IN THE COURT OF APPEALS OF THE STATE OF ALASKA

STEVEN M. HINSHAW, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11953 Trial Court No. 3AN-11-5430 CI MEMORANDUM OPINION No. 6606 — March 14, 2018

Appeal from the Superior Court, Third Judicial District, Anchorage, Philip R. Volland, Judge.

Appearances: Megan R. Webb, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Diane L. Wendlandt, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge SUDDOCK.

Steven M. Hinshaw was indicted for first-degree murder and other charges after he shot and killed the driver of a car next to Hinshaw's vehicle. Hinshaw filed a

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

pretrial motion for self-representation, which Superior Court Judge Philip R. Volland denied. The jury ultimately found Hinshaw guilty of manslaughter, several felony assaults, and evidence tampering.

Hinshaw appealed these convictions, but Hinshaw's appellate attorney did not appeal the denial of Hinshaw's self-representation motion. We affirmed Hinshaw's conviction on direct appeal.[1]

Hinshaw then filed a petition for post-conviction relief, alleging that his appellate attorney provided ineffective assistance of counsel when she failed to appeal the denial of his request for self-representation. The State moved to dismiss the petition for failure to state a prima facie case, and the court dismissed the petition for that reason. Hinshaw now appeals the dismissal of his post-conviction relief action.

For the reasons explained here, we conclude that the superior court erred in dismissing Hinshaw's amended petition on the pleadings. We therefore reverse the superior court's decision and remand Hinshaw's case for further proceedings.

Background facts and proceedings

As Hinshaw was driving in Anchorage in the early morning hours of November 25, 2003, another car containing four occupants pulled alongside him. The occupants of this second car had recently been involved in a dispute with one of Hinshaw's friends. Hinshaw asked his girlfriend, Dorian Dixon, who was sitting in the front passenger seat of his car, to open her window and to recline her seat. Hinshaw then shot the driver of the adjoining car, killing her.

Hinshaw was subsequently indicted for first-degree murder, second-degree murder, first-degree weapons misconduct, three counts of third-degree assault, and one

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[1] *Hinshaw v. State*, 2010 WL 200840 (Alaska App. Jan. 20, 2010) (unpublished).

count of tampering with evidence.[2] Hinshaw moved for leave to represent himself, citing conflicts with his appointed counsel, Joseph Vandemark, as his reason for electing to proceed pro se.

During a hearing on the motion for self-representation, Hinshaw responded to questions from the court. He related that he had twelve years of schooling, that he had maintained a 4.0 grade point average, and that after dropping out of school, he acquired a GED. Hinshaw stated that he understood that he was proposing to forgo representation by an experienced defense attorney and that he would be unaided by any other attorney. Hinshaw also acknowledged the skill of the assistant district attorney, and his own lack of experience in matters of criminal law. He demonstrated some familiarity with the rules of evidence and procedure, and he stated that he had actively researched these topics with the resources available to him in jail as he awaited trial.

The court found that Hinshaw understood the role of counsel and his own lack of equivalent expertise. The court acknowledged that Hinshaw's pleadings demonstrated that he could express himself with clarity. And the court found that Hinshaw was aware of the seriousness of the charges and his potential sentence. But the court nonetheless denied the motion, ruling that "Hinshaw can proceed *in propria persona* only if this court is satisfied that Hinshaw understands precisely what he is giving up by declining the assistance of counsel." The court concluded that Hinshaw's motion was motivated by frustration with his attorney's performance, and that Hinshaw did not appreciate that self-representation in a complex case increases the likelihood of conviction. Unconvinced that Hinshaw fully grasped the realities of his situation, the court denied the motion.

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[2] AS 11.41.100(a)(1)(A), AS 11.41.110(a)(1), AS 11.61.190(a)(2), AS 11.41.220(a)(1)(A), and AS 11.56.610(a)(1), respectively.

Following a trial at which Hinshaw was represented by Vandemark, the jury found Hinshaw guilty of manslaughter, two counts of third-degree assault, and evidence tampering,[3] acquitting him of all other charges.

Vandemark filed points on appeal that included the denial of the self-representation motion, but attorney Cynthia Strout later entered an appearance and represented Hinshaw on appeal; she had previously represented Hinshaw during pretrial proceedings. During those pretrial proceedings, Strout had unsuccessfully challenged the validity of a warrant obtained by the police to record conversations between Hinshaw and his girlfriend Dorian Dixon. On appeal, Strout litigated this warrant issue only, abandoning the appeal point regarding self-representation. This Court affirmed Hinshaw's conviction.[4]

Hinshaw then initiated post-conviction relief proceedings, alleging that Strout provided ineffective assistance of counsel by abandoning the self-representation appeal point. The superior court granted the State's motion to dismiss Hinshaw's petition for failure to state a prima facie case. This appeal followed.

Why we conclude that Hinshaw's petition for post-conviction relief stated a prima facie case

As we noted in *Coffman v. State*, specific standards apply to a claim that an appellate attorney's selection of issues fell below a standard of minimal competence.[5] To establish a prima facie case, the petitioner must allege facts to show:

> (1) that the proposed additional issue is significantly stronger than the issues that were raised in the appeal; (2) that the

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[3] AS 11.41.120(a), AS 11.41.220(a), and AS 11.56.610(a)(1), respectively.

[4] *Hinshaw*, 2010 WL 200840.

[5] *Coffman v. State*, 172 P.3d 804, 813 (Alaska App. 2007) (internal citation omitted).

