

NOTICE

*This is a summary disposition issued under Alaska Appellate Rule 214(a). Summary dispositions of this Court do not create legal precedent and are not available in a publicly accessible electronic database. See Alaska Appellate Rule 214(d).*

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

BENJAMIN DAVIS,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13063  
Trial Court No. 3AN-17-04137 CI

SUMMARY DISPOSITION

No. 0122 — April 22, 2020

Appeal from the Superior Court, Third Judicial District,  
Anchorage, Dani Crosby, Judge.

Appearances: Fleur L. Roberts, Law Offices of Fleur L. Roberts, Fairbanks, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Eric A. Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Harbison, Judge, and Hanley, District Court Judge.\*

Following a jury trial, Benjamin Davis was convicted of first-degree sexual assault, kidnapping, and four counts of second-degree sexual assault.<sup>1</sup> This Court

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\* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

<sup>1</sup> AS 11.41.410(a)(1); AS 11.41.300(a)(1)(C), and AS 11.41.420(a)(1), respectively.

affirmed Davis’s convictions on direct appeal in *Davis v. State*, 2011 WL 2183931 (Alaska App. June 1, 2011) (unpublished).

In 2017, Davis filed an application for post-conviction relief contending that he received ineffective assistance of counsel. The State filed a motion to dismiss Davis’s application as untimely, which the superior court granted.

On appeal, Davis argues that his delay in filing an application for post-conviction relief should be excused under the doctrine of equitable tolling because it resulted from his appellate attorney’s ineffectiveness. We have left open the possibility that an attorney’s ineffective assistance could provide a constitutional basis for allowing a late-filed application for post-conviction relief.<sup>2</sup> But to succeed on such a claim, the applicant still must exercise due diligence.<sup>3</sup>

Here, according to Davis’s affidavit, he “immediately” asked his appellate attorney to file a petition for hearing in the Alaska Supreme Court upon learning he had lost his direct appeal. But three and one-half years passed before he learned that his attorney had not filed a petition. Only at that time — in November 2014 — did Davis file a *pro se* petition for hearing, which the supreme court rejected as untimely. He then waited another year before filing a federal writ of habeas corpus in December 2015. When his federal filing was rejected the following month for failure to exhaust his remedies in state court, Davis waited another year before finally filing his application for post-conviction relief in January 2017.

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<sup>2</sup> *Gregory v. State*, 2019 WL 2156635, at \*2-3 (Alaska App. May 15, 2019) (unpublished) (citing *Xavier v. State*, 278 P.3d 902, 905 (Alaska App. 2012)).

<sup>3</sup> *See id.* (rejecting equitable tolling argument when seven years passed between the time the applicant was informed that his post-conviction relief application had been dismissed and the time he took steps to advance his *Grinols* claim).

Under these circumstances, we conclude that Davis failed to establish an equitable exception to the statute of limitations.<sup>4</sup> Even assuming Davis exercised diligence in the time period between when we issued a decision on his direct appeal and when he learned his appellate attorney had not filed a petition for hearing in the Alaska Supreme Court, at least two more years passed before Davis filed his application for post-conviction relief.

Davis points to his poor health to explain the significant delay between filings.<sup>5</sup> Yet his briefing on this issue was so cursory that the superior court made no ruling on it, and it is therefore not preserved for appeal.<sup>6</sup> Moreover, Davis's *pro se* filings in the Alaska Supreme Court and federal court belie the suggestion that a physical disability rendered him unable to timely file his application for post-conviction relief.

The superior court's dismissal of Davis's application for post-conviction relief is AFFIRMED.

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<sup>4</sup> See *State v. Walker*, 283 P.3d 668, 671 (Alaska App. 2012) (noting that a lower court's ruling can be upheld on an alternative ground if the justification rests on undisputed facts).

<sup>5</sup> See AS 12.72.020(b)(1)(A).

<sup>6</sup> See *McDaniels v. State*, 451 P.3d 403, 405 (Alaska App. 2019) ("To preserve an issue for appeal, an appellant must obtain an adverse ruling." (citing *Mahan v. State*, 51 P.3d 962, 966 (Alaska App. 2002))).