IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ELIGAH B. CHRISTIAN, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13069 Trial Court No. 3PA-16-01034 CI MEMORANDUM OPINION No. 6885 — July 15, 2020

Appeal from the Superior Court, Third Judicial District, Palmer, Jonathan A. Woodman, 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 Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Harbison, Judge, and McCrea, District Court Judge.[*]

Judge ALLARD.

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

Eligah B. Christian appeals the dismissal of his application for post-conviction relief. For the reasons explained in this decision, we vacate the superior court's order and remand this case to the superior court for further proceedings consistent with this decision.

Factual background

Over the course of a few months in early 2015, Eligah B. Christian made a number of purchases in Palmer, Wasilla, and Anchorage using fraudulent checks. For his conduct in Anchorage, the Anchorage District Attorney's Office charged Christian with one count of scheme to defraud, twenty-one counts of felony issuing a bad check, one count of misdemeanor issuing a bad check, one count of theft in the first degree, and fourteen counts of theft in the second degree.

For his conduct in the Mat-Su Valley, a Palmer grand jury indicted Christian for one count of theft in the first degree, two counts of scheme to defraud, and fourteen counts of felony issuing a bad check. Christian was also indicted on charges for failure to stop at the direction of a police officer, reckless driving, and criminal mischief after he fled from police when they attempted to contact him.

Christian was appointed two attorneys from the Alaska Public Defender Agency. Neither attorney moved to consolidate the two cases or to reach a global resolution for the two cases. Instead, with both sets of charges pending, Christian entered into a plea agreement on his Anchorage charges. Pursuant to the terms of the agreement, Christian pleaded guilty to one count of scheme to defraud. The agreed-upon factual basis for the scheme to defraud count was apparently the criminal conduct committed in Anchorage. Two weeks later, Christian entered into a plea agreement on his Palmer charges. Christian pleaded guilty to one count of scheme to defraud and one count of failure to stop at the direction of a peace officer. The agreed-upon factual basis

for the scheme to defraud count was apparently the criminal conduct committed in the Mat-Su Valley.

Christian did not appeal his Anchorage or his Palmer case. He did, however, file applications for post-conviction relief in both cases. This appeal concerns Christian's application for post-conviction relief in his Palmer case. That application raised a number of claims, but only one claim is at issue in this appeal: Christian's claim that his overall conduct of using fraudulent checks in Wasilla, Palmer, and Anchorage constituted only a single scheme to defraud, and that his Palmer (*i.e.*, second) conviction for scheme to defraud violated the double jeopardy clause of the United States and Alaska constitutions.

Christian raised this claim in two ways. First, he argued that his trial attorney was ineffective for failing to raise the double jeopardy issue in the trial court and for failing to file an appeal raising the double jeopardy issue. Second, he argued that, regardless of whether his attorney was ineffective, his sentence was illegal because it violated double jeopardy.

The superior court dismissed both arguments under the theory that Christian's double jeopardy claim was "not ripe" until he filed a direct appeal of his Palmer conviction. There was no dispute that by the time Christian filed his application for post-conviction relief, a direct appeal of his Palmer conviction would have been untimely under the Alaska Rules of Appellate Procedure.[1]

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[1] Alaska R. App. P. 204(a)(1) ("The notice of appeal shall be filed within 30 days . . ."); Alaska R. App. P. 521(1) ("[The appellate rules] may be relaxed or dispensed with by the appellate courts where a strict adherence to them will work surprise or injustice [but] this rule does not authorize an appellate court . . . to allow . . . the notice of appeal to be filed more than 60 days late . . . .").

According to the superior court, however, the Alaska Supreme Court held in *Johnson v. State* that a double jeopardy violation constitutes fundamental error and that a claim of fundamental error can be raised in a direct appeal even if the appeal is untimely.[2] The superior court therefore concluded that before raising a double jeopardy claim in an application for post-conviction relief, Christian was first required to file an untimely appeal of his Palmer conviction.

Why we remand this case for further proceedings

Christian argues on appeal that the superior court's interpretation of *Johnson* was incorrect. We agree. *Johnson* held that a double jeopardy violation constitutes fundamental error and that it therefore can be raised in a *timely* appeal even if it was not raised in the trial court; it did not hold that a double jeopardy claim can be raised in an *untimely* appeal.[3] Indeed, *Johnson* contains no discussion of the Alaska Rules of Appellate Procedure, nor is there any suggestion in the language of *Johnson* that the supreme court intended to create an exception to the usual time limit for filing a notice of appeal.

Instead, *Johnson* favorably cites to two cases from other jurisdictions for the proposition that a double jeopardy claim, in addition to being raised for the first time on appeal, may also be raised for the first time in a collateral attack on a conviction.[4] This suggests an endorsement of the approach Christian has taken in this case: filing a timely application for post-conviction relief rather than an untimely direct appeal.

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[2] *Johnson v. State*, 328 P.3d 77, 82-85 (Alaska 2014).

[3] *Id.*

[4] *Id.* at 85 n.41 (citing *Ramirez v. State*, 36 S.W.3d 660, 666 (Tex. App. 2001); *Ex parte Trawick*, 972 So.2d 782, 783 (Ala. 2007)).

We therefore conclude that the superior court erred when it dismissed Christian's double jeopardy claims as unripe. Because ripeness was the only rationale offered by the superior court for dismissing Christian's double jeopardy claims, we must remand this case to the superior court for further consideration of those claims.

We note that Christian makes one additional argument on appeal: he argues that as a matter of law he established a *prima facie* case of ineffective assistance of counsel against his trial attorney for failure to file an appeal raising the double jeopardy issue. We disagree. As the State points out, Christian failed to support this claim with an affidavit attesting that he asked his trial attorney to file an appeal and his trial attorney refused. Christian also failed to obtain an affidavit from his trial attorney responding to such a claim.[5] Accordingly, the appropriate course of action is to vacate the superior court's order dismissing Christian's ineffective assistance of counsel claim on ripeness grounds, and remand this case to the superior court for further litigation.

Conclusion

We VACATE the superior court's dismissal of Christian's double jeopardy claims (both his ineffective assistance of counsel claim and his free-standing

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[5] Whether Christian has an ineffective assistance of counsel claim related to his trial attorney's failure to file an appeal is separate from the question of whether a double jeopardy claim raised on appeal would have had any merit. *See Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (holding that it is *per se* ineffective assistance of counsel for an attorney to fail to file a notice of appeal in a criminal case if the defendant timely requested an appeal); *Broeckel v. State*, 900 P.2d 1205, 1208 (Alaska App. 1995) (holding that prejudice is established in an ineffective assistance of counsel claim if the defendant made a timely request for an appeal and the appeal was not filed, regardless of the underlying merit of the requested appeal). We do not address the underlying double jeopardy claim here, although we note that Christian has not explained why the remedy for the alleged double jeopardy violation should be merger of the two convictions, as opposed to rescission of the two plea agreements.

constitutional claim) and REMAND this case for further proceedings on those claims. We AFFIRM the judgment of the superior court in all other respects. We do not retain jurisdiction of this case.