IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CHARLES PAUL JACOBSON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12450 Trial Court No. 3AN-13-4734 CI MEMORANDUM OPINION No. 6649 — July 5, 2018

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

Appearances: Jane B. Martinez, Law Office of Jane B. Martinez, LLC, under contract with the Office of Public Advocacy, 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, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge SUDDOCK.

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

After we affirmed Charles Paul Jacobson's conviction for second-degree theft of an access device (a credit card) and third-degree theft of services, Jacobson filed an application for post-conviction relief, alleging that his appellate attorney incompetently briefed the issues that the attorney raised on appeal.

The State moved to dismiss Jacobson's application for failure to plead a prima facie case. The State argued that Jacobson failed to show that better briefing would have led to a reasonable possibility of success on appeal. Superior Court Judge Erin B. Marston dismissed Jacobson's application for post-conviction relief.

For the reasons explained in this opinion, we affirm the judge's ruling.

Background facts

In February 2009, Jacobson was arrested by the Anchorage police for attempting to use a stolen credit card to pay for a meal at the Bear Tooth restaurant. Jacobson was charged with second-degree theft of an access device for possessing a stolen credit card, and with third-degree theft of services for dining without paying for the meal.[1]

Following a jury trial, Jacobson was convicted of these charges. Jacobson appealed, and we affirmed his convictions and sentence.[2] In our decision, we noted that Jacobson's appellate attorney had inadequately briefed four different issues. Nonetheless, we addressed three of those issues on the merits and concluded that they lacked merit. But we concluded that the fourth issue was waived due to Jacobson's inadequate briefing and did not address the merits.

---

[1] Former AS 11.46.130(a)(7) (2008) and former AS 11.46.140(a)(1) (2008), respectively.

[2] *Jacobson v. State*, 2012 WL 4054171 (Alaska App. Sept. 12, 2012) (unpublished).

Following the issuance of our decision, Jacobson filed an application for post-conviction relief. He alleged that his appellate attorney had provided him with ineffective assistance of counsel due to the briefing deficiencies noted in our decision. Jacobson argued that his appellate attorney's ineffective representation entitled him to a second appeal of his convictions and sentence.

The State filed a motion to dismiss Jacobson's post-conviction relief application for failure to state a prima facie case. The judge ruled that Jacobson failed to plead facts that, if proven to be true, would establish that he was prejudiced by his attorney's allegedly deficient performance. The judge accordingly dismissed Jacobson's application.

Jacobson now appeals that dismissal.

Jacobson's application for post-conviction relief failed to state a claim for relief

Jacobson argues that the brief filed by his appellate attorney on direct appeal facially evidenced a lack of zealous advocacy, and that this deficiency standing alone was sufficient to establish a prima facie case of incompetent assistance of appellate counsel. Whether an application for post-conviction relief sets forth a prima facie case is a question of law that this Court reviews de novo.[3]

We disagree that a showing of substandard briefing alone establishes a prima facie case of incompetent assistance of appellate counsel. Our decision in *Coffman v. State* is instructive.[4] In *Coffman*, we held that in order to establish a prima facie case of incompetent issue selection by an appellate attorney, an application for post-

---

[3] *See, e.g.*, *David v. State*, 372 P.3d 265, 269 (Alaska App. 2016).

[4] *Coffman v. State*, 172 P.3d 804 (Alaska App. 2007).

conviction relief must offer reason to believe that the issue omitted by the appellate attorney was significantly stronger than the issues that the attorney did raise in the appeal. Further, the applicant must offer reason to believe that, if the omitted issue had been briefed, there would have been a reasonable possibility that the outcome of the appeal would have been different.[5]

No less is required when an applicant for post-conviction relief pleads that their appellate attorney provided incompetent representation, not by omitting an issue on appeal, but instead by inadequately briefing an issue that was in fact raised. To state a prima facie case based on that theory, Jacobson's application had to set forth the arguments that his appellate attorney ought to have made, arguments of sufficient convincing force that the superior court could ascribe to them a reasonable possibility of appellate success.

The State, in its motion to dismiss Jacobson's application, correctly asserted that Jacobson had not set forth those better arguments. Jacobson then declined to rectify this deficiency, effectively arguing that his appellate attorney's failure to zealously argue even non-meritorious appeal points should entitle him to a second appeal.

We agree with the State that Jacobson was required to plead facts supporting the conclusion that better appellate briefing would have engendered a reasonable possibility of a better outcome, and that Jacobson failed to do so. Because Jacobson failed to plead a prima facie case, we uphold the judge's dismissal of Jacobson's application for post-conviction relief.

Conclusion

We AFFIRM the judgment of the superior court.

---

[5] *Id.* at 813.