IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DARREL W. VANDERGRIFF, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11913 Trial Court No. 3HO-11-229 CI MEMORANDUM OPINION No. 6619 — April 18, 2018

Appeal from the District Court, Third Judicial District, Homer, Margaret L. Murphy, Judge.

Appearances: J. Adam Bartlett, Anchorage, under contract with the Office of Public Advocacy, for the Appellant. Timothy W. Terrell, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

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

Judge MANNHEIMER.

In June 2010, Darrel W. Vandergriff pleaded guilty to driving under the influence and two counts of harassment. A little over one year later, Vandergriff filed

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

a petition for post-conviction relief in which he sought to withdraw those guilty pleas. The district court denied Vandergriff's petition, and he now appeals.

For the reasons explained in this opinion, we affirm the decision of the district court.

Underlying facts

In June 2010, Vandergriff was arrested for driving under the influence, driving with a revoked license, and several counts of harassment for spitting on, and threatening the families of, the officers who participated in his arrest and his DUI processing. At his arraignment the next day, Vandergriff waived his right to counsel and chose to represent himself.

At his arraignment, Vandergriff told the court that he wanted to reach a quick plea agreement with the State: he explained that he had just gotten a new job and a new place to stay, and he feared that he would lose both of them if he remained in jail for any length of time. Vandergriff also stated that he had recently learned that his mother had lung cancer, and he wanted to be able to earn money to purchase an airplane ticket and go see her.

In response, the district court set a hearing in Vandergriff's case for two weeks later, so that Vandergriff would have an early court date if he reached a plea agreement with the State.

Vandergriff remained in custody following his arraignment. He had a bail hearing on June 18th, and at this hearing Vandergriff reiterated his intention to try to reach a quick plea agreement with the State.

On June 21st, Vandergriff called the district attorney's office from jail; he spoke to the prosecutor, and they discussed a potential negotiated resolution of

Vandergriff's case. Following this discussion, the prosecutor faxed a plea offer to Vandergriff at the jail.

The district court held another bail hearing in Vandergriff's case on June 23rd. Vandergriff, who appeared at this hearing telephonically, apprised the court of the prosecutor's plea offer, and Vandergriff told the court that he thought he could work out the final details of the agreement if the court allowed him to speak to the prosecutor off-record. Vandergriff noted that the prosecutor had already agreed to delay Vandergriff's remand date (*i.e.*, the date on which Vandergriff would commence serving his sentence) so that Vandergriff would be able to visit his mother.

The court recessed the hearing so that Vandergriff could confer with the prosecutor. When the court went back on record, the parties announced that they had reached a plea agreement: Vandergriff would plead guilty to DUI and two counts of harassment, and the remaining charges would be dismissed. The court approved the agreement and accepted Vandergriff's plea.

Based on Vandergriff's pleas to the three charges, the court sentenced him to a composite term of 60 days to serve (450 days' imprisonment with 390 days suspended). At Vandergriff's request, the court released him from custody and allowed him to begin serving this sentence on September 1, 2010 (*i.e.*, approximately ten weeks later).

(The court later granted a further delay of Vandergriff's remand date, to October 1, 2010.)

Vandergriff served this 60-day sentence, and he was released on probation. Several weeks later, on January 15, 2011, Vandergriff was arrested and charged with felony DUI, third-degree assault, driving with a revoked license, and first-degree harassment. Because of these new crimes, the State petitioned the district court to revoke Vandergriff's probation in this case.

The following May, both Vandergriff's new case and his probation revocation petition in the present case were resolved in a single plea agreement. In his new case, Vandergriff pleaded guilty to felony DUI and was sentenced to serve 3 years' imprisonment. In the probation revocation proceeding, the court revoked Vandergriff's probation and sentenced him to serve all 390 days of his previously suspended time, consecutive to the 3-year DUI sentence. *See Vandergriff v. State*, unpublished, 2013 WL 6169293 at *1 (Alaska App. 2013).

In late July 2011, Vandergriff filed a motion seeking to withdraw his guilty plea in this case (*i.e.*, the plea that he entered on June 23, 2010), and also to withdraw his admission to the petition to revoke his probation (*i.e.*, the admission that was part of the global resolution of his pending cases in May 2011).

Vandergriff claimed that his pleas had not been knowing and voluntary, that he was under duress to conclude the plea agreement with the State because of his mother's illness, and that he did not understand the collateral consequences of his sentence (*i.e.*, that he would be released on probation and mandatory parole after he served the 60 days, and that his 390 days of suspended jail time could be imposed on him if he committed another crime). Vandergriff further claimed that the district court committed error when the court allowed him to waive his right to counsel.

Because Vandergriff had already been sentenced, his claims were ultimately incorporated in a petition for post-conviction relief. *See* Alaska Criminal Rule 11(h)(3). The district court held an evidentiary hearing on Vandergriff's claims. Based on the evidence presented at this hearing, and on the pleadings of the parties, the court denied Vandergriff's motion to withdraw his pleas.

