IN THE COURT OF APPEALS OF THE STATE OF ALASKA

MARIO F. PAGE, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13012 Trial Court No. 3PA-12-02363 CI MEMORANDUM OPINION No. 6939 — April 28, 2021

Appeal from the Superior Court, Third Judicial District, Palmer, Jonathan A. Woodman, Judge.

Appearances: Mario F. Page, *in propria persona*, Seward, Appellant. Diane L. Wendlandt, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

Before: Wollenberg, Harbison, and Terrell, Judges.

Judge HARBISON.

Mario F. Page was convicted of kidnapping and second-degree murder in connection with the shooting death of Terrell Houngues.[1] We affirmed Page's convictions on direct appeal.[2]

Page subsequently filed an application for post-conviction relief, alleging ineffective assistance of counsel and that his convictions were obtained in violation of his right to due process of law. Specifically, Page claimed that one of the State's witnesses, Frederick Sherman Johnson, lied under oath at trial, and that the State failed to disclose material evidence which could have been used to impeach this testimony. He also claimed that the State failed to correct this purportedly false testimony and, knowing that it was false, used it against him. In addition, Page claimed that both his trial attorney and his appellate attorney were ineffective for failing to pursue claims under *Napue v. Illinois* and *Brady v. Maryland* based on the purportedly false testimony.[3]

After reviewing the parties' pleadings and pertinent portions of the trial transcripts, the superior court dismissed Page's application for failure to state a prima facie claim for relief. Page now appeals.

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[1] *Page v. State* (*Page I*), 2009 WL 6327506, at *1 (Alaska App. Dec. 2, 2009) (unpublished).

[2] *Id.*; *see also Page v. State* (*Page II*), 2010 WL 3722998, at *3 (Alaska App. Sept. 22, 2010) (unpublished) (affirming a restriction on Page's eligibility for discretionary parole).

[3] *See Napue v. Illinois*, 360 U.S. 264, 269 (1959) (holding that the State's use of, or failure to correct, false testimony presented in a criminal trial may violate due process); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that the State's suppression of material evidence favorable to a criminal defendant violates due process). Page also raised additional claims of ineffective assistance of counsel, which he does not renew on appeal.

We review de novo an order dismissing a post-conviction relief application for failure to establish a prima facie case.[4] As Page concedes, his claims are contingent on the existence of the alleged *Napue* and *Brady* violations. Accordingly, we must examine the underlying basis of these claims in greater detail.

Johnson was originally charged as a co-defendant in the kidnapping and murder of Houngues, but he ultimately testified against Page in exchange for a favorable resolution of his charges. As the superior court noted, while Page's presence during the kidnapping and murder was uncontested at trial, Johnson's testimony "filled in the blanks" about the events immediately preceding Houngues's death — and portrayed Page as the instigator of the murder, rather than an innocent bystander.

Page's attorney cross-examined Johnson extensively, pointing out numerous reasons to doubt Johnson's credibility. At one point during the cross-examination, Page's attorney asked Johnson if he had ever been "in trouble with the law because of the use of drugs." Johnson replied, "Not — no."

Page's attorney sought to impeach this testimony, telling the trial court that he "ha[d] reason to believe [Johnson was] lying" because Johnson "went to jail on a drug conviction." The trial court precluded this line of inquiry, however. The court ruled that Johnson's drug use on other unrelated occasions was a collateral issue for which Page could not introduce extrinsic impeachment evidence. The court also ruled that evidence of Johnson's drug use was impermissible character evidence.

In his application for post-conviction relief, Page alleged ineffective assistance regarding his attorneys' handling of this issue, both at the trial level and on appeal, as well as due process violations under *Brady* (based on the State's failure to

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[4] *See State v. Simpson*, 946 P.2d 890, 892 (Alaska App. 1997) (independently reviewing whether an application for post-conviction relief presented a prima facie claim of ineffective assistance of counsel).

disclose evidence of Johnson's prior conviction) and under *Napue* (based on the State's failure to correct Johnson's allegedly false testimony denying the existence of his prior conviction).

