IN THE COURT OF APPEALS OF THE STATE OF ALASKA

RICHARD D. POMEROY, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11406 Trial Court No. 3AN-11-8637 CI MEMORANDUM OPINION No. 6162 — March 18, 2015

Appeal from the Superior Court, Third Judicial District, Anchorage, Philip R. Volland, Judge.

Appearances: Richard D. Pomeroy, *in propria persona*, Anchorage, for the Appellant. Eric A. Ringsmuth, 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 MANNHEIMER.

In 2005, Richard D. Pomeroy pleaded no contest to third-degree assault. In the next several years, he filed three petitions for post-conviction relief attacking this conviction.

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

The superior court dismissed Pomeroy's first petition for post-conviction relief in early 2007, and Pomeroy filed an appeal challenging the dismissal of his petition. *See Pomeroy v. State*, Court of Appeals File No. A-9965. However, Pomeroy later dismissed this appeal. At about the same time, he filed a second petition for post-conviction relief.

The superior court ultimately dismissed Pomeroy's second petition for post-conviction relief, and Pomeroy filed a second appeal. In *Pomeroy v. State*, 258 P.3d 125, 126 (Alaska App. 2011), this Court affirmed the superior court's dismissal of Pomeroy's second petition for post-conviction relief.

In 2011, following this Court's decision in *Pomeroy*, Pomeroy filed a third petition for post-conviction relief. In this third petition, Pomeroy argued that his sentence should be set aside because of newly discovered evidence. Pomeroy also argued that his conviction and sentence violated the United States and Alaska constitutions. And Pomeroy claimed that he had received ineffective assistance of counsel during the proceedings in which he waived his right to counsel in connection with his first petition for post-conviction relief and the ensuing appeal.

The superior court has now dismissed Pomeroy's third petition for post-conviction relief, and Pomeroy appeals the superior court's decision.

For the reasons explained in this opinion, we conclude that all of Pomeroy's claims are barred.

A more detailed look at the prior litigation related to Pomeroy's case

Pomeroy was initially charged with sexual abuse of a minor, but he reached a plea agreement with the State in which he pleaded no contest to a reduced charge of third-degree assault.

In the spring of 2006, Pomeroy filed his first petition for post-conviction relief. Pomeroy's petition was assigned to Superior Court Judge Philip R. Volland. (Pomeroy's original sentencing judge, Judge Larry D. Card, had retired in the interim.)

Judge Volland dismissed Pomeroy's petition for post-conviction relief in early 2007, and Pomeroy filed an appeal challenging the dismissal of his petition. *See Pomeroy v. State*, Court of Appeals File No. A-9965.

When Pomeroy's appeal came to this Court, we discovered a procedural flaw in the post-conviction relief proceedings in the superior court: Pomeroy had litigated his petition without the assistance of counsel, and the superior court had never obtained a waiver of counsel from Pomeroy. *See Grinols v. State*, 74 P.3d 889, 894 (Alaska 2003) (holding that a defendant is constitutionally entitled to the assistance of counsel to litigate a first petition for post-conviction relief).

We therefore remanded Pomeroy's case to the superior court so that Pomeroy would have the opportunity to (1) assert his right to counsel and (2) re-litigate his petition with the assistance of counsel.

In response to this Court's order, the superior court appointed the Office of Public Advocacy to represent Pomeroy. But in late June 2007, Pomeroy stated that he was waiving his right to counsel, announced that he did not wish to re-litigate his post-conviction relief claims, and declared that he wished to continue to represent himself on appeal.

More specifically, Pomeroy informed this Court that he had concluded that it was "in [his] best interest" to "represent himself in the appeal process and not to be pulled back into the black hole of Superior Court proceedings." Pomeroy indicated that his intention was to exhaust his state appellate remedies "prior to moving back into federal court", and he asked this Court to expeditiously set a due date for his opening brief.

(The Appellate Court Clerk's Office initially refused to accept the *pro se* pleadings described in the preceding paragraph, for the reason that Pomeroy was represented by counsel at that time. In response to the Clerk's actions, Pomeroy filed a "Final Judicial Notice of Self-Representation in Appellant[']s Appeal". In this pleading, Pomeroy threatened to seek federal habeas corpus relief if federal intervention was needed to enforce his "constitutional right to self[-]representation".)

Despite Pomeroy's adamant expressions of his desire to represent himself, this Court issued an order on July 11, 2007 in which we ruled that Pomeroy's purported waiver of his right to counsel was legally insufficient. We noted that there had never been a formal court proceeding where Pomeroy was apprised of the benefits of counsel and the dangers of self-representation, and where Pomeroy was formally asked to declare whether he wanted to waive his right to counsel.

