IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DANIEL R. NEAL, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12490 Trial Court No. 1JU-10-00666 CI MEMORANDUM OPINION No. 6815 — August 28, 2019

Appeal from the Superior Court, First Judicial District, Juneau, Philip M. Pallenberg, Judge.

Appearances: Meredith A. Ahearn, Anchorage, appointed under Alaska Administrative Rule 12(e)(1), for the Appellant. Nancy R. Simel, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Harbison, Judge, Mannheimer, Senior Judge,[*] and Lyle, Superior Court Judge.[**]

Judge MANNHEIMER.

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

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

Daniel R. Neal was convicted of first-degree sexual assault and first-degree assault arising from an altercation with his wife. This Court affirmed Neal's convictions on direct appeal. *See Neal v. State*, unpublished, 2003 WL 21508844 (Alaska App. 2003).

After Neal lost his appeal, he filed a petition for post-conviction relief, alleging that he received ineffective assistance from his defense attorney. Neal received new counsel to assist him in pursuing this post-conviction relief petition, and the case was assigned to the judge who had presided over Neal's criminal case.

Neal's first post-conviction relief action ultimately went to an evidentiary hearing. Based on the evidence presented at that hearing, the judge found that Neal's trial attorney had represented him competently, and the judge therefore denied Neal's petition for post-conviction relief. On appeal, this Court affirmed the judge's decision. *See Neal v. State*, unpublished, 2011 WL 766546 (Alaska App. 2011).

Neal then filed a second petition for post-conviction relief, alleging that he received ineffective assistance from the counsel who represented him in the first post-conviction relief action. In support of his petition, Neal included an affidavit in which he asserted that he wanted to testify at the evidentiary hearing in his earlier petition for post-conviction relief, but his post-conviction relief counsel prevented him from taking the stand.

By this time, the judge who presided over Neal's criminal case and Neal's first petition for post-conviction relief had retired. Because of this, a different superior court judge was assigned to hear Neal's second petition for post-conviction relief. In addition, a new attorney was appointed to represent Neal.

But rather than pursue Neal's claims for post-conviction relief, Neal's new attorney filed a "certificate of no merit" under Alaska Criminal Rule 35.1(e)(2) — that is, a certificate declaring that there was no arguable merit to Neal's second petition for

post-conviction relief, and asking the superior court for permission to withdraw as Neal's attorney.

The attorney's certificate of no merit was remarkable in one respect: in this certificate, Neal's attorney reformulated Neal's claim. Instead of evaluating Neal's claim that his former post-conviction relief counsel *actively prevented* him from taking the stand, Neal's new attorney investigated and evaluated a different claim: the claim that Neal's former counsel *failed to inform* Neal that he had a right to take the stand — and that, as a result, Neal did not testify at the evidentiary hearing in his first post-conviction relief action.

Without noting this discrepancy between Neal's original claim and his attorney's reformulation of this claim, and without holding an evidentiary hearing, the superior court ratified the attorney's certificate of no merit and dismissed Neal's second petition for post-conviction relief.

The superior court concluded that Neal was not entitled to relief because, even if Neal was never informed that he had a right to testify at the evidentiary hearing in his earlier post-conviction relief action, any error was harmless. The superior court reasoned that, given Neal's track record in court, there was no possibility that the judge who presided over the evidentiary hearing would have believed whatever testimony Neal gave. In other words, Neal's testimony (whatever it might have been) could not possibly have altered the judge's decision to deny Neal's first petition for post-conviction relief, and thus Neal suffered no prejudice.

Neal now appeals the superior court's dismissal of his second petition for post-conviction relief.

Summary of our decision

When the superior court denied Neal's second petition for post-conviction relief, the superior court assumed (1) that Neal had a personal right to testify at the evidentiary hearing in his first post-conviction relief litigation, (2) that Neal's former attorneys failed to inform him of this right, and (3) that Neal's attorneys acted improperly by failing to inform Neal of this right.

After making these assumptions, the superior court concluded that Neal had failed to show that he was prejudiced by this purported error, because Neal's testimony (whatever it might have been) would not have been believed.

As we are about to explain, the superior court committed error when it found that Neal's testimony could not possibly have altered the result of his first post-conviction relief litigation. For this reason, we must remand Neal's case to the superior court for further proceedings.

In addition, we direct the superior court to reconsider its underlying assumption that Neal had a personal right to testify at the evidentiary hearing in his first post-conviction relief litigation. As we explain in this decision, there is substantial reason to doubt that assumption.

Because this issue was not raised in the superior court, and because Neal and the State have both briefed this case to us based on the same assumption (*i.e.*, that Neal had a personal right to testify), we direct the superior court to address this issue on remand.

