IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ERICK DAVID,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11255
Trial Court No. 3AN-07-11029 CI
t/w 3AN-01-6571 CR

MEMORANDUM OPINION

No. 6123 — December 10, 2014

Appeal from the Superior Court, Third Judicial District, Anchorage, William Morse, Judge.

Appearances: David K. Allen, Sechelt, British Columbia, for the Appellant. Michael S. McLaughlin, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley, District Court Judge.[*]

Judge ALLARD.

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Erick David and William Grossman were convicted of second-degree murder following a joint trial by jury. David filed a petition for post-conviction relief, alleging that his trial counsel provided ineffective assistance by failing to seek severance of his trial from the trial of his co-defendant. The superior court dismissed the application for failure to state a prima facie case. David now appeals the superior court's decision.

For the reasons explained here, we affirm the superior court's dismissal of David's petition for post-conviction relief.

Background facts and prior proceedings

On August 14, 2001, David and Grossman were drinking heavily in an empty lot in Anchorage with three other people: Larry Brown, Kevin Vanderway, and Kathy Tugatuck. A dispute arose in the group. As a result of this dispute, David and Grossman severely beat Brown, and Grossman also assaulted Vanderway. Brown later died from his injuries, and David and Grossman were charged with second-degree murder.

Three witnesses from nearby apartment buildings witnessed the episode and testified that they saw two men assaulting Brown. David and Grossman matched the descriptions of the two assailants provided by the witnesses. The witnesses described Grossman as the primary aggressor but stated that David also attacked Brown.

David and Grossman were convicted of murder following a joint jury trial. We affirmed both defendants' convictions on direct appeal.[1]

After his conviction was affirmed, David filed an application for post-conviction relief. One of David's claims (the only one relevant here) was that his trial

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[1] *See David v. State*, 123 P.3d 1099, 1101 (Alaska App. 2005); *Grossman v. State*, 120 P.3d 1085, 1089 (Alaska App. 2005).

attorney was ineffective for failing to move to sever David's trial from Grossman's. David argued that a competent attorney would have moved to sever the trials because David and Grossman were asserting inconsistent defenses.

David's trial counsel submitted an affidavit in which he stated that he consciously decided, for tactical reasons, not to seek severance. The attorney explained that if David were tried separately the "full evidence would [have] fallen on [David], rather than on [Grossman]."

The State filed a motion to dismiss David's application for failure to state a prima facie case. Superior Court Judge William Morse granted the State's motion. David now appeals.

David has failed to state a prima facie case

We review the dismissal of a post-conviction relief petition for failure to state a prima facie case de novo.[2]

To present a prima facie case of ineffective assistance of counsel, a defendant must plead facts that, if true, would entitle the defendant to relief under both prongs of the test announced in *Risher v. State*.[3] That is, the defendant must assert specific facts demonstrating (1) that the attorney's performance fell below the objective standard of minimal competence and (2) that there is a reasonable possibility that the incompetent performance affected the outcome of the defendant's case.[4]

In evaluating trial counsel's conduct, we apply a presumption of competence. That is, in the absence of evidence to the contrary, we presume that

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[2] *Burton v. State*, 180 P.3d 964, 974 & n.14 (Alaska App. 2008).

[3] 523 P.2d 421, 425 (Alaska 1974).

[4] *Id.*; *see also State v. Steffensen*, 902 P.2d 340, 342 (Alaska App. 1995).

counsel's actions were motivated by sound tactical considerations.[5] The defendant bears the burden of pleading facts that, if true, either rule out the possibility of a tactical reason or demonstrate that the tactic was one that no competent attorney would have adopted under the circumstances.[6]

Here, David failed to allege any facts that, if true, would demonstrate that his attorney's tactical decision not to seek severance was outside the range of competent decision making.

We have previously held that antagonistic defenses do not ordinarily warrant severance and that severance is only required where the defenses are irreconcilable.[7] Defenses are deemed irreconcilable when they are "mutually exclusive to the extent that one must be disbelieved if the other is to be believed[.]"[8] To determine whether defenses are irreconcilable, we look to several factors, including whether either of the co-defendants testified at trial, whether they called witnesses, whether a co-defendant presented affirmative evidence against the other co-defendant, or whether the evidence established that only one person committed the crime.[9]

David asserts in his petition that he and Grossman provided "inconsistent defenses" at trial, but he does not allege sufficient facts to support this claim: his petition does not set forth any details of Grossman's defense, nor does David's petition describe what evidence he and Grossman introduced in support of their respective defenses.

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[5] *State v. Jones*, 759 P.2d 558, 569 (Alaska App. 1988).

[6] *Id*. at 569-70.

[7] *Miller v. State*, 778 P.2d 593, 595 (Alaska App. 1989); *Abdulbaqui v. State*, 728 P.2d 1211, 1219 (Alaska App. 1986).

[8] *Abdulbaqui*, 728 P.2d at 1219.

[9] *See Miller*, 778 P.2d at 596; *Abdulbaqui*, 728 P.2d at 1219.

We note that, according to the evidence presented at trial, Brown was jointly assaulted by two men, both of whom were alleged to be criminally liable for his death either as principals or as accomplices.[10] This was not a situation where one man would be exonerated if the other was found guilty. Thus, David's petition failed to set out a prima facie case that his defense and Grossman's defense were mutually exclusive as this term has been defined in our case law.[11]

Conclusion

We AFFIRM the judgment of the superior court.

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[10] *See* AS 11.16.100; AS 11.16.110(2).

[11] *See Abdulbaqui*, 728 P.2d at 1219.