We presume, for purposes of evaluating whether Page established a prima facie claim for relief, that Johnson in fact had a prior conviction based on his use of controlled substances, that the State failed to disclose this conviction to Page's attorney (the alleged *Brady* violation), and that the State failed to correct the record after Johnson falsely testified that he had no such prior conviction (the alleged *Napue* violation).[5]

But as the superior court noted, both *Brady* and *Napue* require a showing that the evidence underlying the alleged violation was material or that prejudice resulted from the violation itself.[6] We have independently reviewed the record, and we agree with the superior court that Page failed to show prejudice.[7]

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[5] We need not decide whether Johnson in fact committed perjury. At this stage of the post-conviction relief proceedings, we assume that he did. *See LaBrake v. State*, 152 P.3d 474, 480 (Alaska App. 2007).

[6] *See Strickler v. Greene*, 527 U.S. 263, 280 (1999) (defining materiality for purposes of a *Brady* violation as "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985))); *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003) (explaining that to establish a *Napue* violation, a defendant must show that "(1) the testimony (or evidence) was actually false, (2) the prosecution knew or should have known that the testimony was actually false, and (3) that the false testimony was material").

[7] We also reject Page's claim that the *Napue* violation constituted structural error — *i.e.*, that it rendered his conviction void regardless of the materiality of the violation. Page argued below that his conviction was void because it represented a "fraud upon the court." But a "fraud upon the court" requires more than the possibility that a witness committed perjury during the course of trial, especially perjury on a collateral matter, as the trial court found here. Instead, a fraud upon the court entails "the most egregious circumstances involving a corruption of the judicial process itself." *Alaska Fur Gallery, Inc. v. First Nat.*

(continued...)

First, we conclude that, even if Page's attorney had been able to produce a certified copy of Johnson's conviction, this would not have changed the trial court's determination that Johnson's prior drug use was a collateral issue. The trial judge's ruling prohibiting Page from impeaching Johnson's testimony was not based on a lack of proof establishing the existence of the conviction. Instead, the judge assumed the conviction existed, but concluded that the existence or non-existence of the conviction was a collateral matter on which Page was not entitled to introduce extrinsic evidence.[8] As a result, even if the State had provided Page with evidence that Johnson had been previously convicted of a drug offense, this evidence would not have been admissible at trial.

Second, regardless of whether the State disclosed Johnson's prior conviction, Page's attorney clearly knew of the conviction from some source; it was Page's attorney who injected the issue of the prior conviction into the trial and sought to impeach Johnson with the conviction following Johnson's denial. Page has not

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[7] (...continued)
Bank Alaska, 345 P.3d 76, 86 (Alaska 2015) (quoting *Murray v. Ledbetter*, 144 P.3d 492, 497 (Alaska 2006) (additional citations omitted)); *see also Livingston v. Livingston*, 572 P.2d 79, 82 (Alaska 1977). Other than reiterating his *Napue* claim, Page has never alleged a fraud upon the court that meets this definition. And, Page has cited no authority for the proposition that a *Napue* violation should constitute structural error or otherwise render his conviction void, as opposed to being subject to harmless error.

[8] Page notes that Alaska Evidence Rule 607 may allow admission of such evidence. *See* Alaska R. Evid. 607 cmt. para. 4 ("[The rules of evidence do not] specifically bar[] impeachment by presenting extrinsic evidence on a collateral issue."). But while the rules themselves may not prohibit such impeachment, they do not override binding precedent from the Alaska Supreme Court holding that extrinsic evidence on collateral issues is generally not admissible. *See, e.g.*, *Worthy v. State*, 999 P.2d 771, 774 (Alaska 2000); *Shane v. Rhines*, 672 P.2d 895, 898 n.2 (Alaska 1983).

articulated how the State's failure to provide Page's attorney with information the attorney apparently already possessed could have affected the outcome of Page's trial.[9]

Moreover, as the superior court found, even if the jury was allowed to hear evidence that Johnson lied about whether he had a drug conviction, there was no reasonable possibility that this evidence would have affected the jury's verdicts.[10] The evidence would have been cumulative of, and less probative than, the other evidence undercutting Johnson's credibility, including Johnson's trial testimony admitting that he lied to the police, to his friends, and to various witnesses. The evidence also would have been cumulative of the undisputed evidence establishing Johnson's intoxication during both the planning and execution of Houngues's kidnapping — intoxication that Johnson acknowledged had affected his memory and perception of events.

