

NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

BURT GREGORY MERCULIEF JR.,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12280
Trial Court No. 3AN-10-10117 CI

MEMORANDUM OPINION

No. 6615 — April 4, 2018

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

Appearances: Justin A. Tapp, Denali Law Group, under
contract with the Office of Public Advocacy, Anchorage, for the
Appellant. Eric A. Ringsmuth, Assistant Attorney General,
Office of Criminal Appeals, Anchorage, and Jahna Lindemuth,
Attorney General, Juneau, for the Appellee.

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

Judge WOLLENBERG.

Following a jury trial, Burt Gregory Merculief Jr. was convicted of first-degree robbery. We affirmed Merculief's conviction on direct appeal,¹ and Merculief then petitioned the superior court for post-conviction relief, arguing that his

¹ *Merculief v. State*, 2009 WL 3681657 (Alaska App. Nov. 4, 2009) (unpublished).

trial attorney had provided ineffective assistance. The court ultimately dismissed Merculief's application for failure to plead a prima facie case, and this appeal followed.

On appeal, Merculief argues that the superior court prematurely dismissed his post-conviction relief application "prior to the filing of his amended application." Merculief suggests that the superior court inappropriately based its dismissal of his application on the long filing delays by his attorney and that these delays amounted to a denial of effective assistance of counsel. Merculief does not challenge the superior court's ruling that he failed to plead a prima facie case of ineffective assistance of counsel.

Merculief's claim, and his view of the basis for the court's dismissal, are contradicted by the record. After Merculief filed a pro se application for post-conviction relief in 2010, the court appointed him an attorney, and his attorney filed an amended application asserting various claims of ineffective assistance by Merculief's trial attorney. The State moved to dismiss Merculief's amended application, arguing that Merculief had failed to plead a prima facie case of ineffective assistance of counsel. Merculief's attorney actively opposed the State's motion by filing a written opposition contesting the State's arguments.

In October 2014, the superior court issued a six-page order notifying the parties of its intent to dismiss Merculief's application for failing to state a prima facie case, but giving Merculief an additional sixty days to further amend his application to cure the defects. The court stated that if no amendment was submitted, Merculief's application would be dismissed.

Two months later, in December 2014, Merculief's attorney requested an additional sixty days to investigate new information provided by Merculief and to file an amended application. In February 2015, Merculief's attorney filed an affidavit by an investigator providing additional information regarding Merculief's claims. But the

attorney did not further amend Mercurief's post-conviction relief application. Accordingly, in April 2015 — six months after the superior court notified the parties of its intent to dismiss Mercurief's application unless it was amended — the court dismissed Mercurief's case.

We reject Mercurief's suggestion that his "application was denied as untimely." The court denied Mercurief's application because it failed to state a *prima facie* case — and because Mercurief failed to further amend his application, or give any indication that he intended to do so in the near future.

To the extent that Mercurief is suggesting that he received ineffective assistance from his post-conviction relief attorney, this claim is not properly before us. It was not litigated in the superior court, and the court did not issue a ruling on this point. The claim that the superior court did address related to whether Mercurief was effectively represented *at trial*. As we noted, Mercurief does not challenge the superior court's ruling that he failed to plead a *prima facie* case of ineffective assistance of counsel relating to his trial attorney.

To the extent that Mercurief is arguing that he was deprived of the right to file a *second* amended application following the court's notice of intent to dismiss, Mercurief's claim is inadequately briefed. He does not provide any legal authority to suggest that the court abused its discretion in proceeding as it did in this case.² Nor does he acknowledge that his post-conviction relief attorney failed to file anything further between February 2015, when the attorney filed the investigator's affidavit, and April

² *Cf. Tall v. State*, 25 P.3d 704, 707-08 (Alaska App. 2001) (holding that when a court dismisses a post-conviction relief application for the reasons advanced by the State in a motion to dismiss, after the applicant has been afforded a full and fair opportunity to respond to the State's claims, the court is under no obligation to provide additional notice of its intent to dismiss).

2015, when the court dismissed Merculief's case. We therefore conclude that this claim is waived.³

For these reasons, we AFFIRM the superior court's judgment.

³ See *Kingery v. Barrett*, 249 P.3d 275, 285 (Alaska 2011) (deeming issues waived for inadequate briefing where appellant failed to elaborate on the arguments or cite any legal authority supporting the claims).