Why we reverse the superior court's finding of no prejudice

As we have explained, the superior court assumed that Neal had a personal right to testify at the evidentiary hearing in his first post-conviction relief action, but the superior court concluded that even if Neal had offered relevant testimony at that evidentiary hearing, the judge who presided over that action would not possibly have believed Neal's testimony, no matter what Neal said. This ruling is inconsistent with the analysis adopted by our supreme court in *LaVigne v. State*, 812 P.2d 217 (Alaska 1991).

In *LaVigne*, our supreme court discussed the procedures that must be followed if a criminal defendant proves that their attorney improperly prevented them from taking the stand at their criminal trial. Under *LaVigne*, the initial procedural burden falls on the defendant "to show that [they] would have offered relevant testimony had [they] been allowed to testify".[1] But if the defendant meets this initial burden, "the burden will then shift to the State to show that denial of [the defendant's] constitutional right [to testify] was harmless error beyond a reasonable doubt."[2]

The supreme court declared that the State's burden in this situation "is a heavy one", "largely due to the limited ability of appellate courts to judge accurately the possible effect on the jury of a defendant's appearance on the stand."[3]

The supreme court pointed out that a reviewing court has very little ability to "weigh the possible impact upon the jury of factors such as the defendant's

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[1] *LaVigne*, 812 P.2d at 220–21.

[2] *Id.* at 221, citing *United States v. Teague*, 908 F.2d 752 (11th Cir. 1990). *See also Chapman v. California*, 386 U.S. 18, 23–24; 87 S.Ct. 824, 827–28; 17 L.Ed.2d 705 (1967) (defining the test under federal law for assessing whether a constitutional error requires reversal of a criminal conviction).

[3] *LaVigne*, 812 P.2d at 221.

willingness to mount the stand rather than avail [themself] of the shelter of the Fifth Amendment, [the defendant's] candor and courtesy (or lack of them), [the defendant's] persuasiveness, [and the defendant's] respect for court processes."[4]

The supreme court acknowledged that the weight of "these ... elusive and subjective factors" might vary significantly "even among [the jurors] who ... perceive and hear the defendant".[5] But the supreme court emphasized that the crucial problem facing an appellate court in this situation — *i.e.*, an appellate court that is called upon to evaluate the prejudice arising from the wrongful denial of a defendant's right to testify — is that the "elusive and subjective" aspects of the defendant's proposed testimony cannot be communicated to the appellate court at all. Any appellate attempt to "appraise [the] impact upon the jury of such unknown and unknowable matters" will almost always be "purely speculative".[6]

Because of "the inherently speculative nature of an appellate court's task in cases like LaVigne's," the supreme court anticipated that "there will be relatively few cases in which [a] reviewing court can confidently assert that the denial of the [defendant's] right to testify was so insignificant as to constitute harmless error beyond a reasonable doubt."[7]

In the present case, Neal's post-conviction relief attorney filed a certificate of no merit in which he asserted that even if Neal was improperly kept ignorant of his right to testify at the evidentiary hearing in his first post-conviction relief action, any

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[4] *Ibid.*

[5] *Ibid.*

[6] *Ibid.*

[7] *Id.* at 221–22.

error was harmless because the judge who presided over that first post-conviction relief action would not possibly have believed any testimony that Neal might give.

The superior court accepted and endorsed the attorney's position on this matter. But as the supreme court explained in *LaVigne*, an attorney or judge who is assessing these matters in retrospect cannot possibly know and evaluate the "elusive and subjective factors" that might attend Neal's appearance on the stand, and that might render Neal's testimony credible.

LaVigne involved the question of whether an appellate judge could meaningfully evaluate the impact of the testimony that a criminal defendant proposed to offer to a jury. Neal's case differs slightly, in that it raises the question of whether a superior court judge (the judge handling Neal's second petition for post-conviction relief) could meaningfully evaluate the impact of the testimony that Neal proposed to offer to another judge (the judge who served as the finder of fact in Neal's first post-conviction relief action).

But the governing principle is the same: In both instances, a judge is being asked to evaluate whether the fact-finder's decision could possibly have been different if the fact-finder had heard the defendant give the testimony described in the defendant's offer of proof.

In *LaVigne*, the supreme court acknowledged that there might be rare instances — "relatively few cases" — where a reviewing judge could justifiably say, beyond a reasonable doubt, that the proposed testimony would not have altered the earlier fact-finder's decision. But based on our review of the record in this case, we conclude that Neal's case is not one of those rare instances.

