatory parole an offender who has earned good time, it can impose release conditions designed to reduce the risk to the public and to increase the chance that the offender will not return to criminal behavior. If the offender fails to comply with the conditions, the parole board may revoke a portion or all of the offender's good time credit.[22]

Larry Jones, executive director of the state parole board, notes that only about five percent of the board's revocation work is for persons out on discretionary parole; the remaining 95 percent is work connected to persons released on mandatory parole—offenders released manditorily whether ready to transition back into society or not.[23]

In our example case, *Clark v. State*, the parole board issued a warrant for Clark's arrest for a parole violation on January 23, 2001. Whether the board will revoke all or a portion of his good time is at the moment uncertain: the board is waiting for the court to decide on a new charge of misdemeanor assault stemming from an incident on December 2, 2000.

## SENTENCING COMPLEXITIES

As Chris Christensen, staff counsel for the Alaska Court System, points out, overall, the sentencing statutes are "extremely complex." To illustrate his point, he described the sentence calculation for an offender recently convicted on nine separate counts ranging from a misdemeanor to an unclassified felony. In that case, each count is treated differently in the sentencing statutes: some require a mandatory sentence, some require a mandatory minimum

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[21] According to the Alaska Judicial Council's *Guide*, about one-third of imprisoned felony offenders are eligible to apply for discretionary parole—which is available to most inmates serving sentences of at least 181 days (AS 33.16.090). "Some offenders become eligible to apply after serving one-fourth or one-third of their sentences; presumptively sentenced offenders become eligible only after they serve the full presumptive term" p. 28.

[22] Alaska Judicial Council, *Guide to Alaska's Criminal Justice System*, p. 29. In regard to the terminology of parole, the Sentencing Commission noted that the term [*mandatory parole*] "causes confusion with the public by giving the impression that release is in the control of the parole board, when in fact the offender is simply being credited for good time. Offenders, on the other hand, are told they are not eligible for parole, and therefore often fail to understand that the parole board will be setting conditions for release even when good time is earned." Because of this confusion, the Commission unanimously recommended that the term *mandatory parole* be changed in statute to *mandatory release*, pp. 22-23.

[23] Larry Jones, executive director, state parole board, (907) 465-3304.

sentence, some require presumptive sentences, some require sentences be stacked consecutively, and some allow concurrent sentences.[24]

Offenders very often are convicted of multiple offenses, and each crime gets a separate sentence. Those sentences are combined into a composite sentence with an aggregate term of imprisonment. Lawmakers have expressed a preference for consecutive sentences, although judges have discretion to impose concurrent sentences when circumstances warrant.[25] Depending on the circumstances, specific laws that apply, and the facts of a case, a judge may make the sentences consecutive, concurrent, or partially concurrent. The court also imposes limits on consecutive sentences, such that, unless extraordinary circumstances exist—such as a determination that a defendant is a *worst offender* for that particular class of crime, the total aggregate term does not normally exceed the presumptive term for the single most serious offense.[26] For an offender serving consecutive sentences, good time is calculated on the composite sentence rather than on each individual sentence.[27]

In the case of DWI combined with breath-test refusals, the law is specific; if a person is convicted of both felony DWI and refusing a breath-test, then the court must impose mandatory minimum sentences for both offenses, to run consecutively.[28] Portions of sentences that are beyond the mandatory minimums, though, may be imposed concurrently.[29]

Many cases, however, are not limited to that particular combination of convictions. By way of example, we include the memorandum opinion and judgment from two recent appeals stemming from felony DWI convictions, as well as an Alaska Court of Appeals opinion regarding a 1998 sentence for felony DWI.[30]

## *LYON V. STATE*

The summary of *Lyon v. State*, decided February 14, 2001, includes the following details:

> Jody B. Lyon was convicted of first-degree vehicle theft and driving while intoxicated, class C felonies. Lyon had six prior DWI convictions, two in the previous five years, and was therefore convicted of felony DWI. Lyon had a prior felony conviction for driving while intoxicated, and therefore faced a presumptive sentence of two years of imprisonment on each offense. Judge Bolger imposed the two-year presumptive term for each offense, and imposed the sentences consecutively to each other for a four-year composite sentence. This sentence was consecutive to an additional twenty-six months that had been suspended on

[24] Chris Christensen, staff counsel, Alaska Court System, (907) 264-8228.

[25] AS 12.55.025(e), and "Notes to Decisions" following.

[26] DiPietro, pp. 290-91.

[27] *Callan v. State*, 904 P.2d 856 (Alaska App. 1995).

[28] AS 28.35.032(g).

[29] Richard Svobodny, district attorney, 1st Judicial District, (907) 465-3620.

[30] We include as Attachments B, C, and D, respectively, *Lyon v. State*, Alaska Court of Appeals MOJ No. A-7481, No. 4353, decided February 14, 2001; *Workman v. State*, Alaska Court of Appeals MOJ No. A-7357, No. 4230, decided June 21, 2000; and *White, v. State*, 969 P.2d 646 (Alaska App. 1998).

> Lyon's prior felony DWI offense. Thus, Lyon faced a composite sentence of six years and two months of imprisonment. Lyon argues on appeal that there was insufficient evidence to support his convictions and that the trial court imposed an excessive sentence.[31]

In his sentencing, the Superior Court judge had emphasized the seriousness of the defendant's record and his present offenses.

