IN THE COURT OF APPEALS OF THE STATE OF ALASKA

SEYRAN SAMVELOVICH ANDREASYAN, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals Nos. A-11319, A-11309, & A-11310 Trial Court Nos. 3PA-11-618 CR, 3AN-07-7059 CR, & 3AN-03-11237 CR MEMORANDUM OPINION No. 6229 — August 19, 2015

Appeal from the Superior Court, Third Judicial District, Palmer, Eric Smith, Judge.

Appearances: Seyran Samvelovich Andreasyan, pro se, Palmer. Mary A. Gilson, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Coats, Senior Judge.[*]

Judge ALLARD.

[*] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

Following a jury trial, Seyran Samvelovich Andreasyan was convicted of first-degree terroristic threatening, AS 11.56.807(a), for placing a device meant to look like a bomb in another man's driveway.

Andreasyan raises three claims of error on appeal: (1) he asserts that the superior court erred when it denied his last-minute request to replace his appointed public defender with a private attorney retained by his family; (2) he argues that the terroristic threatening statute does not prohibit delivering a bomb, either real or imitation; and (3) he claims that his attorney was ineffective because she advised him to testify at his trial.

For the reasons explained here, we conclude that Andreasyan's first two claims are without merit. We further conclude that his third claim cannot be addressed on direct appeal and instead must be raised through an application for post-conviction relief.

We note that Andreasyan's original notice of appeal included a challenge to his sentence, but Andreasyan did not brief this claim and it is therefore waived.[1]

Background facts and proceedings

On the morning of March 13, 2011, Vitaly Kudryn discovered a device in his driveway as he was leaving his house to go to church. This device was placed several feet behind his car, not far from his house. The device was more than two feet long and consisted of a combination of pipe, foil, cable, and other items bundled together with red wire; an electrical cord ran from this bundle of materials to a stop watch.

Kudryn was afraid to move the device or to take it apart for fear that it would explode, so he called 911.

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[1] *See Gates v. City of Tenakee Springs*, 822 P.2d 455, 460 (Alaska 1991).

An Alaska State Trooper responded to Kudryn's report that a possible bomb was in his driveway. When the trooper arrived, he too thought that the device in Kudryn's driveway looked like an explosive device. Keeping his distance from the device, the trooper walked to the residence and contacted Kudryn. During this interview, Kudryn eventually told the trooper that he suspected that Andreasyan had put the device in his driveway. (Kudryn initially hesitated to name Andreasyan as a suspect, because Kudryn was afraid of him.)

The trooper took pictures of the device and contacted the Elmendorf Air Force Base explosive ordnance disposal team. The trooper also contacted Andreasyan, who claimed to have no knowledge of the bomb device. Based on his interview with Andreasyan, and on materials that he observed in Andreasyan's residence, the trooper arrested Andreasyan.

Meanwhile, the explosive ordnance disposal team arrived at the scene. They evacuated the homes on both sides of Kudryn's residence and then, operating with specialized equipment, they cut the device apart. When they did so, they discovered that the device was not a real explosive and that it did not contain any gun powder or other explosive material. Andreasyan's fingerprint was found on the device.

Andreasyan was indicted for first-degree terroristic threatening. The Public Defender Agency was appointed to represent him. After a number of delays, Andreasyan's trial was set for January 2012.

At trial call on January 23, Andreasyan's public defender moved for a continuance because Andreasyan's family wanted to hire private counsel for him. The proposed private attorney was present in court, but he indicated that he had not yet made a commitment to represent Andreasyan. The attorney informed the court that if a continuance were granted, "then we could discuss the possibility of our representation."

In response to Andreasyan's complaints about his attorney, the court held a representation hearing, Andreasyan told the court that he had "communication problems" with his public defender, that he had problems getting copies of discovery materials from her, and that he did not like the motions she had filed. After hearing Andreasyan's complaints, the court concluded that these complaints did not constitute sufficient grounds for replacing Andreasyan's attorney with a different appointed attorney.

The court informed Andreasyan that he had the right to hire private counsel if he could afford to do so, but emphasized that any new attorney would have to be ready to go to trial next week. The court explained that, given the delays that had already occurred in Andreasyan's case, the last-minute request for substitution of counsel, and the court's own packed trial calendar, it was not going to grant any more continuances in Andreasyan's case.

