IN THE COURT OF APPEALS OF THE STATE OF ALASKA

THOMAS ALPIAK, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12582 Trial Court No. 3KO-12-00074 CI MEMORANDUM OPINION No. 6828 — October 9, 2019

Appeal from the Superior Court, Third Judicial District, Kodiak, Steve Cole, Judge.

Appearances: Glenda Kerry, Law Office of Glenda J. Kerry, Girdwood, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Donald Soderstrom, 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.

Thomas Alpiak appeals the superior court's dismissal of his application for post-conviction relief. The superior court concluded that Alpiak's application and its supporting documents failed to state a prima facie case for relief.

For the reasons explained in this opinion, we reverse the superior court's decision as to one of Alpiak's claims, and we remand this case for further proceedings on that claim. We otherwise affirm the superior court's judgment.

Underlying facts and proceedings

In 2009, Alpiak was charged with attempted first-degree sexual assault, second-degree sexual assault, and fourth-degree assault based on allegations that he tried to have nonconsensual intercourse with a woman in Kodiak.[1] To resolve the case, Alpiak and the State entered into a plea agreement. Under the agreement, Alpiak pleaded guilty to attempted second-degree sexual assault, and the State dismissed the original charges.[2] Alpiak agreed to a sentence of 17 years with 5 years suspended and a 10-year term of probation. (Alpiak was a second felony offender with one prior conviction for a sexual felony.)

Sentencing was continued several times after Alpiak expressed his desire to withdraw his plea. Another attorney entered a limited appearance to consult with Alpiak about whether to file a motion to withdraw his plea. The attorney did not file a motion, and Alpiak was sentenced in accordance with the plea agreement, while represented by his original trial attorney.

Alpiak later filed a pro se application for post-conviction relief. With the benefit of new counsel, Alpiak filed an amended application and attached a personal affidavit along with an affidavit from his trial attorney.

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[1] AS 11.41.410(a)(1) & AS 11.31.100(a), AS 11.41.420(a)(1), and AS 11.41.230(a)(1), respectively.

[2] AS 11.41.420(a)(1) & AS 11.31.100(a).

In Alpiak's affidavit, he stated that his trial attorney coerced him into accepting the plea offer; that he did not understand the plea offer because his attorney did not sufficiently explain it to him; that his attorney threatened him with more jail time if he did not accept the plea offer; that his attorney told him that "after taking this deal, we will appeal for trial"; and that his attorney failed to appeal his sentence despite his asking her to do so.

In the trial attorney's affidavit, the attorney recounted the history of Alpiak's case. The attorney refuted Alpiak's assertions that she coerced him into accepting the plea offer, that she threatened him with additional jail time, and that she advised him that they would "appeal for a trial" following the entry of the plea agreement.

The State filed a motion to dismiss Alpiak's application for failure to state a prima facie case, which Alpiak opposed. The superior court granted the State's motion and dismissed Alpiak's application for post-conviction relief.

Alpiak now appeals the superior court's dismissal.

Our resolution of Alpiak's claims

To set out a prima facie case of ineffective assistance of counsel, a post-conviction relief applicant must allege facts that, if proven true, show (1) that the attorney's performance fell below the standard of the minimal competence expected of an attorney experienced in criminal law; and (2) that, but for the attorney's incompetent performance, there is a reasonable possibility that the outcome of the proceedings would have been different.[3] Whether an application for post-conviction relief and its supporting

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

documents set forth a prima facie case for relief is a question of law that we review without deference to the superior court's conclusion.[4]

As we noted earlier, in Alpiak's application and affidavit, he made several allegations that his trial attorney unduly influenced him to accept the State's proposed plea offer. First, Alpiak claimed that his trial attorney coerced him into accepting the State's plea offer. But Alpiak provided no further detail as to what actions his attorney allegedly took to coerce him. We have rejected similar conclusory allegations in a number of cases.[5] The superior court was not obliged to assume the truth of Alpiak's unsupported assertion about the legal effect of his trial attorney's conduct on his state of mind.[6]

Second, Alpiak claimed that his trial attorney threatened him with serving more jail time if he did not accept the plea offer. Although more specific than the general charge of "coercion," this claim still suffered from a lack of specificity because Alpiak did not provide any detail about what his attorney actually said.

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

[5] *See, e.g.*, *LaBrake v. State*, 152 P.3d 474, 481 (Alaska App. 2007) ("LaBrake asserted in his affidavit that [his attorney] coerced him into accepting the State's proposed plea bargain. The superior court was not obliged to presume the truth of this conclusory assertion about the legal effect of [the attorney's] conduct on LaBrake's state of mind."); *Serradell v. State*, 129 P.3d 461, 463 (Alaska App. 2006) ("Serradell's claim that he was 'tricked' into accepting the plea agreement is a conclusory allegation of implicit coercion rather than an assertion of specific facts that, if true, would overcome the presumption of competence that attaches to a trial attorney's tactical choices."); *see also Evenson v. State*, 2009 WL 3233723, at *2 (Alaska App. Oct. 7, 2009) (unpublished) ("[C]onclusory allegations that a defendant has been coerced into accepting a plea agreement are insufficient to overcome the presumption of competence that attaches to a trial attorney's advice.").

[6] *See LaBrake*, 152 P.3d at 481.