> He noted that Lyon had driven away [while a witness was] holding on to the opened driver's door. He concluded that it was fortunate that [the witness] was not killed or seriously injured in the incident. He pointed out that Lyon was highly intoxicated at the time, that his breath alcohol content was .271, and that at the time of the offense, Lyon was driving while his license was revoked and while he was on probation for his prior felony conviction of driving while intoxicated. He noted that Lyon had consistently not abided by his conditions of probation and that he had several convictions for driving with his operator's license suspended. He concluded that Lyon had poor prospects for rehabilitation and would not abide by court restrictions on drinking or on driving.[32]

In this case, the judge found that the defendant was a *worst offender* with respect to the crime of driving while intoxicated and that the cumulative sentence in excess of six years was necessary to protect the public. The Court of Appeals concurred with the Superior Court judge's determination and affirmed the sentence as appropriate under the circumstances.[33]

According to Candace Brower, the time accounting specialist with the Department of Corrections, the calculation for good time is always based on the composite sentence, rather than on individual sentences. Therefore, as with most offenders, Lyon would be eligible for a one-third reduction in his sentence for good behavior while in jail. If he follows the rules, he could expect to be released after serving just over four years. Because his original sentence was for more than two years, he would serve the portion of his sentence reduced for good time on mandatory parole, under the custody and supervision of the parole board.[34]

## *Workman v. State*

*Workman v. State* provides another example of a very complicated case and sentence. As described by the Court of Appeals in its Memorandum Opinion and Judgment, the defendant "pleaded as follows:

> Workman pleaded no contest to three class C felonies [one count of felony DWI, one count of first-degree failing to stop at the direction of a peace officer, and one count of fourth-degree assault] and a class A misdemeanor from two separate

[31] *Lyon v. State*, at 1-2.

[32] *Lyon v. State*, at 6-7.

[33] *Lyon v. State*, at 7-8.

[34] Candace Brower, program coordinator, Department of Corrections, (907) 465-3307.

> cases. He also admitted that he violated his probation in a third case for which he was on probation for another class C felony.[35]

As a result, and in consideration of the defendant's conduct and past criminal record, the Superior Court imposed a composite sentence of four years and one month for the five crimes. The appeals court provided the following description of the Superior Court's sentence:

> Judge Smith imposed a 2-year term with 1 year suspended on the 1995 second-degree burglary. On the August 1998 felony DWI, Judge Smith imposed the presumptive 2-year term consecutive to the burglary sentence. On the January 1999 felonies, although Judge Smith found no aggravating factors, he enhanced the presumptive term and imposed concurrent 4-year terms with 2 years suspended. Of the 2 years imposed, 1 year was imposed concurrently with the August 1998 DWI sentence and 1 year was imposed consecutively. For the fourth-degree assault, Judge Smith imposed a 1-year term with all but 30 days suspended.[36]

In this case, the Court of Appeals affirmed the judgment of the Superior Court, and the sentence was upheld. If the offender loses none of the good time to which he would be eligible, he could be released after serving roughly two years and nine months of his four year and one month sentence. Because his original sentence was for more than two years, he would be on mandatory parole, under the supervision of the parole board, for the portion of the sentence that was reduced by good time.

## *WHITE V. STATE*

In a 1998 case, *White v. State*, the defendant was charged for some of his offenses, and under a plea agreement, the State dropped certain charges—but reserved the right to have the uncharged crimes considered at sentencing.

> Based on [the description of the incidents involved in the case], White was charged with two counts of felony driving while intoxicated and one count of assault. White ultimately reached a plea agreement with the State. Under this agreement, White pleaded no contest to one count of DWI; the State dismissed the assault and the other count of DWI, with the proviso that these crimes could be considered at sentencing.[37]

Because the defendant had a prior felony conviction, he was subject to a presumptive term of two years, and a maximum of five years. The Superior Court judge considered as aggravating factors his extensive history of driving while intoxicated—many involving motor vehicle accidents, and his extensive history of assaults—most directed at police officers. The judge, determining White to be a *worst offender* for sentencing purposes and concluding that a maximum sentence was required to protect the public, sentenced White to serve five years in prison—the maximum term allowable under AS 12.55.125(e). The Court of Appeals upheld the lower court's findings and

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[35] *Workman v. State*, at 1 and 4. See Attachment C for a full description of the events leading to this sentence.

[36] *Workman v. State*, at 5-6.

[37] *White v. State*, at 647.

affirmed the sentence.[38] Like most offenders, White would be eligible for good time. The one-third time off for good behavior would be calculated on his composite sentence, and White would be released after serving two-thirds of his sentence—roughly three and one-third years—if he earned the good time reduction. Because his sentence was in excess of two years, he would be on mandatory parole and under the custody of the parole board for the remaining one-third of the sentence.

In addition to meeting conditions set by the parole board for mandatory parole, most felony offenders are also required to meet conditions of probation set by the judge under AS 12.55.100. Under the felony DWI law, a judge may not grant probation except on the condition that a felony DWI offender has served the minimum term of sentence; but the judge may suspend time and grant probation on the portions of sentence that exceed the minimum.[39] If an offender fails to meet the conditions of probation, the court may revoke suspended time and send the person back to jail. Thus, whether an offender released for good time stays out of jail, or returns to jail to serve that—or additional—time, depends on his or her behavior after release.

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I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.

[38] *White v. State*, at 647-48.

[39] AS 28.35.030(n)(2)(A) and AS 12.55.080.

