

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

BILLY JACK WIGLESWORTH,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11979
Trial Court No. 3PA-09-01029 CI

MEMORANDUM OPINION

No. 6477 — as corrected on June 23, 2017

Appeal from the Superior Court, Third Judicial District, Palmer,
Vanessa H. White, Judge.

Appearances: Billy Jack Wiglesworth, pro se, Wasilla. Eric A. Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Suddock, Superior Court Judge,* and Coats, Senior Judge.**

Senior Judge COATS.

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

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

Billy Jack Wiglesworth appeals the dismissal of his application for post-conviction relief (PCR). Representing himself, he contends that the superior court erred (1) when it dismissed his PCR allegations for reasons not raised by the State in its motion to dismiss and also failed to provide him an opportunity to amend his PCR application; (2) when it dismissed his claim that plain error occurred at his criminal trial when the prosecutor improperly vouched for the State’s witnesses and stated a personal belief that Wiglesworth’s codefendants, who testified against Wiglesworth, testified truthfully; and (3) when, after a hearing, it dismissed his claim that his trial counsel was ineffective for failing to personally interview two particular witnesses and failing to have these witnesses testify at trial. For the reasons explained in this decision, we conclude that the superior court committed no error. We therefore affirm the court’s dismissal of Wiglesworth’s application.

Wiglesworth’s underlying criminal case

In 2007, Wiglesworth and three others manufactured methamphetamine using the “ephedrine reduction” method (commonly known as the “REI” method).¹ Two of Wiglesworth’s codefendants entered plea agreements, and the third pleaded guilty without the benefit of a plea agreement. All three testified against Wiglesworth at his criminal trial.

Pertinent to this appeal, prior to trial, the defense moved under *Waring v. State* to suppress the statements of another person who implicated Wiglesworth as the methamphetamine manufacturer.² The superior court denied this motion.

¹ *Wiglesworth v. State*, 249 P.3d 321, 323 (Alaska App. 2011).

² *See Waring v. State*, 670 P.2d 357, 362-63 (Alaska 1983).

At Wiglesworth's criminal trial, evidence of his 2001 conviction for possession of methamphetamine was admitted, and certain information about that prior conviction was introduced through the testimony of a police officer who had no personal knowledge of the facts of that prior case. The officer testified from a 2001 police report prepared by a different police officer. The evidence from the 2001 conviction was admitted under Alaska Evidence Rule 404(b)(1) for the purpose of showing that Wiglesworth knew how to manufacture methamphetamine using the REI method.

Additionally, a crime lab analyst testified, without objection, about the State's crime lab test results. But this expert had not conducted the tests; he had only reviewed the work of the analyst who actually tested the evidence. The analyst who tested the evidence did not testify. The crime lab reports were also admitted without objection during the expert's testimony. Among other things, the lab reports showed that the evidence seized was methamphetamine or its precursor chemicals. (The results also showed that some of the evidence was not methamphetamine or its precursor chemicals.)

During closing arguments, the prosecutor, without objection, made some statements that vouched for the testimony of Wiglesworth's codefendants and expressed an opinion that these witnesses were telling the truth.

Ultimately, Wiglesworth was convicted of first-degree burglary (for breaking into a cabin to manufacture methamphetamine) and six counts of second-degree controlled substance misconduct (for manufacturing methamphetamine, possessing methamphetamine, and possessing precursor and other prohibited chemicals).³ He appealed, asserting that there was insufficient evidence to support the burglary

³ *Wiglesworth*, 249 P.3d at 322-23.

conviction, and that the burglary conviction and the drug convictions should have merged into a single conviction at sentencing.⁴

This Court upheld the burglary conviction and ruled that the burglary conviction did not merge with the drug convictions. But this Court agreed that the six drug convictions should merge into one.⁵

The PCR pleadings and proceedings

In 2009, while his criminal appeal was pending, Wigglesworth, representing himself, filed his initial application for post-conviction relief. He alleged that his trial counsel had been ineffective. In particular, he alleged that his attorney had failed to conduct an adequate pretrial investigation (including the failure to interview potential defense witnesses), had failed to obtain expert testimony, had failed to present exculpatory evidence, including exculpatory testimony, and had failed to withdraw due to a conflict of interest.

In 2012, Wigglesworth filed an amended application. In this amended application, he raised four new contentions. He alleged that his trial counsel was ineffective because she failed to object to the admission of hearsay statements introduced through a police officer's testimony during Wigglesworth's trial (the Rule 404(b) evidence), failed to object to evidence from the state crime lab that was introduced through an expert who had not done the actual testing, failed to object to the admission of the crime lab report to prove the identity, content, and weight of the controlled substances he was on trial for manufacturing and possessing, and failed to object to the prosecutor's vouching for the State's witnesses.

