IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DONALD MCDONALD, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11836 Trial Court No. 3AN-07-7070 CI MEMORANDUM OPINION No. 6640 — June 13, 2018

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael L. Wolverton, Judge.

Appearances: J. Adam Bartlett, Attorney at Law, Anchorage, for the Appellant. Michael Sean McLaughlin, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

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

Judge SUDDOCK.

Donald McDonald was convicted of first-degree murder and kidnapping in 1987. This Court affirmed his conviction on direct appeal.[1]

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

[1] *State v. McDonald* (*McDonald I*), 872 P.2d 627, 660 (Alaska App. 1994).

McDonald applied for post-conviction relief twice. In his first application, he alleged that his defense attorney refused to let him testify at his trial. After the superior court rejected this claim, McDonald filed a second post-conviction relief application in 2007, alleging that his first post-conviction relief attorney provided him with ineffective assistance of counsel and that his sentence was illegal because the sentencing judge imposed the maximum sentence for murder without submitting to the jury the question of whether McDonald was a worst offender.

The superior court dismissed both of these claims. McDonald now appeals. For the reasons stated herein, we affirm the superior court's rulings.

McDonald's first post-conviction relief litigation

In 1996, McDonald filed an application for post-conviction relief, claiming that his trial attorney, Pamela Cravez, provided him with ineffective assistance of counsel. McDonald asserted that, while he and Cravez were seated side by side at the counsel table during the trial, he told Cravez that he wanted to testify in his own defense, but that after hearing this, Cravez immediately rested the case.

Cravez affied that although she advised McDonald against taking the stand, she nonetheless informed him that he had a right to do so. She stated that McDonald ultimately accepted her advice not to testify.

The court system's recording equipment had picked up almost inaudible segments of the private conversation between McDonald and Cravez at the counsel table. McDonald's post-conviction relief attorney, James Ottinger, retained an audio expert to amplify the court system's tape recording; but the expert that Ottinger retained was unable to improve its audio quality.

Following an evidentiary hearing, Superior Court Judge Eric Sanders issued a written decision denying McDonald's application for post-conviction relief. The judge

found that Cravez was a credible witness, and that McDonald was not. He further found that McDonald decided not to testify after he realized that, if he took the stand, the prosecutor would cross-examine him about an arguably prejudicial statement that he had made regarding a murder. The judge accordingly denied McDonald's application for post-conviction relief.

McDonald appealed this ruling, and we upheld it in 2001.[2]

McDonald's second post-conviction relief litigation

Six years later, in 2007, McDonald filed a second post-conviction relief application alleging that his first post-conviction relief attorney (Ottinger) had provided him with ineffective assistance of counsel.[3] McDonald alleged that Ottinger should have retained a better expert than he did, one who could have produced a state-of-the-art enhancement of the segment of the court's audiotape where Cravez announced that the defense rested and McDonald allegedly objected to this. McDonald supported his second application with a recording enhanced by a forensic audio specialist named John Mitchell. Mitchell also provided a transcript of his enhanced recording.

While the parties engaged in protracted litigation regarding the timeliness of McDonald's second application, Mitchell died. McDonald then retained a second audio expert, Doug Carner. Carner perceived the content of Mitchell's enhanced recording somewhat differently than Mitchell had, and Carner prepared his own transcript. But both of the transcripts showed that, when Cravez told the judge that

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[2] *McDonald v. State* (*McDonald II*), 2001 WL 649946, at *2 (Alaska App. June 13, 2001) (unpublished).

[3] *See Grinols v. State*, 10 P.3d 600, 618 (Alaska App. 2000) (holding that Alaska law guarantees a right to competent counsel for defendants who are pursuing their first petition for post-conviction relief).

McDonald was her sole remaining witness, McDonald said, "Don't do it," and the defense then rested.

