

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

SCOTT ALAN HIGGINS,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12411
Trial Court No. 3AN-11-9793 CR

MEMORANDUM OPINION

No. 6641 — June 13, 2018

Appeal from the Superior Court, Third Judicial District,
Anchorage, Michael L. Wolverton and Kevin M. Saxby, Judges.

Appearances: Scott Alan Higgins, *in propria persona*, Wasilla,
Appellant. Nancy R. Simel, 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 ALLARD.

Scott Alan Higgins was convicted, following a jury trial, of first-degree burglary and third-degree theft. Higgins now appeals these convictions, raising three separate claims of procedural error related to the pretrial proceedings in his case. For the

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

reasons explained here, we conclude that none of these alleged procedural errors require reversal of Higgins's convictions.

Background facts and prior proceedings

On the evening of August 28, 2011, Alyson Bybee heard a noise coming from the kitchen of her shared apartment. She and her boyfriend, Mark Brady, went to investigate and found Higgins partway through the kitchen window. Higgins was holding Bybee's laptop, which was still attached to the wall via computer cords. Bybee alerted her roommate, Anthony Lemons, and then called 911. Lemons ran outside, grabbed Higgins and restrained him until the police arrived. Higgins was arrested and charged with first-degree burglary¹ and second-degree theft.²

At Higgins's arraignment the next day, he received appointed counsel, and a pre-indictment hearing was scheduled for the following day. At the pre-indictment hearing in district court, Higgins's attorney indicated that Higgins had waived his presence and he requested a continuance so that Higgins could be considered for mental health court. The pre-indictment judge granted the continuance and continued the pre-indictment hearing until September 20. At that September 20 hearing, Higgins's attorney requested that a preliminary examination be scheduled under Alaska Criminal Rule 5. The court scheduled the preliminary examination for September 29.

However, prior to the scheduled preliminary examination, the State filed an amended information reducing the felony charges against Higgins to misdemeanors. The preliminary examination was then vacated because Criminal Rule 5 is not applicable

¹ AS 11.46.300(a)(1).

² Former AS 11.46.130(a)(1) (pre-2016 version).

to cases that do not involve felony charges.³ After vacating the preliminary examination because it no longer applied to Higgins’s case, the pre-indictment judge set Higgins’s case for an October 10 pretrial conference in district court. It does not appear that Higgins’s attorney requested a bail hearing, and Higgins’s bail apparently remained the same even after the charges were reduced. (We note that Courtview indicates that a change-of-plea hearing on the misdemeanor charges was scheduled for October 5, but was subsequently vacated.)

Prior to Higgins’s trial on the misdemeanor charges, the State brought Higgins’s case to the grand jury. On October 21, a few weeks after the State reduced the charges, the grand jury indicted Higgins for first-degree burglary and second-degree theft —thereby reinstating the original felony charges. Following this indictment, jurisdiction was transferred to the superior court, where Higgins was arraigned on the felony charges. At the superior court arraignment, Higgins’s attorney entered “not guilty” pleas to both charges on Higgins’s behalf. The court record from this hearing suggests that Higgins was present at the arraignment, although Higgins has subsequently disputed that he was present.

In June 2012, more than seven months after his indictment and superior court arraignment, Higgins moved to discharge his attorney and represent himself. This request was granted following a hearing in which Higgins was advised of the difficulties of self-representation and the benefits of having counsel.

Higgins subsequently filed a number of pro se motions to dismiss his criminal case, alleging (among other things) that he had been deprived of his right to a preliminary examination under Alaska Criminal Rule 5 and that he had been deprived of his due process right to a finding of probable cause on the felony charges. Higgins

³ See Alaska R. Crim. P. 5(e).

also argued that the pre-indictment judge who granted the continuance requested by Higgins's attorney failed to follow the proper procedures required under a pretrial standing order issued by the presiding judge of the Anchorage superior court — a standing order that incidentally did not apply to the pre-indictment hearings in Higgins's case, which were held in district court.

Superior Court Judge Michael L. Wolverton denied Higgins's pro se motions to dismiss, concluding that there was nothing unlawful in the procedures followed in Higgins's case. The judge also explained the purpose of Criminal Rule 5 to Higgins, and why it did not apply after the State reduced the charges to misdemeanors and after the grand jury indicted Higgins. In the course of this explanation of the governing law, the judge noted that the Anchorage district attorney's office had a long-standing practice of going directly to the grand jury to seek an indictment once a defendant stopped waiving his Rule 5 time and requested a preliminary examination. The judge also noted that he personally could not remember any preliminary examinations occurring in Anchorage since the 1980s.

Following the denial of his various pro se motions to dismiss, Higgins filed a motion for reconsideration, arguing again that his right to a Rule 5 preliminary examination had been violated. In the motion for reconsideration, Higgins also claimed that he had not been physically present for his superior court arraignment, and he asserted that his case should be dismissed on that basis as well. The court denied the motion for reconsideration in a summary order.