> appellate attorney had no valid tactical reason for failing to include this particular issue; and (3) that, if the proposed issue had been included, there is a reasonable possibility that the outcome of the appeal would have been different.
>
> Although proof of these three elements will establish a prima facie case, the ultimate question is not whether the appellate attorney could have done better. Rather, the ultimate question is whether the attorney's choice of issues was so ill-considered that it fails to demonstrate the minimal competence required of criminal law practitioners.[6]

In Hinshaw's case, the court cited three reasons why Hinshaw's petition failed to state a prima facie case. First, the judge found that Hinshaw's petition did not provide "any useful factual information" that the self-representation claim was significantly stronger than the claims that were raised on appeal. But the record does not support this ruling.

Hinshaw appended the transcript of his representation hearing to his application for post-conviction relief. Viewed in the light most favorable to Hinshaw's claim, the transcript reveals that Hinshaw is an articulate, intelligent man, more than minimally grounded in aspects of criminal law. Informed by the court of the advantages of trial counsel, and the corresponding disadvantages of self-representation, Hinshaw readily acknowledged those considerations. But he nonetheless remained determined to represent himself.

Hinshaw's appellate counsel, Strout, stated that, based on her own dealings with Hinshaw, he appeared capable of self-representation:

> I have been appointed in the past to represent people seeking to represent themselves to assist in making this determination. I know that the law in this area favors the right to self-

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[6] *Id.*

> representation if the accused is deemed capable of doing so, even if it appears unwise to allow the defendant to do so. Mr. Hinshaw is very intelligent, in my view, and I think he probably would have been more capable than many others in doing so.

We conclude that Hinshaw's pleadings presented a colorable claim that the self-representation issue abandoned by his appellate attorney would have succeeded had it been pursued on direct appeal. In contrast, Hinshaw's actual contention on direct appeal was significantly weaker, as our memorandum opinion denying the appeal reveals.[7]

In *Wyatt v. State*, a case with analogous facts, we reversed a trial court's finding that a petitioner had failed to establish a prima facie case. Wyatt's appellate attorney had abandoned a plausible appeal point in favor of one that we rejected out of hand on direct appeal. We clarified Wyatt's burden of proof at the pleading stage of the post-conviction relief litigation:

> Because Wyatt's burden was only to offer a "prima facie case" for post-conviction relief, Wyatt did not have to prove (at this stage) that he was entitled to relief. Rather, Wyatt was required to present the superior court with well-pleaded *assertions of fact* which, *if ultimately proved*, would be sufficient to establish his entitlement to relief.[8] (Emphasis in original.)

We noted that the appeal point abandoned by Wyatt's appellate attorney "had ostensible evidentiary support and was litigable," while the appeal point the attorney actually pursued was "doomed from the outset."[9]

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[7] *See Hinshaw*, 2010 WL 200840.

[8] *Wyatt v. State*, 393 P.3d 442, 445 (Alaska App. 2017).

[9] *Id.* at 446, 447.

The same can be said here. The court erred when it ruled that Hinshaw failed to allege facts entitling him to relief.

The second basis for the court's dismissal of Hinshaw's petition was the court's conclusion that Hinshaw had failed to "overcome the presumption that his appellate counsel acted in a tactically sound manner in choosing the points to pursue on appeal."[10] But at the pleading stage, Hinshaw did not have to "overcome" the presumption of attorney competence. Rather, he had to allege facts which, *if proven at trial*, would overcome that presumption — *i.e.*, facts that would establish that Strout's issue selection was incompetent. Hinshaw appended two affidavits to his petition that addressed this issue.

Strout's affidavit contains factual assertions suggesting that she had inadvertently failed to investigate Hinshaw's self-representation claim, and so she did not reject it for tactical reasons:

> I did not file the original notice of points on appeal, the trial attorney did so. My memory is that there was a lengthy list of issues, and I determined that the best issues to pursue were the issues that had been litigated prior to trial.
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> I did review the trial transcripts for other issues however I do not recall reviewing a transcript of the hearing regarding Mr. Hinshaw's request to represent himself. I should have done so, and can think of no good reason why I did not ... I agree with Mr. Hinshaw that I should have at least reviewed this issue before abandoning it on appeal.

In Hinshaw's own affidavit, he stated that Strout had admitted to him that her abandonment of the issue was not tactical:

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[10] *See, e.g.*, *Coffman*, 172 P.3d at 813 (stating that the law presumes that an attorney's tactical and strategic choices are competent).

> I asked Ms. Strout why she failed to raise the issue, and she told me that she had been really busy and that she missed it.

Drawing all reasonable inferences in favor of Hinshaw's offer of proof,[11] we conclude that Hinshaw offered a prima facie case that his appellate attorney acted incompetently.

The superior court's third basis for dismissing the petition was that it failed to address the possibility that the denial of self-representation was harmless beyond a reasonable doubt. But if Hinshaw was denied his constitutional right to represent himself at trial, he was entitled to a per se reversal of his convictions. This would be structural error, and the harmless error doctrine would not apply.[12]

For these reasons, we conclude that the court erred when it ruled that Hinshaw's petition for post-conviction relief failed to state a prima facie case.

Conclusion

We REVERSE the superior court's dismissal of Hinshaw's petition and remand this case to the superior court for further proceedings in the post-conviction relief action.

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[11] *Steffensen v. State*, 837 P.2d 1123, 1125-26 (Alaska App. 1992).

[12] *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984). *See Christian v. State*, 276 P.3d 479, 484 (Alaska App. 2012). *See also* 7 Wayne R. LaFave, Jerold H. Israel, Nancy J. King, and Orin S. Kerr, *Criminal Procedure* § 27.6(d), at 143-68 (4th ed. 2015).