## Attachment A

*Clark v. State*, 8 P.3d 1149 (Alaska App. 2000)

LEXSEE 8 p.3d 1149

**JOHNNY L. CLARK, Appellant, v. STATE OF ALASKA, Appellee.**

**Court of Appeals No. A-7343, No. 1688**

**COURT OF APPEALS OF ALASKA**

***8 P.3d 1149; 2000 Alas. App. LEXIS 137***

**September 22, 2000, Decided**

**NOTICE:**
[**1] THIS OPINION IS SUBJECT TO CORRECTION BEFORE PUBLICATION IN THE PACIFIC REPORTER. READERS ARE REQUESTED TO BRING ERRORS TO THE ATTENTION OF THE CLERK OF THE APPELLATE COURTS.

**PRIOR HISTORY:**
Appeal from the Superior Court, Third Judicial District, Seward, Charles K. Cranston, Judge. Trial Court No. 3SW-98-205 Cr.

**DISPOSITION:**
The judgement of the superior court AFFIRMED.

**COUNSEL:**
Diane L. Foster, Assistant Public Defender, Kenai, and Barbara K. Brink, Public Defender, Anchorage, for Appellant.

Eric A. Johnson, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

**JUDGES:**
Before: Coats, Chief Judge, and Mannheimer and Stewart, Judges.

**OPINIONBY:**
MANNHEIMER

**OPINION:**

[*1150]

MANNHEIMER, Judge.

In this appeal, we are asked to decide whether presumptive sentencing applies to defendants convicted of felony driving while intoxicated. We hold that it does.

Johnny L. Clark drove a motor vehicle while he was intoxicated, a violation of AS 28.35.030(a). This offense is normally a misdemeanor; but because Clark had two prior convictions for this crime within the preceding five years, his offense was a class C felony under AS 28.35.030(n). Clark [**2] pleaded no contest to this charge.

Clark had thirty-one prior criminal convictions. These convictions included two felonies: third-degree assault and attempted second-degree sexual assault. Based on Clark's two prior felonies, Superior Court Judge Charles K. Cranston ruled that Clark was subject to presumptive sentencing as a third felony offender. Because felony DWI is a class C felony, the judge ruled that Clark faced a 3-year presumptive term. n1

n1 *See* AS 12.55.125(e)(2).

Judge Cranston found one pertinent aggravating factor under AS 12.55.155(c): aggravator (c)(8) -- that Clark's criminal history included aggravated or repeated instances of assaultive behavior. (Besides his two assaultive felonies, Clark had been convicted of seven misdemeanor assaults over the past twenty years.) Based on this aggravator, Judge Cranston adjusted Clark's presumptive term by adding 6 months to serve and an additional 1 1/2 years suspended. That is, Clark was sentenced to 5 years' imprisonment with 1 1/2 years suspended [**3] (3 1/2 years to serve).

In this appeal, Clark contends that presumptive sentencing does not apply to his offense. He points out

that, in AS 28.35.030(n), the legislature has enacted a series of mandatory minimum sentences for felony DWI -- minimum sentences that escalate depending on how many times the defendant has been convicted of DWI or breath-test refusal within the preceding ten years. n2 Clark argues that these mandatory minimum sentences are intended to supplant or supersede the "minimum sentences" contained in the presumptive sentencing statutes (specifically, in AS 12.55.125).

n2 *See* AS 28.35.030(o)(4).

Clark's argument is flawed because the presumptive terms listed in AS 12. 55.125 are not "minimum sentences". A mandatory minimum sentence represents the legislature's judgement concerning "[the] minimum sentence ... appropriate for [an] offender whose conduct is the least serious contemplated by the definition of the offense". n3 A presumptive term, on the other hand, represents the legislature's [**4] judgement as to the appropriate sentence for a typical felony offender (*i.e.*, an offender with the specified number of prior felony convictions, and with a typical background) who commits a typical act within the definition of the offense. n4 Thus, the mandatory minimum sentences for felony DWI listed in AS 28.35.030(n) serve a different purpose from the presumptive terms for class C felonies listed in AS 12.55.125(e).

n3 *Middleton v. Anchorage, 673 P.2d 283, 284 (Alaska App. 1983).*

n4 *See Mullin v. State, 886 P.2d 1323, 1328 (Alaska App. 1994). See also Juneby v. State, 641 P.2d 823, 833, 838 (Alaska App. 1982), modified and superseded on other grounds, 665 P.2d 30 (Alaska App. 1983).*

Under AS 12.55.125(e), the sentencing range for class C felonies is normally 0 to 5 years. For defendants with at least one prior felony conviction, the presumptive terms listed in 125(e)(1) and (e)(2) establish the starting point for sentencing within [**5] that 0- to 5-year range. For instance, because Clark is a third felony offender, his presumptive term of imprisonment was 3 years, but the sentencing judge had the authority to adjust that presumptive term -- increasing Clark's sentence up to 5 years or decreasing it down to 0 years -- if aggravating and/or mitigating factors were proved. n5 (Even in [*1151] the absence of aggravating or mitigating factors, Judge Cranston could have referred Clark's case to the statewide three-judge panel under AS 12.55.165.)

n5 *See* AS 12.55.155(a)(1).

The mandatory minimum sentences listed in AS 28.35.030(n) perform another function: they modify the 0- to 5-year sentencing range that would otherwise apply to a class C felony. In other words, even though there is normally no mandatory minimum sentence for class C felonies (even for offenders who have multiple prior felony convictions), the legislature has created special mandatory minimum sentences for this particular class C felony. These minimum sentences hinge, not on the offender's [**6] prior felony record, but on the offender's prior record of DWI and breath-test refusal convictions.

