IN THE COURT OF APPEALS OF THE STATE OF ALASKA

LAURA K. GIPSON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12855 Trial Court No. 2NO-13-00333 CI MEMORANDUM OPINION No. 6886 — July 15, 2020

Appeal from the Superior Court, Second Judicial District, Nome, Romano DiBenedetto, Judge.

Appearances: Michael L. Barber, Barber Legal Services, Anchorage, under contract with the Office of Public Advocacy, for the Appellant. Hazel C. Blum, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Harbison, Judge, and Coats, Senior Judge.[*]

Judge ALLARD, writing for the Court.
Senior Judge COATS, concurring.

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

In 2013, Laura K. Gipson was charged with one count of importing alcohol into a local option area and one count of contributing to the delinquency of a minor.[1] The charges arose after an airport employee discovered alcohol in Gipson's twelve-year-old daughter's luggage shortly before she boarded a flight to the dry village of Savoonga. When confronted by a trooper at the airport, Gipson's daughter pointed to her mother as the person who put the alcohol in her luggage. Gipson's defense at trial, however, was that her daughter acted on her own.[2]

After a jury convicted Gipson of both charges, she filed a direct appeal and we affirmed her convictions.[3] Gipson then filed an application for post-conviction relief, alleging that her trial attorney was ineffective. She claimed, among other things, that her attorney failed to interview and present important testimony from her daughter that would have supported her defense.

With her application, Gipson included affidavits from herself, her daughter, and her trial attorney. Gipson's affidavit states that her attorney told her that, to have any chance of winning at trial, her daughter would have to testify. Gipson's daughter's affidavit states that she and another person packed the bottles in her bag against her mother's wishes, and that she would have testified to this had she been called as a witness in her mother's trial. For his part, Gipson's attorney agreed in his affidavit that he had not interviewed Gipson's daughter, but he did not agree that he believed it was necessary to call Gipson's daughter as a witness. To the contrary, he stated that he made a tactical decision not to call Gipson's daughter as a witness because he assumed she

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[1] AS 04.11.499 and AS 11.51.130(a)(1), respectively.

[2] *See Gipson v. State*, 2016 WL 936759, at *1 (Alaska App. Mar. 9, 2016) (unpublished).

[3] *See id.*

would continue to blame Gipson at trial as she had when she was first confronted by the trooper.

The State filed a motion to dismiss for failure to state a *prima facie* case. With regard to the claim about Gipson's daughter, the State argued that the attorney's decision not to call her as a witness was "a sound trial strategy" because she would have either continued to blame her mother for the presence of alcohol in her luggage or she would have been impeached with evidence that she previously had incriminated her mother. For these same reasons, the State argued that Gipson also failed to show that she was prejudiced by her attorney's failure to call her daughter as a witness.

The superior court dismissed Gipson's application "for the reasons stated in the [S]tate's motion." Gipson now appeals that dismissal.

To plead a *prima facie* case of ineffective assistance of counsel, a post-conviction relief applicant must allege facts that, if proven true, show (1) that the attorney's performance fell below the standard of the 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] When assessing whether the applicant has pled a *prima facie* case, the superior court must view all factual allegations in the light most favorable to the applicant.[5]

Having reviewed Gipson's pleadings and affidavits, we conclude that the superior court erred in dismissing Gipson's claim that her attorney was ineffective for failing to interview her daughter as a potential witness during his pretrial investigation

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

[5] *See Steffensen v. State*, 837 P.2d 1123, 1125-26 (Alaska App. 1992); *LaBrake v. State*, 152 P.3d 474, 480 (Alaska App. 2007).

of the case. Viewing the factual allegations of Gipson's application in the light most favorable to Gipson, as we are required to do at this stage of the proceedings,[6] Gipson has established that her attorney believed it was necessary to call her daughter as a witness, but that he inexcusably failed to interview her daughter or to call her daughter as a witness at trial. Additionally, Gipson's daughter's affidavit indicates that she would have testified favorably if she had been called as a witness at trial — by asserting that she put the alcohol in the bags against her mother's wishes.

We conclude that these factual allegations, if true, would establish that the attorney's conduct fell below the standard of minimal competence and may have affected the outcome in this case.[7] We therefore hold that Gipson established a *prima facie* case for this claim, and the superior court erred when it dismissed the claim without holding an evidentiary hearing. The fact that Gipson's attorney's affidavit disputes some of the factual allegations made by Gipson does not defeat Gipson's *prima facie* claim; instead, it creates issues of fact that must be resolved at an evidentiary hearing.[8]

As we alluded to earlier, Gipson also made a number of other claims in her application for post-conviction relief, and she appeals the dismissal of those claims as well. Specifically, Gipson alleges that her trial attorney failed to interview and present testimony from a family friend and an airport employee, failed to perform fingerprint testing on the alcohol bottles, failed to preempt a juror who was biased against her, and failed to adequately counter one of the State's arguments in closing. We have examined these claims, and we agree with the superior court that Gipson failed to make a *prima*

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[6] *See Steffensen*, 837 P.2d at 1126.

