

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

ANDREW DENNIS JOHNSON,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13286
Trial Court No. 3AN-15-04765 CI

MEMORANDUM OPINION

No. 6999 — April 6, 2022

Appeal from the Superior Court, Third Judicial District,
Anchorage, Michael D. Corey, Judge.

Appearances: David T. McGee, Attorney at Law, under contract
with the Public Defender Agency, and Samantha Cherot, Public
Defender, Anchorage, for the Appellant. Matthias R. Cicotte,
Assistant Attorney General, Department of Law, and Clyde
“Ed” Sniffen Jr., Acting Attorney General, Juneau, for the
Appellee.

Before: Wollenberg, Harbison, and Terrell, Judges.

Judge WOLLENBERG.

Andrew Dennis Johnson filed an application for post-conviction relief, claiming that the Alaska Board of Parole improperly revoked his parole in connection with a 2003 case. In particular, Johnson alleged that his parole supervision from the 2003 case had already expired when, in 2012, he committed a new offense and the parole

board sought to revoke his parole on that basis. Johnson contended that the parole board lacked jurisdiction over him because his parole supervision had already expired.

The superior court dismissed Johnson's application as untimely, and Johnson now appeals. In order to better understand Johnson's claim, it is necessary to provide some additional background information.

Procedural background

In 2003, Johnson was convicted, pursuant to a plea agreement, of several charges. He received a composite sentence of 10 years with 4 years suspended (6 years to serve) and a 10-year term of probation. He was released onto mandatory parole in mid-2007.

A few months later, Johnson was arrested on new charges. Johnson ultimately agreed to serve the suspended time — 4 years — from his 2003 case in exchange for the dismissal of the new charges. Additionally, the parole board revoked his parole and sentenced him to serve 2 years — the entirety of the statutory good-time credit he had previously earned. Johnson served the probation and parole time concurrently, and he was again released onto mandatory parole in mid-2010.

A few months later, in December 2010, Johnson was rearrested. On April 5, 2011, the parole board again revoked Johnson's parole and released him onto parole supervision.

In March 2012, Johnson was arrested on new criminal charges. The parole board issued an arrest warrant, which was served on Johnson on March 29, 2012. The warrant stated that Johnson was under the jurisdiction of the parole board until November 29, 2012.

In October 2012, about seven months after his arrest, Johnson submitted a grievance to the Department of Corrections ("DOC"). In the grievance, Johnson

expressed his belief that he had finished serving his parole time, and he asked for an accounting of his “discharge date from parole,” so that he could request bail release on his new charges. A sergeant responded the next day via a “Grievance Screening Form,” rejecting the grievance and directing Johnson to review his parole time with his attorney. The response form also informed Johnson that he had two options in response to the “screened grievance”: he could (1) correct any deficiency in the grievance and resubmit it within two working days, or (2) appeal the grievance internally. The record does not show that Johnson took any further action at that time.

On November 9, 2012, the parole board revoked Johnson’s mandatory parole and imposed the balance of the sentence in his 2003 case.

In December 2014, over two years later and following the resolution of his 2012 criminal case (in which he pleaded guilty to an amended charge), Johnson received a time accounting from DOC. In response, Johnson filed another grievance.

A sergeant met with Johnson to discuss this grievance, and later drafted a memorandum that detailed the meeting and responded to the issues raised in Johnson’s grievance. In the memorandum, the sergeant noted Johnson’s contention that his parole had expired before he committed and was arrested on his 2012 charges. But the sergeant rejected this assertion, finding that Johnson had not yet completed parole when he was arrested in March 2012. The sergeant stated that Johnson’s time accounting record had been reviewed four times and was found to be correct and consistent with past court and parole board orders.

Two weeks later, on January 28, 2015, Johnson filed a *pro se* application for post-conviction relief, alleging, *inter alia*, that he had been improperly held in custody on a parole hold past the expiration of his 2003 sentence. After being appointed an attorney, Johnson filed an amended application seeking the following relief: (1) an order reversing the parole board’s November 9, 2012 order purporting to revoke his

parole, and (2) an order directing DOC to recalculate his time accounting and credit any parole time he had improperly served against the sentence in his new case.

In cross-motions for summary judgment, the parties disputed the merits of Johnson's claims. Additionally, the State contended that Johnson's application was untimely. Noting that Johnson's parole was revoked on November 9, 2012, and that he did not file his application for post-conviction relief until January 28, 2015, the State argued that Johnson's application fell outside the one-year statute of limitations for challenging a decision of the parole board.¹

In response to the State's assertion of untimeliness, Johnson argued that the court should apply the "discovery rule," a form of equitable tolling used in certain civil cases.² Under the discovery rule, the statute of limitations does not begin to run if "the [claimant], by exercising reasonable diligence, could not have discovered essential information bearing on his or her claim."³ Johnson argued that he was not on notice of his possible post-conviction claim — and thus, the statute of limitations did not begin running — until January 12, 2015, the date on which he received a response to his grievance. And because he filed his application for post-conviction relief two weeks after that, he argued that his application was timely.

In a written order, the superior court dismissed Johnson's amended application for post-conviction relief as untimely. The court ruled that, because Johnson was challenging the parole board's November 9, 2012 revocation order, he had one year from that date to file an application for post-conviction relief. The court further

¹ AS 12.72.020(a)(4).

² See *Greater Area Inc. v. Bookman*, 657 P.2d 828, 829-31 (Alaska 1982).