In her affidavit, Alpiak's trial attorney stated that she explained to Alpiak that the potential sentence he faced if convicted of the charged offenses was significantly greater than the sentence he would serve under the plea agreement, and that his likelihood of success at trial was low given the statements by the State's witnesses. This advice was not incompetent. Without more detail contradicting the attorney's statement, the superior court did not err in concluding that Alpiak failed to state a prima facie case on this claim.[7]

Third, Alpiak claimed that his attorney did not sufficiently explain the plea offer to him. But again, Alpiak provided no detail about what he did not understand about the plea agreement, nor did he point to anything that his attorney allegedly failed to tell him. The superior court was not required to accept Alpiak's conclusory characterization of the facts.[8]

We therefore affirm the superior court's dismissal of Alpiak's post-conviction relief application as to these claims.

However, the State concedes that Alpiak set out a prima facie case as to one claim regarding his acceptance of the plea offer. In particular, Alpiak alleged in his affidavit that his trial attorney told him that "after taking this deal, we will appeal for trial." Alpiak's trial attorney contested this assertion in her affidavit.

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[7] *See Evenson*, 2009 WL 3233723, at *2 (holding that an attorney's letter, which bluntly outlined the evidence against the defendant, evaluated the difficult choice that he faced, and strongly urged him to accept the State's offer, was insufficient to allege a prima facie case for post-conviction relief).

[8] *See LaBrake*, 152 P.3d at 481 (holding that the superior court was not required to accept LaBrake's characterization of his opportunity to review the grand jury record as not "meaningful").

We have independently reviewed the record, and we agree that the superior court erred when it dismissed this claim at the first stage of the post-conviction relief proceedings.[9]

A defendant is entitled to competent advice from defense counsel regarding whether to accept a plea agreement in a criminal case.[10] Alpiak's agreement to plead guilty foreclosed a direct appeal of his conviction.[11] If Alpiak's trial attorney erroneously advised him that he could file a merit appeal and obtain a new trial after entering into the plea agreement, and if that advice impacted Alpiak's decision to plead guilty, then the attorney's conduct would constitute ineffective assistance of counsel entitling Alpiak to withdraw his plea.[12]

At this stage in the proceedings, the superior court was obliged to presume that Alpiak's well-pleaded assertions of fact were true, notwithstanding the competing affidavit from his trial attorney.[13] "When material facts are contested, the trial court must

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[9] *See Haakanson v. State*, 760 P.2d 1030, 1035 (Alaska App. 1988) ("When the State concedes error, this court must still make an independent examination of the facts and the law to determine if there was indeed an error.").

[10] *Ferguson v. State*, 242 P.3d 1042, 1048-49 (Alaska App. 2010).

[11] *See Gordon v. State*, 577 P.2d 701, 703 (Alaska 1978) ("[A] plea of guilty . . . is a waiver of all non-jurisdictional defects[.]"); *Cooksey v. State*, 524 P.2d 1251, 1255 (Alaska 1974) ("A plea of guilty is generally regarded as a waiver of all non-jurisdictional defects in a case."). Had Alpiak filed a motion to withdraw his plea in the trial court and had the trial court denied that motion, he could have appealed that decision. *See, e.g.*, *Love v. State*, 630 P.2d 21, 25 (Alaska App. 1981) (holding on direct appeal that the motion to withdraw the guilty plea should have been granted). But as we noted earlier, Alpiak did not file a motion to withdraw his plea.

[12] *See Ferguson*, 242 P.3d at 1049.

[13] *See LaBrake*, 152 P.3d at 480.

hear the evidence and determine which assertions of fact are more credible."[14] We therefore accept the State's concession that Alpiak set out a prima facie case as to this claim, and we reverse the superior court's dismissal of this claim.

Alpiak's final claim concerns his attorney's conduct *after* he accepted the plea offer and was sentenced. In Alpiak's affidavit, he stated that he asked his trial attorney to file a sentence appeal and that she refused. Alpiak's application did not identify anything that he wanted to appeal other than his sentence.

As we explained in *Johnson v. State*, a defendant has no right to appellate review of a sentence imposed in accordance with a plea agreement that provided for imposition of a specific sentence.[15] Under Alpiak's plea agreement, he agreed to a sentence of 17 years with 5 years suspended and a 10-year probationary term, and that is the sentence he received. Alpiak therefore had no right to appellate review of his sentence, and his trial attorney was not ineffective for failing to seek review of his sentence.[16]

On appeal, Alpiak argues for the first time that his guilty plea did not extinguish his right to appeal based on the alleged involuntary nature of his plea. This premise is inconsistent with Alaska case law.[17] And in any event, Alpiak never asserted that he wished to file a direct appeal on this ground.

We therefore conclude that the superior court properly dismissed this claim.

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[14] *Alexie v. State*, 402 P.3d 416, 418 (Alaska App. 2017).

[15] *Johnson v. State*, 334 P.3d 701, 704-05 (Alaska App. 2014).

[16] *See id.* at 705.

[17] *See Gordon*, 577 P.2d at 704 ("[A] defendant cannot challenge the voluntariness of his plea on direct appeal from the judgment entered upon his plea.").

Conclusion

We REVERSE the superior court's dismissal of Alpiak's claim that his trial attorney erroneously advised him that he could file an "appeal for trial" after he pleaded guilty. We REMAND Alpiak's case to the superior court for further proceedings on this claim. With that exception, the superior court's judgment is AFFIRMED.

We do not retain jurisdiction.