⁴ *Id.* at 322.

⁵ *Id.* at 322-23.

Wiglesworth asserted that any of the above four errors entitled him to a new trial, and that he had shown that his attorney was ineffective. Based on this view of his claims, he moved for summary judgment.

In his motion for summary judgment, Wiglesworth argued that he was entitled to relief because the trial court had committed plain error by allowing the State to admit testimony or evidence that was inadmissible under the federal and state constitutions.

The State opposed Wiglesworth's motion for summary judgment, and also asked the superior court to dismiss the application for post-conviction relief in its entirety because it did not raise any claims cognizable under the PCR statute. In part, the State argued that under the PCR statute, any evidentiary errors not raised in the merit appeal could not be litigated in a PCR application.

In response to the State's motion, Wiglesworth filed a second amended application. Among other things, he clarified that he was alleging that both his trial attorney and his appellate attorney were incompetent.

In this second amended application, Wiglesworth alleged that his trial counsel was ineffective because she failed to object to hearsay statements introduced through a police officer's testimony during trial to establish Rule 404(b) evidence, failed to object when the State admitted expert testimony regarding crime lab results through an expert who did not conduct the testing, failed to object to the admission of the crime lab report, and failed to object to the State's vouching for the credibility of its witnesses and arguing to the jury facts that were not in evidence.

Additionally, Wiglesworth alleged that his appellate counsel was incompetent because he failed to appeal the trial court's decision to admit hearsay statements that were introduced through a police officer's testimony during trial to

establish Rule 404(b) evidence, and failed to appeal the denial of the pretrial *Waring* suppression motion.

In resolving the parties' motions, the superior court considered Wiglesworth's original, amended, and second amended applications, his pleading for summary judgment, the State's opposition to that motion, and the State's motion to dismiss the applications.

In March 2013, in a written decision, Superior Court Judge Vanessa H. White addressed all of Wiglesworth's allegations. She dismissed all but one allegation. With regard to that remaining allegation, Judge White found that a hearing was required to determine whether trial counsel had conducted an inadequate pretrial investigation by failing to interview two potential defense witnesses.

In May 2013, before the evidentiary hearing was conducted, Wiglesworth filed a third amended application (along with a motion for relief from judgment,⁶ all of which the superior court treated as a motion for reconsideration).

Wiglesworth alleged that his trial counsel was ineffective because she did not call potential defense witnesses to testify that he was not the methamphetamine manufacturer, and that his codefendants intended to falsely implicate him in their criminal activity. He also alleged his trial counsel was ineffective because she allowed the State to introduce evidence of the lab results through the expert who reviewed the analyst's report, rather than require the State to present the analyst. Finally, he alleged that his appellate counsel was ineffective for not appealing the superior court's denial of the *Waring* suppression motion. He did not, however, challenge the dismissal of his other allegations.

⁶ See Alaska Rule of Civil Procedure 60(b).

As just noted, the superior court treated the third amended application as a motion for reconsideration. After addressing the three allegations on their merits, the superior court denied the motion.

Finally, in October 2013, the superior court held an evidentiary hearing to determine whether Wiglesworth's trial counsel had failed to conduct an adequate pretrial investigation by failing to interview two potential defense witnesses. The only evidence introduced at the hearing was the testimony of Wiglesworth's trial counsel. At the end of the hearing, the superior court found that Wiglesworth's trial counsel was not ineffective for not personally interviewing two potential defense witnesses, nor was she ineffective for deciding not to have these witnesses testify at the criminal trial. Approximately eight months later — in May 2014 — the superior court issued a written order dismissing this last remaining allegation, and denying Wiglesworth's third amended application.

Wiglesworth then appealed.

The appeal

As already explained, on appeal, Wiglesworth contends that the superior court committed three errors: that the court erred (1) when it dismissed claims that were not called into question by the State's motion to dismiss, and did so without allowing Wiglesworth the opportunity to amend his application; (2) when it dismissed his claim that the prosecutor committed misconduct by improperly vouching for the State's witnesses, and by stating his personal belief that Wiglesworth's codefendants testified truthfully; and (3) when it dismissed his claim that his trial counsel was ineffective for failing to interview two potential witnesses (the two witnesses who were the subject of the evidentiary hearing).

Wiglesworth had adequate notice that his claims would be dismissed

Wiglesworth first contends that the superior court was required to give him advance notice of its intent to dismiss the allegations in his application, and give him the opportunity to amend his pleadings. But the record shows that by the time litigation of his application ended, Wiglesworth had adequate notice of its deficiencies and an opportunity to address those deficiencies.

