

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, although it may be cited for whatever persuasive value it may have. See McCoy v. State, 80 P.3d 757, 764 (Alaska App. 2002).

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

TIMOTHY BARCLAY,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12615
Trial Court No. 3VA-13-00033 CI

MEMORANDUM OPINION

No. 6781 — April 3, 2019

Appeal from the Superior Court, Third Judicial District, Valdez,
Daniel Schally, Judge.

Appearances: Sharon Barr, Assistant Public Defender, and
Quinlan Steiner, Public Defender, 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, Harbison, Judge, and Coats, Senior
Judge.*

Judge ALLARD.

In 2011, Timothy Barclay was convicted of second-degree criminal trespass
for boarding a fishing vessel that was registered to Marcus Fuller. At Barclay's criminal

* Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska
Constitution and Administrative Rule 23(a).

trial, Fuller testified that Barclay had sold him the boat, *F/V Sarah Nicole*, in exchange for \$75,000 in future fishing proceeds. However, Barclay claimed that the boat belonged to him. According to Barclay, there had never been an agreement to sell Fuller the boat and the bill of sale registered with the Coast Guard was fraudulent. The jury did not believe Barclay, and they convicted him of criminal trespass.

While the criminal case was pending, Barclay filed a civil lawsuit against Fuller in federal court, seeking to quiet title to the fishing vessel. Three years after Barclay was convicted of criminal trespass, a federal district court resolved Barclay's civil lawsuit against Fuller in Barclay's favor. The federal court found that Barclay was the true owner of the boat and that there had been no agreement between Barclay and Fuller to sell Fuller the boat. The federal court further found that the bill of sale registered with the Coast Guard was fraudulent.

Based on these findings, Barclay moved to vacate his criminal conviction, arguing that Fuller had never had lawful possession of his boat and that Barclay's conviction had been procured through fraud and perjury. Although the State initially indicated that it would non-oppose the motion, the State subsequently reversed course and opposed the motion. Barclay's motion was converted into an application for post-conviction relief. In his application for post-conviction relief, Barclay argued that the federal court's judgment and findings constituted newly discovered evidence entitling him to reversal of his conviction. Barclay also submitted Fuller's testimony from the federal court case, arguing that this testimony showed that Fuller had perjured himself at Barclay's criminal trial.

The State filed a motion to dismiss Barclay's application, arguing that it failed to state a prima facie case for relief. The State argued erroneously that the federal court's findings did not qualify as "newly discovered evidence" because they did not exist as evidence until three years after the criminal trial concluded. (According to the

State, a newly discovered evidence claim must be based on evidence that existed at the time of the criminal trial.) The State also argued that Barclay’s application for post-conviction relief was barred by the principles of collateral estoppel and *res judicata* based on Barclay’s unsuccessful attempts to appeal his original criminal conviction.

The superior court agreed with the State’s arguments and dismissed Barclay’s application in a summary order. This appeal followed.

Why we vacate the superior court’s dismissal of Barclay’s application for post-conviction relief

A person commits the crime of criminal trespass in the second degree under AS 11.46.330(a)(2) if the person “enters or remains unlawfully . . . in a propelled vehicle.” In this context, “enter or remain unlawfully” means to enter or remain in a propelled vehicle “when the . . . propelled vehicle, at the time of the entry or remaining, is not open to the public and when the defendant is not otherwise privileged to do so.”¹ As we explained in *Johnson v. State*, to convict a person of criminal trespass (as opposed to the civil tort of trespass), the State is required to prove, *inter alia*, that the person was at least reckless as to their lack of privilege to be on the premises.²

The fact that a person may have an ownership right to certain property does not necessarily mean that the person has a right to enter the property. As the Vermont Supreme Court explained in *State v. Gillard*, the crime of trespass is an offense against another person’s *physical possession* of property, not the person’s right of ownership.³ As the Vermont court explained:

¹ AS 11.46.350.

² *Johnson v. State*, 739 P.2d 781, 783-84 (Alaska App. 1987).

³ *State v. Gillard*, 88 A.3d 389, 394-96 (Vt. 2013).

The right to possess property — [a person’s] “lawful possession” — may flow from one’s ownership of property[,] but it may also flow from other sources, such as a lease, a court order, or even the circumstances surrounding the property’s use. . . . [P]roof of [the other person’s] ownership is not an element required for an unlawful trespass conviction, so long as lawful possession is established. . . . Other jurisdictions have held that even an owner may be prosecuted [for trespass] if he is not in lawful possession.⁴

Thus, the fact that Barclay was ultimately found to be the lawful owner of the boat does not, by itself, render his trespass conviction invalid. Instead, the critical question for purposes of Barclay’s application was whether he had put forward sufficient evidence to show that Fuller’s *possession* of the boat was itself unlawful and that Barclay was privileged to enter and remain on the boat.⁵

The superior court never grappled with this question because it accepted the erroneous arguments contained in the State’s motion to dismiss. Contrary to the State’s assertion, a defendant can raise a claim of newly discovered evidence in a criminal case even if the newly discovered evidence at issue did not exist at the time of the criminal trial. This is commonly found in cases of a witness’s recantation.⁶

⁴ *Id.* at 394; *see also People v. Johnson*, 906 P.2d 122, 124-26 (Colo. 1995) (holding that because the crime of trespass is an offense against the victim’s *lawful possession* of property, the defendant could properly be convicted of trespass even though the defendant arguably had an ownership interest in the property).

