IN THE COURT OF APPEALS OF THE STATE OF ALASKA

NICK F. LINDOFF, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11119 Trial Court No. 1JU-07-841 CI t/w 1JU-05-1049 CR MEMORANDUM OPINION No. 6070 — July 2, 2014

Appeal from the Superior Court, First Judicial District, Juneau, Philip Pallenberg, Judge.

Appearances: Marcelle K. McDannel, Assistant Public Advocate, and Richard Allen, Public Advocate, Anchorage, for the Appellant. Nancy R. Simel, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley, District Court Judge.[*]

Judge ALLARD.

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

A jury convicted Nick F. Lindoff of second-degree assault for assaulting Jeffrey Mills with an axe. After this Court affirmed his conviction on direct appeal,[1] Lindoff filed an application for post-conviction relief. In his application, Lindoff claimed that his trial attorney provided ineffective assistance of counsel by not eliciting testimony from Lindoff regarding Mills's prior acts of violence, and by not objecting to an erroneous jury instruction on self-defense. Lindoff also claimed that his appellate attorney was ineffective for challenging the wrong portion of the self-defense jury instruction on appeal.

After reviewing Lindoff's claims, the superior court dismissed Lindoff's application for failure to state a *prima facie* case for relief. The court ruled that, even accepting Lindoff's allegations as true, Lindoff had failed to establish that either of his attorneys had acted ineffectively.

Lindoff now appeals the dismissal of his application for post-conviction relief. For the reasons discussed below, we affirm the superior court.

Factual and Procedural Background

The underlying criminal case

On August 10, 2005, Jeffrey Mills called the Hoonah Police Department and reported that Lindoff had assaulted him with an axe. After police interviewed Mills and Lindoff, they arrested Lindoff. The grand jury later indicted Lindoff on one count of second-degree assault.[2]

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[1] *See Lindoff v. State*, 2008 WL 5101794 (Alaska App. Dec. 3, 2008) (unpublished).

[2] AS 11.41.210(a)(1).

Prior to trial, Lindoff's attorney filed a notice that Lindoff would be claiming self-defense at trial. Lindoff's attorney also filed a motion asking the court to allow her to question Mills regarding his acts of violence known to Lindoff and his prior convictions of assault in the fourth degree. The trial court ruled that this questioning would be permitted if Lindoff testified that he knew about these prior acts and that this knowledge influenced his actions during the altercation with Mills.

At trial, Mills and Lindoff both testified and provided conflicting accounts of the events of August 10. According to Mills, he was at Lindoff's house drinking beer with several other people. At some point, everyone but Mills left the house; Mills sat in a reclining chair and fell asleep. Mills testified that the next thing he knew Lindoff was standing over him and hitting him in the chest with the handle of an axe. The men began wrestling for control of the axe and eventually ended up in the bathroom. Mills claimed that he was lying in the bathtub with the axe underneath him and Lindoff continued to hit him. Mills fought back by punching and kneeing Lindoff until he was able to leave the bathroom. Mills's testimony regarding his injuries was consistent with the testimony of police officers who observed a number of recent injuries to Mills when they contacted him, including lacerations to the nose and eye area, abrasions and swelling on his face, a swollen area on the back of his head, and three distinct injuries to his upper back and neck area that were consistent with strikes from the blunt side of an axe.

Lindoff testified that he left Mills sleeping on the reclining chair in his living room and went to a local bar to drink beer. Lindoff claimed that when he returned home, he asked Mills to go to the liquor store and Mills refused. Lindoff told Mills to "get the hell out," and Mills went to the arctic entry of the home and retrieved an axe. Lindoff testified that Mills then clubbed Lindoff on the side of the head with the axe handle. The men exchanged blows, and Lindoff ended up on the floor. When Lindoff

got up, he went to the bathroom where Mills was standing and the fight continued. Lindoff pushed Mills into the bath tub; they exchanged more punches, and Mills again clubbed Lindoff with the axe. Lindoff landed on the floor and the next thing he remembered was being woken up by the police. Lindoff's testimony regarding his injuries was not particularly corroborated by the testimony of police officers and correctional officers, who said Lindoff had a small cut on the bridge of his nose and was given Tyenol in the days immediately following his arrest.

While Lindoff was on the stand, his attorney did not ask him about any of Mills's prior acts of violence. At the close of evidence, the judge instructed the jury on the affirmative defense of self-defense. The instruction included the following statements:

> The law of self-defense is designed to afford protection to one who is beset by an aggressor and confronted by a necessity not of his own making; therefore, only the person who fires the first shot, strikes the first blow, or speaks the first insult can be deemed an initial aggressor. A person who provokes a difficulty forfeits his right of self-defense.

Lindoff's attorney did not object to this instruction.

After hearing closing arguments from the parties, the jury found Lindoff guilty of second-degree assault.

