IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DANIEL GERRICK JACKSON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12354 Trial Court No. 3AN-09-13100 CR MEMORANDUM OPINION No. 6629 — May 2, 2018

Appeal from the Superior Court, Third Judicial District, Anchorage, David R. Wallace, Judge.

Appearances: Justin A. Tapp, Denali Law Group, 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, and Allard and Wollenberg, Judges.

Judge MANNHEIMER.

Daniel Gerrick Jackson appeals his conviction for second-degree theft. He raises two claims on appeal.

Jackson's first claim on appeal involves a motion that his attorney filed in the trial court, seeking dismissal of an additional charge against Jackson — a charge of

scheme to defraud. Jackson's attorney argued that this charge should be dismissed because the prosecutor's decision to add this charge was motivated by prosecutorial vindictiveness.

In this appeal, Jackson contends that the superior court was required to hold an evidentiary hearing on his claim of vindictiveness, to allow the court to assess the prosecutor's state of mind. This claim is meritless because it is moot.

In the trial court, Jackson's attorney filed two motions to dismiss the scheme to defraud charge. In one motion, Jackson's attorney asserted vindictive prosecution; and in the other motion, Jackson's attorney asserted that even if all of the State's factual allegations were proved, this proof would be legally insufficient to support a conviction for scheme to defraud.

The superior court dismissed the scheme to defraud charge on this second basis — *i.e.*, that there was insufficient evidence to support the charge. And having dismissed the scheme to defraud charge on this basis, the court concluded that there was no reason to hold an evidentiary hearing on Jackson's alternative theory for dismissing that charge (*i.e.*, the prosecutorial vindictiveness theory) because that alternative claim was now moot. We agree.

Jackson raises one more claim in this appeal — a claim involving the relationship between his theft conviction in this case and a conviction for escape that was entered against him in a different case. (That different case is File No. 3AN-12-10681 CR.)

When Jackson was sentenced for escape in 2014, the superior court found that Jackson was a third felony offender, and that he therefore faced a higher presumptive sentencing range for the escape. In finding that Jackson was a third felony offender, the court relied in part on Jackson's theft conviction in the present case.

In this appeal, Jackson claims that because he was separately sentenced for this theft, the superior court violated the guarantee against double jeopardy when, at Jackson's sentencing for escape, the court used Jackson's theft conviction as part of its basis for ruling that Jackson was a third felony offender.

This claim has no merit. It does not violate the double jeopardy clause when a defendant commits a subsequent crime and, because of the defendant's prior convictions, the defendant faces an increased sentence (or an increased sentencing range) as a repeat or habitual offender. *State v. Carlson*, 560 P.2d 26, 28-29 (Alaska 1977); *Sikeo v. State*, 258 P.3d 906, 910 (Alaska App. 2011). Compare *Fry v. State*, 655 P.2d 789, 792 (Alaska App. 1983), where this Court held that it is legal to convict a defendant of being a felon in possession of a concealable handgun and, at the defendant's sentencing, subject the defendant to a higher presumptive term because of the defendant's prior felony conviction.

The fact that Jackson's prior conviction for theft triggered a higher presumptive sentencing range when Jackson was sentenced for the later crime of escape does not raise constitutional concerns. This is not the kind of "double punishment" that the constitution forbids.

For these reasons, the judgement of the superior court is AFFIRMED.

Although we have resolved the issues raised on appeal, we would be remiss if we failed to address the manner in which Jackson's attorney briefed the first of these issues — the vindictive prosecution issue.

As we explained earlier in this opinion, Jackson was originally charged with the crime of scheme to defraud, and he asked the superior court to dismiss this charge on two bases: first, that the evidence presented to the grand jury failed to support this charge, and second, that the charge was the result of prosecutorial vindictiveness.

When the superior court denied Jackson's request for an evidentiary hearing on his claim of prosecutorial vindictiveness, the court clearly stated that no evidentiary hearing was required because (1) the court agreed with Jackson that the State's evidence was not legally sufficient to support the scheme to defraud charge, and therefore (2) there was no need to decide whether that same scheme to defraud charge should also be dismissed for the additional reason of prosecutorial vindictiveness.

In his brief to this Court, Jackson's attorney did not acknowledge and address the substance of the superior court's ruling. Instead, Jackson's appellate attorney merely stated, "The Superior Court denied [Jackson's] request for an evidentiary hearing" — and then the attorney declared that the superior court was required to hold an evidentiary hearing because there were "disputes of material fact".

When the State filed its brief, explaining that the superior court denied Jackson's request for an evidentiary hearing because the court concluded that the question of prosecutorial vindictiveness was moot, Jackson's attorney had no response: he waived his right to file a reply brief.

When a lawyer claims that a trial court judge committed error, the lawyer has a duty to (1) describe how the issue was litigated, (2) describe the substance of the trial court judge's ruling, including the judge's stated reasons for ruling that way, and then (3) explain why the lawyer contends that this ruling was error. This is required by Alaska Appellate Rules 212(c)(1)(G) and (I).

Indeed, both the Alaska Supreme Court and this Court have held that a lawyer's failure to meaningfully address the substance of a challenged ruling constitutes a waiver of that point on appeal. [1]

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[1] *See Jaworski v. Estates of Horwath ex rel. Streets*, 277 P.3d 753, 754 (Alaska 2012); *Ennen v. Integon Indemnity Corp.*, 268 P.3d 277, 289 (Alaska 2012); *Garhart v. State*, 147 P.3d 746, 752 (Alaska App. 2006).

Although we did not enforce this rule of waiver in Jackson's case, we caution Jackson's attorney that he jeopardizes his client's interests if he fails to meaningfully address the substance of a challenged judicial ruling.