The next week, when the court convened for Andreasyan's trial, the private attorney appeared and told the court that his firm was now "fully retained," but that he could not be ready for Andreasyan's trial as it was currently scheduled, and he would need a continuance.

When the court asked the private attorney how much time he was requesting, the attorney said that he would need a minimum of "a couple of weeks." The attorney acknowledged, however, that due to the court's busy trial calendar, a continuance of any length would effectively delay the trial until March.

The court denied the request for a continuance. As a result, Andreasyan proceeded to trial with his appointed public defender.

At trial, Andreasyan testified on his own behalf. His defense was that he was simply playing a prank on Kudryn's housemate. Andreasyan claimed that Kudryn

knew all along that the bomb was fake, but Kudryn did not like him, so he lied to the authorities about the bomb being left by unknown persons in the driveway. Andreasyan also claimed that he (Andreasyan) had lied to the trooper who interviewed him, because he was afraid and confused and did not know what to say.

The jury convicted Andreasyan of first-degree terroristic threatening.

Why we conclude that the superior court did not abuse its discretion when it denied the continuance

On appeal, Andreasyan does not challenge the court's finding that there were inadequate grounds to remove Andreasyan's appointed attorney. Instead, he argues only that he had a constitutional right to counsel of his choice and that the court's refusal to grant him his requested continuance deprived him of that right.

Andreasyan is correct that criminal defendants have a constitutional right to representation by counsel of their choice (if they can afford to pay for that counsel).[2] But this right can be waived if the defendant fails to timely invoke that right.[3]

As a general matter, a trial judge has the discretion to grant or deny a continuance of trial, even when the continuance is requested in order to retain private counsel.[4] In exercising this discretion, the judge "must give great weight to any substantial prejudice to the rights of the moving party [and] also consider the interests of the opposing party, the public and the judicial system in the prompt disposition of

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[2] *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006).

[3] *Gottschalk v. State*, 602 P.2d 448, 451 (Alaska 1979); *see also Gonzalez-Lopez*, 548 U.S. at 144; *United States v. Hughey*, 147 F.3d 423, 428-31 (5th Cir. 1998); *Burleson v. State*, 543 P.2d 1195, 1199 (Alaska 1975).

[4] *Gottschalk*, 602 P.2d at 450-51; *Burleson*, 543 P.2d at 1199.

litigation."[5] But, ultimately, "[t]he denial of a request for continuance falls properly within the discretion of the trial court and will not be disturbed on appeal unless the discretion has been clearly abused."[6]

Thus, in *Gottschalk v. State*, the Alaska Supreme Court found no abuse of discretion where the trial court denied the defendant's last-minute request for a continuance to allow him to consult with the attorney he had just retained and to prepare his defense.[7] The court explained that "[i]t has been well established that a non-indigent defendant who fails to retain an attorney within a reasonable time before trial may be found to have waived his right to counsel."[8] Furthermore, "[when] a defendant is financially able to engage an attorney, he may not use his neglect in hiring one as a legitimate reason for delay."[9] The court acknowledged that "[w]hile blind adherence to the requirements of court calendaring should never be used as an excuse to deny one accused of a serious crime the fundamental right to organize his defense, there is a compelling public interest in the prompt and orderly disposition of such matters."[10] The court ultimately concluded that Gottschalk had had seven months in which to retain and consult with an attorney, hence his predicament was attributable solely to his lack of diligence.[11]

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5 *Burleson*, 543 P.2d at 1199.

6 *Gottschalk*, 602 P.2d at 450.

7 *Id. at* 451.

8 *Id*.

9 *Id.*.

10 *Id*.

11 *Id*.

Andreasyan's circumstances are analogous to Gottschalk's. Andreasyan was represented by the Public Defender Agency for nearly a year before he announced — just prior to the scheduled start of his trial — that his family had retained private counsel for him. There was no explanation provided for why this delay in securing counsel had occurred.

In addition, as the private attorney conceded, his representation of Andreasyan was contingent on securing a significant continuance that would necessarily result in an even longer delay because of the court's trial calendar.

