IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JOSHUA BEATY, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12516 Trial Court No. 3PA-13-01329 CI MEMORANDUM OPINION No. 6866 — April 22, 2020

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

Appearances: Michael Horowitz, Law Office of Michael Horowitz, Kingsley, Michigan, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Michal Stryszak, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

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

Judge WOLLENBERG.

Joshua Beaty appeals from the superior court's denial of his application for post-conviction relief. For the reasons explained in this opinion, we affirm the court's judgment.

Underlying facts and proceedings

Between 2010 and 2011, Beaty was arrested and charged with numerous counts of burglary, felony-level theft, and trespass, in addition to one count of controlled substance misconduct. Beaty was eventually released on bail. His bail conditions required him to have a third-party custodian and submit to random drug testing twice a week.

Beaty's case proceeded to trial in late January 2012. Shortly after the jury was sworn, however, the prosecutor informed Beaty's attorney that she had just received additional discovery from the troopers — a police report from an uncharged burglary describing the records of the cell phone found in the car that Beaty was driving at the time of his arrest. The cell phone records apparently put Beaty in the vicinity of the uncharged burglary. Beaty's attorney stated that he thought this evidence was important — as it might show that Beaty was not near one of the *charged* burglaries — and that he needed more than a few days to review it.

The attorney had a murder trial scheduled for February, so he informed the court that he could not resume trial until March. The attorney therefore requested a mistrial. After extended discussion and a break to review the new discovery, the court granted the mistrial and rescheduled the trial for March. The parties later stipulated to continuing the trial to mid-April.

On the eve of trial call in April, Beaty's attorney asked a colleague to set Beaty's case for a change of plea. The court scheduled a change of plea hearing for May 23.

In mid-May, Beaty's attorney requested a bail hearing to approve a new third-party custodian, as Beaty's current third-party custodian would soon be unavailable. Before a bail hearing was held, the court held the change of plea hearing as scheduled on May 23. At that hearing, Beaty's attorney explained the terms of the

plea agreement: Beaty would plead guilty to one count of first-degree burglary, and he would receive a sentence of 6 years flat, with a 30-day delayed remand. The remaining charges would be dismissed.

The court advised Beaty of the rights he would be relinquishing by pleading guilty. Beaty's attorney informed the court that Beaty was comfortable proceeding with the change of plea but hesitant to proceed with the sentencing at that time. Accordingly, the court continued the change of plea hearing and set a bail hearing for two days later.

At the bail hearing, the prosecutor informed the court that Beaty had not submitted documentation showing that he had been complying with the drug testing required by his bail conditions. After an off-record discussion, the parties agreed that Beaty would proceed with the change of plea and sentencing that day (sooner than originally scheduled) and that, as part of the agreement, he would receive the 30-day delayed remand contemplated in the original agreement and remain on bail during that time with his new third-party custodian. The parties also agreed that the State would not pursue a new charge for violating conditions of release or for the uncharged burglary. After advising Beaty of his rights, the court accepted Beaty's plea and sentenced Beaty to the agreed-upon sentence.

Beaty subsequently filed an application for post-conviction relief. Beaty argued that his trial attorney was ineffective for, *inter alia*, mishandling the mistrial after the State's disclosure of the additional discovery. Beaty also argued that he should be allowed to withdraw his plea because it was not knowing or voluntary. After holding an evidentiary hearing, the superior court rejected these claims.

Beaty's ineffective assistance of counsel claims

On appeal, Beaty renews his argument that his attorney was ineffective. Specifically, Beaty argues that his attorney failed to consult with him prior to consenting

to the mistrial and the dismissal of Beaty's empaneled jury. Beaty also makes a related claim that his attorney was ineffective for requesting a mistrial in order to conduct an investigation, and then failing to undertake that investigation.