As we noted in our decision of Neal's first post-conviction relief appeal (*Neal v. State*, 2011 WL 766546), one of the claims that Neal raised was the assertion that his trial attorney, Patrick Conheady, failed to inform him of a plea bargain that was

offered by the State. During the litigation of Neal's first post-conviction relief action, Neal filed a pre-hearing affidavit in which he asserted under oath that Conheady failed to inform him of the State's proposed plea bargain. In fact, Neal asserted that when he inquired about the possibility of a plea bargain, Conheady told him (falsely) that the State was not willing to bargain the case. [8]

In a video deposition, Conheady testified that he *had* told Neal about the plea bargain offered by the State — and that Neal had rejected the State's offer. This video deposition was admitted at the evidentiary hearing in the post-conviction relief action. But Neal did not testify at that hearing — and, because Neal did not testify, the judge presiding over the hearing declared that he would give no weight to the assertions in Neal's affidavit. [9]

This meant that there was absolutely no evidence to rebut Conheady's testimony — no evidence to support Neal's claim that Conheady failed to tell him about the proposed plea bargain. Unsurprisingly, the judge ruled that Neal had failed to prove his claim. [10]

As we noted in our decision on appeal, the judge who decided Neal's first post-conviction relief action also found that Conheady had truthfully described his dealings with Neal concerning the State's proposed plea bargain. [11] But the judge made this finding in the context of an evidentiary hearing where Conheady's testimony went unchallenged.

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[8] *Neal*, 2011 WL 766546 at *2.

[9] *Id.* at *3.

[10] *Ibid.*

[11] *Ibid.*

Given this record, there is simply no meaningful way to tell what effect Neal's testimony might have had on the judge's decision. The judge's position might well have changed if Neal had taken the stand and forcefully contradicted Conheady's account of these matters.

We therefore conclude that the superior court committed error when the court ruled that, no matter what testimony Neal might have offered at the evidentiary hearing in his earlier post-conviction relief action, there was no reasonable possibility that Neal's testimony could have altered the result of that earlier litigation. Accordingly, we vacate the superior court's dismissal of this claim.

The question of whether Neal had a personal right to testify at the evidentiary hearing in his first post-conviction relief litigation

Neal's claim for post-conviction relief rests on the premise that he had a guaranteed personal right to testify at the evidentiary hearing in his first post-conviction relief action, and that his former post-conviction relief attorneys acted unlawfully when they either (1) failed to affirmatively apprise him of this right or (2) actively prevented him from exercising this right.

Defendants in criminal cases do have a guaranteed personal right to testify at their trial.[12] In *LaVigne v. State*, 812 P.2d 217 (Alaska 1991), our supreme court affirmed that a criminal defendant is entitled to exercise this right regardless of the wishes or advice of their attorney[13] — and the court held that if the defense rests in a

[12] *See Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987); *Hughes v. State*, 513 P.2d 1115 (Alaska 1973).

[13] *LaVigne*, 812 P.2d at 219–20.

criminal trial without the defendant testifying, the trial judge has an obligation to ask the defendant to personally affirm that they do not wish to testify. [14]

But Neal does not assert that he was denied the right to testify at his criminal trial. Rather, Neal asserts that he was denied the right to testify at the evidentiary hearing in his first post-conviction relief action. Neal's claim for relief hinges on the premise that, just like a defendant at a criminal trial, a person seeking post-conviction relief has a guaranteed personal right to testify if their case goes to an evidentiary hearing — and that an attorney who represents the petitioner in a post-conviction relief action has an affirmative obligation to inform the petitioner of this right, and to assist the petitioner in exercising this right, even if their testimony will not support the attorney's trial strategy, or even if the attorney thinks (for any other reason) that it is a bad idea for the petitioner to testify.

But the supreme court's decision in *LaVigne* is grounded on the fact that the federal and state constitutions guarantee a defendant's right to testify *in criminal cases*. Likewise, the applicable rule of legal ethics, Alaska Professional Conduct Rule 1.2(a), states that "*in a criminal case*, the lawyer shall abide by the client's decision ... whether the client will testify".

Post-conviction relief actions are civil actions. [15] Because of this, our supreme court has recognized that different rules apply to post-conviction relief cases.

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[14] *Id.* at 222.

[15] *See Hensel v. State*, 604 P.2d 222, 230–31 (Alaska 1979) ("The post-conviction relief proceeding is not another trial; it is separate from the original criminal proceeding, and it is governed primarily by rules of civil procedure."); *State v. Laraby*, 842 P.2d 1275, 1279 (Alaska App. 1992) ("A postconviction relief action is a civil proceeding; as such, it is subject to the normal rules governing civil cases."); *cf.* Alaska Criminal Rule 35.1(g) (declaring that "all rules and statutes applicable in civil proceedings" are available in post-conviction relief proceedings).

For instance, in *Nelson v. State*, 273 P.3d 608, 611 (Alaska 2012), the supreme court held that, because post-conviction relief actions are civil in nature, the finder of fact is entitled to draw an adverse inference against a witness who invokes the Fifth Amendment privilege against self-incrimination.

When Neal's case was litigated in the superior court, neither the parties nor the court addressed the underlying question of whether Neal had a guaranteed personal right to testify at the evidentiary hearing in his first post-conviction relief action, regardless of his attorneys' wishes or trial tactics. Because the answer to this question is crucial to the resolution of Neal's claim, and because Neal's case is now returning to the superior court, we direct the superior court to address this question.

Conclusion

The judgement of the superior court is VACATED, and this case is remanded to the superior court for further proceedings in light of this opinion.