IN THE COURT OF APPEALS OF THE STATE OF ALASKA

HARRY N. WILLIAMS, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13772 Trial Court No. 4BE-15-00256 CI SUMMARY DISPOSITION No. 0330 — July 19, 2023

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Michael A. MacDonald, Judge.

Appearances: Barbara Dunham, Attorney at Law, under contract with the Public Defender Agency, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Donald Soderstrom, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Harbison, Judge, and Bolger, Senior Supreme Court Justice.[*]

Harry N. Williams was convicted, following a jury trial, of second-degree murder and kidnapping for his participation in the torture and death of Benjamin

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

Kaiser.[1] We affirmed his conviction and his sentence on direct appeal,[2] and Williams then filed an application for post-conviction relief. Relevant to this appeal, Williams argued in his application that his trial attorneys usurped his right to testify and incompetently failed to hire a medical expert to independently investigate the cause of Kaiser's death. The superior court dismissed Williams's application because it concluded that Williams failed to state a prima facie case. Williams now appeals. We affirm the superior court's order dismissing Williams's post-conviction relief application.

First, Williams argues that the superior court erroneously dismissed his claim that his trial attorneys usurped his right to testify. In an affidavit he submitted with his application, Williams stated that his trial counsel "pressured [him] into not testifying." According to Williams, his attorneys "said it was not in [his] interest [to testify] but never explained their reasoning." He also stated in his affidavit that it was his attorneys, not him, who "made the decision" that he would not testify, and that he "just agreed . . . when the judge asked because [he] believed [he] had no other choice." Williams did not offer any specific factual allegations to support these claims.

By contrast, both of Williams's trial attorneys stated in their affidavits that they had informed Williams multiple times that it was his decision whether to testify. They also stated that they again discussed Williams's decision whether to testify with him during the trial, shortly before the court conducted the *LaVigne* inquiry.[3] Both of the attorneys explained that they advised Williams that it was not in his best interest to testify, but also told him that whether or not to testify was ultimately his decision.

---

[1] AS 11.41.110(a)(1) and AS 11.41.300(a)(1)(C), respectively.

[2] *Williams v. State*, 2015 WL 1137654, at *1 (Alaska App. Mar. 11, 2015) (unpublished).

[3] *See LaVigne v. State*, 812 P.2d 217, 219 (Alaska 1991).

Williams's application included a transcript of the *LaVigne* inquiry. During the inquiry, the superior court explained to Williams that the decision regarding whether to testify was his decision and not his attorneys' decision. The court asked Williams whether it was his decision not to testify, and he responded, "Yes, sir." Williams does not dispute the accuracy of this transcript.

When a trial court reviews a motion to dismiss for failure to state a prima facie claim, it must accept the factual allegations in the defendant's affidavit, even if contradicted by counsel, unless those allegations are obviously false based on the court record.[4] Thus, in deciding the State's motion to dismiss, the superior court was obliged to presume that Williams's well-pleaded assertions of fact were true, even if contradicted by his attorneys' competing affidavits.

But Williams's application did not contain *any* factual assertions that would support his contention that his attorneys said or did something during private conversations with him that overbore his free will. Instead, the application relied upon the conclusory statements in Williams's affidavit that it was not his choice to testify, that his attorneys "pressured" him, and that his attorneys "made the decision." As we explained in *LaBrake v. State*, the presumption favoring the allegations in the application does not apply to "conclusory assertions concerning the ultimate facts to be decided."[5] For this reason, the superior court did not err in determining that Williams's application did not make out a prima facie case for relief on this claim.

Second, Williams argues that the superior court erred in dismissing Williams's claim that his trial attorneys provided ineffective assistance by failing to investigate the cause of Kaiser's death.

---

[4] *LaBrake v. State*, 152 P.3d 474, 481 (Alaska App. 2007).

[5] *Id.*

At trial, a medical examiner testified that Kaiser died of a brain hemorrhage that could have been caused by a single blow, causing death immediately or over time. Williams alleged in his post-conviction application that a minimally competent attorney would have hired an independent medical expert to investigate the cause of Kaiser's death and establish that Williams's actions were not a substantial factor in causing Kaiser's death.

When an applicant challenges the effectiveness of their trial counsel's decision to present expert testimony or obtain expert testing of physical evidence, the applicant must offer evidence (*i.e.*, affidavits or reports) demonstrating that the testimony or evidence would have been favorable.[6] Williams did not include an affidavit or a report of a medical expert demonstrating that an investigation would have yielded testimony or evidence beneficial to Williams's case. He thus failed to set forth a prima facie case that his trial attorneys provided ineffective assistance for failing to investigate the cause of Kaiser's death.

The judgment of the superior court is AFFIRMED.

[6] *See, e.g.*, *David v. State*, 372 P.3d 265, 269 (Alaska App. 2016); *Allen v. State*, 153 P.3d 1019, 1024-26 (Alaska App. 2007); *State v. Jones*, 759 P.2d 558, 573-74 (Alaska App. 1988); *Howell v. State*, 758 P.2d 103, 105 n.1 (Alaska App. 1988).