Superior Court Judge Michael L. Wolverton granted summary judgment to the State. The judge found that the enhanced recording did not support McDonald's underlying allegations that Cravez prevented McDonald from testifying — and that McDonald had therefore failed to show that Ottinger was ineffective for failing to obtain an enhanced audio recording.

This appeal followed.

Why we affirm the judge's dismissal of McDonald's post-conviction relief application

McDonald argues on appeal that summary judgment was inappropriate because there were issues of material fact regarding the disparities between the two transcripts that required an evidentiary hearing to resolve. We affirm the judge's dismissal of the application because we conclude that McDonald failed to plead a prima facie case for post-conviction relief as a matter of law.

To plead a prima facie case for relief based on ineffective assistance of counsel, a defendant must plead facts that, if later proven to be true, would be sufficient to establish both prongs of the test announced in *Risher v. State*.[4] That is, the defendant's pleadings must contain well-pleaded facts showing: (1) that his attorney's performance fell below the objective standard of minimum competence required of criminal law practitioners, and (2) the existence of a reasonable possibility that the outcome of the trial

[4] *Risher v. State*, 523 P.2d 421, 425 (Alaska 1974).

would have been different but for that incompetent performance (or here, that McDonald's right to testify at trial would have been honored).[5]

The theory of McDonald's second application for post-conviction relief was that the tape recording of the proceeding, if rendered fully audible, would prove that Cravez usurped McDonald's expressed desire to testify, and that Ottinger was therefore ineffective in failing to obtain such a recording. But when McDonald obtained an enhanced version of the tape recording and filed two transcripts with the court, these transcripts did not support his theory of the case. Both transcripts reflect that, after Cravez announced that the defense would rest, McDonald told Cravez that he wanted to testify. Then, after the judge asked the prosecutor to specify how she would cross-examine McDonald if his testimony were limited to the victim's drug involvement, the prosecutor responded:

> There is some evidence that the defendant made prior statements, prior to this, that someone had contacted him about killing someone ... I would intend to inquire of the defendant about ...

Cravez then inquired whether the judge intended to begin the State's rebuttal case immediately. The court answered in the affirmative, stating "I thought you rested. Did you not rest? I mean, you now want to call the defendant?" When Cravez responded, "That would be our only witness," McDonald interjected (two seconds later), "Don't do it." Hearing this, Cravez immediately reversed ground and said, "Ah, I think we're resting ... we're resting."

McDonald's second application emphasized irrelevant inconsistencies between the enhanced recording and Judge Sanders's interpretation of the unenhanced audio recording. But, even when we view the transcripts of the enhanced audio

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[5] *Id.*

recording in the light most favorable to McDonald, this evidence supports Judge Sanders's original finding in the first post-conviction relief proceeding that McDonald, faced with adverse consequences were he to testify, decided not to do so. Accordingly, the transcripts offer no basis to suspect that if Ottinger had hired a more adroit audio expert, Judge Sanders would have decided the matter differently.

Because McDonald's second application does not address this deficiency, it fails to state a prima facie case for relief, and dismissal on the pleadings was therefore appropriate.

McDonald's Blakely claim

McDonald additionally argues that, under *Blakely v. Washington*, the sentencing court erred by imposing the maximum sentence for first-degree murder without submitting the question of whether McDonald was a worst offender to the jury.[6] Judge Wolverton dismissed this claim without comment.

McDonald's case became final ten years before *Blakely* was decided. The Alaska Supreme Court decided in *State v. Smart* that *Blakely* does not apply retroactively to convictions that were final when *Blakely* was decided.[7] And even if *Blakely* did apply retroactively to McDonald's case, we would reject his claim, because "a worst offender finding is not the type of factual issue that must be submitted to a jury under *Blakely*."[8]

Conclusion

We AFFIRM the judgment of the superior court.

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[6] *See Blakely v. Washington*, 542 U.S. 296 (2004).

[7] *State v. Smart*, 202 P.3d 1130, 1147 (Alaska 2009).

[8] *Baker v. State*, 182 P.3d 655, 659 (Alaska App. 2008).