

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

FRANK HENRY MARSHALL,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12596
Trial Court No. 3AN-07-7885 CI

MEMORANDUM OPINION

No. 6626 — April 25, 2018

Appeal from the Superior Court, Third Judicial District,
Anchorage, Erin Marston, Judge.

Appearances: Doug Miller, Law Office of Douglas S. Miller,
under contract with the Office of Public Advocacy, Anchorage,
for the Appellant. Kenneth M. Rosenstein, under contract with
the Office of Criminal Appeals, Anchorage, and Jahna
Lindemuth, Attorney General, Juneau, for the Appellee.

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

Judge ALLARD.

Frank Henry Marshall appeals the superior court's dismissal of his application for post-conviction relief. On appeal, Marshall argues that his pleadings stated a prima facie case for relief on two of his ineffective assistance of counsel claims. For the reasons explained here, we affirm the superior court's judgment.

Factual background and prior procedural history

In December 2003, Marshall was indicted on three counts of misconduct involving a controlled substance.

From December 2003 through October 2005, Marshall was represented by Assistant Public Defender Gary Soberay. In October 2005, Soberay moved to withdraw as Marshall's counsel, citing an irrevocable breakdown in the attorney-client relationship. The trial court granted the motion to withdraw and appointed conflict counsel from the Office of Public Advocacy to represent Marshall. The assistant public advocate represented Marshall for the remainder of the pre-trial proceedings and also at trial, where Marshall was convicted of one count of second-degree misconduct involving a controlled substance.¹

Marshall appealed his conviction and, as a result of his appeal, Marshall's case was remanded to the superior court for an evidentiary hearing on his entrapment claim.² Following the evidentiary hearing, the superior court found that Marshall had failed to establish his entrapment defense. This ruling was later affirmed on appeal.³

While the proceedings on Marshall's entrapment defense were still pending, Marshall filed two pro se applications for post-conviction relief. These pro se applications were later incorporated into an amended application for post-conviction relief filed by Marshall's appointed post-conviction relief attorney. In his application for post-conviction relief, Marshall raised a number of ineffective assistance of counsel claims against Soberay.

¹ *Marshall v. State*, 238 P.3d 590, 591 (Alaska 2010).

² *Id.*

³ *Marshall v. State*, 2013 WL 6169302, at *3-4 (Alaska App. Nov. 20, 2013) (unpublished).

Marshall's application was later dismissed by the superior court for failure to state a prima facie case for relief on any of the ineffective assistance of counsel claims. Marshall now appeals, arguing that the court erred in dismissing two of his ineffective assistance of counsel claims.

Marshall's first argument on appeal

In his amended post-conviction relief application, Marshall alleged that there was a "complete breakdown in communication between Mr. Soberay and [Marshall] by late 2004" and that this "complete breakdown is evident on record at Pretrial Conference on March 17, 2005." Marshall further alleged that "Mr. Soberay did not provide effective assistance of counsel when he failed to conflict out of the case, despite [the] breakdown in the attorney client relationship until ... approximately nine months after the breakdown."

In response to these allegations, Soberay submitted an affidavit that stated, in relevant part:

Paragraph 35 — Communications

Paragraph 35 alleges a complete breakdown in communications by late 2004. This is not supported by the record, as I continued to litigate the issues in [Marshall's] case well into August 2005

Paragraph 36 — Withdrawal

Paragraph 36 alleges ineffective assistance because I did not move to withdraw from representing Mr. Marshall early enough. I believed that withdrawals based on a breakdown of attorney-client relationships were rarely granted and left to the sound discretion of the court unless there was a clear showing that the relationship could not be restored, or was in fact complete. Throughout 2005, I continued to try to work with Mr. Marshall, especially on the issue of entrapment. I

continued to file pleadings and litigated his case thoroughly. It was only when it became clear that Mr. Marshall would not discuss with me a way forward on a potential entrapment defense that I felt it necessary to withdraw.

