

NOTICE

*Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.*

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ELI M. MITCHELL SR.,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11621  
Trial Court No. 2KB-07-134 CI

MEMORANDUM OPINION

No. 6253 — November 12, 2015

Appeal from the Superior Court, Second Judicial District,  
Kotzebue, Michael I. Jeffery, Judge.

Appearances: Doug Miller, The Law Office of Douglas S. Miller, Anchorage, for the Appellant. Terisia K. Chleborad, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.\*

Judge ALLARD.

After pleading no contest to first-degree assault for attacking his ex-wife with an axe, Eli M. Mitchell Sr. filed an application for post-conviction relief asserting

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

that the attorney who represented him in the plea process had a conflict of interest that was never waived.

Following an evidentiary hearing, the superior court denied Mitchell's conflict claim on the merits. The court acknowledged that there had been a potential conflict of interest, but the court found that this potential conflict had never ripened into an actual conflict that adversely affected the attorney's performance.

Mitchell now appeals the superior court's ruling, arguing that the court erred in placing the burden on him to prove an actual conflict. Mitchell also argues that the court mischaracterized his testimony at the evidentiary hearing and therefore a remand for additional fact-finding is needed. We find no merit to either of these claims. Accordingly, we affirm the superior court's denial of Mitchell's application for post-conviction relief.

*Background facts and prior proceedings*

In 2005, Mitchell was indicted on one count of attempted murder<sup>1</sup> and three counts of assault in the third degree<sup>2</sup> for attacking his ex-wife with an axe, in daylight, in front of witnesses. During the attack, Mitchell broke his ex-wife's arm and cut her left nostril. Mitchell's ex-wife was subsequently treated for her injuries at Kotzebue's Maniilaq Health Center.

Then-Assistant Public Defender Brooke Browning Alowa was appointed to represent Mitchell. At the time, Alowa's mother was a nurse at the Kotzebue Maniilaq Health Center.

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<sup>1</sup> AS 11.31.100(a)(1), AS 11.41.100.

<sup>2</sup> AS 11.41.220(a)(1)(A).

During her review of the discovery in Mitchell's case, Alowa discovered her mother's signature on one of the medical records, suggesting that her mother might have had some involvement in the treatment of the victim's injuries. Alowa informed Mitchell of this potential conflict, and Mitchell did not express any discomfort about Alowa's representation. Alowa also discussed the potential conflict with her supervisor, who agreed with Alowa that if it turned out that Alowa's mother had material information about the case and might be a witness, a different public defender would be assigned to take over the case.

In the meantime, Alowa continued to represent Mitchell and negotiated a plea agreement for Mitchell. Under the plea agreement, Mitchell would plead no contest to the reduced charge of first-degree assault and the other charges would be dismissed. The agreement called for Mitchell to receive a sentence of up to 15 years to serve, with the possibility that the sentencing judge could impose a lesser sentence. Alowa later testified that she encouraged Mitchell to take the plea agreement because it offered significantly less jail time than he would have otherwise faced, and the evidence was essentially incontrovertible that Mitchell had attacked and injured his wife.

Senior Superior Court Judge Donald D. Hopwood accepted Mitchell's no-contest plea under the plea agreement and later sentenced Mitchell to 20 years with 5 years suspended, 15 years to serve.

A few months later, Mitchell filed a pro se application for post-conviction relief asserting that Alowa had been laboring under a conflict of interest based on her mother's involvement in the victim's treatment. Specifically, Mitchell alleged that Alowa failed to interview her mother because of this conflict and that Alowa had advised Mitchell that she would not vigorously cross-examine her mother at trial. Mitchell asserted that he felt forced to accept the plea agreement because he believed that

Alowa would not zealously advocate for him due to her mother's involvement in the case.

Superior Court Judge Michael I. Jeffery held an evidentiary hearing at which both Alowa and Mitchell testified about the perceived conflict. Following the evidentiary hearing, Judge Jeffery issued a twenty-one page decision denying Mitchell's claim on the merits. Judge Jeffery found that Alowa's testimony about the alleged conflict and its lack of impact on her representation was credible:

The Court accepts Ms. Alowa's testimony that the medical records showed that her mother had an extremely minor role in the victim's care — simply checking in on the victim on one occasion. Her mother was never interviewed by the police nor called as a witness before the grand jury. At most, Mr. Mitchell has shown that there was a "conflict in the abstract." He has not shown that Ms. Alowa "actively represented conflicting interests."