The felony version of DWI is relatively new; it was enacted in 1995. n6 Because DWI has traditionally been a misdemeanor, many defendants prosecuted under the felony provision of the statute will be first felony offenders even though they have many prior DWI convictions within the preceding ten years. The minimum sentences listed in the statute guarantee that these first felony offenders will receive the stated amount of jail time.

n6 *See* SLA 1995, ch. 80, § § 3-7.

For example, Clark had four or more prior convictions for DWI and/or breath-test refusal within the ten years preceding his current offense. (To be precise, Clark had five prior convictions.) Because of these prior convictions, Clark was subject to a mandatory minimum sentence of 360 days' imprisonment. n7 This would be true even if Clark had had no prior felony convictions and had not faced a presumptive term.

n7 *See* AS 28.35.030(n)(1)(C).

[**7]

In this case, Clark had two prior felony convictions, so his presumptive term of imprisonment was 3 years. But the minimum sentence specified in AS 28.35.030(n) still applied. Even if Judge Cranston had found mitigating factors and had wanted to impose no jail time, or even if Judge Cranston had referred Clark's case to the three-judge sentencing panel and the three-judge panel had concluded that Clark deserved little or no jail time, Clark would still have to receive a minimum of 360 days to serve.

For these reasons, we reject Clark's contention that presumptive sentencing does not apply to felony DWI. This offense is governed both by the presumptive sentencing laws and the mandatory minimum sentences established in AS 28.35.030(n). There is only one inconsistency between AS 28.35.030(n) and the usual rules of felony sentencing codified in AS 12.55.125 - 175: normally, there is no mandatory minimum sentence for class C felonies, but the legislature has created mandatory minimum sentences for felony DWI. Because a more specific sentencing statute such as AS 28.35.030(n)(1) takes precedence over the general sentencing statute, AS 12.55.125(e) n8, Clark is subject to the mandatory minimum [**8] sentence specified in AS 28.35.030(n)(1)

n8 *See In re Hutchinson, 577 P.2d 1074, 1075 (Alaska 1978).*

Clark raises two more issues on appeal.

First, Clark contends that Judge Cranston gave inordinate sentencing weight to Clark's history of assaultive crimes (aggravator (c)(8)). Clark's argument is premised on the assertion that Judge Cranston increased Clark's time to serve by 2 1/2 years (from 360 days to 3 1/2 years) based on this aggravator. But Clark is again relying on the erroneous notion that a mandatory minimum sentence is the same thing as a presumptive term. Clark faced a presumptive term of 3 years to serve. Judge Cranston did not use aggravator (c)(8) to increase Clark's time to serve by 2 1/2 years. Rather, the judge relied on this aggravator to increase Clark's time to serve by 6 months.

Clark does not offer any argument why this 6-month increase was clearly mistaken. n9 We have independently reviewed the record, and we conclude that it supports Judge Cranston's decision. [**9]

n9 *See Lepley v. State, 807 P.2d 1095, 1099 n.1 (Alaska App. 1991)* (a sentencing judge's decision regarding how much to adjust a presumptive term based on aggravating or mitigating factors is reviewed under the "clearly mistaken" test).

[*1152]

Finally, Clark argues that his sentence (5 years with 1 1/2 years suspended) is excessive. Clark's argument is essentially a reiteration of the contention that his presumed sentence should have been 360 days to serve. This is incorrect. A sentence of 360 days was the absolute minimum that Clark could receive under any circumstance. A sentence of 3 years was what Clark would presumptively have received if Judge Cranston had concluded that Clark's offense was a typical felony DWI and that Clark was a typical third felony offender. Judge Cranston concluded, however, that Clark was a serious offender whose record of alcohol abuse and violence called for an upward adjustment of the 3-year presumptive term. Having reviewed the record, we conclude that Clark's sentence [**10] is not clearly mistaken. n10

n10 *See McClain v. State, 519 P.2d 811, 813-14 (Alaska 1974)* (an appellate court is to affirm a sentencing decision unless the decision is clearly mistaken).

The judgement of the superior court is AFFIRMED.

## Attachment B

*Lyon v. State*, Alaska Court of Appeals MOJ No. A-7481, No. 4353, decided February 14, 2001

JODY B. LYON, Appellant, v. STATE OF ALASKA, Appellee.

Court of Appeals No. A-7481, No. 4353

COURT OF APPEALS OF ALASKA

*2001 Alas. App. LEXIS 40*

February 14, 2001, Decided

NOTICE:
[*1] MEMORANDUM DECISIONS OF THIS COURT DO NOT CREATE LEGAL PRECEDENT. SEE ALASKA APPELLATE GUIDELINES FOR PUBLICATION OF COURT OF APPEALS DECISIONS. ACCORDINGLY, THIS MEMORANDUM DECISION MAY NOT BE CITED FOR ANY PROPOSITION OF LAW, NOR AS AN EXAMPLE OF THE PROPER RESOLUTION OF ANY ISSUE.

PRIOR HISTORY:
Appeal from the Superior Court, Third Judicial District, Valdez, Joel H. Bolger, Judge. Trial Court No. 3VA-S99-0044 CR.

DISPOSITION:
The convictions and sentence AFFIRMED.