Page's allegations of ineffective assistance of counsel relate to his *Brady* and *Napue* claims. He contends that his trial counsel was ineffective for failing to

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[9] *See St. John v. State*, 715 P.2d 1205, 1211 (Alaska App. 1986) (recognizing that *Brady* requires a showing that governmental action deprived a defendant of material evidence).

[10] Page argues that the superior court erroneously evaluated whether the proposed impeachment evidence "would have," rather than "could have," affected the jury's verdict. *See Belmontes v. Brown*, 414 F.3d 1094, 1115-16 (9th Cir. 2005), *rev'd on other grounds sub nom. Ayers v. Belmontes*, 549 U.S. 7 (2006) (noting that a *Napue* violation requires reversal if "there is 'any reasonable likelihood that the false testimony could have affected the judgment of the jury,'" but then stating its holding in terms of "would have": "we hold that there is no reasonable likelihood that [the witness's] false testimony . . . *would have* affected the judgment of the jury" (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)) (emphasis added)).

We need not decide whether the superior court's use of "would have" was inconsistent with this standard. Having reviewed the record and Page's arguments de novo, we conclude that there was no reasonable possibility that impeachment regarding Johnson's prior conviction could have, or would have, affected the jury's verdict.

request Johnson's criminal records and for failing to present the jury with evidence that Johnson lied about whether he had a drug conviction, and that his appellate attorney was ineffective for failing to litigate the *Brady* and *Napue* claims on direct appeal. But to prevail on his claim of ineffective assistance of counsel, Page must show not only that his former attorneys' performance fell below the minimum level of competence but also that he was prejudiced as a result of the incompetence.[11]

As we have explained, the sole relevance of evidence of Johnson's drug conviction was to impeach Johnson on a collateral matter, and as a result, the trial judge properly refused to allow Page to impeach Johnson with this evidence. Because the evidence of Johnson's conviction was inadmissible, there is no reasonable possibility that the defense attorney's purported failure to request Johnson's criminal history, or the State's purported failure to disclose it, affected the outcome of the trial or our resolution of Page's claims on direct appeal.[12]

Similarly, even if Page's attorney had been successful in his effort to impeach Johnson with evidence that he lied about whether he had a drug conviction, this would not have changed the outcome of Page's trial. The jury heard a substantial amount of impeachment evidence relating to Johnson, including evidence of his plea agreement with the State, the inconsistencies between his testimony and that of others, evidence of his intoxication, and evidence of his many lies to the police and to his friends. As a result, there was no reasonable possibility that the defense attorney's

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[11] *Risher v. State*, 523 P.2d 421, 424-25 (Alaska 1974).

[12] *See Coffman v. State*, 172 P.3d 804, 813 (Alaska App. 2007).

failure to impeach Johnson with this evidence would have affected the jury's verdicts or that further litigation of this issue would have affected the outcome on appeal.[13]

The judgment of the superior court is AFFIRMED.

[13] Page also disputes several of the findings in the superior court's order dismissing his application for post-conviction relief. For example, Page disagrees with the court's characterizations of some of his arguments regarding his ineffective assistance of counsel claims. But we review de novo an order dismissing a post-conviction relief application for failing to establish a prima facie case for relief. Accordingly, even if the superior court misunderstood Page's arguments, such error would be harmless.

Page also challenges some of the court's findings related to the strength of the evidence against him at trial. But even if we excise the individual findings Page challenges on appeal, this would not affect the conclusion that Page failed to present a prima facie case establishing the alleged *Brady* and *Napue* violations, which Page himself acknowledges are prerequisites for relief on his ineffective assistance of counsel claims.