NOTICE

This is a summary disposition issued under Alaska Appellate Rule 214(a). Summary dispositions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d).

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

HARRY ALEX MORENA, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13368 Trial Court No. 2KB-15-00200 CI SUMMARY DISPOSITION No. 0268 — May 18, 2022

Appeal from the Superior Court, Second Judicial District, Kotzebue, Paul A. Roetman, Judge.

Appearances: George W.P. Madeira Jr., Assistant Public Defender, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Michal Stryszak, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

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

Harry Alex Morena was convicted, following a guilty plea, of attempted first-degree murder for shooting through a closed door at a police officer. Morena pleaded guilty pursuant to a partial plea agreement that set forth an agreed-upon sentencing range of 15 to 25 years for the active term of imprisonment but left the amount of suspended time open to the discretion of the trial judge. At sentencing, the trial court imposed a sentence of 45 years with 20 years suspended (25 years to serve).

Morena later filed an application for post-conviction relief seeking to withdraw his plea on the ground that he did not understand that "the sentence actually imposed could be imposed."[1] In support of his application, Morena submitted documentation that he has Fetal Alcohol Spectrum Disorder, cognitive impairments, and an IQ of 71. Morena alleged that, because of these deficits, he had misunderstood the plea agreement and had thought that the maximum sentence he could receive was 25 years total, including suspended time. Morena also alleged that his trial attorney never met with him in person and had not properly explained the plea agreement. (We note, however, that Morena did not raise a separate ineffective assistance of counsel claim.)

Following an evidentiary hearing in which Morena, his trial attorney, and a neuropsychologist expert testified, the superior court found that Morena had understood that the plea agreement called for a maximum of 25 years of active time with no agreement as to the amount of suspended time that could be imposed. The superior court therefore denied the application for post-conviction relief.

Morena now appeals the denial of his post-conviction relief application, raising two claims.

First, Morena argues that the trial court erred when it found that he had failed to prove by clear and convincing evidence that he did not understand the plea agreement. To prevail on this claim, Morena must show that the superior court's finding

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[1] Alaska R. Crim. P. 11(h)(4)(C) ("Withdrawal [of a plea] is necessary to correct a manifest injustice whenever it is demonstrated that . . . [t]he plea . . . was entered without knowledge . . . that the sentence actually imposed could be imposed."); *see also* AS 12.72.010(8) (allowing post-conviction relief applicant to seek to withdraw plea of guilty after imposition of sentence "in order to correct manifest injustice under the Alaska Rules of Criminal Procedure").

was clearly erroneous.[2] A finding of fact is "clearly erroneous" when, after reviewing the record, the appellate court is left "with a definite and firm conviction that a mistake has been made."[3] Having reviewed the record, we are not persuaded that the trial court clearly erred.

The superior court found that Morena's attorney had explained the plea agreement to Morena both orally and in writing. The superior court also found that Morena had demonstrated an understanding of the plea agreement during the proceedings. The superior court found it significant that the State had repeatedly proposed a sentence that had significant suspended time above 25 years, and Morena never objected to the proposed sentence as contrary to the agreement. (We note that the record also shows that Morena had previously expressed a willingness to plead guilty under a less favorable plea offer that called for open sentencing up to 99 years.)

On appeal, Morena argues that the court erred in relying on its own observations of Morena, because the expert testified that Morena generally presented as understanding more than he actually did. According to Morena, the court was obligated to defer to the expert's opinion that it was "more probable than not" that Morena did not understand the plea agreement.

But the superior court could reasonably question the expert's conclusion given the expert's failure to actually review the plea colloquy in this case. The superior court also found that the expert had failed to take into account Morena's experience with

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[2] *See Ferguson v. State*, 242 P.3d 1042, 1051 (Alaska App. 2010); *see also Parks v. State*, 2013 WL 1558122, at *3 (Alaska App. Apr. 10, 2013) (unpublished) (reviewing for clear error trial court's finding that Parks "fully understood" he could receive 5 years' imprisonment as part of plea bargain).

[3] *Ferguson*, 242 P.3d at 1051 (quoting *Majaev v. State*, 223 P.3d 629, 631 (Alaska 2010)); *Booth v. State*, 251 P.3d 369, 373 (Alaska App. 2011).

the criminal justice system when evaluating Morena's level of understanding. And the superior court found it significant that Morena was familiar with sentencing terminology, having experienced numerous other change of plea hearings.

Ultimately, it is the superior court which was in the best position to judge the credibility of the witnesses and assess Morena's claim. Given the record before us, we cannot conclude that the superior court erred in finding that Morena had failed to meet his burden of proving by clear and convincing evidence that he did not understand the plea agreement.

Second, Morena argues that his plea should be withdrawn because the trial court failed to fully comply with the requirements of Alaska Criminal Rule 11 when accepting his plea. Specifically, the trial court failed to inform Morena of the maximum punishment that he faced (99 years) and also failed to inform Morena that he had a right to plead not guilty.[4]

Morena did not raise this claim in the superior court, and we question Morena's ability to raise a claim of plain error in an appeal from the denial of post-conviction relief.[5] But, even assuming Morena is entitled to pursue such a claim, we find no plain error. A defendant may withdraw their plea based on a Rule 11 violation only if (1) they were not otherwise aware of the information that the judge neglected to say, and (2) they would not have entered the guilty plea or the no contest plea if they had

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[4] Alaska R. Crim. P. 11(c)(3)(A) (stating that the court must inform the defendant of "the maximum possible punishment provided by the statute defining the offense to which the plea is offered"); Alaska R. Crim. P. 11(c)(3)(B) (declaring that "the defendant has the right to plead not guilty or to persist in that plea if it has already been made, or to plead guilty").

[5] *See, e.g.*, *Peters v. State*, 2007 WL 2216610, at *2-3 (Alaska App. Aug. 1, 2007) (unpublished) (suggesting that allowing new post-conviction relief claims to be brought on appeal would turn appeals into "a second, independent petition for post-conviction relief . . . addressed to an appellate court in the first instance").

been aware of this information.[6] Because Morena never raised this issue in the superior court, no such findings were ever made. Morena has therefore failed to establish plain error.

Lastly, we note that, although we reject Morena's arguments on appeal, we do not mean to suggest that best practices were followed in this case. We find it very concerning that Morena's attorney never met with Morena in person, and that the attorney was not present at the sentencing, even though Morena himself was present in the courtroom. We also agree with Morena that the plea colloquy could have been clearer, and we encourage trial courts to make sure that all the terms of a plea agreement are placed on the record and fully explained. Ultimately, everyone involved in the process — defense attorneys, prosecutors, and trial courts — should be especially careful to ensure that defendants with cognitive impairments understand their plea agreements and are capable of demonstrating that understanding on the record.

The judgment of the superior court is AFFIRMED.

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[6] *Lindoff v. State*, 224 P.3d 152, 156 (Alaska App. 2010) (citing *Peterson v. State*, 988 P.2d 109, 119-20 (Alaska App. 1999)).