COUNSEL:
Sharon Barr, Assistant Public Defender, and Barbara K. Brink, Public Defender, Anchorage, for Appellant.

Douglas H. Kossler, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

JUDGES:
Before: Coats, Chief Judge, and Mannheimer and Stewart, Judges.

OPINIONBY:
COATS

OPINION:

MEMORANDUM OPINION AND JUDGMENT

COATS, Chief Judge.

Jody B. Lyon was convicted of first-degree vehicle theft and driving while intoxicated, class C felonies. n1 Lyon had six prior DWI convictions, two in the previous five years, and was therefore convicted of felony DWI. n2 Lyon had a prior felony conviction for driving while intoxicated, and therefore faced a presumptive [*2] sentence of two years of imprisonment on each offense. n3 Judge Bolger imposed the two-year presumptive term for each offense, and imposed the sentences consecutively to each other for a four-year composite sentence. This sentence was consecutive to an additional twenty- six months that had been suspended on Lyon's prior felony DWI offense. Thus, Lyon faced a composite sentence of six years and two months of imprisonment. Lyon argues on appeal that there was insufficient evidence to support his convictions and that the trial court imposed an excessive sentence. We affirm.

n1 *See AS 11.46.360(a)(1); AS 28.35.030(a)(1)*, (n).

n2 *See AS 28.35.030(n)*,(o)(4); *AS 28.35.032(p).*

n3 *See AS 12.55.125(e)(1).*

On March 10, 1999, Lyon was drinking at the Sugarloaf Saloon in Valdez. Lyon become loud and obnoxious and the bartender decided to cut Lyon off based on his [*3] signs of intoxication. The bartender dumped Lyon's drinks when Lyon was away from the bar. Lyon was asking people in the bar for a ride to the Long Branch Saloon, apparently a bar in Anchorage.

A short time later, Lyon was seen by at least two people in the bar trying to get into a car that belonged to Jessica Groppel, a waitress at the Sugarloaf Saloon. Groppel was about to get off duty and her friend, Shiloh Stamm, had Groppel's car running outside the bar.

Apparently Lyon was unable to enter Groppel's car because the door handle on the side he was trying to enter was broken.

Stamm also had left his car outside the bar. The car had its keys in it. Someone noticed Stamm's car was moving, and Groppel and Stamm ran outside. Stamm opened the door and yelled for the person driving the car to get out. The person driving the car accelerated with Stamm hanging on to the door. Stamm was dragged a short way and fell off.

The police were called and responded in a few minutes. They found Stamm's car stuck in an alley. No one was in the car but there was a trail in the fresh snow leading from the car to a cabin where the police found Lyon. When a police officer yelled at Lyon, "Stop, police, [*4] " Lyon took off running. But the police were able to apprehend Lyon and arrest him. Lyon denied driving the car.

The police took Lyon to the police station and gave him a breath alcohol test, which yielded a result of .271. Groppel positively identified Lyon as the person she saw taking Stamm's car. The police showed Stamm a photographic lineup that included a photograph of Lyon. Stamm concluded that two photographs resembled the man who stole his car; one of the photographs that he identified was of Lyon.

Following the presentation of this evidence at trial, the jury convicted Lyon. This appeal followed.

Lyon contends that the evidence that he was the person driving Stamm's car was weak and was insufficient to support his convictions. In reviewing a conviction to determine whether the evidence is sufficient to convict, we view the evidence in the light most favorable to the state. We are to uphold the conviction if we determine that fair- minded jurors exercising reasonable judgment could conclude that the state had met its burden of proving guilt built beyond a reasonable doubt. n4

n4 *See Dorman v. State, 622 P.2d 448, 453 (Alaska 1981).*

[*5]

Lyon argues that his conviction rests largely on the testimony of Groppel and argues that her testimony contained inconsistencies that undermine her credibility. He argues that her testimony identifying Lyon as the person who was driving the car is not credible. But the question of whether a witness is credible or not is a question for the jury to determine, not this court. n5 According to Groppel's testimony, she was in a position to observe Lyon both before and during the time that he was stealing the car. Her testimony was corroborated by other witnesses, including Stamm, who picked Lyon and another person out of the photographic lineup. Furthermore, Groppel's testimony was corroborated by the circumstances immediately following the offense. The police were able to follow a trail that led directly to Lyon from Stamm's car.

n5 *See Simpson v. State, 877 P.2d 1319, 1320-21 (Alaska App. 1994).*

Taking the evidence in the light most favorable to the state, we conclude that there was sufficient [*6] evidence for a reasonable jury to conclude beyond a reasonable doubt that Lyon was the person who took Stamm's car.

Lyon argues that his composite sentence of six years and two months to serve is excessive. In imposing the sentence, Judge Bolger emphasized Lyon's prior DWI convictions. Lyon had been convicted of this offense six times in the previous ten years. In addition, he had a conviction for refusing a breath test. Judge Bolger also emphasized the seriousness of Lyon's present offenses. He noted that Lyon had driven away with Stamm holding on to the opened driver's door. He concluded that it was fortunate that Stamm was not killed or seriously injured in the incident. He pointed out that Lyon was highly intoxicated at the time, that his breath alcohol content was .271, and that at the time of the offense, Lyon was driving while his license was revoked and while he was on probation for his prior felony conviction of driving while intoxicated. He noted that Lyon had consistently not abided by his conditions of probation and that he had several convictions for driving with his operator's license suspended. He concluded that Lyon had poor prospects for rehabilitation and would [*7] not abide by court restrictions on drinking or on driving.