Judge Jeffery further found that Alowa's representation had been competent and unaffected by the alleged conflict.

This appeal followed.

*Why we affirm the superior court's denial of Mitchell's application for post-conviction relief*

On appeal, Mitchell argues that the superior court erred in placing the burden on him to prove that there was an actual conflict that adversely affected his attorney's performance.

We find no merit to this argument. As a general matter, a defendant seeking post-conviction relief based on an alleged conflict of interest bears the burden of establishing that there was an actual conflict of interest that adversely affected his

attorney's performance.<sup>3</sup> However, having proved that there was an actual conflict of interest that adversely affected his attorney's performance, the defendant is not required to show that the outcome of the case would necessarily have been any different.<sup>4</sup>

Alaska law also applies a slightly different rule for cases involving “particularly egregious types of conflicting interests” such as when an attorney simultaneously represents two co-defendants.<sup>5</sup> In those circumstances, Alaska law (unlike federal law) presumes that the conflict adversely impacted the attorney's performance, and the burden of disproving the adverse impact is shifted to the State who must prove that the conflict was harmless beyond a reasonable doubt.<sup>6</sup> Mitchell asserts that this burden-shifting rule should apply to his case because his attorney failed to secure a written waiver of her alleged conflict as required by Alaska Rule of Professional Conduct 1.7(b)(4).

But this case does not involve the type of obvious and “egregious” conflict of interest that arises when an attorney represents co-defendants. To the contrary, as the superior court found, this case involved at most a “conflict in the abstract” — that is, a potential conflict that never materialized into an actual conflict that could adversely affect the attorney's performance. We therefore reject Mitchell's contention that the

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<sup>3</sup> See *Newby v. State*, 967 P.2d 1008, 1011-12 (Alaska App. 1998) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 348-49 (1980)).

<sup>4</sup> *Sullivan*, 446 U.S. at 348-50.

<sup>5</sup> See *Newby*, 967 P.2d at 1014.

<sup>6</sup> See *id.* at 1012; see also *Moreau v. State*, 588 P.2d 275, 284 (Alaska 1978) (adopting a standard that, if a trial judge fails to advise defendant of the “potential dangers inherent in dual representation .... the burden shifts to the state to prove beyond a reasonable doubt that a prejudicial conflict did not exist”); *State v. Celikoski*, 866 P.2d 139, 141-42 (Alaska App. 1994) (applying *Moreau* standard).

State should have borne the burden of disproving the adverse effect of the alleged conflict in this case.<sup>7</sup>

We likewise reject Mitchell’s claim that Alowa was required under Professional Conduct Rule 1.7(b) to secure his formal waiver of the purported conflict.

Rule 1.7(b) provides a mechanism for clients to waive a conflict of interest and consent to an attorney’s continued representation. But this rule only applies when the attorney is, in fact, laboring under a “concurrent conflict of interest” as defined in Rule 1.7(a) — that is, only when the attorney is in a situation where “(1) [her] representation of one client will be directly adverse to [the interests of] another client; or [where] (2) there is a significant risk that [her] representation of one or more clients will be materially limited by [her] responsibilities to another client, a former client, or a third person[,] or by [her] personal interest.”

In Mitchell’s case, the superior court expressly found that Alowa was *not* operating under such a conflict of interest — and we have upheld that finding. Accordingly, Rule 1.7(b) does not apply here.

We acknowledge that, in his written decision, Judge Jeffery faulted Alowa for failing to obtain Mitchell’s written waiver of the potential conflict. But this aspect of the judge’s decision is not correct. Professional Conduct Rule 1.7(b) does not require attorneys to obtain client waivers of purely theoretical conflicts that never materialize. Given the judge’s finding that there was no active conflict in this case, Alowa was not required to obtain a formal waiver from Mitchell.

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<sup>7</sup> See *LaPierre v. State*, 734 P.2d 997, 1003-04 (Alaska App. 1987) (burden shifting inappropriate where the alleged conflict involved the potentially conflicting interests of clients in unrelated cases); *Newby*, 967 P.2d at 1011-15 (same).

*Conclusion*

We AFFIRM the judgment of the superior court.