Higgins's case proceeded to a jury trial, where Higgins (now again represented by counsel) was convicted of burglary in the first degree⁴ and theft in the third degree.⁵

This pro se appeal followed.

Why we find no merit to Higgins's claim that he was deprived of his right to a preliminary examination

Article I, section 8 of the Alaska Constitution guarantees a right of grand jury indictment to all persons accused of felonies.⁶ Alaska Criminal Rule 5 provides procedural protections for defendants who have been charged with a felony but who have not yet been indicted by the grand jury.

Under Alaska Criminal Rule 5(e), a defendant charged with a felony offense is entitled to a preliminary examination within ten days if the defendant is in custody (or within twenty days if the defendant is released on bail), unless the defendant waives this time under Rule 5 or the defendant is indicted earlier than the time scheduled for the preliminary examination.⁷ At the preliminary examination, the State is required to establish probable cause to believe that the defendant committed the charged felony offense, and the defendant is entitled to cross-examine the State's witnesses.⁸ If the State

⁴ AS 11.46.300(a)(1).

⁵ Former AS 11.46.140(a)(1) (pre-2016 version).

⁶ Alaska Const. art. I, § 8; *see also* AS 12.40.100(a); Alaska R. Crim. P. 7(c); *State v. Dague*, 143 P.3d 988, 1007-08 (Alaska App. 2006).

⁷ Alaska R. Crim. P. 5(e)(2) & (e)(4).

⁸ Alaska R. Crim. P. 5.1(b), (i).

fails to establish probable cause, the defendant is entitled to dismissal of the felony charges — but the dismissal is without prejudice to any later indictment.⁹

Because Rule 5 is intended to provide procedural protections for defendants who have been charged with felonies but have not yet been indicted, it is inapplicable to defendants once they have been indicted or to defendants who no longer face felony charges.¹⁰ This was explained more than forty years ago by the Alaska Supreme Court in *Maze v. State*:

The main purpose of a preliminary hearing is to protect the accused from unwarranted incarceration while awaiting action by the grand jury, by determining whether there is a basis for holding him until the grand jury has reviewed the facts. After the grand jury has acted on the accused's case and returned an indictment no reason exists for conducting a hearing to determine whether probable cause exists for detaining the accused.¹¹

As Judge Wolverton repeatedly explained to Higgins on more than one occasion, Higgins was not deprived of his right to a preliminary examination because there was no need for a preliminary examination in Higgins's case. As the record shows, a preliminary examination was timely scheduled at Higgins's request, and the hearing was properly vacated after the State reduced the felony charges to misdemeanors. While those misdemeanor charges were still pending, the State took Higgins's case to grand

⁹ See *Sproates v. State*, 81 P.3d 301, 302-04 (Alaska App. 2003); *Buchanan v. State*, 561 P.2d 1197, 1208 (Alaska 1977), *abrogated on other grounds by Young v. State*, 374 P.3d 395, 429 (Alaska 2016).

¹⁰ Alaska R. Crim. P. 5(e)(2) (“A defendant is entitled to a preliminary examination if the defendant is charged with a felony for which the defendant has not been indicted.”).

¹¹ *Maze v. State*, 425 P.2d 235, 236 (Alaska 1967) (quoting *Martinez v. State*, 423 P.2d 700, 711 (Alaska 1967)).

jury and the grand jury indicted Higgins on the original felony charges. Once Higgins was indicted, there was no longer any need for a preliminary examination under Rule 5. Nor was Higgins entitled to one by any criminal rule, statute, or constitutional provision.

Higgins is therefore mistaken when he claims that he was deprived of his “right” to a preliminary examination in this case. He is also mistaken when he claims that his “substantive due process” rights were violated because he did not receive a preliminary examination. Higgins asserts that his due process rights were violated because the court never found probable cause for the felony charges through a preliminary hearing. But the need for such a finding was obviated by the grand jury indictment in this case.¹² Higgins also argues that he was deprived of his “right” to cross-examine the State’s witnesses prior to trial. But the right to cross-examine the State’s witnesses does not exist independently from the defendant’s right to a preliminary examination under Criminal Rule 5.¹³ Thus, because there was no need for a preliminary examination in Higgins’s case, he was not entitled to cross-examine the State’s witnesses prior to trial.¹⁴

We also note that Higgins appears to assume that the remedy for a violation of Rule 5 is complete dismissal of the case with prejudice — *i.e.*, the charges are dismissed and cannot be filed again. But this is incorrect. The remedy for such a violation is dismissal of the felony charges *without prejudice to a later indictment*.¹⁵

¹² *Maze*, 425 P.2d at 236; *Martinez*, 423 P.2d at 711; *see also Sproates*, 81 P.3d at 302-04.