Judge Bolger found that Lyon was a worst offender with respect to the crime of driving while intoxicated and that it was necessary for him to impose a cumulative sentence of over six years of imprisonment to protect the public. He stated that, "quite simply, the only effective way to prevent Lyon from driving while intoxicated is to keep him behind bars."

Judge Bolger's findings are supported by the record and support the sentence that he imposed. Lyon has an extensive record of driving while intoxicated. He has an extensive record of violating conditions of probation and driving while his license was suspended. According to the presentence report, Lyon stated that he was not interested in again undergoing treatment for his

alcoholism because he had done several programs in the past and did not agree with them. From Lyon's prior criminal history, the seriousness and life-threatening nature of his current offenses, and his attitude towards rehabilitation, Judge Bolger could properly conclude that it was necessary to protect the public by incarcerating Lyon for the entire sentence of six years and two months of imprisonment. [*8] We conclude that this sentence was not clearly mistaken. n6

n6 *See Mutschler v. State, 560 P.2d 377, 381 (Alaska 1977); McClain v. State, 519 P.2d 811, 813-14 (Alaska 1974)* (consecutive sentences not clearly mistaken where aggregate sentence not clearly mistaken).

The convictions and sentence are AFFIRMED.

## Attachment C

*Workman v. State,* Alaska Court of Appeals MOJ No. A-7357, No. 4230, decided June 21, 2000

2 of 3 DOCUMENTS

**AARON J. WORKMAN, Appellant, v. STATE OF ALASKA, Appellee.**

**Court of Appeals No. A-7357, No. 4230**

**COURT OF APPEALS OF ALASKA**

***2000 Alas. App. LEXIS 83***

**June 21, 2000, Decided**

**PRIOR HISTORY:**
[*1] Appeal from the Superior Court, Third Judicial District, Palmer, Eric Smith, Judge. Trial Court Nos. 3PA-S99-123 CR; 3PA-S98-1751 CR; 3AN-S95-9647 CR.

**DISPOSITION:**
The judgment of the superior court AFFIRMED.

**COUNSEL:**
John E. McConnaughy, III, Assistant Public Defender, Palmer, and Barbara K. Brink, Public Defender, Anchorage, for Appellant.

David G. Berry, Assistant District Attorney, and Roman J. Kalytiak, District Attorney, Palmer, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

**JUDGES:**
Before: Coats, Chief Judge, and Mannheimer and Stewart, Judges.

**OPINIONBY:**
STEWART

**OPINION:**

MEMORANDUM OPINION AND JUDGMENT

STEWART, Judge.

Aaron J. Workman pleaded no contest to three class C felonies and a class A misdemeanor from two separate cases. He also admitted that he violated his probation in a third case for which he was on probation for another class C felony. Workman appeared before Superior Court Judge Eric Smith for sentencing and disposition on these five crimes. Judge Smith imposed a composite term of 4 years and 1 month to serve. Workman claims that this term is excessive. Because we conclude that Workman's term to serve is not clearly mistaken, we affirm.

Workman was 22 years old [*2] when he appeared before Judge Smith on these three cases. Workman was on probation on a 1995 Anchorage case where he was convicted on one count of second-degree burglary. n1 In that case, on December 15, 1995, Workman smashed in the windows of a liquor store on Muldoon Road in Anchorage and stole cans of beer. Workman was driving his car near the location of the burglary when the police stopped him. His blood alcohol level was .194. He was sentenced for driving while intoxicated on January 12, 1996. Shortly after, on January 24, 1996, Superior Court Judge Karen L. Hunt imposed a 2-year suspended imposition of sentence on the burglary.

n1 AS 11.46.310(a).

Workman was sentenced for his next crime, another DWI, on January 15, 1997. On November 17, 1997, he was sentenced for driving on a revoked license. A probation revocation followed in January 1998. Superior Court Judge Milton M. Souter revoked Workman's probation on the second-degree burglary charge because he violated terms of his probation. Judge Souter suspended [*3] imposition of sentence for 2 years and 6 months. Workman was next sentenced on April 13, 1998, for a domestic violence assault and for malicious destruction of property.

Workman's second felony case arose out of an incident in August 1998. Workman was pursued by Wasilla police because he was driving an off-road motorcycle on the road without a headlight in the late

evening. Workman eluded police for awhile but was finally contacted and arrested. Ultimately, he entered a no contest plea to a single count of felony driving while intoxicated, a class C felony. n2 As a second-felony offender, Workman faced a presumptive two-year term. n3

n2 AS 28.35.030(a)(1) & (n). Under AS 28.35.030, driving while intoxicated is normally a misdemeanor. But AS 28.35.030(n) declares that this offense is a class C felony if, within the previous five years, the defendant has been convicted two or more times of either driving while intoxicated or refusing to submit to a breath test.

n3 AS 12.55.125(e)(1).