Lindoff's direct appeal

Lindoff appealed his conviction to this Court. His appellate attorney argued that the self-defense instruction was reversible error because the language "provokes a difficulty" was ambiguous and suggested that a person forfeits the right to claim self-

defense by provoking a verbal altercation that later leads to a physical altercation.[3] This Court recognized that the instruction could potentially be misread, but we concluded that this was highly unlikely in Lindoff's case given the manner in which the case was litigated and argued by the parties.[4] We noted that the central dispute at trial was who was the first physical aggressor with the axe, not who started any type of verbal altercation.[5] We therefore concluded that it was not plain error for the trial court to give this instruction.[6]

Lindoff's application for post-conviction relief

Following this Court's affirmance of Lindoff's conviction on direct appeal, Lindoff filed an application for post-conviction relief raising three separate claims for relief: (1) that his trial attorney was ineffective for failing to question Lindoff about Mills's prior violent acts; (2) that his trial attorney was ineffective for failing to object to the self-defense instruction; and (3) that his appellate attorney was ineffective for challenging only one part of the self-defense instruction on appeal.

Superior Court Judge Philip Pallenberg issued a preliminary order, noting various deficiencies in Lindoff's pleadings and giving him an opportunity to correct these deficiencies and amend his application. When Lindoff failed to amend his pleadings or provide any additional information in support of his claims, the court dismissed Lindoff's application for failure to state a *prima facie* case for relief.

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[3] *Lindoff*, 2008 WL 5101794, at *2.

[4] *Id.* at *3.

[5] *Id.*

[6] *Id.* at *4.

Lindoff now appeals that dismissal. Because a dismissal for failure to state a *prima facie* case is a ruling of law, our review is de novo.[7]

Did Lindoff's application state a prima facie case for post-conviction relief based on the alleged ineffectiveness of his trial counsel?

To present a *prima facie* case of ineffective assistance of counsel under Alaska law, a defendant must plead facts that, if true, would entitle the defendant to relief under both prongs of the test announced in *Risher v. State*.[8] That is, the defendant must assert specific facts demonstrating (1) that his or her attorney's performance fell below the objective standard of minimal competence; and (2) that there is a reasonable possibility that the incompetent performance affected the outcome of the defendant's case.[9]

In particular, the defendant's pleadings must rebut the presumption that the attorney performed competently and that the attorney's actions were motivated by "sound tactical considerations."[10] The defendant therefore bears the affirmative burden of pleading facts that, if proven true, either rule out the possibility of a tactical reason or demonstrate that the tactic was one that no competent attorney would have adopted under the circumstances.[11]

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[7] *Burton v. State*, 180 P.3d 964, 974 & n.14 (Alaska App. 2008).

[8] *Hampel v. State*, 911 P.2d 517, 524 (Alaska App. 1996); *Risher v. State*, 523 P.2d 421, 424-25 (Alaska 1974).

[9] *See Risher*, 523 P.2d at 424-25; *State v. Jones*, 759 P.2d 558, 567-68 (Alaska App. 1988).

[10] *Jones*, 759 P.2d at 569.

[11] *Id.* at 569-570.

Lindoff's first claim of ineffectiveness against his trial attorney

Lindoff alleged two claims of ineffectiveness against his trial attorney: (1) that she was ineffective for failing to question him about Mills's prior violent acts; and (2) that she was ineffective for failing to object to the self-defense instruction.

The trial attorney responded to the first allegation by asserting that her decision was based on tactical concerns — namely the desire to finish Lindoff's testimony as quickly as possible. In her affidavit filed with the pleadings in this case, the trial attorney explained that Mills testified much better than she anticipated and that Lindoff testified much worse:

> While Jeff Mills came across as a somewhat passive person, Mr. Lindoff came across as a bit angry and not very credible. His claim of being attacked first was not supported by the evidence, including witnesses at the jail who saw him after the incident ... . Given that Mr. Lindoff was not presenting well, and that our prior witness from the Hoonah jail testified that she gave him an aspirin upon his request, but did not see any injuries on Mr. Lindoff, I did not think the self-defense claim was going anywhere and I got him off the stand as quickly as I could.

When a trial attorney asserts that her challenged actions were motivated by strategic or tactical reasons, the defendant must explain why that answer is not sufficient to defeat the claim of ineffectiveness. As already noted, the law presumes competency on the part of counsel.[12] Thus, when a litigant does not even allege facts demonstrating why a tactic was incompetent, an ineffectiveness claim fails as a matter of law.[13]

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[12] *See Alexander v. State*, 838 P.2d 269, 272 (Alaska App. 1992).

[13] *See Nelson v. State*, 273 P.3d 608, 612 (Alaska 2012); *Smith v. State*, 185 P.3d 767, 768 (Alaska App. 2008); *Jones*, 759 P.2d at 569-70.

Here, Lindoff never responded to his trial attorney's explanation for her actions, even after the superior court gave him thirty additional days to supplement his application. Because Lindoff never rebutted his trial attorney's tactical explanation for her challenged action, we agree with the trial court that he failed to establish a *prima facie* case for ineffective assistance of counsel on this claim.