¹³ *Maze*, 425 P.2d at 236; *Martinez*, 423 P.2d at 711; *see also Sproates*, 81 P.3d at 302-04.

¹⁴ *Buchanan*, 561 P.2d at 1209.

¹⁵ *Maze*, 425 P.2d at 236; *Martinez*, 423 P.2d at 711; *see also Sproates*, 81 P.3d at 302-
(continued...)

This is essentially what occurred in Higgins’s case when the State dismissed the felony charges without prejudice to the later indictment.

On appeal, Higgins also argues that the Anchorage district attorney’s practice of moving to indict a defendant prior to a scheduled preliminary examination violates equal protection. Higgins argues that this practice violates equal protection because it deprives Anchorage defendants of preliminary examinations that defendants in other parts of the State routinely receive. We find no merit to this claim. Equal protection is violated when similarly situated defendants are treated differently.¹⁶ But defendants who have been indicted by the grand jury are not similarly situated to defendants who are still awaiting indictment. Therefore, the fact that defendants who have not been indicted by the grand jury are entitled to a preliminary examination under Rule 5, while those defendants who have been indicted are not, does not violate equal protection. In both cases, the same rule applies and the defendant’s substantive rights are not materially affected.

Higgins’s final argument (raised in a supplemental pleading) is that the pre-indictment judge never directly informed him of his right to a preliminary examination. As Higgins’s correctly points out, Criminal Rule 5(e)(2) declares that a judicial officer “shall” inform the defendant of his right to a preliminary examination. We cannot tell from the current record whether the pre-indictment judge complied with this obligation. But even assuming that no direct advisement occurred, the record is clear that Higgins was aware of this right and was not prejudiced by the absence of a direct advisement by the judge. As already noted, Higgins’s attorney requested a preliminary examination in

¹⁵ (...continued)
04.

¹⁶ *See State v. Ladd*, 951 P.2d 1220, 1224 (Alaska App. 1998) (noting that equal protection is violated only when similarly situated defendants are treated differently).

Higgins's case and one was timely scheduled, only to be vacated when the State reduced the felony charges to misdemeanors.

Why we find no merit to Higgins's claim that the court erred in granting the August 30, 2011 continuance

On appeal, Higgins contends that the judge violated a superior court standing order for felony cases when he granted the continuance requested by Higgins's attorney at the first pre-indictment hearing. According to Higgins, this superior court standing order requires all continuances requested by the defense to be in writing and to be accompanied by a written Alaska Criminal Rule 45 waiver personally signed by the defendant.

As an initial matter, we note that the superior court standing order at issue does not require a signed Criminal Rule 45 waiver from the defendant in all instances where the defense requests a continuance. Instead, the standing order only requires a signed waiver in situations where the defense requests a continuance from a set trial date that has been previously agreed to by all parties.

In any case, as the State correctly points out, the superior court standing order did not govern the district court pre-indictment proceedings in Higgins's case. The continuance was granted by the pre-indictment judge in district court prior to any superior court proceedings in Higgins's case. The superior court's standing order did not apply to Higgins's case until after he was indicted and arraigned in superior court. (We note that the standing order was not even filed in Higgins's case until October 25, 2011, the day of Higgins's arraignment in superior court.)

Why we find no merit to Higgins's claim that he is entitled to dismissal of his case because he was allegedly not present at his superior court arraignment

On appeal, Higgins claims that his convictions should be reversed because he was not personally present at his superior court arraignment, which was held on October 25, 2011.

Higgins appears to have raised this claim for the first time in a motion for reconsideration, which was filed in response to the superior court's denial of one of his pro se motions to dismiss. Because this issue was raised in a motion for reconsideration and not directly ruled on by the court, this issue has been waived.¹⁷

Indeed, because Higgins failed to timely raise and properly preserve this claim below, we have no factual findings or legal rulings from the judge to review. We therefore do not know if Higgins's claim is even factually accurate. As already noted, the paperwork generated at the arraignment suggests that Higgins *was* present for his superior court arraignment, although that notation may be a clerical mistake.

In any case, contrary to Higgins's claim on appeal, the remedy for this type of procedural defect (if timely raised) would typically be a second arraignment that was procedurally proper, not dismissal of the entire case with prejudice as Higgins now demands. Had Higgins timely objected to his absence at the superior court arraignment, the court would have been able to provide this remedy and to appropriately address any other claims of prejudice that Higgins might have had. We note that, on appeal, Higgins has made no showing that he was materially prejudiced by his alleged absence at his arraignment. Nor has he claimed that his attorney's entry of "not guilty" pleas on his behalf was contrary to his stated wishes at the time. Indeed, the record makes clear that

¹⁷ See, e.g., *Stephanie W. v. Maxwell V.*, 319 P.3d 219, 227 (Alaska 2014).

Higgins intended to go to trial in this case, which he ultimately did with the assistance of a different attorney.

Conclusion

The judgment of the superior court is AFFIRMED.