IN THE COURT OF APPEALS OF THE STATE OF ALASKA

LLOYD A. JENKINS, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12864 Trial Court No. 3AN-09-04968 CI MEMORANDUM OPINION No. 6877 — June 10, 2020

Appeal from the Superior Court, Third Judicial District, Anchorage, Eric A. Aarseth, Judge.

Appearances: Michael Horowitz, Law Office of Michael Horowitz, Kingsley, Michigan, 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 WOLLENBERG.

In 2007, Lloyd A. Jenkins was charged with first-degree burglary, violating a protective order, and violating conditions of release in a pending misdemeanor case.[1]

[1] AS 11.46.300(a)(1), AS 11.56.740(a)(1), and AS 11.56.757(a) & (b)(2), respectively.

Pursuant to a plea agreement, Jenkins pleaded no contest to attempted first-degree burglary. As part of the agreement, the State dismissed the remaining counts in the case, as well as three other pending criminal cases against Jenkins, and agreed not to file a petition to revoke Jenkins's probation in a prior case. Jenkins received an agreed-upon sentence of 36 months with 32 months suspended (4 months to serve).

Jenkins subsequently filed an application for post-conviction relief, seeking to withdraw his plea. Jenkins's claim stemmed from a deficiency in his indictment for first-degree burglary: the indictment failed to identify a target crime for the burglary.[2] The only charging document to identify a target crime for the burglary was the information replacing indictment that the State filed as part of Jenkins's change of plea. This document charged Jenkins with attempted first-degree burglary and identified the target crime as violating a protective order.

In his application, as amended by counsel, Jenkins argued that his attorney failed to research whether violating a protective order was a valid target crime for burglary, or properly advise Jenkins as to his options for challenging the burglary indictment based on the absence of, and ambiguities related to, the alleged target crime. Jenkins contended that, as a result, his plea was not knowing. He also asserted in an affidavit that he would not have accepted the State's offer if he had been advised about the possibility of filing a motion to dismiss the indictment.

The superior court held an evidentiary hearing on Jenkins's application. Jenkins, his trial attorney, and an expert witness (an experienced defense attorney) testified at the hearing.

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[2] *See* AS 11.46.300(a)(1) (providing that a person commits first-degree burglary if the person enters or remains unlawfully in a dwelling with "intent to commit a crime" in the dwelling); *State v. Semancik*, 99 P.3d 538, 540-41 (Alaska 2004) (reaffirming the requirement that burglary indictments specify the target crime).

Jenkins's trial attorney testified that he discussed with Jenkins the deficiency on the face of the indictment and the possible target crimes. The attorney could not recall reviewing the grand jury audio, and he also could not recall advising Jenkins about the possibility of challenging the indictment due to its failure to specify a target crime. But he testified that the real driver of Jenkins's decision-making was Jenkins's desire to obtain a global resolution of all his cases and "get out of jail as soon as possible."

Jenkins's trial attorney further testified that the prosecutor informed him during plea negotiations that the target crime was violating a protective order, and that this target crime was set out in the amended information filed in connection with Jenkins's change of plea. The attorney was certain that he told Jenkins that, under the plea agreement, the target crime was violating a domestic violence protective order. Jenkins's attorney acknowledged that, at the time, there was no case law in Alaska addressing whether a protective order violation could be a target crime for burglary.[3] But ultimately, according to the attorney, Jenkins decided to accept the State's offer because he wanted to secure his release from incarceration.

In contrast, Jenkins testified that his attorney never discussed with him the issues related to the target crime. He further testified that, while he wanted to get out of jail, he would not have accepted the plea offer if he had known that there was a possibility of challenging the indictment.

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[3] We have since addressed the issue of whether violating a protective order may serve as the target crime for burglary in *Lane v. State*, 2019 WL 4673556 (Alaska App. Sept. 25, 2019) (unpublished). In *Lane*, we noted that courts in other jurisdictions had upheld burglary convictions where the unlawfulness of the defendant's entry into a building and the unlawfulness of the defendant's intended conduct inside the building rested on different provisions of the same protective order, and that Alaska's burglary statute did not obviously prohibit such a prosecution. *Id.* at *2.

The expert defense attorney testified that any competent attorney would have listened to the grand jury audio to determine the alleged target crime and to determine if there were any other possible challenges to the indictment. He further testified that any competent attorney would have discussed possible challenges to the indictment with the defendant as part of advising the defendant whether to accept a plea offer by the State.

