IN THE COURT OF APPEALS OF THE STATE OF ALASKA

BRENDA CLEVELAND, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12028 Trial Court No. 3AN-11-11572 CI MEMORANDUM OPINION No. 6561 — January 3, 2018

Appeal from the Superior Court, Third Judicial District, Anchorage, Erin B. Marston, Judge.

Appearances: Douglas O. Moody, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Tamara E. De Lucia, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

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

Judge ALLARD.

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

Brenda Cleveland was convicted, following a jury trial, of kidnapping and first-degree sexual assault on M.J.[1] The evidence at trial established that, after M.J. stole drugs and other items from one of Cleveland's co-defendants, Cleveland and the other co-defendant took M.J. to a trailer, where, over a series of three days, they beat, sexually assaulted, and tortured her.[2] Cleveland did not testify at trial. This Court affirmed Cleveland's convictions on direct appeal.[3]

Following her appeal, Cleveland filed an application for post-conviction relief, alleging that her trial attorney was ineffective for advising her not to testify at trial. Cleveland asserted that, had she testified, she would have stated that she did not engage in the charged conduct. She further asserted that, in addition to contradicting M.J.'s allegations, her testimony would also have "humanized and personalized her in front of [the] jury."

In response to these allegations, Cleveland's trial attorney filed an affidavit. In the affidavit, the defense attorney explained that she advised Cleveland against testifying at trial because she foresaw certain problems with Cleveland testifying. The attorney stated that Cleveland "has a bit of an impulse control problem" and the attorney was "concerned that her answers would be unpredictable." The attorney acknowledged that "some [people] find [Cleveland] charming," but she stated that she could not say that Cleveland's appeal was necessarily universal. The attorney did not recall Cleveland having a strong position on testifying or not testifying. The attorney explained that, at

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[1] Cleveland was also convicted of coercion, third-degree assault, misconduct involving weapons, fourth-degree assault, and harassment. *Cleveland v. State*, 258 P.3d 878, 881 (Alaska App. 2011). She was acquitted of kidnapping and assault against another victim, V.B. *Id.* at 881.

[2] *Id.* at 880-81.

[3] *Id.* at 888.

the time, she felt like Cleveland testifying "could have been a disaster" and that she "didn't think the risk [of her testifying] was warranted." Rather, the attorney thought that she (the attorney) "could do enough damage to the victim through cross-examination and the presentation of other evidence, such as phone records, where it wouldn't be necessary for [Cleveland] to testify and offer a competing version of events." The attorney also stated that, in hindsight, she now felt that it was a mistake not to have Cleveland testify, and that she now thought that she should have put Cleveland through "mock examinations to see how she would do."

The State filed an answer denying that Cleveland's trial attorney had acted incompetently when she advised Cleveland not to testify, and further denying that Cleveland had established that she was prejudiced by this advice. The State did not, however, move to dismiss Cleveland's post-conviction relief application.

The superior court then issued a tentative decision indicating that it intended to dismiss Cleveland's post-conviction relief application for failure to state a prima facie case for relief. The court acknowledged that the State had not filed a motion to dismiss Cleveland's application. However, the court noted that, pursuant to the authority recognized in *Tall v. State*, it was tentatively dismissing Cleveland's application for failure to state a prima facie claim, and giving her thirty days to supplement or amend her claim to address the deficiencies identified by the court.[4]

In its tentative decision denying Cleveland's application, the court noted that Cleveland was *not* making the argument that she was denied her right to testify; instead, she was only making the argument that her attorney was incompetent for advising her not to testify. The court also noted that Cleveland's attorney had provided tactical reasons why she had given Cleveland this advice, and that Cleveland had failed

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[4] *See Tall v. State*, 25 P.3d 704, 707-08 (Alaska App. 2001).

to allege any facts that showed that this advice fell below the minimal standard of competence.

Cleveland did not respond to the court's tentative ruling, and she did not amend or otherwise supplement her application. The superior court then dismissed Cleveland's post-conviction relief application in accordance with its earlier tentative ruling.

Cleveland now appeals this dismissal. Cleveland argues first that the court acted improperly when it dismissed her application *sua sponte*. Cleveland acknowledges that the former version of Alaska Criminal Rule 35.1 explicitly gave the court this authority.[5] But she asserts that nothing in the current rule gives the court such authority, and she argues that the court therefore had no authority to dismiss her application in the absence of a motion to dismiss from the State.

We find no merit to this claim. Criminal Rule 51 provides that in cases where no specific procedure exists, "the court may proceed in any lawful manner not inconsistent with these rules, the constitution, and the common law."[6] We find nothing unlawful in the court's actions here. The record makes clear that Cleveland was given proper notice of the superior court's tentative decision to dismiss her application and the specific reasons why the court intended to do so. Cleveland was also given an opportunity to respond to this tentative decision and to amend her application to address the deficiencies identified by the court. But she did not do so. Under these circumstances we do not find any error in the court's handling of the matter.

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[5] *See Tall*, 25 P.3d at 707-08.

[6] Alaska R. Crim. P. 51; *see also* Alaska R. Crim. P. 53 ("These rules are designed to facilitate business and advance justice. They may be relaxed or dispensed with by the court in any case where it shall be manifest to the court that a strict adherence to them will work injustice.").

Second, Cleveland argues that the court erred in dismissing Cleveland's application for failure to state a prima facie case of ineffective assistance of counsel. We also find no merit to this claim.

To plead a prima facie case for relief based on ineffective assistance of counsel, a defendant must plead facts that, if true, would be sufficient to establish both prongs of the test announced in *Risher v. State*.[7] That is, the defendant's application must contain well-pleaded facts showing (1) that her attorney's performance fell below the objective minimum standard of competence required of lawyers experienced in the criminal law, and (2) that there is a reasonable possibility that the outcome of the trial would have been different but for the incompetent performance of her attorney.[8]

As the superior court pointed out, Cleveland is not claiming that she was denied her right to testify. Instead, she claims that she was "willing" and that her attorney acted incompetently when she advised her not to testify. But the attorney's affidavit explained why the attorney had advised Cleveland not to testify, and it is clear that the attorney's reasons were based on the attorney's tactical assessment of the benefits and risks of Cleveland testifying (even if the attorney later second-guessed those tactics with the benefit of 20/20 hindsight).[9] Cleveland did not plead any facts showing that the attorney's tactical assessment was unreasonable or otherwise unsound; nor has she shown that no competent attorney would have given such advice under the circumstances as they appeared at the time of trial. We therefore agree with the superior

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[7] *Risher v. State*, 523 P.2d 421, 424-25 (Alaska 1974); *see also State v. Jones*, 759 P.2d 558, 567-68, 572 (Alaska App. 1988); U.S. Const. amend. VI; Alaska Const. art. I, § 11.

[8] *See Risher*, 523 P.2d at 424-25; *Jones*, 759 P.2d at 567-68, 572.

[9] *Jones*, 759 P.2d at 569-70.

court that Cleveland's post-conviction relief application failed to state a prima facie case for relief.

The superior court's judgment is AFFIRMED.