IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ANDREW DAYTON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11676 Trial Court No. 4FA-02-2886 CI MEMORANDUM OPINION No. 6646 — June 27, 2018

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Jane F. Kauvar, Judge.

Appearances: Cynthia Strout, 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: Mannheimer, Chief Judge, and Allard and Wollenberg, Judges.

Judge WOLLENBERG.

Following a jury trial, Andrew Dayton was convicted of first-degree sexual assault and first-degree burglary for breaking into S.S.'s house and sexually assaulting her. At trial, S.S. testified that Dayton was the man who assaulted her. Additionally, the State presented evidence that Dayton's DNA matched the DNA in the sperm fraction

collected from S.S. This DNA evidence and the methods used to analyze it were the subject of two appellate decisions issued by this Court after Dayton was convicted.[1]

This case is now before us following the dismissal of Dayton's post-conviction relief application, which was based primarily on allegations that his previous attorneys provided ineffective assistance of counsel.

On appeal, Dayton does not challenge the superior court's determination that, on the record before it, Dayton failed to establish a prima facie case for relief. Rather, Dayton challenges the court's earlier denial of his motion to compel the State to produce certain information related to how an Athabascan DNA database (a database used to analyze the statistical frequency of the DNA profile in Dayton's case) was constructed. Dayton argues that, without the requested information, he could not establish a prima facie case of prejudice in connection with his claim of ineffective assistance of counsel.

For the reasons explained in this opinion, we reject Dayton's claim and affirm the dismissal of his post-conviction relief application.

Background on the litigation regarding the Athabascan DNA database

At Dayton's trials (Dayton was tried twice), the State presented evidence that Dayton's DNA matched the DNA in the sperm fraction collected from S.S. after the assault. The State's expert testified at Dayton's second trial that, using an Athabascan DNA database developed by the state crime lab, there was a one in 2.5 million chance that the sperm fraction taken from S.S. would be repeated randomly.[2]

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[1] *See Dayton v. State*, 54 P.3d 817 (Alaska App. 2002) ("*Dayton I*"); *Dayton v. State*, 89 P.3d 806 (Alaska App. 2004) ("*Dayton II*").

[2] *Dayton I*, 54 P.3d at 819.

After Dayton appealed his convictions, this Court remanded his case to the trial court to resolve whether the Athabascan DNA database was scientifically reliable.[3] At an evidentiary hearing on remand, the State presented the testimony of a senior FBI scientist who testified that the database was scientifically valid and that it constituted the type of data upon which experts who analyze and use DNA databases rely.[4] Dayton's attorney at this hearing, John Rice, cross-examined the State's expert, but he presented no witnesses of his own.[5] (Rice was not the attorney who represented Dayton at trial.)

The superior court found that the Athabascan DNA database was the type of data upon which experts would reasonably rely.[6] Based on the record developed in the trial court, this Court subsequently concluded that the trial court did not abuse its discretion in admitting the testimony on the Athabascan DNA database at Dayton's trial.[7]

Dayton's post-conviction relief proceedings

Dayton petitioned for post-conviction relief. Several different attorneys represented Dayton over the course of the post-conviction relief litigation.

Ultimately, the Office of Public Advocacy contracted with a private law firm to represent Dayton. Dayton's new attorney filed an amended post-conviction relief application in July 2009 and a second amended post-conviction relief application in December 2009, containing more than a dozen claims. Among other claims, the second amended application alleged that Dayton's trial attorney and one of Dayton's appellate

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[3] *Id.* at 820-21.

[4] *Dayton II*, 89 P.3d at 809.

[5] *Id.*

[6] *Id.*

[7] *Id.*

attorneys had provided ineffective assistance. But the application did not make any claims against Rice or his handling of the evidentiary hearing on remand.

The State filed a motion to dismiss the application, arguing that Dayton had failed to set forth a prima facie case of ineffective assistance.

At a status hearing in January 2011, another attorney from the firm representing Dayton informed the court that the firm had selected, but not yet formally hired, an expert on DNA databases. The attorney stated that there was literature indicating that the Athabascan DNA database was "not formed correctly" and that the defense expert would analyze the database to confirm or reject that position.

Dayton's attorney subsequently gave formal notice that Dayton intended to rely on the expert opinion of Professor Greg Hampikian, whom the attorney described as "an expert on Athabascan DNA database analysis." Dayton's attorney provided a curriculum vitae (CV) for Professor Hampikian but no further detail on Hampikian's proposed testimony. Shortly thereafter, the attorney filed an unopposed motion to stay the proceedings until Hampikian could complete a report. The court granted the stay.