The superior court denied Jenkins's application. The court found that the testimony of Jenkins's attorney was "credible, clear and consistent." The court further found that Jenkins's attorney knew that the burglary charge required a target crime and that he explained that to Jenkins. The court rejected Jenkins's assertion that he would have stayed in jail to fight the burglary charge.

Ultimately, the court found that Jenkins was "duly advised of his options, especially in light of his push to get out of jail as soon as possible." Given this finding, the court rejected Jenkins's claim that his plea was not knowing and voluntary, or that his attorney had acted incompetently.

Jenkins now appeals the denial of his post-conviction relief application. On appeal, Jenkins renews his argument that his trial attorney provided ineffective assistance of counsel.

In order to prevail on a claim of ineffective assistance of counsel, a criminal 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.[4]

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

When an application for post-conviction relief is denied following an evidentiary hearing, we review factual findings for clear error and legal conclusions de novo.[5]

The superior court found that Jenkins's attorney duly advised Jenkins of his options and that Jenkins was not willing to stay in jail to fight the burglary charge. These findings are not clearly erroneous. And ultimately, these factual findings rest on credibility determinations by the superior court that are entitled to broad deference. Having independently reviewed the record in light of the superior court's findings, we agree with the superior court that Jenkins failed to show that he received ineffective assistance of counsel.

Jenkins raises one additional issue. For the first time on appeal, Jenkins argues that his sentence, imposed pursuant to the plea agreement, is illegal.

As a first felony offender, Jenkins was subject to a presumptive range of 0 to 2 years.[6] Absent aggravating or mitigating factors, the total term imposed (active time, plus any suspended time) was required to fall within this presumptive range.[7] Jenkins's sentence of 36 months with 32 months suspended exceeded the applicable range.

On appeal, Jenkins asserts that the superior court did not find any aggravating factors, and that his sentence is therefore illegal.[8]

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[5] *Lindeman v. State*, 244 P.3d 1151, 1154 (Alaska App. 2011); *State v. Laraby*, 842 P.2d 1275, 1280 (Alaska App. 1992).

[6] AS 12.55.125(e)(1).

[7] AS 12.55.125(n); AS 12.55.155(a).

[8] *See McManners v. State*, 650 P.2d 414, 416 (Alaska App. 1982).

Ordinarily, we will not consider claims for post-conviction relief raised for the first time on appeal.[9] Jenkins argues, however, that we should make an exception because an illegal sentence may be challenged at any time.[10] Even assuming we could address this issue for the first time on appeal, we conclude that we have insufficient information to do so on the record before us.

Although the sentencing judge made no express findings regarding aggravating factors at Jenkins's change of plea and sentencing hearing, the record in this case includes clear references to aggravating factors. At Jenkins's change of plea hearing, the State submitted a proposed judgment form; this form stated that the parties had stipulated to the existence of two aggravating factors and that the court found these aggravating factors. The superior court ultimately signed this judgment form.

At least one of these aggravating factors, AS 12.55.155(c)(31), is plainly supported by the record. Under this provision, a defendant's sentence may be aggravated if the defendant has five or more prior class A misdemeanor convictions. The original charging document in this case lists Jenkins's prior criminal history, which includes at least five prior class A misdemeanor convictions. Jenkins does not contest this summary of his criminal history.

The existence of a single aggravating factor authorized the trial court to impose a sentence exceeding the top end of the presumptive range.[11] And because the

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[9] *See Burton v. State*, 180 P.3d 964, 975 (Alaska App. 2008); *Peters v. State*, 2007 WL 2216610, at *2 (Alaska App. Aug. 1, 2007) (unpublished).

[10] *See* Alaska R. Crim. P. 35(a).

[11] *Cleveland v. State*, 143 P.3d 977, 988 (Alaska App. 2006).

sentence in this case was agreed-upon, the superior court had no need to engage in any weighing of the aggravating factors.[12]

To the extent Jenkins is arguing that he did not *know* he was stipulating to one or more aggravating factors at the time of his change of plea hearing, this presents a factual question requiring an evidentiary hearing and is therefore inappropriate for us to consider in the first instance.[13]

For these reasons, the judgment of the superior court is AFFIRMED.

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[12] *See Malutin v. State*, 198 P.3d 1177, 1187 (Alaska App. 2009) (noting that, because "the parties presented a specific proposed sentence to the superior court," including aggravating factors, "the only question before the court was whether to accept the agreed-upon sentence").

[13] *See Alexie v. State*, 402 P.3d 416, 417-18 (Alaska App. 2017).