IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CLARENCE EDWARD WOODS, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12194 Trial Court No. 3AN-12-6325 CI MEMORANDUM OPINION No. 6573 — January 17, 2018

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

Appearances: Glenda J. Kerry, Girdwood, for the Appellant. Terisia K. Chleborad, 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 MANNHEIMER.

Clarence Edward Woods appeals the superior court's dismissal of his petition for post-conviction relief. The petition was based on Woods's assertion that he received ineffective assistance of counsel from the attorney who represented him in his

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

underlying criminal case. The superior court dismissed the petition because the court concluded that it failed to state a *prima facie* case for relief. For the reasons explained here, we agree with the superior court that Woods failed to offer a *prima facie* case that his trial attorney was ineffective. We therefore affirm the decision of the superior court.

Woods's underlying criminal case

The following facts are taken from this Court's decision in *Woods v. State*, unpublished, 2011 WL 3893578 (Alaska App. 2011), where we affirmed Woods's convictions on direct appeal.

In 2008, Woods and another man, Artemio Vega, were charged with robbing a third man, Larry Nesteby, at a bus stop in the Mountain View neighborhood of Anchorage.

According to the State's evidence, Nesteby was sitting on a concrete wall, drinking alcohol and waiting for the bus. Woods, who was an acquaintance of Nesteby's, sat down next to him. Nesteby had his backpack resting between his feet.

As Nesteby was talking with Woods, Nesteby noticed another man (a man he did not know) coming toward them from across the street. While Nesteby was looking away toward a nearby bench, someone hit him in the eye. Then Nesteby was hit a second time; this second blow knocked him off the wall he had been sitting on.

Nesteby heard someone say, "Get his money." He lost his grip on his backpack, and it was taken from him. When Nesteby's head cleared and he regained his feet, he saw two people leaving with his backpack.

A friend of Nesteby's observed this incident. She later stated that she heard "yelling and screaming", and that she "saw a couple people run off with [Nesteby's]

backpack." At trial, she identified Woods and Vega as the two men who had attacked Nesteby and stolen his backpack.

The following day, the Anchorage police searched Woods's car and his residence; they found several of Nesteby's belongings — items that had been in his backpack.

Neither Woods nor Vega took the stand at their trial, nor did they present any other defense case. Woods's attorney argued (in both her opening statement and her summation) that Woods was merely an innocent bystander when Nesteby and Vega got into a fight. According to the defense attorney, Woods decided that he wanted nothing to do with this fight, so he grabbed what he thought were his belongings and left the area — only to belatedly realize that he had grabbed Nesteby's backpack by mistake.

The jury found both Vega and Woods guilty of second-degree robbery, and Woods was additionally found guilty of fourth-degree theft. The superior court sentenced Woods to serve 10 years in prison.

Woods's petition for post-conviction relief

Most of Woods's petition for post-conviction relief consisted of a lengthy recapitulation of the testimony at his trial and the procedural history of his case (including his appeal to this Court). However, in the midst of this recitation, Woods's post-conviction relief attorney described a particular incident that occurred at Woods's trial.

At the close of the State's case, the trial judge asked both of the defense attorneys (Woods's attorney and Vega's attorney) whether their clients intended to take the stand. In response, Vega's attorney told the trial judge that she needed a short recess so that she could talk to her client about this decision.

When the court resumed its session, Vega's attorney announced that Vega had decided not to testify. The trial judge then asked Woods's attorney if Woods would be testifying, and Woods's attorney answered "no". The judge then addressed Vega and Woods personally, to make sure that each defendant understood that this decision was theirs to make, and to confirm that they did not wish to testify.

As soon as this inquiry was over, the judge asked the defense attorneys if they had any other witnesses to present. Vega's attorney answered, "No, Judge. [Mr. Vega's decision] completely changes our game plan. When the jury comes back in, the defense would rest, ... and we would be ready to [begin closing arguments]."

Woods's defense attorney made no comment to any of this, other than to tell the trial judge that, by stipulation with the prosecutor, she was going to introduce the State Crime Laboratory's fingerprint report.

The case then proceeded to final arguments and jury deliberations.