Lindoff's second claim of ineffectiveness against his trial attorney

Lindoff's second claim for relief was based on his trial attorney's alleged ineffectiveness for failing to object to the "first insult" and "provokes a difficulty" language in the self-defense jury instruction. But Lindoff never asked his trial attorney to address this claim in her affidavit, even after the trial court specifically noted this deficiency and gave Lindoff the opportunity to supplement his application.

When a defendant alleges ineffective assistance of counsel as a ground for post-conviction relief, Alaska law normally requires the defendant obtain an affidavit from his attorney explaining the reasons for the attorney's actions.[14] While not an inflexible requirement, an affidavit from an applicant's trial attorney is usually necessary for the superior court to evaluate whether the attorney made a tactical choice, and whether that tactical choice was sound.[15] A defendant's failure to obtain such an affidavit is therefore generally fatal to the post-conviction claim, unless the defendant can provide a sufficient explanation for why he was unable to secure the attorney's response.[16]

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[14] *Jones*, 759 P.2d at 570.

[15] *Id.*

[16] *Id.*; *see also Steffensen v. State*, 837 P.2d 1123, 1127 (Alaska App. 1992).

Here, Lindoff provided no explanation for his failure to ask his trial attorney to respond to his second claim of ineffectiveness in her affidavit. Nor did he explain why he failed to cure this deficiency in his pleadings when given the opportunity to do so. We conclude that the trial court did not err when it dismissed this claim.

Whether Lindoff established a prima facie case that his appellate counsel was ineffective in failing to highlight the "first insult" language in the challenged jury instruction

Lindoff's third claim is that his attorney on direct appeal was ineffective because she incompetently attacked the self-defense jury instruction. Lindoff claims specifically that his "appellate counsel challenged the 'provokes [a] difficulty' language for which there was case law support but failed to challenge the 'first insult' language which finds no support in the case law and to which the facts of this case directly relate."

In reviewing this claim, the superior court found that Lindoff's appellate attorney did challenge the "first insult" language on appeal, although her briefing primarily emphasized the "provokes a difficulty" language. The court therefore characterized Lindoff's argument as essentially an argument that the appellate attorney could have written a "more persuasive" brief to the Court of Appeals. The superior court then gave Lindoff thirty days in which to amend his application and explain how he was prejudiced by his attorney's actions. When Lindoff failed to amend his pleadings, the court dismissed this claim for failure to state a *prima facie* case for relief.

On appeal, Lindoff asserts that the superior court erred in finding that his appellate counsel had challenged the "first insult" language on appeal. We have reviewed the briefing in Lindoff's direct appeal. We agree with the superior court that the appellate attorney's challenge to the self-defense instruction was broader than Lindoff claims. Although the attorney focused on the "provokes a difficulty" language,

her argument was essentially that "provokes a difficulty" was ambiguous in the context of Lindoff's case, and that the jury must have concluded that Lindoff forfeited his right to claim self-defense because he made "the first insult" by ordering Mills out of the house and taunting him when he picked up the axe.

In rejecting this claim, this Court noted that any ambiguity in the instruction was likely cured by the manner in which the parties litigated the case and argued the instruction to the jury.[17] We noted that the parties presented two competing views of the incident and that the central dispute was whether Mills or Lindoff was the initial aggressor.[18]

Moreover, both parties argued the law of self-defense, and the concept of the initial aggressor, correctly to the jury in this case.[19] During closing argument, the prosecutor told the jury that a defendant loses the right to claim self-defense if he provokes the other person's conduct and that, here, "Mr. Lindoff came at Mr. Mills with an axe; he provoked whatever else happened that night, he's the initial aggressor, the one that fired the first shot, the one who under the law isn't entitled to the defense of self-defense." In response, the defense argued that Mills was the initial aggressor because "[t]hey had an argument about who was going to get some more beer ... Mr. Mills got mad and he's the one that attacked him with the axe."

Thus, neither party ever argued that a verbal "insult" was sufficient to "provoke a difficulty" and forfeit a claim of self-defense. And, as we recognized in Lindoff's direct appeal, the central question for the jury was whether Mills or Lindoff

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[17] *Lindoff*, 2008 WL 5101794, at *3.

[18] *Id.*

[19] *See O'Brannon v. State*, 812 P.2d 222, 229 (Alaska App. 1991); *Allen v. State*, 51 P.3d 949, 959 (Alaska App. 2002).

began the altercation by wielding the axe. We therefore conclude here that even accepting Lindoff's claim that his appellate attorney should have focused more on the "first insult" part of the instruction and less on the "provokes a difficulty" language, the outcome of his appeal would have remained the same.[20]

Conclusion

We AFFIRM the superior court's judgment.

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[20] *See Carter v. State*, 2005 WL 712239, at *4 (Alaska App. Mar. 30, 2005) (unpublished) (declaring defendant could only prevail in post-conviction relief action against appellate counsel if he could show that he would have won his appeal if an issue on appeal had been argued differently) (citing *Steffensen*, 902 P.2d at 342); *see also Tucker v. State*, 892 P.2d 832, 836-37 (Alaska App. 1995).