[7] *See State v. Jones*, 759 P.2d 558, 569 (Alaska App. 1988) (noting that a mistake made out of ignorance rather than from strategy cannot later be validated as being tactically defensible).

[8] *See LaBrake*, 152 P.3d at 480.

facie case for any of them. Even assuming Gipson's factual allegations are true, she has not shown that her attorney's choice of tactics on these issues was so bad that no competent criminal practitioner would have handled the issues in the same way or that his investigation and preparation of the case was so inadequate that the attorney had no competent basis for making decisions entrusted to him as an attorney.[9] Nor has she shown that but for these allegedly incompetent inactions, there is a reasonable possibility that the outcome of the proceedings would have been different.[10]

Accordingly, we REVERSE the superior court's decision to dismiss Gipson's claim that her attorney was ineffective for failing to interview her daughter as a potential witness at her trial, we AFFIRM the superior court's dismissal of Gipson's other claims, and we REMAND this case for further proceedings consistent with this opinion.

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[9] *See Id.*

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

Senior Judge COATS, concurring.

I write separately to provide additional details about the proceedings that I believe are necessary for a complete understanding of Gipson's claim that her attorney provided ineffective assistance of counsel.

Gipson's defense at trial was that her twelve-year-old daughter had acted on her own. Gipson testified that her daughter packed the alcohol in her luggage without Gipson's knowledge.

In an affidavit, Gipson's daughter supported her mother's account. Gipson's daughter stated that her mother purchased the alcohol a day or two before her daughter's scheduled trip to Savoonga. But her mother specifically told her not to put the alcohol in her bags on the morning of the trip. In spite of this, Gipson's daughter stated that she ignored her mother's request and packed her bag with the bottles of alcohol. In the affidavit, Gipson's daughter stated that she would have testified to these facts if she had been called as a witness at her mother's trial.

In her affidavit, Gipson stated that, well before trial, she had discussed her defense with her attorney. The attorney told Gipson that to prevail at trial, not only would Gipson have to testify but that her daughter would also have to testify. The attorney told her that, before her daughter could testify, he would have to get an independent attorney to advise her daughter. Gipson's affidavit stated that she was uneasy about having her daughter testify given her young age. But the attorney told Gipson that having her daughter testify was the only way to win. The attorney told her that, in a worst case scenario, Gipson's daughter would be facing only a couple of weeks in a juvenile detention center.

According to Gipson's affidavit, the attorney contacted her a few days before trial. During this contact, Gipson learned that the trial was set at a time when her

daughter would be unavailable to testify. Gipson stated that she was panicked at the thought that her daughter would not be available to testify. But the attorney told her that her daughter was no longer needed as a witness. However, the attorney did not answer Gipson's inquiries as to why her daughter was no longer necessary as a witness.

In her affidavit, Gipson stated that she was the only defense witness at trial. And she was found guilty of both charges.

In her post-conviction relief application, Gipson raises several issues regarding ineffective assistance of counsel. But the critical issue appears to be that the attorney decided, as a tactical matter, that he would not call Gipson's daughter as a witness. He concluded that, most likely, Gipson's daughter would blame Gipson for putting the alcohol in her luggage. The attorney indicated that he may have been incompetent because he did not remember interviewing Gipson's daughter and that he had no excuse for failing to do so.

In reviewing an application for post-conviction relief and determining whether the applicant has established a *prima facie* case of ineffective assistance of counsel, we are to review the application with the assumption that the allegations in the affidavits are true and to look at the allegations in the light most favorable to upholding the application.[1]

Although tactical decisions of counsel are treated with great deference, a tactical decision made on the basis of ignorance, neglect, or mistake is not a sound tactical decision and is not a protected decision.[2] When we review the application for post-conviction relief in the light most favorable to upholding the application, it appears

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[1] *See Steffensen v. State*, 837 P.2d 1123, 1125-26 (Alaska App. 1992).

[2] *See State v. Jones*, 759 P.2d 558, 569 (Alaska App. 1988); *see also State v. Simpson*, 946 P.2d 890, 893 (Alaska App. 1997).

that the attorney, for some reason, was unaware about how Gipson's daughter, a critical witness for Gipson, would testify. Gipson's daughter's testimony, as presented in the affidavit, if believed by a jury would have resulted in Gipson's acquittal. On the facts of this case, without further explanation, this would establish a *prima facie* case of ineffective assistance of counsel.