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, although it may be cited for whatever persuasive value it may have. See McCoy v. State, 80 P.3d 757, 764 (Alaska App. 2002).

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JOHN LEE VANN, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13093 Trial Court No. 3SW-11-00057 CI MEMORANDUM OPINION No. 6873 — June 3, 2020

Appeal from the Superior Court, Third Judicial District, Seward, Charles T. Huguelet, Judge.

Appearances: Olena Kalytiak Davis, Attorney at Law, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Timothy W. Terrell, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

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

Judge HARBISON.

John Lee Vann was charged with one count of kidnapping, six counts of sexual assault, and two counts of fourth-degree assault after he picked up L.B., drove her

to a camping area against her will, and forced her to engage in multiple sex acts.[1] At trial, Vann testified that he had never met L.B. and had not had any contact with her on the night in question. To establish Vann's identity as the perpetrator, the State presented evidence that L.B. had identified Vann in a photographic lineup and had memorized his vehicle's license plate number. The State also presented evidence that semen containing Vann's DNA was found on a vaginal swab taken from L.B.

The jury convicted Vann of all charges. Vann then filed a direct appeal, and we affirmed his convictions.[2]

Vann also filed an application for post-conviction relief, which the superior court dismissed for failure to plead a *prima facie* case. He again appealed, and we remanded his case to the superior court because it was unclear whether the obvious deficiencies in the post-conviction relief pleadings were intentional — *i.e.*, the equivalent of a no-merit certificate without complying with the requirements for filing a no-merit certificate — or the result of attorney incompetence and lack of diligence.[3] We ordered that a new attorney be appointed to represent Vann and that this new attorney file either an amended application or a proper no-merit certificate.[4]

On remand, Vann's new counsel filed a second amended application for post-conviction relief raising several new claims. The superior court dismissed most of the claims for failure to plead a *prima facie* case for relief, but it declined to dismiss two of Vann's claims.

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[1] AS 11.41.300(a)(1)(C), AS 11.41.410(a)(1), AS 11.41.420(a)(1), AS 11.41.230(a)(1), and AS 11.41.230(a)(3).

[2] *Vann v. State*, 229 P.3d 197, 213 (Alaska App. 2010).

[3] *Vann v. State*, 2016 WL 936765, at *2 (Alaska App. Mar. 9, 2016) (unpublished).

[4] *Id.* at *3.

One claim the court did not dismiss was that Vann's trial attorney was ineffective for failing to adequately investigate his case. In this claim, Vann alleged that his trial attorney neglected to interview a cab driver who had information suggesting that the victim had committed perjury. The court notified Vann that it would dismiss this claim unless Vann provided an affidavit from the cab driver or an explanation of why one was not available. Vann subsequently provided the missing affidavit.

The other claim the court declined to dismiss was that Vann's trial attorney provided ineffective advice to him during plea negotiations. Vann alleged that his attorney told him that the State had little evidence and that, but for this statement, Vann would have accepted the State's plea offer. The court held a hearing to take evidence related to this claim.

At the hearing, Vann testified that his trial attorney visited him in jail shortly after his arrest and conveyed an offer from the State of 12 years with 4 years suspended.[5] According to Vann, his attorney did not go over the charges against him or the sentence he faced, which included up to 99 years for the kidnapping charge alone. Vann testified that his attorney described the State's evidence as "a couple pieces of circumstantial evidence," and that had Vann known how much time he was facing and how strong the State's evidence actually was, he would have accepted the State's offer.