As just explained, Wiglesworth moved for summary judgment. The State then opposed Wiglesworth's motion, but also made a broader motion to dismiss his application in its entirety because it did not "raise cognizable claims under the [PCR] statute." Wiglesworth then filed his lengthy second amended application in response to the State's motion to dismiss the application.

Under Alaska Criminal Rule 35.1(f)(3), "The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."

The rule does not require the superior court to provide notice to either party before granting a motion for summary disposition on the grounds raised in that motion. For instance, this Court held in *Tall v. State* that Criminal Rule 35.1(f)(3) does not "require advance notice by the court of its intent to dismiss a post-conviction relief application when the court grants a dismissal in response to a motion by the State and for the reasons advanced in that motion."⁷ This Court reasoned that the State's motion to

⁷ 25 P.3d 704, 707 (Alaska App. 2001).

dismiss alerts the applicant to potential deficiencies in the application and gives the applicant an opportunity to oppose dismissal or to file an amended application.⁸

The State, by seeking to dismiss the entire PCR application, placed Wigglesworth on notice of the State's contention that his application was deficient because the application did not "raise cognizable claims under the [PCR] statute." In response to the State's motion, Wigglesworth filed a lengthy second amended application. The superior court took the second amended application into account when resolving the parties' motions.

After considering all the pleadings and affidavits, the superior court issued a written decision in March 2013 dismissing on the merits almost all of Wigglesworth's allegations. Subsequently, in response to the court's decision, Wigglesworth filed his third amended application.

Despite the superior court's decision explaining why most of his many claims were dismissed, Wigglesworth addressed only three claims in this last application: that his trial counsel had been ineffective because she did not call some potential defense witnesses, and because she allowed the State to admit evidence of the lab results through the expert who reviewed the analyst's report, rather than make the State present the analyst. He also alleged that his appellate counsel was ineffective for not appealing the superior court's denial of the *Waring* suppression motion. But he did not address the other dismissed allegations.

We conclude that even if the superior court was required to provide notice, the record demonstrates that, after the court dismissed the majority of his allegations, Wigglesworth had ample opportunity to respond to the dismissal and to supplement his

⁸ *Id.*

application in order to respond to the reasons his allegations were dismissed.⁹ His application was finally denied in May 2014, more than a year after the superior court dismissed the majority of his allegations.

Based on this record, we conclude that the superior court did not improperly dismiss Wiglesworth's application. The process that occurred in this case adequately provided Wiglesworth with notice of his application's deficiencies and gave him an opportunity to amend those claims.

Wiglesworth has waived his claim that the prosecutor committed misconduct during closing arguments

Among the PCR allegations the superior court dismissed was the allegation that Wiglesworth's trial counsel was ineffective because she did not object to various comments made by the prosecutor during his closing arguments at the criminal trial. The superior court found that Wiglesworth did not make any assertion in his application that no competent counsel would have failed to object to the prosecutor's comments, and the court then ruled that simply asserting that the attorney failed to object did not establish that counsel was ineffective. Wiglesworth did not address this ruling when he filed his third amended application, nor does he challenge this ruling on appeal.

Instead, despite raising this as an ineffective assistance of counsel claim in the superior court, Wiglesworth now asserts that the superior court should have sua sponte determined whether Wiglesworth was entitled to post-conviction relief on the ground that plain error occurred when the prosecutor allegedly vouched for the State's witnesses and said that he believed that Wiglesworth's codefendants testified truthfully.

But as the State points out, AS 12.72.020(a)(2) places limits on the issues that can be raised in an application for post-conviction relief. Under this statute, a

⁹ See *Bush v. State*, 157 P.3d 1059, 1063 (Alaska App. 2007).

litigant cannot bring a claim in a post-conviction relief application that “was, or could have been but was not, raised in a direct appeal from the proceeding that resulted in the conviction.” Because Wigglesworth’s claim of improper argument could have been raised in his direct appeal, but was not, Wigglesworth is now barred from raising it outside of an allegation that his trial counsel was ineffective.¹⁰ (Wigglesworth does not now challenge on appeal the superior court’s ruling that he failed to show that his trial attorney was incompetent for not objecting, so he has abandoned that potential claim of error.)

In his reply brief, Wigglesworth confirms that he is not claiming that what happened in the criminal trial was a result of ineffective assistance. Instead, he contends that under federal law, the writ of habeas corpus is available to collaterally challenge any violation of “fundamental law.”

But Wigglesworth did not litigate this allegation in the superior court, nor has he shown on appeal that AS 12.72.020(a)(2) is constitutionally deficient because it bars litigating a claim of error that was, or could have been, raised long ago. Wigglesworth had the opportunity to address this claim in the direct appeal of his criminal convictions, and again later as a claim of ineffective assistance by his appellate counsel for not raising it in the direct appeal.