In his petition for post-conviction relief, Woods relied on this incident as evidence that his trial attorney formulated the defense case incompetently. Specifically, Woods claimed that his trial attorney formulated Woods's defense in reliance on the premise that Woods's co-defendant, Vega, would take the stand, and that Vega's trial attorney would call other (unspecified) witnesses to testify about (unspecified) aspects of the incident.

Woods's post-conviction relief attorney asserted that, had Vega testified, Vega would have told the jury that "Woods had nothing to do with the fight" between Vega and Nesteby, and that this fight "had nothing to do with a plan to take property from Nesteby". Woods's post-conviction relief attorney also asserted that, had the other unspecified defense witnesses testified, they would have presented testimony that Nesteby was belligerent and that he had provoked the fight, at least in part.

These assertions were supported to some degree by the affidavit that Woods's trial attorney submitted in conjunction with the petition for post-conviction relief.

In her affidavit, Woods's trial attorney confirmed that she and Vega's trial attorney had agreed to run a joint defense. According to the trial attorney's understanding, Vega was going to take the stand and testify that his fight with Nesteby began when Nesteby attacked *him* — that he fought with Nesteby in self-defense, and that Woods was not involved in this fight. Woods's trial attorney stated that she was surprised when Vega decided not to testify.

Woods's trial attorney also understood that Vega's attorney was going to present "other witnesses to the incident" — although Woods's trial attorney did not name or otherwise describe these witnesses, nor did she explain what these witnesses were expected to say.

Other than his trial attorney's affidavit, Woods presented no materials in support of his petition for post-conviction relief.

As we explained earlier, the superior court dismissed Woods's petition because the court concluded that Woods had failed to state a *prima facie* case for relief.

Why we uphold the superior court's decision

In his brief to this Court, Woods contends that the superior court was wrong to dismiss his petition for post-conviction relief because, according to Woods, the petition was sufficient to raise a triable issue as to whether his trial attorney was incompetent.

More specifically, Woods contends that no competent defense attorney would have gone to trial under the working assumption that Woods's co-defendant,

Vega, would take the stand and give testimony that exculpated Woods. Woods argues that any competent attorney would have realized that Vega might change his mind about testifying — and that, if Vega declined to take the stand, the defense attorney would have to be prepared to present other witnesses who could give similar exculpating testimony.

We reject Woods's argument for two reasons.

First, Woods presented nothing to support his assertion that a defense attorney is incompetent if they (1) jointly plan a defense with a co-defendant's attorney, and then (2) rely on the trial plans of the co-defendant's attorney when they formulate their own defense case.

In particular, Woods presented nothing to suggest that his trial attorney had good reason to distrust Vega's attorney's suggestion of a joint defense, or to distrust the other attorney's description of Vega's proposed testimony. Indeed, the record shows that Vega's attorney was as much surprised as Woods's attorney when, at the close of the State's case, Vega declined to testify.

(As we have already explained, immediately after Vega declared that he would not take the stand, Vega's attorney told the court that Vega's decision "completely changes our game plan" — and that, given Vega's decision, "the defense would rest".)

Second, with regard to Woods's assertion that his trial attorney should have prepared for this eventuality by lining up exculpatory witnesses of her own, Woods's petition contains no information about who these witnesses would be, or what they would have said if they were called to testify. As we noted in *State v. Savo*, "when a petitioner for post-conviction relief criticizes their trial attorney's failure to pursue avenues of investigation ... , it is the petitioner's burden to produce evidence to show ... that potential witnesses would actually have given favorable testimony". *Savo*, 108 P.3d 903, 911-12 (Alaska App. 2005).

(Obviously, Woods himself was a potential source of exculpatory testimony. But the record shows that, in answer to the trial judge's inquiry, Woods declared that he would not testify even though he knew that his co-defendant Vega was likewise declining to take the stand. And under *LaVigne v. State*,[1] Woods's trial attorney had no authority to tell him otherwise.)

For these reasons, we agree with the superior court that Woods's petition for post-conviction relief failed to state a *prima facie* case that his trial attorney handled the case incompetently.

Conclusion

The judgement of the superior court is AFFIRMED.

[1] 812 P.2d 217, 219-220 (Alaska 1991).