For his part, Vann's trial attorney testified that he had no specific recollection of his conversation with Vann about the State's offer, but he did recall that the State was unwilling to dismiss the first-degree sexual assault charge and that Vann was unwilling to plead guilty to sexual assault. The attorney testified that his customary practice is to explain to a client what an offer means and what might happen if the client

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[5] Although this was Vann's testimony, the State claimed in its trial court pleadings that this offer had never been made and that in fact the State had extended an offer of 20 years with 12 years suspended.

elects to go to trial, and he believed he had that conversation with Vann. He also testified that he normally discusses the strengths and weaknesses of a given case with a client, and he believed he informed Vann about the State's evidence against him, which included the DNA evidence, photographic lineup evidence, and evidence that the victim had provided Vann's license plate number and a description of his car. Vann's trial attorney denied telling Vann that the State only had a couple pieces of circumstantial evidence against him. Additionally, the attorney testified that Vann consistently maintained that he had no contact with the victim whatsoever.

The court allowed the parties to submit written closing arguments. Before the court adjourned, however, Vann reminded the court that it had yet to rule on his claim that his attorney failed to investigate and noted that he had filed an affidavit from the cab driver. The court checked the file, located the affidavit from the cab driver, and said it would take another look at that claim and issue a decision.

The court later issued an order dismissing Vann's second amended application for post-conviction relief. The court wrote: "After hearing the evidence, this court remains convinced that Mr. Vann chose to reject the [S]tate's plea offer, take the case to trial, and testify that he had never met the victim with the full knowledge he could be convicted of kidnapping and sexual assault." The court found that "the case against Mr. Vann was very strong" and that "the suggestion years later that [his trial attorney] was responsible for his bad choice is not convincing." The order did not include any reference to Vann's claim that his attorney failed to investigate or to the cab driver's affidavit, notwithstanding Vann's specific request for a ruling on this claim.

On appeal, Vann renews his argument that his attorney provided him with incompetent advice during the plea negotiations. He contends that his testimony was more persuasive than that of his trial attorney.

But we defer to the superior court on questions of credibility.[6] In this case, the court's finding that Vann understood the consequences of rejecting the plea is well supported by the record.

Vann also argues that the superior court erred in deciding the plea negotiation claim based on the judge's personal view of Vann's guilt. He argues that the court's discussion of the strength of the State's case demonstrates that the judge "prejudge[d]" his claim. But the superior court's discussion of Vann's apparent guilt and the strength of the State's case was necessary to explain its assessment of whether Vann proved prejudice — *i.e.*, whether he proved that he would have accepted the State's offer if not for his attorney's alleged incompetence.[7] The court expressly incorporated the record of the criminal trial into the post-conviction relief proceeding, and it relied on that record as well as on the testimony adduced at the evidentiary hearing to evaluate Vann's subjective motives for rejecting the plea offer. The court's findings were not clearly erroneous.

We therefore affirm the superior court's denial of Vann's plea negotiation claim.

Vann also argues that the superior court erred in dismissing his case without addressing his outstanding claim that his trial attorney was ineffective for failing to interview the cab driver. Under the facts of this case, we agree. Vann specifically

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[6] *See Troyer v. State*, 614 P.2d 313, 319 (Alaska 1980) ("[T]he trial judge's decision depended largely on the oral testimony of witnesses seen and heard by him and on inferences to be drawn from the statements made. Thus, we give due regard to his opportunity to judge the credibility of such witnesses."); *Smith v. State*, 2009 WL 792800, at *3 (Alaska App. Mar. 25, 2009) (unpublished) ("We are especially deferential to the trial court's decisions on credibility because of its ability to observe the witnesses' demeanor.") (internal citation omitted).

[7] *See Lafler v. Cooper*, 566 U.S. 156, 163-64 (2012).

requested a ruling from the court on this issue at the close of the evidentiary hearing, but the court's final order does not contain any reference to this claim or to the affidavit from the cab driver that the court promised to review. Accordingly, we remand this case to the superior court for a ruling on this issue and, if necessary, further proceedings.

For the reasons we have explained, we AFFIRM the superior court's denial of Vann's claim that his attorney gave him ineffective advice during the plea negotiations, but we REMAND this case to the superior court for further consideration of Vann's claim that his attorney was ineffective for failing to interview the cab driver.