IN THE COURT OF APPEALS OF THE STATE OF ALASKA

REX VICTOR WESTON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12900 Trial Court No. 3AN-13-07640 CI MEMORANDUM OPINION No. 6904 — October 28, 2020

Appeal from the Superior Court, Third Judicial District, Anchorage, Erin B. Marston, Judge.

Appearances: Elizabeth D. Friedman, Redding, California, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Ann B. Black, 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 Mannheimer, Senior Judge.[*]

Judge MANNHEIMER.

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

Rex Victor Weston appeals the superior court's denial of his petition for post-conviction relief. The superior court ruled that Weston failed to offer prima facie support for any of his post-conviction relief claims. On appeal, Weston raises several challenges to the superior court's decision. For the reasons explained in this opinion, we reject Weston's claims and we affirm the superior court's judgement.

Background facts and proceedings in the superior court

Early one morning in March 2012, a passing driver found Weston in a parked vehicle that was sitting in one of the traffic lanes of the Glenn Highway. Weston explained his presence by asserting that he was having trouble with his clutch — but his vehicle was equipped with an automatic transmission. Weston's eyes were bloodshot and watery, his speech was slurred, and he seemed to be reaching for non-existent dashboard controls. The driver summoned the police.

When the police arrived, Weston failed a horizontal gaze nystagmus test. In addition, Weston admitted that his driver's license was revoked.

Weston was arrested and transported to a police station, where he submitted to a DataMaster breath test. The result was .084 percent blood alcohol (slightly over the legal limit of .08 percent).

Based on this episode, Weston was charged with driving with a revoked license and felony driving under the influence (because he had prior DUI convictions).

At trial, Weston was represented by an assistant public defender. This public defender was, in turn, assisted by a legal intern who was practicing law under the authority of Alaska Bar Rule 44 — a rule that allows law students and law school graduates who are not members of the Alaska Bar to practice law under the supervision of a licensed attorney.

The legal intern presented the defense opening statement, and she cross-examined the police officer who first responded to the scene and administered field sobriety tests to Weston. Weston's licensed public defender was present to supervise the legal intern during these portions of the trial, and the public defender conducted all other aspects of Weston's trial herself.

At the conclusion of Weston's trial, his public defender conceded that Weston drove while his license was revoked, but the attorney argued that Weston was not guilty of driving under the influence. The jury convicted Weston of both charges. (Weston waived his right to a jury with respect to the prior convictions that made his offense a felony.)

After the superior court entered judgement against him, Weston pursued a direct appeal in which he argued that the evidence presented at his trial was legally insufficient to support his DUI conviction. [1]

One aspect of Weston's argument in that earlier appeal has particular relevance to Weston's post-conviction relief litigation: In his direct appeal, Weston noted that since his DataMaster test result was .084 percent, and since even a properly functioning DataMaster has a margin of error of .005 percent, there was a possibility that Weston's actual blood alcohol level was as low as .079 percent. Thus, Weston argued, the State could not have proved beyond a reasonable doubt that Weston's true blood alcohol level was .08 percent or higher.

But as this Court noted when we decided Weston's appeal, the Alaska legislature has defined the crime of DUI so that a driver's guilt hinges on the driver's breath test result, even if that test result may overstate the driver's actual blood alcohol level because of the testing equipment's inherent margin of error. *See* AS 28.90.020;

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[1] *See Weston v. State*, unpublished, 2015 WL 5000563 (Alaska App. 2015).

Bushnell v. State, 5 P.3d 889, 891–93 (Alaska App. 2000) (upholding the constitutionality of the legislature's action). We therefore rejected Weston's argument.[2]

After this Court affirmed Weston's DUI conviction on appeal, he filed a petition for post-conviction relief. This appeal involves two of the claims that Weston presented in his petition.

First, Weston argued that his trial attorney (*i.e.*, the licensed public defender) was incompetent for failing to present expert testimony regarding the potential significance of the DataMaster's margin of error. However, Weston's post-conviction relief attorney did not provide the superior court with an affidavit or other offer of proof explaining what relevant testimony an expert witness might offer if they were called to testify. Moreover, Weston's trial attorney filed an affidavit indicating that she made a tactical decision *not* to retain an expert witness on this topic.