Workman was on release [*4] from the August offense when, late at night on January 20, 1999, he stole a vehicle from in front of a bar in Wasilla. Troopers saw the vehicle and tried to stop Workman but a chase of several miles ensued. Workman drove at speeds up to 100 mph and turned his lights off during the chase. He was caught after he drove the stolen vehicle into a ditch. He fought with the troopers when they arrested him. Workman kicked one trooper in the knee. Workman was intoxicated and refused a breath test. For this misconduct, Workman eventually pleaded no contest to one count of felony driving while intoxicated, one count of first-degree failing to stop at the direction of a peace officer, n4 and one count of fourth-degree assault. n5 Workman was not yet convicted for the August 1998 felony DWI when he committed these offenses, so he faced a presumptive two-year term for the felony DWI and for the first-degree failure to stop. Workman did not allege that any mitigating factors applied at sentencing. The State did not allege that any aggravating factors applied to the August 1998 charge, but the State did file notice of the following aggravating factors: AS 12.55.155(c)(6) (Workman's conduct created [*5] a risk of imminent physical injury to three or more persons); AS 12.55.155(c)(10) (Workman's conduct was among the most serious conduct within the definition of the offense); and AS 12.55.155(c)(12) (Workman was on bail release for another felony charge) applied to sentencing for the January 1999 felonies.

n4 AS 28.35.182(a).

n5 AS 11.41.230(a)(1).

At sentencing, the prosecutor argued that the court could *sua sponte* find aggravating factor (c)(12), but the court did not address the prosecutor's comment. Apparently, the court and the parties overlooked the State's previously filed notice of aggravating factors because the court made no findings on aggravating factors.

Judge Smith found Workman's prospects for rehabilitation to be "pretty good." But he found that Workman's sentence had to reflect general deterrence and community condemnation.

Judge Smith imposed a 2-year term with 1 year suspended on the 1995 second-degree burglary. On the August 1998 felony DWI, Judge Smith imposed the presumptive [*6] 2-year term consecutive to the burglary sentence. On the January 1999 felonies, although Judge Smith found no aggravating factors, he enhanced the presumptive term and imposed concurrent 4-year terms with 2 years suspended. Of the 2 years imposed, 1 year was imposed concurrently with the August 1998 DWI sentence and 1 year was imposed consecutively. For the fourth-degree assault, Judge Smith imposed a 1-year term with all but 30 days suspended. n6

n6 *But see* AS 12.55.135(d)(1) ("A defendant convicted of assault in the fourth degree who knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer ... shall be sentenced to a minimum term of imprisonment of ... 60 days if the defendant violated AS 11.41.230(a)(1)[.]")

Citing *Comegys v. State*, n7 Workman attacks the propriety of his composite term. Workman argues that his composite term is excessive and that a 3-year term would be adequate to effectuate the sentencing goals discussed by Judge Smith. [*7] Workman also claims that his offenses and background compare favorably to those of the defendant in *White v. State* n8 where we affirmed a maximum 5-year sentence on one count of felony DWI. n9 He argues that a 3-year composite term is supported by his comparison of *White* to his case.

n7 *747 P.2d 554 (Alaska App. 1987).*

n8 *969 P.2d 646 (Alaska App. 1998).*

n9 *Id. at 648.*

But Workman was sentenced on the probation revocation of his first felony conviction and on his

second, third, and fourth felonies. Workman had a string of offenses as an adult following a series of contacts with the juvenile system that started when he was ten years old. As Judge Smith found at sentencing, Workman was a young man who had trouble "both with substance abuse, certainly alcohol[,] and with the property of others." Furthermore, Workman's composite sentence is less than the 5-year term imposed in *White* for one count of felony DWI.

Under *Comegys*, when we review [*8] a composite sentence imposed for several criminal convictions, we assess whether the defendant's combined sentence is clearly mistaken, given the whole of the defendant's conduct and history. n10 At the age of 22, Workman had already accumulated four felony convictions. In addition, Workman's adult criminal history included several misdemeanor convictions. From our review of the record, we are not able to say that Workman's composite term to serve is clearly mistaken. n11

n10 *Comegys, 747 P.2d at 558-59. See also Neal v. State, 628 P.2d 19, 21-22 (Alaska 1981).*

n11 *See McClain v. State, 519 P.2d 811, 813-14 (Alaska 1974)* (an appellate court is to affirm a sentencing decision unless the decision is clearly mistaken).

*Conclusion*

The judgment of the superior court is AFFIRMED.

**Attachment D**

*White, v. State*, 969 P.2d 646 (Alaska App. 1998)

LEXSEE 969 P.2d 646

**FREDERICK WHITE, Appellant, v. STATE OF ALASKA, Appellee.**

**Court of Appeals No. A-6895, No. 1614**

**COURT OF APPEALS OF ALASKA**

***969 P.2d 646; 1998 Alas. App. LEXIS 52***

**December 24, 1998, Decided**

**PRIOR HISTORY:**
[**1] Appeal from the Superior Court, First Judicial District, Juneau, Larry R. Weeks, Judge. Trial Court No. 1JU-97-1521 Cr.

**COUNSEL:**
David D. Mallet, Juneau, for Appellant.

Thomas E. Wagner, Assistant District Attorney, Richard A. Svobodny, District Attorney, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

**JUDGES:**
Before: Coats, Chief Judge, and Mannheimer and Stewart, Judges.

**OPINIONBY:**
MANNHEIMER

**OPINION:**

[*647] OPINION

MANNHEIMER, Judge.

