IN THE COURT OF APPEALS OF THE STATE OF ALASKA

RAFAEL LOPEZ MARTINEZ, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13050 Trial Court No. 3AN-12-11630 CI MEMORANDUM OPINION No. 7055 — April 26, 2023

Appeal from the Superior Court, Third Judicial District, Anchorage, Gregory A. Miller, Judge.

Appearances: Emily L. Jura, Assistant Public Defender, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. RuthAnne Beach, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

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

Judge ALLARD.

Rafael Lopez Martinez appeals from the denial of his application for post-conviction relief. For the reasons explained here, we affirm the judgment of the superior court.

Factual background

In March 2010, Martinez was employed as a taxi driver for Anchorage Yellow Cab. On March 19, a woman (I.C.) reported to the Anchorage Police Department that a taxi driver had sexually assaulted her earlier that day while she slept in the back of his cab. A sexual assault examination was performed on I.C., which revealed the presence of sperm in her vagina.

According to I.C., she had gotten into the taxi in the early morning hours after a night of drinking, and she had fallen asleep during the ride to her apartment. When she woke up, she was naked from the waist down, and the driver was in the backseat with her. I.C. testified that she confronted the driver and asked what he was doing and he backed away, but did not respond. The driver got back into the driver's seat and drove her to her apartment. I.C. asked the driver the number of the cab. He told her "40" although she noticed it was 57 when she got out. Martinez was later identified as the driver of cab 57.

The police subsequently interviewed Martinez. Martinez is originally from a mountainous region in Oaxaca, Mexico, and his native language is an indigenous language called Triqui. At the time of the interview, Martinez had lived in Alaska for fifteen years and had children with an Alaska Native woman. However, Martinez's ability to understand and communicate in English is apparently very limited. Martinez also has some difficulty with understanding and articulating himself in Spanish.

The police interviewed Martinez in Spanish with a detective serving as an interpreter. At times, Martinez had difficulty understanding certain Spanish terms. He also had some difficulties expressing himself in Spanish, sometimes taking long pauses before answering a question. Martinez told the officers that because the interview was conducted in Spanish, "sometimes he couldn't think as fast."

In the interview, Martinez initially denied any memory of picking up I.C. and he denied having sexual relations with her. The police asked Martinez to provide a DNA sample, which he voluntarily did. After providing the DNA sample, Martinez's version of events changed. Martinez then stated that he remembered picking up a woman whom he had sex with.

Martinez said that he had sexual relations with the woman but that she was awake the whole time. Martinez stated that she had taken off her pants and initiated the sexual encounter by getting close to him. He alternatively stated that she had urinated on herself and that was why she took her pants off. The detectives accused Martinez of lying about the woman being awake. Martinez insisted that the woman had been awake and that she was not mad at him. When asked why he did not initially tell the truth, Martinez said that he was nervous and worried about his job and his family.

Later DNA testing indicated to a reasonable degree of forensic certainty that Martinez was the source of the sperm found during the sexual assault examination of I.C. A grand jury subsequently indicted Martinez on one count of second-degree sexual assault (sexual penetration of a person who is incapacitated and/or unaware that a sexual act is being committed).[1]

Trial proceedings

Although the Alaska Public Defender Agency was initially appointed to represent Martinez, he later retained a private defense attorney. The private defense attorney raised the issue of Martinez's language difficulties during a pretrial status hearing. According to the attorney, Martinez did not have "much facility in any of the

[1] Former AS 11.41.420(a)(3)(B) and/or (C) (2010) ("An offender commits the crime of sexual assault in the second degree if . . . the offender engages in sexual penetration with a person who is . . . incapacitated; or . . . unaware that a sexual act is being committed.").

languages that we talk including Spanish." The attorney stated that he had tried to find a Triqui interpreter but had been unable to locate one. He explained that he had been communicating with Martinez in Spanish through Martinez's pastor who was from Cuba. The attorney's intention was to use the pastor as the trial interpreter because of his long-standing relationship with Martinez and because Martinez did not have funds for a certified interpreter.[2]

The trial court expressed hesitation about using a non-certified interpreter. Instead, the trial court obtained the services of two certified Spanish interpreters at court expense. The trial court explained to Martinez that the pastor could also attend trial and that Martinez could use the pastor during breaks to communicate with his attorney. There was no objection to this plan.

At the beginning of trial, the trial court checked with the first Spanish interpreter to make sure that Martinez was understanding the interpreter.[3] The interpreter confirmed that Martinez understood him and that he and Martinez had been able to communicate with one another.

Through the Spanish interpreter, the trial court then advised Martinez of his right to testify and the court made clear that Martinez did not need to make a decision at that moment. Martinez appeared to indicate his understanding of this advisement.