We therefore ordered the superior court to again ask Pomeroy whether he wished to waive his right to counsel, forego any re-litigation of his petition for post-conviction relief, and proceed directly to his appeal. We also told the superior court that if Pomeroy again expressed the desire to waive counsel, the superior court could not accept Pomeroy's waiver until the court expressly advised Pomeroy of the benefits of counsel and the dangers of self-representation.

In mid-August 2007, this Court received a report from the superior court, certifying (1) that the court had advised Pomeroy of the benefits of counsel and the dangers of self-representation, (2) that Pomeroy still wished to waive his right to counsel, (3) that Pomeroy did not want to re-open the litigation of his petition for post-conviction relief, but rather wanted to proceed directly to the appeal, and (4) that Pomeroy wished to represent himself on appeal. *See* "Report to Appellate Court" dated August 13, 2007.

After receiving the superior court's report, this Court issued an order authorizing Pomeroy to represent himself on appeal and directing that the appeal go

forward. Pomeroy filed his opening brief in mid-2008, the State filed its brief in January 2009, and this Court set a filing deadline of February 12, 2009 for Pomeroy's reply brief.

But toward the end of January 2009, Pomeroy filed a motion asking this Court to stay his appeal. Pomeroy told this Court that he wished to hold his appeal in abeyance while he litigated a second petition for post-conviction relief.

This Court denied Pomeroy's request for a stay of the appeal. We noted that, whatever might be the merits of Pomeroy's proposed claims in a second application for post-conviction relief, the issues raised in that second post-conviction relief application would be separate from the issues raised in Pomeroy's appeal from the superior court's dismissal of his first application.

This Court did, however, extend the filing deadline for Pomeroy's reply brief to March 20, 2009. Three days after this deadline expired, Pomeroy filed a "Motion to Withdraw Appeal".

In his affidavit supporting this motion, Pomeroy told this Court (1) that he had filed a second petition for post-conviction relief, (2) that this second petition contained attacks on the rulings made by the superior court during the litigation of his first petition for post-conviction relief, (3) that there were "numerous issues [to be] resolved in the lower court", including "mistakes made by the appellant and the [superior] court during [the] litigation of [Pomeroy's] first application", and (4) that Pomeroy was asking to withdraw his appeal "in the best interest of justice, and [of his] family".

On April 3, 2009, this Court granted Pomeroy's motion to dismiss his appeal of the superior court's dismissal of his first petition for post-conviction relief.

Three weeks later, Pomeroy filed a second petition for post-conviction relief in the superior court, which he again litigated *pro se*. Judge Volland was assigned to this second petition, and in September 2009 he dismissed the petition. Pomeroy

appealed Judge Volland's decision to this Court — leading to our decision in *Pomeroy v. State*, 258 P.3d 125 (Alaska App. 2011). In *Pomeroy*, this Court decided four issues.

First, we ruled that Pomeroy was not entitled to peremptorily challenge Judge Volland as the judge handling the second post-conviction relief litigation because Pomeroy had not objected to Judge Volland's participation in his first post-conviction relief litigation. *Id.* at 128-29.

Second, we ruled that Pomeroy was estopped from claiming that he received ineffective assistance of counsel during the early stages of his first post-conviction relief litigation. We noted that even if Pomeroy's claim of ineffective assistance was true, his remedy would be the opportunity to re-litigate that first post-conviction relief action, this time with the assistance of counsel — and Pomeroy had already expressly waived that opportunity, even after we remanded his case to the superior court for this very purpose. *Id.* at 130. As we explained:

> The superior court committed error by allowing Pomeroy to litigate his petition for post-conviction relief pro se without first obtaining Pomeroy's knowing waiver of his right to counsel. But when this error was brought to light, Pomeroy was given two opportunities to assert his right to counsel and to completely relitigate his post-conviction relief claims, this time with the assistance of counsel. Pomeroy declined these opportunities and, instead, he chose to let the results of the superior court litigation stand.

Third, regarding Pomeroy's claims that errors occurred during the litigation of his underlying criminal prosecution, we noted that Pomeroy had waived all of these claims when he decided to accept the State's plea bargain and plead no contest. *Id.* at 131.

And fourth, regarding Pomeroy's claims that errors occurred during the litigation of his first petition for post-conviction relief, we ruled that Pomeroy waived all

of these claims when he voluntarily dismissed his appeal of the superior court's dismissal of that first petition. *Id.* at 131-32.

Pomeroy's current (third) petition for post-conviction relief

Pomeroy filed his third petition for post-conviction relief in 2011. The superior court dismissed this petition, leading to the present appeal.