To succeed on a claim of ineffective assistance of counsel, a defendant must show (1) that the attorney's performance fell below the standard of minimal competence expected of an attorney experienced in criminal law; and (2) that, but for the attorney's incompetent performance, there is a reasonable possibility that the outcome of the proceedings would have been different.[1]

As an initial matter, we note that — even assuming Beaty's attorney was obligated to consult with Beaty prior to requesting a mistrial and that the attorney violated that duty — Beaty fails to explain why this would entitle him to withdraw his later change of plea. A guilty plea generally constitutes "a waiver of all non-jurisdictional defects."[2] On appeal, Beaty does not explain how he was prejudiced by his attorney's handling of the mistrial given his later decision to accept the State's plea offer and plead guilty.[3]

But the State has not addressed this point. And we conclude that we need not definitively decide it because we agree with the superior court that Beaty's claim fails on the merits.

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[1] *Risher v. State*, 523 P.2d 421, 425 (Alaska 1974).

[2] *Gordon v. State*, 577 P.2d 701, 703 (Alaska 1978) (citing *Cooksey v. State*, 524 P.2d 1251, 1255 (Alaska 1974)).

[3] *Cf. Ferguson v. State*, 242 P.3d 1042, 1049 (Alaska App. 2010) (holding that a defendant is entitled to withdraw his or her plea "[i]f the defendant's attorney provide[d] incompetent advice on an issue that [was] crucial to the defendant's decision whether to accept the plea bargain, and if, as a result of this incompetent advice, the defendant accept[ed] the plea bargain when he or she otherwise would not have done so") (citing *Love v. State*, 173 P.3d 433, 437 (Alaska App. 2007)).

We have previously recognized that the decision to request a mistrial is a strategic decision for the attorney: "The decision to move for a mistrial and the decision to withdraw such a motion, if granted, are matters of trial strategy which defense counsel may determine without the express agreement of his client."[4] Thus, even assuming Beaty's attorney had an ethical obligation to *consult* with Beaty regarding the request for a mistrial, Beaty's attorney would not have been obligated to act in accordance with Beaty's position on the issue.[5]

Beaty also argues that his attorney was ineffective for requesting a mistrial, given that the attorney failed to follow through on the investigation of the cell phone records. We again note that Beaty fails to explain how he was prejudiced by his attorney's conduct, given his later decision to accept the State's plea offer. Beaty makes no assertion that he would not have pleaded guilty if his attorney had done an adequate

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[4] *Liston v. State*, 658 P.2d 1346, 1350 (Alaska App. 1983) (citation omitted); *see also Michael v. State*, 2002 WL 2015287, at *3 (Alaska App. Sept. 4, 2002) (unpublished) (holding that the trial court's failure to obtain defendant's personal consent to a mistrial was not "plain error or error at all"). This position is consistent with the law of other jurisdictions. *See, e.g.*, *United States v. Chapman*, 593 F.3d 365, 369-70 (4th Cir. 2010); *Watkins v. Kassulke*, 90 F.3d 138, 143 (6th Cir. 1996); *Walker v. Lockhart*, 852 F.2d 379, 382-83 (8th Cir. 1988); *People v. Carpenter*, 935 P.2d 708, 743 (Cal. 1997), *abrogated on other grounds by People v. Diaz*, 345 P.3d 62, 69 (Cal. 2015); *People v. Ferguson*, 494 N.E.2d 77, 81-82 (N.Y. 1986).

[5] *Cf. Simeon v. State*, 90 P.3d 181, 184 (Alaska App. 2004) (delineating those decisions over which a criminal defendant has ultimate authority — *i.e.*, what plea to enter, whether to waive jury trial, whether to testify, and whether to appeal) (citing Alaska Rule of Professional Conduct 1.2(a)). We also note that, although Beaty testified that his attorney did not consult with him regarding the mistrial, Beaty's post-conviction relief attorney never asked Beaty's trial attorney whether he consulted with Beaty about the mistrial, as the superior court noted.

investigation, or that he was compelled to accept the State's plea offer because his attorney would not pursue an investigation.

In any event, the superior court found that, at the time of the mistrial, Beaty's attorney had tactical reasons for requesting a continuance. This is a factual finding to which we defer.[6] The court also found that Beaty's attorney credibly testified that the length of the continuance (and the consequent need for mistrial) was necessitated only by the fact that Beaty's attorney had another trial scheduled directly after Beaty's.

