IN THE COURT OF APPEALS OF THE STATE OF ALASKA

LAWRENCE GREGORY, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12451 Trial Court No. 4BE-11-00370 CI MEMORANDUM OPINION No. 6793 — May 15, 2019

Appeal from the Superior Court, Fourth Judicial District, Bethel, Charles W. Ray Jr., Judge.

Appearances: Glenda Kerry, Law Office of Glenda J. Kerry, Girdwood, for the Appellant. Elizabeth T. Burke, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges.

Judge WOLLENBERG.

In 1994, a jury found Lawrence Gregory guilty of one count of first-degree sexual assault and one count of second-degree assault.[1] The following year, the superior court entered a judgment of conviction against Gregory.

[1] AS 11.41.410(a)(1) and AS 11.41.210(a)(2), respectively.

With the assistance of counsel appointed through the Office of Public Advocacy, Gregory timely filed an application for post-conviction relief in which he alleged that his trial attorney had been ineffective. But shortly after litigating a reduced filing fee for Gregory's application, Gregory's attorney abandoned the case, taking no further action.

In November 1998, the superior court issued a notice of intent to dismiss Gregory's post-conviction relief application for lack of prosecution. Gregory's attorney did not respond to the notice. In March 1999, the court dismissed Gregory's application without prejudice.

Gregory did not receive notice of the dismissal from the court, the State, or even his attorney. He made efforts to find out the status of his application, but in 2000, he abandoned these efforts.

In 2004, Gregory "got curious again" about his application. He wrote a letter to the Alaska Attorney General's Office seeking information. An attorney from the Office of Special Prosecutions and Appeals responded in writing to Gregory's inquiry. In the letter, the attorney informed Gregory that an application for post-conviction relief was filed in 1996 and dismissed in 1999. The attorney informed Gregory that if he needed more information or help, he should contact the Office of Public Advocacy. The letter included the address for the Fairbanks office.

After receiving the letter, Gregory contacted the Office of Public Advocacy in Fairbanks. He spoke to someone in that office, who told him to contact the Bethel court clerk's office to get information about his case. Gregory did this, and the clerk gave him a phone number for the attorney who had filed his post-conviction relief application. Gregory called the number, but the number was no longer associated with the attorney.

Gregory took no further steps to pursue or find out information about his case for the next seven years.

Then, in 2011 — twelve years after the dismissal of his first post-conviction relief application — Gregory wrote to the court raising the same claims of trial counsel's ineffective assistance that his attorney had raised in his first petition for post-conviction relief. After the court directed him to fill out an application for post-conviction relief, Gregory completed and filed a second application for post-conviction relief, and he requested that the court appoint an attorney to assist him.

The court appointed an attorney to represent Gregory. Gregory's new attorney filed an amended second petition for post-conviction relief, arguing that the attorney who filed Gregory's first post-conviction relief application had provided ineffective assistance.[2]

The State moved to dismiss the amended application on the basis that it was barred by the one-year statute of limitations under AS 12.72.025.[3] Gregory opposed the State's motion, arguing that the untimeliness of his second application should be excused because the delay in filing was the result of his first attorney's ineffective assistance, and among other reasons, enforcement of the statute of limitations would violate his right to due process. In response, the State urged the court to find that it was Gregory's own lack of diligence, rather than his attorney's inaction, that prevented him from filing his second application by the filing deadline.

---

[2] *See Grinols v. State*, 74 P.3d 889, 895 (Alaska 2003) (authorizing a defendant to bring a second post-conviction relief application challenging the ineffectiveness of counsel who provided representation in first post-conviction relief application).

[3] *See* AS 12.72.025 ("An application may not be brought . . . if it is based on a claim that the assistance the applicant's attorney provided in a prior [post-conviction relief] application . . . was ineffective, unless it is filed *within one year* after the court's decision on the prior application is final[.]") (emphasis added).

The superior court held an evidentiary hearing to resolve the question of timeliness. Following the hearing, at which Gregory testified to the foregoing events, the court granted the State's motion to dismiss. The court recognized the potential applicability of equitable tolling, but the court found that Gregory himself had failed to exercise due diligence, particularly after receiving notice in 2004 that his post-conviction relief application had been dismissed. The court therefore dismissed Gregory's application as time-barred, finding no due process violation.

Gregory now appeals the superior court's dismissal.

In *Grinols v. State*, we held, and the Alaska Supreme Court affirmed, that the due process clause of the Alaska Constitution affords a criminal defendant the right to challenge the competency of the representation provided by the attorney who litigated the defendant's first application for post-conviction relief — thus, necessitating a limited exception to the ban on successive applications for post-conviction relief codified in AS 12.72.020(a)(6).[4] But although defendants have the right to file a successive application in this type of situation, this relief is not available indefinitely.

Under AS 12.72.025, a defendant pursuing a *Grinols* application must file the application within one year after the court's decision on the prior application is final. This statute became effective on July 1, 2007, and individuals whose initial applications were denied prior to that date had until July 1, 2008 to file their second application.[5]

(In *Grinols*, prior to the enactment of the statute, we held that when a defendant challenged the competence of the attorney who represented the defendant in a first petition for post-conviction relief, the defendant was required to establish due diligence — *i.e.*, that "the facts upon which [the defendant] relies were not known to [the

---

[4] *Grinols v. State*, 10 P.3d 600, 620 (Alaska App. 2000), *aff'd*, 74 P.3d at 895-96.

[5] SLA 2007, ch. 24, §§ 25, 36(c), 39.

defendant] and could not in the exercise of due diligence have been discovered by him . . . substantially earlier than the time of his [second petition]."[6])

We have left open the possibility that an attorney's ineffective assistance might provide a constitutional basis for allowing a late-filed application for post-conviction relief, despite the applicable statute of limitations.[7] On appeal, Gregory argues that his case presents such an exception. In particular, he contends that he has a constitutional right under the due process clause of the Alaska Constitution to pursue the claims he raised in his first post-conviction relief application despite his significant delay in filing his second application, and that application of the statute of limitations therefore violates his right to due process.

But Gregory was explicitly informed in writing in 2004 that his post-conviction relief application had been dismissed. Despite this notice, and notwithstanding his attorney's prior incompetent assistance, Gregory did not take any steps to advance his *Grinols* claim until seven years later.

Thus, even assuming that Gregory exercised due diligence between 1999 (when the court dismissed Gregory's first application) and 2004 (when Gregory learned of the dismissal), the record shows that Gregory did not attempt to pursue his claims in court until 2011. Under these circumstances, we agree with the superior court that Gregory has failed to establish that application of the statute of limitations, which did not become effective until 2007, violated his right to due process.

---

[6] *Grinols*, 10 P.3d at 619 (quoting *In re Clark*, 855 P.2d 729, 744 (Cal. 1993)) (alterations in *Grinols*).

[7] *See, e.g.*, *Xavier v. State*, 278 P.3d 902, 905 (Alaska App. 2012); *cf. Holland v. Florida*, 560 U.S. 631, 649-52 (2010) (recognizing that the statute of limitations for federal habeas corpus claims may be equitably extended to remedy the egregious performance of appointed counsel).

The judgment of the superior court is AFFIRMED.