The superior court concluded, based on these pleadings, that Marshall had failed to allege facts that would support a finding that Soberay was incompetent for continuing to represent Marshall until October 2005. The superior court also concluded that Marshall's pleadings failed to allege facts that would support a finding that Marshall was prejudiced by Soberay's failure to withdraw earlier in the case.

On appeal, Marshall does not actually challenge this ruling. Instead, Marshall challenges a ruling that the superior court never made on a purported conflict of interest claim that Marshall failed to properly litigate in the proceedings below.

This purported conflict of interest claim was raised in one of Marshall's pro se applications. In that application, Marshall alleged the following:

Attorney Soberay also failed to file for any conflicts with him and the Public Defender's Agency. He had represented the informant in this case and would not file to have himself or the Public Defender Agency removed from this case for 2 years. He quit 10/07/05.

The amended application later incorporated by reference all of the allegations in the pro se applications. However, the amended application did not directly mention this purported prior representation of "the informant." Marshall's pleadings also failed to identify *which* informant Soberay was alleged to have represented (there were two informants in Marshall's case, Robert Clossey and Margaret Purcell). Nor did they explain the factual basis for Marshall's belief that Soberay represented one of these two informants.

Now on appeal, Marshall points to two trial court documents as the apparent origin of Marshall's belief that Soberay previously represented one of the

informants. The first document is a pleading filed by the assistant public advocate who replaced Soberay as Marshall's attorney. This pleading explains Soberay's withdrawal in this way: "the disclosure of the name of the informant created a conflict of interest for the Public Defender Agency." It is not clear where this information came from or whether it is accurate. Notably, Soberay's motion to withdraw never mentioned any such prior representation. The confidential representation hearing in which Soberay's motion to withdraw was granted likewise does not refer to any representation of either informant.⁴

The second document is a trial court order issued in response to the pleading described above. This order includes a footnote that states that the Public Defender Agency moved to withdraw "when it was learned that Robert Clossey was the informant used in Marshall's arrest." Again, it is not clear where this information came from or whether it is accurate.

Based on these two documents, Marshall argues on appeal that there are "questions of material fact" regarding "whether Soberay represented Clossey or Purcell, and if so, whether the representation overlapped with Soberay's representation of Mr. Marshall." Marshall therefore contends that he "should have been allowed to gather and present evidence regarding the circumstances of Gary Soberay's representation of Clossey or Purcell, and the possible effect it had upon Soberay's actions," and he further contends that the superior court's dismissal of his claim on the pleadings erroneously prevented him from doing so.

We find no merit to either contention because Marshall never preserved this claim in the proceedings below. If Marshall intended to pursue this claim in his

⁴ We have listened to the confidential representation hearing despite Marshall's failure to transcribe this hearing for his appeal.

application for post-conviction relief, he needed to do more than simply allege that this purported prior representation of “the informant” had occurred. He also needed to allege facts that would support his claim that Soberay acted incompetently in failing to discover the conflict earlier or in failing to act immediately upon the discovery of the conflict; and his claim that he was prejudiced by Soberay’s failure to withdraw earlier based on this conflict.⁵

Marshall was also required to obtain a response from Soberay regarding these allegations.⁶ Indeed, such a response may well have answered the “material questions of fact” that Marshall now claims exist on appeal. But Soberay did not address this claim. Instead, his affidavit responded only to Marshall’s claim that Soberay should have moved to withdraw earlier based on the alleged breakdown in the attorney-client relationship in 2004. This is also the claim that the court ruled on.

Accordingly, because Marshall failed to properly litigate the conflict of interest ineffective assistance of counsel claim that he now argues on appeal, and because he failed to obtain a ruling on that claim in the proceedings below, we find no merit to his first argument on appeal.⁷

Marshall’s second argument on appeal

Marshall’s second argument on appeal suffers from the same procedural deficiencies as his first argument. Marshall asserts that the court erred when it dismissed his ineffective assistance of counsel claim related to Soberay’s litigation of Rule 45

⁵ See *State v. Jones*, 759 P.2d 558, 567-68 (Alaska App. 1988).

