IN THE COURT OF APPEALS OF THE STATE OF ALASKA

TOMMIE G. PATTERSON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12592 Trial Court No. 3PA-12-1630 CI MEMORANDUM OPINION No. 6738 — November 28, 2018

Appeal from the Superior Court, Third Judicial District, Palmer, Eric Smith, Judge.

Appearances: Jane B. Martinez, Anchorage, under contract with the Office of Public Advocacy, for the Appellant. Eric A. Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Coats, Senior Judge.[*]

Judge MANNHEIMER.

Tommie G. Patterson appeals the superior court's denial of his petition for post-conviction relief.

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

Patterson's first claim for relief arose from the fact that Patterson had co-counsel status at his criminal trial, and he was allowed to file his own motions. In his petition for post-conviction relief, Patterson argued that his defense attorney improperly impeded his ability to file *pro se* motions attacking his indictment, in that the attorney refused to provide Patterson with a copy of the grand jury transcript.

But even assuming this to be true, Patterson would not be entitled to post-conviction relief unless he demonstrated that he could have filed a meritorious attack on his indictment, and that this attack would have led to dismissal of the indictment *with prejudice — i.e.*, without possibility of re-indictment. *See Wilson v. State*, 711 P.2d 547, 550 n. 2 (Alaska App. 1985).

Here, the superior court found that Patterson's petition for post-conviction relief failed to describe any potentially meritorious attacks on his indictment. Patterson's brief to this Court does not offer anything to rebut the superior court's conclusion. Accordingly, we uphold the superior court's rejection of this claim for relief.

Patterson's next claim was that his trial attorney, Abigail Sheldon, improperly pressured Patterson not to take the stand at his trial. This claim had two parts.

First, Patterson asserted that, toward the end of the State's case-in-chief, both Sheldon and her investigator assured Patterson that he was going to win the trial, and that there was no need to present a defense case. The superior court held an evidentiary hearing to investigate this claim. Based on the evidence presented at this hearing, the superior court judge found that Patterson's assertion was not credible. Instead, the judge affirmatively found that Sheldon and her investigator had *not* told Patterson that he was going to win the case, and had *not* told Patterson that there was no need for him to testify.

Given the testimony at the evidentiary hearing, the judge's finding is not clearly erroneous, and we therefore uphold that finding.

The second part of Patterson's claim was his somewhat contrary assertion that (1) he told Sheldon that he wanted to testify in his own defense, but (2) Sheldon pressured him not to take the stand by telling him that she already knew that Patterson's proposed testimony would be perjury — so that, if he testified, she would have a conflict and she would have to withdraw from the case.

Again, following the evidentiary hearing, the superior court judge found that Patterson's assertions were not credible:

> *The Court*: My finding is that Ms. Sheldon did not say to Mr. Patterson, "If you get up and testify, I will withdraw." My finding is that what Ms. Sheldon told Mr. Patterson was, "It's your decision." ... That it was Mr. Patterson's decision to testify or not to testify. [But] that he needed to understand that if he got up and testified, he wasn't just going to be able to present his story, but he was going to get cross-examined, and that the prosecutor was going to ask him a lot of questions … that were going to be much harder to answer than the questions [Ms. Sheldon] might ask him. And that he had to understand that ... if he got up and said something that she knew was false, that she was going to be put in the position of having to withdraw.

With regard to this last statement — Sheldon's statement to Patterson that she would have to withdraw if he committed perjury on the stand — the judge found that Sheldon was justified in giving this warning to Patterson, since Patterson had already lied to Sheldon about a significant aspect of the case. (Patterson initially falsely told Sheldon that he did not know the other people involved in the crime.) The judge declared that, in these circumstances, Sheldon "had reason to be concerned ... that Mr. Patterson might

say something that she knew was an overt lie." And thus, the judge concluded, "it was an appropriate thing for Ms. Sheldon to warn Mr. Patterson about [perjury] — so, as he thought through what he wanted to say [on the stand], he made sure he didn't lie, because that would have put [Ms. Sheldon] in a quandary."

Moreover, the judge concluded that Sheldon's warning to Patterson "did not impermissibly interfere with [Mr. Patterson's] evaluation about whether to testify or not testify." The judge found that Sheldon did not try to dissuade Patterson from testifying — that, instead, Sheldon understood that this was Patterson's decision, and she tried not to exert undue pressure on Patterson one way or the other.

The judge further noted that, when he presided over Patterson's criminal trial, he conducted a detailed *LaVigne* inquiry when it appeared that Patterson was not going to testify.[1] The judge stated that, at the conclusion of this *LaVigne* inquiry, he "came away convinced that [Patterson] in fact had made a knowing, intelligent, and voluntary decision not to testify."

In addition, based on the testimony presented at the evidentiary hearing in the post-conviction relief case, the judge declared that he "found credible Ms. Sheldon's testimony that, in the end, the three of them — Mr. Patterson, [the defense] investigator, [and] Ms. Sheldon — agreed that it would be best that [Patterson] not [testify]."

Based on these findings, the judge rejected Patterson's claim that he wanted to testify at his trial, but that he was dissuaded from doing so because his trial attorney improperly pressured him not to take the stand.

---

[1] *See LaVigne v. State*, 812 P.2d 217 (Alaska 1991) (holding that if a defendant has not testified when the defense attorney announces that the defense intends to rest, the trial judge must ask the defendant personally to confirm that their decision not to testify is voluntary).

Given the testimony at the post-conviction evidentiary hearing, and given the *LaVigne* inquiry that was conducted at Patterson's criminal trial, the judge's findings are not clearly erroneous. We therefore uphold the judge's rejection of this claim.

In conclusion, the judgement of the superior court is AFFIRMED.