

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

DANNY E. CONWAY,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12642
Trial Court No. 3PA-14-1345 CI

MEMORANDUM OPINION

No. 6777 — March 6, 2019

Appeal from the Superior Court, Third Judicial District, Palmer,
Kari Kristiansen, Judge.

Appearances: Jason A. Weiner, Gazewood & Weiner, P.C.,
Fairbanks, under contract with the office of Public Advocacy,
Anchorage, 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 Allard, Judge.

Judge MANNHEIMER.

Danny E. Conway filed a petition for post-conviction relief, but he missed the statutory filing deadline by three weeks. When the State moved to dismiss Conway's petition as time-barred, Conway filed an affidavit suggesting that there might be a legally sufficient excuse for his late filing.

In *Holden v. State*, 172 P.3d 815, 818 (Alaska App. 2007), this Court held that when an indigent defendant’s first petition for post-conviction relief is challenged as time-barred, “the defendant has a constitutional right to the assistance of counsel when responding to that challenge”.

Conway had court-appointed counsel — a private attorney working under contract with the Office of Public Advocacy. But when the superior court attempted to hold a hearing on the question of whether Conway’s late filing might be excused, Conway’s court-appointed attorney insisted that he had no authority to investigate this matter, nor any authority to argue this matter on Conway’s behalf, until the superior court separately appointed (and separately paid) the attorney for this purpose.

The attorney was wrong, and the superior court ultimately ruled that the attorney was wrong. At that point, the superior court should have ordered Conway’s court-appointed attorney to investigate and litigate the question of whether Conway might have an excuse for his late filing. But instead, the superior court simply ruled that Conway had failed to present a sufficient excuse for the late filing — and the court dismissed Conway’s petition as time-barred.

Under these circumstances, we conclude that Conway was denied his right to counsel on the question of whether his petition was timely. We therefore reverse the judgement of the superior court, and we direct the court to hold renewed proceedings on the question of whether Conway’s petition is time-barred.

Underlying facts, and why we conclude that the superior court erred when it dismissed Conway’s petition as time-barred

Conway was convicted of felony driving under the influence, felony breath-test refusal, and driving with a suspended license. This Court affirmed his convictions

on appeal, *see Conway v. State*, unpublished, 2012 WL 4215795 (Alaska App. 2012), and the Alaska Supreme Court denied Conway's petition for hearing on February 6, 2013.

Under the provisions of AS 12.72.020(a)(3)(A), Conway had until February 7, 2014 to file a petition for post-conviction relief. He missed this deadline by three weeks. (Conway filed his petition on February 28, 2014.) Thus, when the State responded to Conway's petition for post-conviction relief, the State's argument was that Conway's petition should be dismissed because it was time-barred.

In answer to the State's contention that his petition was time-barred, Conway filed an affidavit in which he asserted that the lateness of his petition was due to several factors. Conway contended that his appellate attorney had not told him about the deadline for filing his petition. Conway also asserted that, when he tried to file his petition at the beginning of February 2014, his efforts were frustrated by the Department of Corrections. According to Conway, the prison law library was only open for limited hours, the library ran out of copies of the post-conviction relief application packet, and (after Conway completed his application packet) no notary was immediately available.

Under *Holden v. State*, Conway had the right to the assistance of counsel when responding to the State's motion to dismiss.¹ And, in fact, Conway already had a court-appointed attorney: the Office of Public Advocacy had contracted with the law firm of Gazewood and Weiner to represent Conway in the post-conviction relief proceedings.

But when the State raised the issue of the timeliness of Conway's petition, Conway's attorney insisted that he had no authority to represent Conway on that issue

¹ *Holden*, 172 P.3d at 818.

— that, indeed, he had no authority to even *investigate* this issue for Conway — until he received a separate court appointment for this purpose.

Conway’s attorney relied on the fact that, under AS 18.85.100(c)(1), the Public Defender Agency and the Office of Public Advocacy have no authority to represent a defendant who is pursuing an untimely petition for post-conviction relief. Based on this statute, Conway’s attorney told the superior court that he was barred from investigating and arguing Conway’s claim that there might be a justification for Conway’s delay in filing his petition. The attorney declared that if the court wanted him to assist Conway in this matter, the court would have to separately appoint (and separately pay) the attorney under Alaska Administrative Rule 12(e).

