

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

PATRICK H. TORRENCE,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13359
Trial Court No. 3AN-17-09873 CI

MEMORANDUM OPINION

No. 7045 — February 22, 2023

Appeal from the Superior Court, Third Judicial District,
Anchorage, Michael L. Wolverton, Judge.

Appearances: Eric Auten, Law Office of Eric Auten, Valdez,
for the Appellant. Ann B. Black, Assistant Attorney General,
Office of Criminal Appeals, Anchorage, and Treg R. Taylor,
Attorney General, Juneau, for the Appellee.

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

Judge HARBISON.

Patrick H. Torrence appeals the dismissal of his second application for post-conviction relief. In this application, Torrence alleged, *inter alia*, that he received ineffective assistance of counsel from the attorney who litigated his first application for

post-conviction relief.¹ He also asserted that he had obtained newly discovered evidence that established his innocence.² After filing the application, Torrence asked the superior court to appoint counsel for him. The State opposed the request for counsel and filed a motion to dismiss. The superior court granted the State's motion to dismiss the application, ruling that the claims were successive, untimely, and barred by *res judicata*.

Because the ineffective assistance of counsel claim was neither successive nor untimely, we vacate the dismissal of this claim and remand this case to the superior court for further proceedings. We also vacate the dismissal of the newly discovered evidence claim so that Torrence's court-appointed counsel may litigate this claim, including its timeliness, on his behalf.

Relevant facts and analysis

In 2010, Torrence was convicted, following a jury trial, of kidnapping, first-degree sexual assault, and second- and third-degree assault.³ He appealed his convictions, arguing that (1) the evidence was not sufficient to support the verdicts for sexual assault and kidnapping, (2) the trial court erred in denying his motions to dismiss the indictment, and (3) his sentence was excessive.⁴ In 2013, this Court rejected Torrence's arguments

¹ See *Grinols v. State*, 74 P.3d 889 (Alaska 2003).

² See AS 12.72.010(4); Alaska R. Crim. P. 35.1(a)(4).

³ AS 11.41.300(a)(1)(C), AS 11.41.410(a)(1), AS 11.41.210(a)(1), and AS 11.41.220(a)(1)(A), respectively.

⁴ *Torrence v. State (Torrence I)*, 2013 WL 1283396, at *2-7 (Alaska App. Mar. 27, 2013) (unpublished).

and affirmed his convictions.⁵ Torrence then filed a petition for hearing with the Alaska Supreme Court, which was denied on May 28, 2013.

In October 2011, Torrence filed his first application for post-conviction relief, claiming that his trial attorney provided him ineffective assistance of counsel. The superior court appointed an attorney to represent him, and the attorney filed an amended application. On October 19, 2017, the superior court dismissed the application for failure to state a *prima facie* case.⁶ Torrence appealed, and in March 2020, this Court affirmed the superior court's dismissal order.⁷ The Alaska Supreme Court subsequently denied Torrence's petition for hearing.

On October 24, 2017, after the superior court dismissed Torrence's first application for post-conviction relief but prior to this Court's decision affirming the dismissal order, Torrence filed a second application for post-conviction relief, alleging, *inter alia*, that he received ineffective assistance of counsel from the attorney who litigated his first application for post-conviction relief; he also alleged that he had obtained newly discovered evidence of his innocence. Torrence filed a motion asking the superior court to appoint an attorney to assist him in litigating this second application.

In response, the State moved to dismiss Torrence's second application, arguing that (1) the application was untimely, and (2) the claims raised in the application were successive and therefore barred. The superior court granted the State's motion to dismiss on May 10, 2018 without appointing counsel for Torrence.

⁵ *Id.*

⁶ *Torrence v. State (Torrence II)*, 2020 WL 9174580, at *1 (Alaska App. Mar. 4, 2020) (unpublished summary disposition).

⁷ *Id.* at *2.

Torrence then filed this appeal, challenging the order dismissing his second application for post-conviction relief and arguing that the superior court erred in failing to timely provide counsel to assist him. He also filed a request for counsel.

This Court entered an order remanding Torrence's case to the superior court to consider whether to appoint counsel. In the order remanding the case, we noted the unusual procedural posture of Torrence's case — *i.e.*, Torrence was appealing the dismissal of his second post-conviction relief application raising ineffective assistance of counsel claims against his first post-conviction relief attorney, while the appeal of the dismissal of his first post-conviction relief application was still pending. On remand, the superior court appointed counsel for Torrence.

On March 4, 2020, this Court affirmed the superior court's dismissal of Torrence's first application for post-conviction relief.⁸ (Twenty days later, Torrence filed a third application for post-conviction relief in the superior court.⁹)

Briefing in the current appeal was completed in May 2022. In the opening brief filed with this Court, Torrence's attorney argues that two of the claims in Torrence's second application for post-conviction relief were timely and not successive. The first of these is Torrence's claim that he received ineffective assistance of counsel from the attorney who represented him in his first application for post-conviction relief. Because

⁸ *Torrence II*, 2020 WL 9174580, at *2.

⁹ The State contends we should affirm the dismissal of Torrence's second application for post-conviction relief because Torrence has now filed a third application, and, according to the State, his claim that he received ineffective assistance from his first post-conviction relief attorney (and any other viable claims) can be litigated in that case. But because Torrence included this claim in his second application, the same claim in his third application likely would be barred as successive. We accordingly disagree with the State that Torrence's third application is the correct procedural vehicle in which to litigate the ineffective assistance of counsel claim against his first post-conviction relief attorney.

the appeal challenging the superior court's dismissal of Torrence's first application for post-conviction relief was still pending before this Court when the superior court granted the State's motion to dismiss his second application, Torrence's claim that his first post-conviction relief attorney provided ineffective assistance of counsel was neither untimely nor successive.¹⁰ We accordingly vacate the superior court's dismissal of this claim and remand this case for further proceedings.

The second claim that is not, on its face, time-barred and successive is Torrence's claim of newly discovered evidence. We conclude that, read generously, Torrence's second application avers that he has discovered new material facts, not previously presented and heard, that could establish his innocence.¹¹ Although the application did not detail or cogently explain the alleged new evidence, Torrence filed this application without the benefit of counsel. Since the superior court has now appointed an attorney to represent Torrence, on remand the superior court should permit Torrence's attorney to further develop this claim as well as his ineffective assistance of counsel claim.

Conclusion

We VACATE the dismissal of Torrence's second application for post-conviction relief and remand this case to the superior court for further proceedings on the two claims we have identified in this opinion.

¹⁰ See AS 12.72.025.

¹¹ See AS 12.72.020(b)(2); *Hall v. State*, 446 P.3d 373 (Alaska App. 2019).