When an attorney has made a tactical decision, a post-conviction relief applicant must demonstrate that the tactic was unreasonable — that is, a tactical decision that no competent attorney would make.[7] We agree with the superior court that Beaty failed to make this showing.

We acknowledge that Beaty's attorney never followed up on his intended investigation of the phone records. Both the superior court, and Beaty's attorney, essentially recognized that the attorney was incompetent in this respect. But Beaty presented no evidence that, had his attorney investigated the matter, the records would have assisted Beaty's case. The superior court therefore found that Beaty was not prejudiced by his attorney's failure to investigate. On appeal, Beaty does not contest this finding. Having reviewed the record, we find no error in the court's assessment of prejudice.

For these reasons, we reject Beaty's ineffective assistance of counsel claims.

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[6] *See State v. Laraby*, 842 P.2d 1275, 1279-80 (Alaska App. 1992).

[7] *Simeon*, 90 P.3d at 184-85.

Beaty's claim that his plea was not voluntary

At the evidentiary hearing, Beaty testified that, at the time of the change of plea, he was suffering from a serious case of colitis. According to Beaty, he had previously received inadequate medical care while in custody, and he wished to delay his remand to attend an upcoming medical appointment. As a result, he changed his plea in order to avoid being remanded for failing to comply with his required drug testing.

The superior court accepted Beaty's testimony that he was faced with a difficult decision of whether or not to accept the State's offer, given the possibility of immediate remand and his concern about obtaining appropriate medical treatment. But the court further found that, even though Beaty may have felt "pressured," the circumstances with which he was confronted were not materially different from the range of pressures and priorities that defendants must weigh when deciding whether to change their plea.

On appeal, Beaty renews his argument that he was "being threatened with immediate remand and was compelled to stay out of custody" because of his serious medical issues. As a result, he argues that his plea was involuntary and that he is entitled to withdraw his plea to correct a manifest injustice.[8]

But the possibility of immediate remand stemmed from the prosecutor's assertion that Beaty had failed to comply with his bail conditions. Beaty never contested this assertion at the bail hearing, nor has he suggested in this post-conviction relief proceeding that he was in fact complying with his bail conditions.

Moreover, the sequence of events prior to Beaty's change of plea belies his claim that he was under immediate pressure to accept the State's plea offer. Beaty's case was first set for a change of plea hearing over a month before the State ever alleged that

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[8] *See* Alaska R. Crim. P. 11(h)(3) & (h)(4)(c).

Beaty had violated his bail conditions. At the first change of plea hearing — which took place two days before the bail violation allegations arose — Beaty's attorney informed the court of the terms of the plea bargain, and the court explained to Beaty the rights he was relinquishing by pleading guilty. Although the change of plea did not go forward that day because Beaty did not wish to be sentenced, Beaty's attorney explained to the court that Beaty was otherwise comfortable proceeding with the change of plea.

Beaty did not actually change his plea until the bail hearing two days later. At that hearing, the court conducted a thorough plea colloquy and ensured that Beaty had enough time to speak with his attorney and understood the finality of his decision. Beaty confirmed that he understood and that he did not need additional time to consult with his attorney.[9]

Under these circumstances, we conclude that the superior court could properly find that Beaty failed to demonstrate by clear and convincing evidence that he faced undue pressure or duress when he changed his plea,[10] and that he therefore failed to establish that his plea was involuntary.

Conclusion

The judgment of the superior court is AFFIRMED.

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[9] We note that the events that occurred after Beaty's change of plea on May 25, 2012 also undermine the credibility of Beaty's assertion that his medical issues compelled him to plead guilty. Shortly before he was supposed to remand on June 25, 2012, Beaty obtained another delay in his remand, until July 25. But Beaty failed to remand as scheduled on July 25, and an arrest warrant was issued. Beaty was arrested on the warrant in October 2012, as he was fleeing from a residence with stolen property, and he was subsequently charged with committing a string of burglaries in the late summer and fall.

[10] *See* AS 12.72.040 (requiring a post-conviction relief applicant to prove all factual assertions by clear and convincing evidence).