

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

BERNIE ALEXIA,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12679
Trial Court No. 4BE-06-440 CI

MEMORANDUM OPINION

No. 6583 — February 14, 2018

Appeal from the Superior Court, Fourth Judicial District, Bethel,
Charles W. Ray Jr., Judge.

Appearances: Elizabeth D. Friedman, Law Office of Elizabeth
D. Friedman, Redding, California, under contract with the
Office of Public Advocacy, Anchorage, for the Appellant. Ann
B. Black, Assistant Attorney General, Office of Criminal
Appeals, Anchorage, and Jahna Lindemuth, Attorney General,
Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard and Wollenberg,
Judges.

Judge ALLARD.

Bernie Alexia filed an application for post-conviction relief more than six years after the statutory deadline. After extensive litigation on whether the late filing should be excused, the superior court dismissed the application as untimely. Alexia now appeals that dismissal. We affirm the superior court's judgment.

Background facts and prior proceedings

In 1997, Alexia was indicted on charges of first-degree murder, first-degree burglary, and first-degree sexual assault. Alexia was subsequently convicted, pursuant to a plea of no contest, of second-degree murder. At sentencing, the court found Alexia a “worst offender” based on the horrific nature of the murder and Alexia’s lengthy and violent criminal history. The court sentenced Alexia to the maximum term of 99 years with no possibility of discretionary parole.

Alexia appealed his sentence and the worst offender finding to this Court. We affirmed the sentence and the worst offender finding in an unpublished memorandum decision that was issued in January 1999.¹ Alexia did not file a petition for hearing with the Alaska Supreme Court.

Under AS 12.72.020(a)(3)(A), a defendant has one year after his appeal becomes final under the appellate rules to file an application for post-conviction relief.² Approximately six years and nine months after this statutory deadline, Alexia filed an application for post-conviction relief challenging his plea agreement and his sentence.

Alexia was appointed counsel to assist him in litigating this application and to investigate the reasons for the untimeliness of the filing. However, when the State moved to dismiss the application as time-barred, Alexia’s attorney’s only action was to file a non-opposition to the dismissal, directly conceding that Alexia’s application was time-barred.

Based on the defense attorney’s non-opposition to the State’s motion to dismiss, the superior court dismissed the application as untimely. Alexia requested that his attorney appeal this dismissal, but his attorney failed to do so.

¹ *Alexia v. State*, 1999 WL 11170, at *3 (Alaska App. Jan. 13, 1999) (unpublished).

² *See also* Alaska R. Crim. P. 35.1(c).

Alexia then filed his own pro se appeal to this Court. After reviewing the record, we concluded that a remand was required to determine why Alexia’s attorney had conceded that the dismissal was proper, and to determine what steps, if any, the attorney had taken to investigate whether there were any exceptions to the statute of limitations that might apply in Alexia’s case.³

On remand, the superior court ordered that Alexia’s attorney explain his reasons for concluding that there was no arguable excuse for the untimeliness of the application. After receiving the attorney’s response, the superior court concluded that the attorney had failed to provide enough detail justifying his decision to non-oppose the dismissal of Alexia’s case. The court noted a number of different avenues of investigation that the attorney could have pursued but did not pursue, including (1) whether Alexia suffered from a physical disability or mental disease or defect; (2) whether the Department of Corrections had any medical records documenting such problems; and (3) whether there was any attempt to file a timely application.

The court ultimately concluded that, given the lack of detail in the attorney’s response, the court was unable to “meaningfully assess and independently evaluate counsel’s assertions that there are no arguable exceptions to the [s]tatute of [l]imitations.” The court therefore appointed new counsel and directed that new counsel to conduct a fresh investigation of the timeliness issue.

A series of attorneys represented Alexia in the ensuing years, and the record indicates that these attorneys investigated and ultimately litigated the timeliness issue on

³ See *Griffin v. State*, 18 P.3d 71, 77 (Alaska App. 2001) (requiring attorney who files a “no-merit” certificate to provide the court with a full explanation of all the claims that the attorney considered so that the court can meaningfully assess and independently evaluate the attorney’s assertion that the petitioner has no arguable claim); see also *One v. State*, 127 P.3d 853, 856 (Alaska App. 2006) (same).

Alexia's behalf. The final result was an amended application that asserted that the late filing should be excused because (1) Alexia's trial and appellate attorneys failed to properly advise him of his post-conviction rights; (2) Alexia's lack of education and lack of English proficiency prevented him from filing a timely application; and (3) Alexia suffered from a mental disease or disability — specifically, headaches and hypertension — that also prevented the timely filing. In support of this last claim, Alexia submitted medical records that indicated Alexia suffered from headaches and hypertension from 1998-2001.

The State moved to dismiss, arguing that Alexia had failed to support his various claims, that none of these alleged reasons were sufficient to justify the more than six years of delay that occurred in this case, and that Alexia had failed to document or otherwise show that he had been diligent in pursuing his post-conviction remedies during this time.

The superior court agreed with the State that summary disposition on the issue of timeliness was appropriate and that Alexia's pleadings and supporting documentation failed to provide any basis for establishing his diligence and excusing the more than six-year delay that occurred in his case. The court noted, *inter alia*, that (1) Alexia's claims that he had not been properly advised by his former attorneys were conclusory and unsupported; (2) the medical records presented to support the claim of physical disability indicated that Alexia's medical problems had largely resolved by 2001; and (3) the record demonstrated that, his various alleged deficiencies notwithstanding, Alexia was capable of using the law library and effectively advocating for his rights, as demonstrated by his various letters to counsel and the pro se pleadings he had filed in court.

