IN THE COURT OF APPEALS OF THE STATE OF ALASKA

KIRBY D. ANTHONEY, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-10841 Trial Court No. 3AN-00-06760 CI SUMMARY DISPOSITION No. 0129 — May 20, 2020

Appeal from the Superior Court, Third Judicial District, Anchorage, Patrick J. McKay, Judge.

Appearances: Olena Kalytiak Davis, Attorney at Law, Anchorage, under contract with the Office of Public Advocacy, for the Appellant. Nancy R. Simel, 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 McCrea, District Court Judge.[*]

This appeal comes before us after a lengthy procedural history. Kirby D. Anthoney was convicted more than thirty years ago of three counts of first-degree

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

murder, two counts of first-degree sexual assault, and one count of kidnapping.[1] The charges arose after Anthoney killed his aunt and his two young cousins.[2]

After his conviction, Anthoney filed a series of applications (and amended applications) for post-conviction relief, eventually settling on a number of claims, including that his trial attorney was incompetent for failing to pursue independent DNA testing of semen found at the crime scene and that he is entitled to post-conviction DNA testing of that semen. The superior court dismissed all of Anthoney's claims for failure to state a *prima facie* case except for his claim that he is entitled to post-conviction DNA testing. That claim is still being litigated in the superior court.

In the interim, Anthoney filed this appeal of the superior court's dismissal of his other claims. But Anthoney's appellate brief only challenges the superior court's dismissal of one of those claims: the claim that his trial attorney was incompetent for failing to pursue independent DNA testing of semen found at the crime scene. We agree with the State that Anthoney's claim was properly dismissed.

"[I]n order to prove ineffective assistance of counsel, the accused must establish a level of performance that no reasonably competent attorney would provide."[3] When an attorney has made a tactical choice, "the choice will be subject to challenge only if the tactic itself is shown to be unreasonable — that is, a tactic that no reasonably competent attorney would have adopted under the circumstances."[4]

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[1] *See Anthoney v. State*, 1993 WL 13156613, at *1 (Alaska App. Feb. 17. 1993) (unpublished).

[2] *Id.*

[3] *State v. Jones*, 759 P.2d 558, 568 (Alaska App. 1988) (citing *Brown v. State*, 601 P.2d 221, 234 (Alaska 1979)).

[4] *Id.* at 569-70.

It is clear from the deposition of Anthoney's trial attorney that he made a tactical choice not to pursue independent DNA testing. He explained that he did not think it made sense to spend considerable time and money pursuing independent DNA testing when those tests were unlikely to be helpful to Anthoney's case, and when, even if those results were helpful, it was not clear they would ultimately be admissible at trial.

This tactical decision was reasonable under the circumstances. As the superior court noted in its order dismissing Anthoney's claims, DNA testing was an emerging science at the time Anthoney was tried in 1988. The first Alaska appellate case holding DNA evidence admissible was not issued until 1995.[5] And as the superior court also noted, the State had conducted its own DNA tests and received inconclusive results. Given these inconclusive results, there was good reason to believe that independent testing would have been a waste of time and money that could have been better spent preparing Anthoney's defense in other ways.

Anthoney's trial attorney made a tactical choice, and we agree with the superior court that Anthoney failed to present a *prima facie* case that this tactic was unreasonable. We also note that Anthoney is currently litigating his right to post-conviction DNA testing under AS 12.73.010, and that this statute does not require a showing of ineffective assistance of counsel.

The judgment of the superior court is AFFIRMED.

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[5] *Harmon v. State*, 908 P.2d 434, 438-42 (Alaska App. 1995), *abrogated on other grounds by State v. Coon*, 974 P.2d 386 (Alaska 1999).