Lastly, there were good reasons for the State's objection to any further delay. The prosecutor told the court that many of the government's witnesses were afraid of Andreasyan — and that, the longer the delay, the "more difficult ... it becomes to secure [the testimony of] those witnesses." The State also had credible reasons for believing that delaying Andreasyan's case would push the trial date well beyond March because it appeared that a murder case (a case assigned to the same judge) was going to be set for trial in March. Additionally, some of the State's witnesses were members of the military who were standing by in other states, waiting to see if they needed to travel to Alaska to testify at Andreasyan's trial. Because they could be unexpectedly deployed or given new orders, their future availability was far from assured.

Given all these circumstances, we conclude that the superior court did not abuse its discretion when it refused to grant Andreasyan's last-minute request for a continuance.[12]

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[12] *See Boggess v. State*, 783 P.2d 1173, 1182 (Alaska App. 1989) (finding no abuse of discretion in trial court's denial of request for continuance when it appeared continuance was needed only because of defendant's own lack of diligence in substituting a new attorney).

Why we conclude that Alaska Statute 11.56.807 criminalizes delivering an explosive device such as a bomb

Andreasyan claims that the charge against him should have been dismissed because his underlying conduct was not covered by the first-degree terroristic threatening statute.

The statute in question, AS 11.56.807(a), declares that it is a crime to place a person in reasonable fear of physical injury, or to cause the evacuation of any building, by knowingly sending or delivering "a bacteriological, chemical, or radiological substance," whether real or imitation.

Andreasyan argues that a bomb does not qualify as a "bacteriological, biological, chemical, or radiological substance." We disagree. Another provision of the same statute, AS 11.56.807(b)(1), defines "bacteriological, biological, chemical, or radiological substance" as "a material that is capable of causing serious physical injury." A bomb is certainly a device containing a "chemical, or radiological substance" — the explosive material — designed to cause serious physical injury.

Although the device constructed by Andreasyan was not actually capable of causing injury, the jurors at Andreasyan's trial could reasonably conclude that this device was constructed and placed in such a way that reasonable people would believe that it was capable of causing serious physical injury. The jury could therefore find that it constituted an "imitation" chemical device, within the definition codified in AS 11.56.807(b)(2).

The legislative history of AS 11.56.807 further demonstrates that the legislature intended the statute to cover bomb threats, whether real or false. When discussing the language of the proposed AS 11.56.807, Representative Kevin Meyer

asked how a bomb threat would be treated under the proposed statute.[13] Assistant Attorney General Anne Carpeneti, a representative from the Department of Law, responded that a bomb would be included in the term "any substance," and that making a false bomb threat would be first-degree terroristic threatening.[14] She later reiterated this position — that a bomb threat would be considered a biological or chemical substance under the proposed statute.[15] Additionally, the bill sponsor, Representative Lesil McGuire, stated that the new statute would make it a crime for a person to cause panic and fear in a public area by claiming to have a bomb.[16]

We thus conclude that Andreasyan's conduct was covered by the terroristic threatening statute.

Andreasyan's ineffective assistance of counsel claim cannot be addressed on direct appeal

Andreasyan also argues that his trial attorney was ineffective because she advised him to testify at his trial. But absent incontrovertible evidence of attorney incompetence, this Court "require[s] that the question of ineffective assistance of counsel be argued first to the trial judge either in a motion for a new trial or an application for post-conviction relief."[17] Because the record in this appeal does not contain

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[13] Minutes of House Judiciary Committee, House Bill 328/350, Tape 02-25, Side B, log no. 2221 (Feb. 7, 2002).

[14] *Id.*

[15] *Id.*

[16] Minutes of House Transportation Committee, House Bill 350, log no. 292 (Feb. 19, 2002).

[17] *Barry v. State*, 675 P.2d 1292, 1295 (Alaska App. 1984); *see Pedersen v. State*, 2014 WL 4536293, at *11 (Alaska App. Sept. 10, 2014) (unpublished).

incontrovertible evidence that it was incompetent for Andreasyan's attorney to advise him to take the stand, Andreasyan must raise this claim in a post-conviction relief application.[18]

Conclusion

The judgment of the superior court is AFFIRMED.

[18] *See Sharp v. State*, 837 P.2d 718, 722 (Alaska App. 1992) (explaining that ineffective assistance of counsel claims that "rest on considerations of strategy and trial tactics that are not directly addressed in open court" may only be raised in post-conviction relief applications).