Because the court determined that Alexia had failed to set forth sufficient reason for excusing the more than six-year delay in filing his application for post-

conviction relief, the court dismissed Alexia's application as untimely. This appeal then followed.

Alexia's arguments on appeal

On appeal, Alexia essentially concedes that his amended application and its supporting documents failed to establish any exceptions to the statute of limitations or any legal basis for excusing the late filing. But Alexia claims that this is the fault of his post-conviction attorneys, who he asserts failed to properly litigate the timeliness issue. Alexia also faults the superior court for failing to directly question Alexia's attorneys about the avenues of investigation that the court had identified in its previous order appointing a new attorney in Alexia's case.

We find no merit to this argument. As an initial matter, we note that Alexia is misreading the court's earlier order. The court's earlier order appointed new counsel and directed this counsel to conduct a "fresh investigation" of all possible exceptions to the statute of limitations that could apply in Alexia's case. The court did not order the new counsel to pursue specific avenues of investigation or to report the results of that investigation to the court.

The record currently before us makes clear that such a "fresh investigation" occurred, and that, unlike Alexia's first post-conviction relief attorney, Alexia's subsequent post-conviction relief attorneys investigated and directly litigated a number of exceptions to the statute of limitations that could potentially apply in this case. Although none of this litigation was ultimately successful, we are not facing the kind of empty record that we faced the last time Alexia's case came before us.

Alexia's complaint appears to be that there is no way of knowing on the current record whether the attorneys truly pursued *all* possible avenues of investigation. But that is the situation in every case. Unless a defendant directly complains to the judge

about an investigation that the defendant believes should be occurring and a representation hearing is held on the matter, there will never be a factual record for the appellate court to review what precisely the attorney did or did not do in investigating the defendant's case. Instead, such a factual record can only be developed in subsequent proceedings, such as through an application for post-conviction relief.⁴

In support of his request for another remand in his case, Alexia cites our decisions in *Griffin v. State*⁵ and *Tazruk v. State*.⁶ But these cases are factually and procedurally distinguishable from Alexia's case. *Griffin* involved an attorney who filed a certificate of "no-merit" under Alaska Criminal Rule 35.1(e)(2) but who failed to adequately explain how and why he had come to the conclusion that the defendant had no arguable claims.⁷ We remanded the case to the superior court and emphasized that an attorney who files a "no-merit" certificate must provide the court with a full explanation of all the claims the attorney has considered and why the attorney has concluded that these claims are frivolous.⁸ We also held that a court cannot dismiss an application based on a "no-merit" certificate unless the court has an adequate record before it from which it can meaningfully assess and independently evaluate the attorney's assertions and any contrary assertions by the defendant.⁹ As we explained,

⁴ See *Barry v. State*, 675 P.2d 1292, 1295-96 (Alaska App. 1984).

⁵ *Griffin v. State*, 18 P.3d 71 (Alaska App. 2001).

⁶ *Tazruk v. State*, 67 P.3d 687 (Alaska App. 2003).

⁷ *Griffin*, 18 P.3d at 77.

⁸ *Id.*

⁹ *Id.*

this independent evaluation is part of a court’s constitutional duty to make sure that an indigent petitioner receives zealous and competent representation.¹⁰

We ordered a remand in *Tazruk* under similar reasoning. In *Tazruk*, the defendant’s attorney did not file a certificate of “no-merit.”¹¹ Instead, the attorney proceeded with the defendant’s pro se application without filing any supplemental pleadings or support — even though the pro se application was clearly deficient on its face.¹² We concluded that the attorney’s decision to proceed on the pro se application was essentially equivalent to the attorney filing a “no-merit” certification without any of the procedural safeguards and substantive requirements that filing a “no-merit” certificate requires.¹³ Accordingly, we remanded *Tazruk*’s case to the superior court for further investigation into the attorney’s actions and reasons for proceeding as he did.¹⁴

Here, unlike in *Griffin* or *Tazruk*, it is clear that Alexia’s post-conviction relief attorneys actively investigated and directly litigated the timeliness issue. The law requires us to presume that the attorneys acted competently in these efforts, and there is nothing in the record that, on its face, rebuts that presumption.¹⁵

¹⁰ *Id.*

¹¹ *Tazruk*, 67 P.3d at 690.

¹² *Id.*

¹³ *Id.* at 691; *see also Duncan v. State*, 2008 WL 5025424, at *3 (Alaska App. Nov. 26, 2008) (unpublished) (explaining that the failure to oppose the State’s motion to dismiss the post-conviction relief application was the equivalent of a “no-merit” certificate — only without the required explanations).

¹⁴ *Tazruk*, 67 P.3d at 691.

¹⁵ *Nelson v. State*, 273 P.3d 608, 611 (Alaska 2012) (citing *State v. Jones*, 759 P.2d 558, 569 (Alaska App. 1988)). To the extent that Alexia believes that his attorneys acted incompetently and that there were meritorious grounds to excuse his more than six-year delay (continued...)

Accordingly, we affirm the superior court's granting of summary disposition on the timeliness issue, and we reject Alexia's claim that this case should be remanded to the superior court for further proceedings on that issue.

Conclusion

The judgment of the superior court is AFFIRMED.

¹⁵ (...continued)
in filing his application, Alexia may pursue such a claim through the authority provided by *Grinols v. State*, 10 P.3d 600, 619-20 (Alaska App. 2000), *aff'd in part*, 74 P.3d 889, 895, 896 (Alaska 2003).