Second, Weston argued that he was unlawfully deprived of his right to the assistance of counsel because, at trial, his public defender was assisted by a legal intern who presented a portion of the defense case. Weston asserted that he never consented to the intern's participation — and that, therefore, he was denied his constitutional right to counsel. However, Weston did not submit a personal affidavit to support his assertion that he never consented to the intern's participation.

Weston's trial attorney, on the other hand, submitted an affidavit in which she stated that whenever a legal intern was going to participate in a defendant's case, she (the attorney) would introduce the intern to the client, explain the intern's position, and make sure that the client was comfortable with the intern's participation. Although the trial attorney had no specific recollection of her discussion with Weston on this point, the attorney believed that she had followed her normal practice in Weston's case.

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[2] *Weston*, 2015 WL 5000563 at *1.

And, as we have already explained, the trial attorney was physically present for all stages of Weston's trial, and she conducted most of the trial herself.

Based on this record, the State filed a motion asking the superior court to dismiss Weston's claims on the basis that he had failed to offer a prima facie case to support them. Weston's post-conviction relief attorney filed an opposition to the State's motion — but the attorney did not supplement (or ask for additional time to supplement) Weston's post-conviction relief application.

Indeed, months later, while the State's motion to dismiss was still pending, Weston's post-conviction relief attorney filed a pleading in which he asserted that "[Weston's] case is now ripe for a decision ... on whether a prima facie case exists". In other words, Weston's attorney told the superior court that it should decide the case on the existing record.

The superior court ultimately dismissed Weston's petition for failing to present a prima facie case for post-conviction relief.

Weston's claims in this appeal

Weston first argues that the superior court committed error by failing to give him an opportunity to make a factual offer of proof to support his claim that it was improper for the legal intern to participate in his trial.

Weston mistakenly asserts that the existing record contains no information as to whether he was ever given information about the intern's background, or what the intern's role would be at his trial. Weston also mistakenly asserts that the record contains no information as to whether he was asked to consent to the intern's proposed participation in his trial — or, if he was asked, whether he in fact did consent.

It is true that the record contains no information *from Weston* about these matters. But as we have already explained, the record contains an affidavit from Weston's trial attorney. In this affidavit, Weston's attorney explained that when she intended to have an intern participate in a defendant's trial, the attorney would introduce the intern to the defendant, explain the intern's position, and make sure that the defendant was comfortable with the intern's participation. Weston's trial attorney had no specific recollection of her discussion with Weston on this point, but she believed that she had followed her normal practice of explaining these matters to Weston and obtaining his consent.

Weston never offered his own affidavit to rebut his trial attorney's assertions — and Weston had ample opportunity to file such an affidavit. Weston's post-conviction relief attorney could have submitted an affidavit from Weston when he filed the amended application for post-conviction relief that superseded Weston's original *pro se* application. Alternatively, after the State moved to dismiss this amended application (based on its failure to present a prima facie case for relief), Weston's attorney could have asked to supplement the application with a personal affidavit from Weston. But instead, Weston's post-conviction relief attorney affirmatively told the superior court that it should decide the State's motion to dismiss based on the existing record — a record that contained no statement from Weston on these matters.

For these reasons, we conclude that Weston had ample opportunities to offer facts to support his claim regarding the legal intern. Rather than take advantage of these opportunities, Weston asked the superior court to decide his claim based on the existing record. The only relevant offer of proof in the existing record is Weston's trial attorney's affidavit — a document which indicates that Weston knowingly consented to the intern's participation.

We therefore uphold the superior court's dismissal of this claim.

Weston's next claim on appeal is that his trial attorney was incompetent for failing to present an expert witness to testify about the DataMaster's inherent .005 percent margin of error. But as we have already explained, Weston's application for post-conviction relief contained no offer of proof regarding what this envisioned expert witness would have said about the DataMaster's margin of error. Nor did Weston's application contain any explanation as to how expert testimony about the DataMaster's margin of error would have been relevant — given the fact that Weston's guilt of the DUI charge hinged on his *test result*, not on his actual blood alcohol level.

