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

JEFFREY ALLAN HOUT, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13854 Trial Court No. 4FA-16-01540 CI SUMMARY DISPOSITION No. 0341 — August 23, 2023

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

Appearances: Michael L. Barber, Barber Legal Services, Boston, Massachusetts, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Diane L. Wendlandt, 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.

Jeffrey Allan Hout was convicted, following a jury trial, of second-degree murder, kidnapping, and tampering with physical evidence for his participation in the torture and death of Benjamin Kaiser.[1] We affirmed his conviction and his sentence on

[1] AS 11.41.110(a)(1), AS 11.41.300(a)(1)(C), and AS 11.56.610(a)(1), respectively.

direct appeal.[2] Hout then filed an application for post-conviction relief. Relevant to this appeal, Hout argued in his application that his trial attorney usurped his right to testify. The superior court dismissed Hout's application for failing to state a prima facie case. Hout now appeals that ruling, arguing that the court erred in concluding that he failed to state a prima facie case. We affirm.

In his application, Hout alleged that his trial attorney "failed to prepare him to testify and coerced him to not do so." In an affidavit he submitted with his application, Hout stated that his trial counsel "refused to discuss this in earnest" with him, and his counsel, her co-counsel, and her investigator "ganged up" to "dissuade" him from testifying. Hout did not offer any specific factual allegations about what his counsel did or said to coerce or dissuade him from testifying.

Hout's application also included a copy of the trial transcript. At trial, the superior court conducted the *LaVigne* inquiry, explaining to Hout that the decision regarding whether to testify was his and not his attorneys'.[3] The court asked Hout whether it was his decision not to testify, and he responded, "Yes, it is, Your Honor." Hout does not dispute the accuracy of this transcript.

When a trial court reviews a motion to dismiss for failure to state a prima facie case, the court must accept all well-pleaded factual allegations.[4] But, 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]

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[2] *Hout v. State*, 2015 WL 5000552 (Alaska App. Aug. 19, 2015) (unpublished).

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

[4] *LaBrake v. State*, 152 P.3d 474, 480 (Alaska App. 2007).

[5] *Id.* at 481.

Here, Hout's application did not contain any factual assertions that would support his contention that his attorney said or did something to "coerce[]" him not to testify. Instead, the application relied upon the conclusory statements in Hout's affidavit that his attorney and her colleagues "ganged up" to "dissuade" him. For this reason, the superior court did not err in determining that Hout's application failed to establish a prima facie case for relief on this claim.

The judgment of the superior court is AFFIRMED.