In June 2011, Dayton's attorney filed a motion to compel the State to provide copies of certain documents that she claimed Hampikian needed to complete his analysis of the Athabascan DNA database. In an email attached to this motion, Hampikian explained that he had only illegible copies of: (1) the data tables for the allele frequencies, and (2) another report related to the database (documents that were introduced by the State at the evidentiary hearing on remand). Hampikian stated that he needed legible copies of both documents to complete his review. In this motion, Dayton's attorney explained that the original documents in Dayton's trial attorney's file — indeed, the attorney's entire file — had been "irretrievably lost," leaving Dayton with only "copies of copies" of the necessary documents. The attorney did not explain what other efforts she had made to find these documents, or whether she had contacted

Dayton's other attorneys, including Rice. She also did not identify the origin of the illegible copies she had sent to Hampikian, nor did she attach them to her motion.

The State told the court that it had already provided this information in the underlying criminal case, and the State pointed out that Dayton's post-conviction relief proceeding was not yet in the discovery phase. The State opposed having to produce this information again until the court ruled on the motion to dismiss and the case entered the discovery phase. The State also argued that Dayton was trying to relitigate issues that had already been decided by this Court.

The superior court held a hearing on the motion to compel. At the hearing, a third attorney from the firm appeared on behalf of Dayton. This attorney clarified that Dayton was seeking a legible copy of the allele tables underlying the Athabascan DNA database.

At the hearing, the court questioned the defense attorney in two main areas: (1) the steps Dayton's attorneys had already taken to secure the information they were seeking, and (2) what exactly they hoped to establish through the use of these documents.

With regard to the first question, the court asked Dayton's attorney why the firm had not attempted to find the information in the court's files — either in the trial court file or the appellate court file. The attorney explained that she had just taken over the case, and that she had not personally searched the court records, nor did she know to what extent others in her firm had searched the court records.

The prosecutor advised the court that he had reviewed three boxes of the State's own files when he prepared the motion to dismiss, and he did not recall seeing the allele tables. The prosecutor said that if he reviewed the State's files again, the material might be there, but it had taken him a month to go through the boxes of files the first time.

With regard to the second question, the court noted that Dayton appeared to be relitigating the validity of the Athabascan DNA database, an issue resolved in *Dayton II*.[8] In response, Dayton's attorney explained that one of the "major areas" Dayton wished to explore was whether Rice had provided ineffective assistance of counsel when he failed to present expert testimony at the evidentiary hearing on the reliability of the Athabascan DNA database. The attorney further explained that a new expert was necessary to establish that there were in fact deficiencies in the Athabascan DNA database that should have been explored at the evidentiary hearing.

The court denied Dayton's motion to compel. The judge noted that Dayton's attorneys had only provided their expert's name and CV without any detail about the expert's proposed testimony or how it supported Dayton's prima facie case. The judge also noted that Dayton's amended application did not include the claim articulated at the hearing — *i.e.*, the claim regarding the competency of Rice's performance at the evidentiary hearing. And the judge again reiterated that Dayton's attorneys had failed to establish that they had tried to get the requested information any other way.

The court then gave Dayton thirty days to oppose the State's motion to dismiss. She urged Dayton's attorneys to review the court files or contact the crime lab to see if they could find the requested information.

Dayton's attorney did not file an opposition to the State's motion to dismiss. Instead, she filed a third amended application in January 2012. The third amended application now included a claim that Rice should have retained an expert at the evidentiary hearing on remand and should have presented evidence attacking the foundation of the Athabascan DNA database. According to the amended application,

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[8] *See Dayton II*, 89 P.3d 806.

Rice did not file any notice of expert, and Dayton's attorney asserted that it was unclear whether Rice had actually retained an expert at any time.

The State moved to dismiss the third amended application, and Dayton's attorney opposed. Attached to Dayton's opposition was an affidavit from Rice, in which Rice stated that he had retained an expert to address the Athabascan DNA database and that this expert agreed with the State's expert that the database was reliable; thus, Rice did not call his expert to testify. Instead, according to Rice, he cross-examined the State's expert to the best of his ability.

The court subsequently dismissed Dayton's application, ruling that Dayton had failed to establish a prima facie case of ineffective assistance from any of his attorneys. With regard to Rice, the judge ruled that Dayton had not provided any basis to believe that Rice had not contacted an expert, or that Rice's decision not to call the expert was anything other than sound. The judge also noted that "the information from the database supported the trial testimony at the time." In particular, the court noted that S.S. "knew Mr. Dayton. . . . [S]he knew who he was." Thus, the court found, "[T]he DNA database and the DNA evidence confirms what she said. It is not [like] some of these cold cases where nobody had any idea who the person was but for some DNA evidence. The evidence supported what had been the trial testimony."