³ See *Kaiser v. Umialik Ins.*, 108 P.3d 876, 882 (Alaska 2005) (quoting *Abbott v. State*, 979 P.2d 994, 998 (Alaska 2005)).

concluded that, even if the discovery rule is available in post-conviction relief cases, Johnson had been put on notice of the critical issue — that the parole board believed it still had jurisdiction over him — when he was served with the parole arrest warrant in March 2012, almost three years before he filed his post-conviction relief application. The court therefore concluded that he was not entitled to equitable tolling.

Johnson now appeals the dismissal of his post-conviction relief application as untimely.

Why we affirm the superior court's ruling

On appeal, Johnson contests the superior court's refusal to equitably toll the limitations period for his post-conviction relief application. He does not dispute that, in his application, he was challenging the parole board's November 9, 2012 revocation decision. And he acknowledges that, under AS 12.72.020(a)(4), a post-conviction relief applicant challenging a final administrative decision of the Alaska Board of Parole or the Department of Corrections has one year from the date of the decision to file an application. But he now argues that the grievance procedure constituted an alternative administrative remedy that tolled the deadline for filing his post-conviction relief application and that he was therefore entitled to file for post-conviction relief when that remedy was unsuccessful.

Johnson bases his claim for equitable tolling on the Alaska Supreme Court's decision in *Gudenau & Co. v. Sweeney Insurance*.⁴ In *Gudenau*, the supreme court addressed equitable tolling in a situation where a civil litigant had multiple legal remedies available, and the litigant (a corporation) argued that the time for filing its

⁴ *Gudenau & Co. v. Sweeney Ins., Inc.*, 736 P.2d 763 (Alaska 1987).

lawsuit tolled while it was pursuing an alternative remedy that was ultimately unsuccessful. The court explained the requirements for invoking this doctrine:

[A] plaintiff must satisfy three requirements in order to establish his right to pursue an otherwise untimely remedy. His pursuit of the initial remedy must give the defendant notice of the existence of a legal claim against it; the defendant must not be prejudiced in its ability to gather evidence by the bringing of the second claim; and the plaintiff must have acted in good faith.^[5]

Johnson argues that he has fulfilled each of these requirements.

But this theory of equitable tolling is directly contrary to the theory that Johnson pursued in the superior court. In the superior court, Johnson asserted that he did not *discover* his claim for relief until early 2015, when he received the memorandum from DOC in response to his second grievance. Johnson argued that the statute of limitations should therefore have run from that date.⁶

But as the superior court found, this assertion is plainly contradicted by the record: Johnson was arrested on a parole warrant in March 2012, and he filed a grievance challenging the parole board’s jurisdiction in October 2012 — before the parole board ever revoked his parole. The record supports the superior court’s conclusion that Johnson had notice of his claim prior to the expiration of the statute of limitations.

⁵ *Id.* at 768; *see also Kaiser*, 108 P.3d at 881-82.

⁶ *See Kaiser*, 108 P.3d at 881-82 (discussing different theories of equitable tolling, including the tolling of the limitations period when the claimant has “multiple legal remedies available,” and the tolling (and restarting) of the limitations period where the claimant, “by exercising reasonable diligence, could not have discovered essential information bearing on his or her claim”).

Johnson now argues that his later grievance should toll the deadline for filing a post-conviction relief application. But because Johnson did not raise the theory of equitable tolling in the superior court that he is now raising on appeal, he must show plain error.⁷

We decline to find plain error. As an initial matter, it is not settled in Alaska whether the DOC grievance process counts as an alternative legal remedy for purposes of equitable tolling in a post-conviction relief case.⁸ Even assuming it does, however, Johnson filed his first grievance, questioning the parole board’s jurisdiction over him, in October 2012 — before the November 2012 parole revocation hearing. The record does not show that, once this grievance was rejected, he took any further action. And following the parole board’s revocation decision, Johnson did not file another grievance for more than two years. Thus, even if the grievance procedure is an alternative legal remedy in this context, it is not obvious from the record that Johnson reasonably pursued it.⁹

⁷ See *Adams v. State*, 261 P.3d 758, 764 (Alaska 2011).

⁸ Cf. *Osborne v. State, Dep’t. of Corr.*, 332 P.3d 1286, 1288-90 (Alaska 2014) (holding that, because the DOC grievance process is not “sufficiently adjudicative” and does not produce a record capable of review, the superior court generally lacks subject matter jurisdiction to review grievance decisions; instead, a prisoner may seek judicial review of a DOC sentence calculation through an application for post-conviction relief).

⁹ See *Adams*, 261 P.3d at 773 (explaining that, among other factors, a plain error “must be obvious, meaning that it should have been apparent to any competent judge or lawyer”).

We acknowledge that, to the extent a prisoner is actually being detained illegally, a time bar that precludes a challenge to that illegal detention would present significant due process concerns. But Johnson, who no longer appears to be in custody, does not raise a constitutional challenge to the time bar, and we therefore do not address it further. We note, however, that we have reviewed Johnson’s time accounting record, and we see no obvious support for his claim that his parole supervision had already expired by the time he

(continued...)

Johnson raises one final issue. He argues that he was entitled to leniency because he filed his grievances and his first application for post-conviction relief without the assistance of an attorney. But almost all post-conviction relief applications are initially filed *pro se*. While Alaska courts generally “hold the pleadings of *pro se* litigants to less stringent standards than those of lawyers,”¹⁰ we have never held that a criminal defendant is exempt from the applicable statute of limitations, and we decline to do so here.¹¹

The judgment of the superior court is AFFIRMED.

⁹ (...continued)
committed his new offense in early 2012.

¹⁰ *Wright v. Shorten*, 964 P.2d 441, 444 (Alaska 1998) (internal quotation marks omitted).

¹¹ We note too that Johnson would have been entitled to counsel to represent him in his parole revocation proceedings, although the status of his representation in that proceeding is not entirely clear from the record.