Pomeroy argues that his first petition for post-conviction relief should have been assigned to Judge Card (the judge who sentenced him) rather than Judge Volland. Pomeroy also argues that, before the superior court dismissed his first petition for post-conviction relief, the court should have warned him that he needed to support his claim of ineffective assistance of counsel by securing an affidavit from the attorney(s) whose performance he was attacking.

These claims are waived. Pomeroy could have raised them when he appealed the superior court's dismissal of his first petition for post-conviction relief, but Pomeroy voluntarily dismissed that appeal. When he dismissed that appeal, Pomeroy abandoned all claims of procedural error arising from that first post-conviction relief litigation. *Pomeroy*, 258 P.3d at 131-32.

In his brief to this Court, Pomeroy makes numerous assertions of fact, all supporting the contention that he should not be held to the consequences of his earlier decisions (1) to forego the assistance of counsel, (2) to forego re-litigation of his first petition for post-conviction relief, this time aided by counsel, and (3) to litigate his first appeal *pro se*.

More specifically, Pomeroy asserts that when he made these decisions he was exhausted from working nights and was suffering from physical disabilities. Pomeroy also asserts that his ability to make decisions was impaired because the superior

court placed him under "duress" by appointing an attorney who Pomeroy thought was inadequately trained and incompetent to represent him. Additionally, Pomeroy asserts that the superior court failed to warn him of the possible legal consequences of his decisions.

We acknowledge that it is difficult for a person to engage in litigation without the assistance of counsel. Litigation takes time and energy; it requires specialized knowledge and skills; and it can be both mentally and physically taxing. Moreover, litigation often requires people to put their emotions aside so they can make decisions with an adequate level of objectivity and foresight.

This is why the law puts procedural roadblocks in the path of criminal defendants who wish to waive their right to counsel and to represent themselves. As illustrated by the facts of Pomeroy's case, even when a defendant announces that they do not want an attorney, courts will not allow the defendant to waive the right to counsel unless and until the defendant is expressly informed of the benefits of counsel and warned of the dangers of self-representation.

But our society values and protects the individual's right of self-determination — the right to make choices for oneself, even when those choices appear to be ill-considered or even self-defeating.

Here, even after Pomeroy was warned that his decision to proceed *pro se* might be ill-advised, Pomeroy adamantly declared that he did not want the assistance of counsel, that he wanted to litigate *pro se*, and that he did not want the opportunity to re-open his first post-conviction relief litigation. In addition, many months later, Pomeroy announced that he wished to abandon his appeal of the superior court's dismissal of his first petition for post-conviction relief.

Having made these decisions, Pomeroy is not entitled to have this Court relieve him of the consequences.

In addition to the foregoing claims, Pomeroy also argues that the superior court committed error during the litigation of his current (third) petition for post-conviction relief (1) by failing to provide him with an attorney to help him develop his claim of newly discovered evidence, and (2) by failing to hold an evidentiary hearing on this new evidence.

Pomeroy's new evidence consisted of telephone records and photographs that he found in a box of personal belongings — a box that had been in the safekeeping of a friend while Pomeroy was serving his sentence.

But even construing the record in the light most favorable to Pomeroy's claim, Pomeroy's new evidence was not the sort that, standing alone, would lead to the conclusion that he was innocent of the underlying criminal offense. Rather, as the superior court noted, this evidence merely impeached the general credibility of two government witnesses. Thus, this evidence did not form an adequate basis for granting post-conviction relief. See AS 12.72.020(b)(2), which states that when a defendant seeks post-conviction relief based on newly discovered evidence, the evidence must not merely impeach the State's case, but must clearly and convincingly establish the defendant's innocence. Given the nature of Pomeroy's evidence, the superior court did not err by failing to hold an evidentiary hearing, nor did the court abuse its discretion by failing to appoint an attorney for Pomeroy. [1]

Finally, Pomeroy claims that the superior court violated the rule announced in *Holden v. State*, 172 P.3d 815 (Alaska App. 2007), by failing to appoint an attorney

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[1] *See Grinols v. State*, 10 P.3d 600, 623-24 (Alaska App. 2000) (holding that indigent defendants have no constitutional right to counsel at public expense when they litigate a second or subsequent petition for post-conviction relief, but the superior court nevertheless has the discretion, under the due process clause of the Alaska Constitution, to appoint counsel for a defendant if the court concludes "that a lawyer's assistance is needed for a fair and meaningful litigation of the defendant's claim").

to help Pomeroy litigate the issue of whether his third petition for post-conviction relief was time-barred. But the *Holden* decision expressly states that it applies only to defendants who are pursuing a *first* petition for post-conviction relief. *Id.* at 818.

More importantly, aside from the issue of timeliness, the superior court had several other valid reasons for dismissing Pomeroy's petition. Thus, any purported violation of the *Holden* rule is moot.

Conclusion

The judgement of the superior court is AFFIRMED.