⁵ *See State v. Klein*, 342 P.3d 89, 91 (Or. App. 2014) (“[A] person who has no property rights in a dwelling cannot exclude the dwelling’s owner from it for the purposes of the first-degree criminal trespass statute.”). We note that Alaska’s criminal trespass statute is derived from Oregon’s statute and from the Model Penal Code.

⁶ *See, e.g., Dunbar v. State*, 522 P.2d 158, 158 (Alaska 1974); *James v. State*, 84 P.3d 404, 407 (Alaska 2004); *Montgomery v. Commonwealth*, 751 S.E.2d 692 (Va. App. 2013);
(continued...)

To establish a claim of newly discovered evidence, a defendant must show that (1) the evidence is, in fact, newly discovered, *i.e.*, discovered after trial; (2) the defendant was diligent in pursuing the evidence; (3) the evidence is neither merely cumulative nor impeaching; (4) the evidence is material to the issues involved; and (5) the evidence is likely to result in an acquittal at a new trial.⁷ As a general matter, claims of newly discovered evidence are disfavored and viewed with “great caution.”⁸

The superior court did not need to resolve Barclay’s claim of newly discovered evidence at this stage in the post-conviction relief proceedings. The only question for the superior court was whether Barclay’s pleadings, viewed in the light most favorable to him, established a *prima facie* case for post-conviction relief entitling Barclay to proceed to the second stage of the post-conviction relief litigation.⁹

Having reviewed Barclay’s pleadings, we conclude that Barclay met this threshold standard. In support of his application for post-conviction relief, Barclay submitted the federal court’s judgment and oral findings as well as Fuller’s testimony from the federal court case. Although it is questionable whether the findings would be

⁶ (...continued)
cf. State v. Etienne, 35 A.3d 523, 554 (N.H. 2011) (standard for government’s unwitting use of perjured testimony is same as for newly discovered evidence).

⁷ *Salinas v. State*, 373 P.2d 512, 514 (Alaska 1962). Implicit in this is that the newly discovered evidence must also be admissible. Although *Salinas* involved a motion for new trial, the same standard applies when newly discovered evidence is raised in a post-conviction relief application. *Lewis v. State*, 901 P.2d 448, 449-50 (Alaska App. 1995).

⁸ *Angasan v. State*, 314 P.3d 1219, 1222 (Alaska App. 2013).

⁹ *See* Alaska R. Crim. P. 35.1(f); *State v. Jones*, 759 P.2d 558, 565 (Alaska App. 1988).

directly admissible at a future criminal trial,¹⁰ the judgment and the testimony could be used to impeach Fuller’s claim of ownership and lawful possession of the fishing vessel. It is important to note that, unlike other cases where ownership and lawful possession are distinct inquiries, the claim of lawful possession in this case appears to be directly tied to the claim of lawful ownership. That is, Fuller does not appear to have claimed that he was granted permission to use the boat or that he had lawful possession of the boat through a lease or valid court order. Rather, his claim of possession appears directly predicated on his claim of ownership—a claim of ownership that the federal court found was based on a falsified bill of sale.¹¹

Given this, we conclude that the superior court erred when it dismissed Barclay’s application for post-conviction relief. Contrary to the State’s claims, *res judicata* and collateral estoppel do not bar Barclay’s application, and Barclay is entitled to proceed to the next stage of the post-conviction relief process based on the prima facie case for relief presented in his pleadings.¹²

¹⁰ Hearsay is an out-of-court statement (like a judge’s factual findings) introduced to prove the truth of the matter asserted. *See* Alaska Evid. R. 801(c); *see also* *F.T. v. State*, 862 P.2d 857, 864 (Alaska 1993); *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992) (holding that judicial notice of another court’s factual findings may be used only to establish the fact of litigation and related filings, not the truth of the matters asserted).

¹¹ We note that it is not entirely clear from the current record whether Fuller himself falsified the bill of sale. Fuller apparently suggested that a different man (Matt Schneider) may have altered the bill of sale. However, the federal district court judge found that Schneider had no motive to alter the bill of sale, where “Fuller, in contrast, had every motive to remove SARA NICOLE, LLC, from the Bill of Sale so that the vessel could be recorded in his name alone.”

¹² *See Jones*, 759 P.2d at 565.

Conclusion

We REVERSE the dismissal of Barclay's application for post-conviction relief and we REMAND this case to the superior court for further proceedings consistent with the guidance provided here.