The attorney’s interpretation of AS 18.85.100(c)(1) was wrong. Seven years earlier, in *Alex v. State*, 210 P.3d 1225, 1228-29 (Alaska App. 2009), this Court rejected this same argument.

The defendant in *Alex* filed a petition for post-conviction relief that was apparently untimely, but he suggested that there were facts which might trigger the doctrine of equitable tolling, thus excusing his late filing. The question arose whether the Public Defender Agency could represent Alex in litigating this matter — or whether, instead, AS 18.85.100(c)(1) barred the agency from representing Alex because his petition was presumptively untimely.

This Court held that the Public Defender Agency was authorized to represent Alex in litigating the timeliness of his petition:

[I]n cases where a defendant claims that there is a reason to toll the normal period of limitation or to otherwise exempt the defendant from the normal period of limitation, the defendant’s petition for post-conviction relief is not “untimely” for purposes of AS 18.85.100(c)(1) until that claim is resolved against the defendant. This means that the

Public Defender Agency is authorized to represent the defendant in the litigation of such a claim.

Alex, 210 P.3d at 1229.

Because the authority of the Office of Public Advocacy is likewise governed by AS 18.85.100(c)(1),² our holding in *Alex* applies to court-appointed attorneys who, like Conway's attorney, are working under contract with the Office of Public Advocacy.

Thus, Conway's attorney was mistaken when he asserted that he lacked the authority to investigate and litigate the timeliness of Conway's petition for post-conviction relief. And, in fact, the superior court ultimately ruled that Conway's attorney *was* authorized to represent Conway in this matter.

But instead of ordering the attorney to investigate and litigate the question of whether Conway might have an excuse for his late filing, the court proceeded to issue a ruling on the merits of the timeliness issue. The superior court concluded that Conway had failed to offer a sufficient justification or excuse for his late filing, and the court therefore granted the State's motion to dismiss Conway's petition as time-barred.

This was error. Even though Conway had filed a personal affidavit in which he offered various explanations for his late filing, Conway's attorney repeatedly told the court that he had not investigated the factual assertions in Conway's affidavit — and the attorney repeatedly refused to argue the factual merits of Conway's explanations for the late filing. Instead, Conway's attorney wrongly insisted that he had no authority to represent Conway in this matter unless he was separately appointed under Administrative Rule 12(e).

² See AS 44.21.410(a)(5).

Given these facts, we conclude that Conway was denied his rights under *Holden*. That is, Conway did not receive the assistance of counsel when he litigated the timeliness of his petition for post-conviction relief.

We acknowledge that Conway does not make this argument on appeal. In fact, Conway's brief does not even *mention* the fact that, during the litigation in the superior court, Conway's attorney repeatedly insisted that he had no authority to represent Conway on the question of whether the petition was time-barred — and that, for this reason, he declined to investigate this question and he declined to argue its merits.

Potentially, Conway's failure to raise this issue on appeal is due to his appellate attorney's failure to understand the significance of the two errors committed in the superior court: (1) the mistake committed by Conway's former attorney when he declined to investigate or litigate the timeliness issue, coupled with (2) the mistake committed by the superior court when it issued a ruling on the merits of the timeliness issue, when Conway's attorney openly declared that he had done nothing to assist Conway in investigating or litigating this issue.

Alternatively, Conway's failure to raise this issue on appeal may be due to a conflict of interest on the part of Conway's appellate attorney — a conflict arising from the fact that Conway is represented on appeal by the law partner of the attorney who represented Conway in the superior court.

In either event, the superior court's dismissal of Conway's petition is an obvious and fundamental error that requires correction by this Court.

Conclusion

The judgement of the superior court is REVERSED. We direct the superior court to hold renewed proceedings on the question of whether Conway's petition is time-barred — and to make sure that Conway is properly represented when he litigates this issue.