Why we uphold the superior court’s ruling that Wigglesworth’s trial attorney was not ineffective for failing to investigate and present two defense witnesses at the criminal trial

¹⁰ See, e.g., *Rogers v. State*, 280 P.3d 582, 589 (Alaska App. 2012); *Kehlenbach v. State*, 2006 WL 2089386, at *2 (Alaska App. July 26, 2006) (unpublished); *Seek v. State*, 2004 WL 901901, at *2 (Alaska App. Apr. 28, 2004) (unpublished). See also *Gardner v. State*, 2006 WL 829758, at *4-5 (Alaska App. Mar. 29, 2006) (Mannheimer, J., concurring) (unpublished); *Stavenjord v. State*, 2006 WL 120181, at *4-5 (Alaska App. Jan. 18, 2006) (Mannheimer, J., concurring) (unpublished).

Wiglesworth's final contention is that the superior court erred when, after the evidentiary hearing, it dismissed his allegation that his trial counsel was incompetent because she failed to conduct an adequate pretrial investigation. In particular, he asserts that his trial counsel should have personally interviewed two potential defense witnesses — William Johnson and Michael Plummer — and should have called them to testify at Wiglesworth's criminal trial.

The superior court held an evidentiary hearing to resolve this claim. The only evidence presented at the hearing was the trial counsel's testimony. Wiglesworth did not testify, call any other witnesses, or offer any other evidence.

At the hearing, Wiglesworth's trial counsel could not recall much of her decision-making process regarding her pretrial investigation and witness selection. But she testified that it was her practice not to personally interview all potential witnesses. She would instead hire an investigator to do so. She testified that she did hire an investigator in Wiglesworth's case, although she could no longer recall who the investigator interviewed, or the results of those interviews.

She explained that at Wiglesworth's criminal trial, their defense was that his codefendants, not Wiglesworth, were the methamphetamine manufacturers, and that his codefendants, not he, possessed controlled substances and illegal precursor chemicals. She said she called two witnesses to testify who supported this defense. Although she could not recall why she chose these two particular witnesses, she did explain why she did not call Plummer or Johnson as witnesses.

She did not call Plummer because she knew he had a lengthy criminal history and, because he was incarcerated at the time of Wiglesworth's trial, he would likely have testified in a yellow prison jumpsuit. She did not call Johnson because his testimony would have opened the door to Wiglesworth's prior physical assault on Wiglesworth's wife.

After the close of evidence, the superior court ruled that Wiglesworth had not rebutted the presumption that his trial counsel made competent decisions regarding her pretrial investigation and regarding who to have testify at trial. The superior court found that the defense attorney had a sound tactical strategy when she decided, as was her general practice, to not personally interview all potential witnesses, but to hire an investigator to do so. Consequently, the superior court concluded that the attorney was not incompetent for not personally interviewing Plummer or Johnson.

Regarding Wiglesworth's allegation that Plummer and Johnson would have been better witnesses for the defense than the witnesses that his attorney did call, the superior court concluded that there was no basis to find that the attorney did not engage in sound tactical decision-making when she decided not to have Plummer or Johnson testify. The superior court also found that even had the attorney called Plummer and Johnson, considering the evidence given by the witnesses that were called, the outcome of the trial would not have been different.

At this stage of the proceedings, trial counsel is presumed to have acted competently, and "[a]n integral component of the presumption of competence is the further presumption that trial counsel's actions were motivated by sound tactical considerations."¹¹ Wiglesworth had the burden of proving by clear and convincing evidence that his attorney was incompetent with regard to her decisions regarding Plummer and Johnson, and that those decisions resulted in prejudice. Here, the attorney's testimony was the only evidence on this issue, and based on that evidence, the superior court did not err when it found the attorney acted competently.

Moreover, even though the attorney could not remember much of her pretrial investigation, her investigator's actions, or her trial preparation, her lack of recall

¹¹ *State v. Jones*, 759 P.2d 558, 569 (Alaska App. 1988).

does not mean that Wiglesworth should prevail. Wiglesworth bore the burden to prove by clear and convincing evidence that the attorney was incompetent.¹² By failing to put on evidence to show his trial attorney performed incompetently, he failed to satisfy that burden.

Conclusion

The judgment of the superior court is AFFIRMED.

¹² See *Merrill v. State*, 457 P.2d 231, 234 (Alaska 1969), *overruled on other grounds by Donnelly v. State*, 516 P.2d 396 (Alaska 1973). See also *Jones*, 759 P.2d at 569 (presumption of competence remains un rebutted in the absence of evidence ruling out the possibility of a tactical reason to explain counsel's conduct).