⁶ See *Peterson v. State*, 988 P.2d 109, 113-14 (Alaska App. 1999).

⁷ See *Marino v. State*, 934 P.2d 1321, 1327 (Alaska App. 1997) (failure to obtain a trial court ruling on an issue waives that claim for appeal).

speedy trial issues in his case. But Marshall's characterization of this claim on appeal differs from the claim that he actually raised and litigated in the post-conviction relief proceedings below.

In his *pro se* post-conviction relief application, Marshall alleged that Soberay was ineffective because he failed to properly litigate Marshall's Rule 45 speedy trial claim. However, Marshall did not specify *how* Soberay was ineffective or how he thought the Rule 45 claim should have been litigated. Marshall clarified these issues in his amended application, which specifically alleged that "Mr. Soberay did not provide effective assistance of counsel when he failed to present the court with any legal argument in support of dismissal based on violation of Petitioner's right to speedy trial."

Soberay responded to this claim by listing his various written and oral objections to the Rule 45 calculations in Marshall's case. The State then moved to dismiss this ineffective assistance of counsel claim for failure to state a *prima facie* case for relief, arguing that Marshall had failed to show that there was any additional legal authority that Soberay could have cited that would have made any difference to the trial court's rulings on Marshall's Rule 45 objections.

The superior court agreed with the State that Marshall had failed to state a *prima facie* case for relief on this claim and dismissed the Rule 45 claim on that basis.

Now on appeal, Marshall makes an entirely different argument regarding Soberay's alleged ineffectiveness in litigating the Rule 45 issues in his case. For the first time, Marshall asserts that Soberay was ineffective for failing to object to an earlier Rule 45 deadline that had never previously been objected to in his case.

To understand this new claim, additional background on the Rule 45 litigation in the trial court proceedings is required:

In December 2003, Marshall was indicted on three counts of misconduct involving a controlled substance in December 2003. Marshall (represented by Soberay)

filed a motion to dismiss the indictment based on insufficiency of the evidence. The trial court granted this motion as to one of the counts. However, when the State reindicted Marshall, they reindicted him on all three counts. Based on this second indictment, the trial court recalculated Marshall's Rule 45 deadline, setting a new speedy trial deadline of October 14, 2004. There were no objections to this Rule 45 deadline. Instead, Soberay filed a motion to dismiss the second indictment, which was subsequently granted by the trial court.

The State then reindicted Marshall for a third time, and the trial court set a new Rule 45 deadline of January 20, 2005. At Marshall's request, Soberay objected to this new deadline. The trial court overruled this objection, pointing out that Alaska Criminal Rule 45(c)(2) requires the Rule 45 speedy trial clock to begin anew when a defendant is reindicted on claims that were dismissed pursuant to a defense motion to dismiss. At Marshall's request, Soberay then filed a motion to dismiss, arguing that the October 14, 2004 Rule 45 deadline was the correct deadline. The court denied the motion to dismiss under Criminal Rule 45(c)(2).

Marshall then filed his own pro se motion to dismiss, again objecting to the January 20, 2005 deadline. Because the trial court refused to rule on this pro se motion, Soberay refiled the motion and requested that the court rule on it. The trial court then denied this motion as well.

Now on appeal, Marshall argues (for the first time) that the trial court erred in setting the October 14, 2004 Rule 45 deadline and that Soberay was ineffective for failing to object to the October 14, 2004 deadline. But this is not the ineffective assistance of counsel claim that Marshall raised in his post-conviction relief application. Nor is it the ineffective assistance of counsel claim that Soberay responded to and that the superior court ruled on.

Accordingly, because Marshall failed to properly litigate the Rule 45 ineffective assistance of counsel claim that he now argues on appeal, and because he failed to obtain a ruling on that claim in the proceedings below, we find no merit to his second argument on appeal.⁸

Conclusion

The judgment of the superior court is AFFIRMED.

⁸ *See Marino*, 934 P.2d at 1327.