The court did not abuse its discretion in denying Dayton's motion to compel

On appeal, Dayton argues that the superior court erred by denying his motion to compel. As we noted earlier, Dayton does not challenge the court's ultimate decision to dismiss his post-conviction relief application based on the record before it.

The record shows that the court denied Dayton's motion to compel for two primary reasons. First, Dayton's attorneys had not sufficiently explained why

Hampikian (their proposed expert) needed the information, and how the requested information related to his proposed testimony. Second, Dayton's attorneys had not explored any other possible ways to obtain the information — namely, by looking for this information in the court's files and at the crime lab (who assembled the database and who presumably continued to use it).

Dayton's attorneys partially remedied the court's first concern by filing the third amended application, which included an ineffectiveness claim against Rice. We do note, however, that Dayton's attorney never amended the expert notice to provide more detail about the expert's proposed testimony, even in the abstract. Dayton's attorney also did not request an opportunity to question the expert before the court about the expert's need and use for the allele tables, nor did the attorney provide the court with copies of any of the literature that purportedly cast doubt on the Athabascan DNA database.

But in any event, Dayton's attorneys never addressed the court's second concern. At the oral argument on the motion to compel, Dayton's attorney explained that she had just entered the case and she was uncertain whether prior attorneys had searched the court's files for the requested information. Both during the hearing, and again at the end of the hearing, the court urged Dayton's attorneys to review the court's trial file and the appellate file, or to contact the crime lab to see if it had the requested information. Implicitly, the court left open the possibility that it might revisit the motion if Dayton's attorneys could truly establish a need to have the prosecutor search for these documents.[9]

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[9] *See State v. Jones*, 759 P.2d 558, 565-66 (Alaska App. 1988) (discussing the three basic phases of a post-conviction relief proceeding but recognizing that "[t]here is, of course, a need for flexibility in implementing and administering the procedural requirements of Criminal Rule 35.1").

Although Dayton's attorneys continued to argue in subsequent pleadings and hearings that the court's decision hamstrung Dayton's attempt to prove prejudice, Dayton's attorneys never explained what further efforts they took to find the materials.

Basic review of the superior court's file shows that the allele table was admitted as an exhibit at the evidentiary hearing handled by Rice. Dayton now suggests that this exhibit would ordinarily have been returned to the State after the hearing. But Dayton's attorneys never presented this argument to the trial court, nor is there any indication that they confirmed that the exhibits were in fact returned and that the court's file was devoid of any other copies of the document.

This Court has reviewed the court system's scanned appellate record in *Dayton II* — the continuation of Dayton's direct appeal following remand — and the allele table and the other report identified in Hampikian's email are part of the scanned excerpt of record.[10] The allele table is admittedly difficult to read — consistent with Dayton's expert's assertion. But the trial court was not asking Dayton's attorneys to independently produce the information if it was not available, but rather to *certify* that they had taken certain steps to ensure that it was not available from another source.

This situation is similar to the steps an applicant must take when he is unable to obtain an affidavit from his former attorney. As we said in *State v. Jones*, establishing a prima facie case of ineffective assistance of counsel will generally require the applicant to obtain an affidavit from his former attorney addressing the attorney's challenged actions or decisions.[11] An applicant must first try to obtain this affidavit directly from the attorney. But if, despite good-faith efforts, the applicant is unable to

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[10] *See Dayton v. State*, File No. A-07724. Hampikian listed excerpt page numbers in his email, suggesting that his copies originated in the appellate case.

[11] *State v. Jones*, 759 P.2d 558, 570 (Alaska App. 1988).

obtain an affidavit from his former attorney, the applicant may then explain to the court why he cannot obtain an affidavit and ask the court to order a deposition.[12]

We think this same procedure applies here. The court essentially asked Dayton to exhaust his own efforts to obtain the materials as a prerequisite to the court ordering the State to produce the materials at a point in the proceedings when it would not otherwise be required to do so. The court did not abuse its discretion.[13]

Conclusion

Given that Dayton does not challenge the court's subsequent dismissal of his post-conviction relief application, we AFFIRM the superior court's judgment.

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[12] *Id.*; *see also Davis v. State*, 1995 WL 17221230, at *3 (Alaska App. July 26, 1995) (unpublished).

[13] *See Coulson v. Marsh & McLennan, Inc.*, 973 P.2d 1142, 1146 (Alaska 1999) (reviewing the denial of a motion to compel discovery for an abuse of discretion).