In his brief to this Court, Weston argues that it is unconstitutional — a denial of due process — for the Alaska legislature to define the crime of DUI as hinging on a defendant's test result rather than on a defendant's actual blood alcohol level.

In effect, Weston is asking us to overrule our decision in *Bushnell v. State*, 5 P.3d 889, 891–92 (Alaska App. 2000), where we rejected a due process challenge to the DUI statute even though, at the time, Alaska was using a breath test device that had a larger inherent margin of error (a margin of .01 percent).

Under the doctrine of *stare decisis*, an appellate court will overrule one of its prior decisions only when (1) the court is "clearly convinced that [its decision] was originally erroneous" or (2) the court is convinced that its prior decision "is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent".[3]

With regard to changed conditions, the only relevant change is that Alaska now uses a more accurate testing device. And Weston has failed to convince us that our decision in *Bushnell* was erroneous from the beginning.

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[3] *State v. Fremgen*, 914 P.2d 1244, 1245 (Alaska 1996).

We therefore stand by our decision in *Bushnell*, and we uphold the superior court's dismissal of Weston's claim regarding the DataMaster's margin of error.

Finally, Weston argues that his *post-conviction relief attorney* was incompetent in the way he litigated the post-conviction relief action that led to the present appeal.

Originally, Weston's application for post-conviction relief contained the claim that Weston's trial attorney was incompetent for failing to interview and present the testimony of the woman who was a passenger in Weston's car on the morning he was arrested. The State asked the superior court to dismiss this claim, pointing out that Weston had failed to make an offer of proof regarding what this passenger would have said if she had been called as a witness. While the State's motion to dismiss was still pending, Weston's post-conviction relief attorney chose to drop this claim.

Now, on appeal, Weston argues that his post-conviction relief attorney acted incompetently when he dropped this claim.

In addition, Weston suggests that his post-conviction relief attorney was incompetent for failing to supplement the post-conviction relief application with an affidavit from Weston addressing the issue of the legal intern's participation in Weston's trial.

Because these claims of incompetence are being raised for the first time on appeal, the superior court was never asked to consider these matters. No factual record was developed regarding the reasons for the attorney's actions (or inactions), and the superior court made no ruling on whether the attorney's litigation of the post-conviction relief case was competent or incompetent.

Weston acknowledges that, under Alaska law, when a defendant wishes to challenge the competence of the attorney who litigated the defendant's application for

post-conviction relief, the defendant is normally required to file a second petition for post-conviction relief. *See Grinols v. State*, 10 P.3d 600 (Alaska App. 2000).[4]

This is because the record of the proceeding in the lower court will generally be inadequate to assess whether an attorney's performance was competent or incompetent. As we explained in *Burton v. State*:

> [T]he record of the [lower court] proceedings will seldom conclusively establish incompetent representation, because that record will rarely provide an explanation for the attorney's conduct that is challenged as deficient. ... Claims of ineffective assistance can rarely be determined from the trial record alone [because a defense] attorney's trial decisions — including which potential defenses to pursue, whether to object to the evidence offered by the government, how to cross-examine government witnesses, and whether and how to present a defense case — generally rest on considerations of strategy and trial tactics that are not directly addressed in open court.

Burton, 180 P.3d 964, 969 (Alaska App. 2008) (internal citations omitted).

Weston asks us to relieve him of the requirement of filing a second application for post-conviction relief. He suggests instead that we simply remand his case to the superior court, with directions to let him litigate this claim against his post-conviction relief attorney. According to Weston, this procedure would "save valuable judicial resources".

We disagree. The contemplated litigation would not be a continuation of Weston's present application for post-conviction relief — litigation that focused on the actions of Weston's trial attorney. Rather, the contemplated new litigation would focus on the performance of Weston's post-conviction relief attorney. The factual record

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[4] *Affirmed in relevant part*, 74 P.3d 889 (Alaska 2003).

pertinent to this new claim will be substantially different from the existing record, and Weston's post-conviction relief attorney can no longer represent him, since the attorney will be a material witness (and could be the source of important evidence against Weston's claim).

In sum, the aim of fairly and efficiently resolving Weston's claim against his post-conviction relief attorney will be best served by requiring Weston to file a second application for post-conviction relief.

Conclusion

The judgement of the superior court is AFFIRMED.