Frederick White was convicted of felony driving while intoxicated, a class C felony. n1 Superior Court Judge Larry R. Weeks sentenced White to serve 5 years in prison -- the maximum term allowable under AS 12.55.125(e). In this appeal, White contends that this sentence is excessive. For the reasons explained here, we conclude that the superior court properly viewed White as a "worst offender", and we therefore conclude that White's sentence of 5 years to serve [**2] is not clearly mistaken. n2

n1 See AS 28.35.030(a) & (n).

n2 See *McClain v. State, 519 P.2d 811, 813-14 (Alaska 1974).*

This case arose in Yakutat on August 3, 1997. In the middle of the afternoon, the police received a report that Frederick White was intoxicated and was driving from the airport towards town. Investigating this report, a police officer drove toward the airport. When he saw White's truck headed the other way, the officer turned around and began to follow White. White turned onto a side road, then backed his vehicle into a ditch while trying to turn around. The officer contacted White and had him perform field sobriety tests. When White failed these tests, the officer arrested him for driving while intoxicated. White's Intoximeter result was .233 percent blood alcohol.

White was released from custody around 5:00 p.m.. As part of his conditions of release, White was ordered not to drive for the next 24 hours and not to possess or consume alcohol pending his next court appearance. [**3]

About an hour and a half later, the police received a report that White was again operating his vehicle (while still intoxicated), and that White was in possession of a bottle of vodka. When officers went to investigate, they found a 55-gallon drum that had rolled off of White's truck while he was driving. They then found White at the boat harbor; White told the officers that he had driven to the harbor to deliver groceries to his boat. The officers found a half-gallon bottle of vodka in the front seat of White's truck. White again failed field sobriety tests, and he was again arrested.

During the ride to the police station, White raised his leg over the seat divider and kicked one of the police officers in the face. The blow was forceful enough to

leave a boot imprint. The officers used cap-stun on White, but they still had to physically struggle with White to subdue him. At the station, White's Intoximeter result was .221 percent blood alcohol.

Based on these incidents, White was charged with two counts of felony driving while intoxicated and one count of assault. White ultimately reached a plea agreement with the State. Under this agreement, White pleaded no contest to one count [**4] of DWI; the State dismissed the assault and the other count of DWI, with the proviso that these crimes could be considered at sentencing.

Felony driving while intoxicated is a class C felony. n3 White had a prior felony conviction from 1983, and so he faced a presumptive term of 2 years' imprisonment and a maximum term of 5 years' imprisonment. n4 White's prior felony conviction was for third-degree assault, but the offense actually constituted an aggravated instance of driving while intoxicated: White caused a traffic accident while he was driving drunk and, as a result, six people were injured.

n3 AS 28.35.030(n).

n4 AS 12.55.125(e)(1).

White had an extensive history of driving while intoxicated. He had twelve prior convictions for that crime (or the predecessor crime, "operating a motor vehicle while intoxicated"). Many of these prior DWIs involved [*648] motor vehicle accidents; one of them involved a hit-and-run. The DWI in the present case was White's thirteenth, and the dismissed count would have been his [**5] fourteenth.

Moreover, White had an extensive history of assault offenses. Most of these assaults were directed at police officers. As already explained, White assaulted one of the arresting officers in the present case by kicking him in the head. This latest assault was similar to three other assaults that White had committed.

White was convicted of assault and battery in 1974 (under the former criminal code) for attempting to kick a police officer in the head. As in the present case, the assault occurred while the officer was trying to take White to jail. Six years later, in 1980, White was convicted of fourth-degree assault for kicking and hitting a state trooper in the face. In 1985, White was again convicted of fourth-degree assault. This incident occurred after White was arrested in Juneau. White was intoxicated, and he assaulted the officer by hitting him in the face with his fists and with handcuffs.

In addition to these assaults on police officers, White was convicted of fourth-degree assault in 1994 for shaking and threatening his wife.

Based on White's history of DWI's, Judge Weeks found aggravator AS 12.55.155(c)(21) -- that White had a history of repeated offenses similar [**6] in nature to the crime for which he was being sentenced. Based on White's history of assaults, Judge Weeks found aggravator AS 12.55.155(c)(8) -- that White's criminal history included repeated instances of assault.

Judge Weeks found that White was a "worst offender" for sentencing purposes. n5 The judge noted that White "had been through numerous alcohol rehabilitation programs", all without lasting effect. The judge also noted that White had repeatedly violated previous probations. He concluded that a maximum sentence was required to protect the public from White.

n5 See *State v. Wortham, 537 P.2d 1117, 1120 (Alaska 1975); Napayonak v. State, 793 P.2d 1059, 1062 (Alaska App. 1990).*

On appeal, White essentially concedes that he has a terrible record, but he nevertheless argues that Judge Weeks should not have classified him as a "worst offender" because the facts of his present offense are not among the worst. We reject this argument for two reasons, one legal and one factual.

First, a finding of "worst [**7] offender" need not be based on the facts of the defendant's present offense. A defendant can be classified as a "worst offender" based either on the circumstances surrounding the defendant's present offense, or on the defendant's criminal history, or both. n6 In this case, White's record amply supports Judge Weeks's finding that White is a "worst offender".

n6 *Wortham, 537 P.2d at 1120; Napayonak, 793 P.2d at 1062.*

Second, White's present offense is hardly mitigated. Although he was allowed to plead no contest to a single count of felony DWI, White in fact committed two separate DWI's. Further, as part of the second incident, White assaulted one of the officers who were transporting him to jail. Even after the officers sprayed White with cap-stun, they still had to use physical force to subdue him.

For all of these reasons, we uphold Judge Weeks's finding that White is a "worst offender". We accordingly

conclude that White's 5-year prison term is not clearly mistaken. The sentencing decision of the superior [**8] court is AFFIRMED.