Specifically, the court concluded that the evidence failed to support Vandergriff's claim of duress, his claim that he did not understand the sentences that could be imposed on him, and his claim that the court should have barred him from

representing himself. The district court further ruled that a sentencing court is not required to advise a defendant of the rules that the Department of Corrections employs when calculating a defendant's mandatory parole release date.

Why we uphold the district court's decision

When a defendant files a petition for post-conviction relief seeking to withdraw their plea after judgement has been imposed, the defendant bears the burden of proving their factual allegations by clear and convincing evidence. AS 12.72.040. The record in this case supports the district court's conclusion that Vandergriff failed to prove the factual bases of his claims by clear and convincing evidence. We therefore uphold the district court's rejection of Vandergriff's claims.

We nevertheless wish to address one specific aspect of Vandergriff's claims: his assertion that he was not physically present in court with the sentencing judge when he received his original sentence on June 23, 2010.

As we have explained, at the bail hearing held on June 23, 2010, Vandergriff appeared telephonically. During this hearing, Vandergriff apprised the district court of his plea negotiations with the State. He asked the court to go off-record so that he could finalize a plea agreement with the district attorney — and, when Vandergriff and the prosecutor did reach agreement, Vandergriff asked the district court to convert the bail hearing into a change-of-plea hearing, so that Vandergriff could immediately enter his pleas and be sentenced.

Under this Court's decision in *Henry v. State*, 861 P.2d 582 (Alaska App. 1993), a defendant has a right to be physically present at their sentencing; defendants may not be sentenced telephonically unless they agree to this. In the present case, even

though Vandergriff was appearing telephonically on June 23rd, he urged the district court to accept his plea and proceed to sentencing.

Now, on appeal, Vandergriff asserts that it was error for the district court to proceed with sentencing without expressly informing Vandergriff of his right to be personally present and then asking Vandergriff whether he was willing to waive that right.

But when Vandergriff litigated his petition for post-conviction relief in the district court, he did not raise this as a stand-alone claim for relief. Instead, Vandergriff's attorney noted in a single sentence that Vandergriff was not physically in the courtroom when he was sentenced. The attorney did not assert that Vandergriff was independently entitled to relief under *Henry*. Rather, Vandergriff's attorney simply argued that this was one of the circumstances that rendered Vandergriff's plea suspect. We conclude that the district court implicitly rejected this aspect of Vandergriff's claim when the court found that Vandergriff's plea had been knowing and voluntary.

We note, in addition, that Vandergriff would have been barred from raising this *Henry* issue as a stand-alone claim in his post-conviction relief petition, because (as we are about to explain) Vandergriff had already litigated this issue, and the district court had decided this issue against him.

In June 2013, Vandergriff filed a motion which he styled as a motion to correct an "illegal sentence". But in this motion, Vandergriff did not claim that his sentence was "illegal" as that term is used in Criminal Rule 35(a). Rather, Vandergriff claimed that the district court had not been authorized to proceed to sentencing on June 23, 2010, after the court approved the plea bargain and accepted Vandergriff's plea, because (1) Vandergriff was appearing telephonically at the hearing and (2) the court never advised him of his right to be physically present for sentencing.

In February 2014, the district court denied Vandergriff's motion — under the rationale that Vandergriff had implicitly waived his right to be physically present when he affirmatively asked the court to convert the bail hearing to a change-of-plea hearing, and to let him immediately plead guilty pursuant to the plea bargain.

After the district court denied his motion, Vandergriff filed an appeal (*Vandergriff v. State*, File No. A-11883), but that appeal was dismissed when Vandergriff failed to prosecute it. *See* "Notice of Closure" issued on April 14, 2014.

Thus, Vandergriff engaged in prior litigation of his *Henry* claim, and that litigation was decided against him on the merits.

As we explained earlier in this opinion, Vandergriff sought to withdraw his plea *after* he was sentenced; he was therefore required to pursue his claims in a petition for post-conviction relief. And in post-conviction relief litigation, a defendant is barred from re-raising claims that have already been litigated and decided on their merits. *See* AS 12.72.020(a)(5), which bars a defendant from seeking post-conviction relief based on "[a] claim [that] was decided on its merits ... in any previous proceeding". Thus, even if Vandergriff had explicitly tried to raise a renewed *Henry* claim when he litigated his current motion to withdraw his plea, that claim would be barred.

Even though we reject Vandergriff's *Henry* claim on these grounds, we wish to remind trial courts that, under *Henry*, defendants are entitled to be in the judge's physical presence when they are sentenced. Thus, in cases like Vandergriff's, where a defendant who is appearing telephonically unexpectedly asks to plead guilty and be sentenced, the better course — at least, when there is no agreed-upon sentence — is for the judge to apprise the defendant that they are entitled to ask for a delay of the sentencing so that they can be in the judge's physical presence when the sentence is imposed.

The judgement of the district court is AFFIRMED.