At trial, the defense attorney highlighted Martinez's lack of facility with both English and Spanish. The attorney argued that Martinez's conduct in the police

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[2] At the time, the party requiring the interpretation services was required to bear the costs. *See* former Alaska R. Admin. P. 6(b)(2) (2011). Alaska Rule of Administrative Procedure 6(b) has since been amended and presently the court system bears the cost of interpretation services.

[3] There was one Spanish language interpreter for the first two days of trial and two Spanish language interpreters for the last three days.

interview was a result of Martinez's language difficulties and naivety rather than evidence that he was lying, as the prosecutor claimed.

To support the defense attorney's argument that Martinez had difficulties with Spanish, the defense called Martinez's pastor to testify. The pastor testified that Martinez has a hard time understanding both English and Spanish. He explained that he and other church members were able to communicate with Martinez in Spanish by speaking slowly, modifying their vocabulary, and repeating themselves quite a bit.

After the pastor's testimony, the defense attorney informed the trial court that Martinez had chosen not to testify. The court then conducted the required *LaVigne* inquiry to make sure that Martinez understood that he had a right to testify and that this right belonged to him, not his attorney.[4] After giving Martinez additional time to consult with his attorney and checking with the interpreter to make sure that there were no interpretation issues, the trial court found that Martinez had knowingly and voluntarily waived his right to testify.

Following deliberations, the jury convicted Martinez of second-degree sexual assault.

Sentencing hearing

At sentencing, Martinez provided the following statement through a Spanish interpreter:

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[4] *LaVigne v. State*, 812 P.2d 217, 222 (Alaska 1991) (holding that "judges should make an on-the-record inquiry after the close of the defendant's case, although out of the jury's hearing, into whether a nontestifying defendant understands and voluntarily waives [their] right [to testify]"); Alaska R. Crim. P. 27.1(b) ("If the defendant has not testified, the court shall ask the defendant to confirm that the decision not to testify is voluntary. This inquiry must be directed to the defendant personally and must be made on the record outside the presence of the jury.").

> Whenever — this is what I want to say. Whenever that woman asked me to get in my car, she was not very drunk. She actually got in my car. She was doing sort of well. And she asked me to bring her to her apartment. I did that. Then she asked me to bring her to Mountain View and I took her to Mountain View. And then when we got there, she knocked on the door, but nobody opened the door. And then I brought her back to her apartment, and she showed me her breasts. That was the reason — that's how it all started.
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> And she also wanted me to drink with her. She wanted me to buy beer with her but I told her that the liquor stores weren't open and so we didn't — we did not go to buy it. And then we — yes, I was with her in the car, but it was only for 20 minutes and she said that I hit her, but I did not hit her. She only spoke loud and the thing that she offered me her body, that's — yes, she did that, but that was it. What I think is that whenever she went to her apartment, she had more beer and she probably drunk more beer. That's everything.

The trial court sentenced Martinez to 15 years with 5 years suspended (10 years to serve) and 10 years' probation.

Martinez's post-conviction relief application

Approximately eight months after his sentencing, Martinez filed a timely application for post-conviction relief. An attorney from the Alaska Public Defender Agency was appointed to assist Martinez, and an amended application was ultimately filed.

The amended application raised two primary claims: First, Martinez argued that his due process rights were violated by having only the assistance of Spanish interpreters at his trial rather than an interpreter in his native language of Triqui. Second,

Martinez argued that his trial attorney's failure to secure a Triqui interpreter constituted ineffective assistance of counsel.[5]

The post-conviction relief proceedings were held before the same judge who had presided over Martinez's trial and sentencing. The superior court held an evidentiary hearing on Martinez's claims. After some difficulty, a Triqui interpreter was obtained for the evidentiary hearing. The Triqui interpreter spoke Spanish but did not speak English, so the evidentiary hearing also involved a Spanish interpreter who interpreted between English and Spanish for the benefit of the Triqui interpreter.

At the evidentiary hearing, Martinez testified that he "really didn't understand what was said" at his trial. He said that he had told his trial attorney that he did not understand and that he needed a Triqui interpreter, but that the attorney told him "not to talk." Martinez was not asked, and he did not volunteer, as to whether he would have testified at trial if he had a Triqui interpreter.

Martinez also testified that he had not had sex with I.C. and had only "hugged" her and touched her arm. (This testimony contradicted what Martinez had told the police during his interview and what his lawyer had argued at trial.) When asked, Martinez had no explanation for why his sperm was found inside I.C.'s vagina, and he asserted that he had never seen proof of the DNA results.

Martinez's trial attorney also testified at the evidentiary hearing. He testified that he believed that Martinez was "very, very unsophisticated" when it came to the criminal process. However, he also believed that Martinez was able to understand

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[5] Martinez also raised a third claim related to his trial attorney's failure to file a notice of appeal or to meaningfully consult with Martinez about his right to file a direct appeal. The superior court granted relief on this claim and Martinez was allowed to submit a late-filed direct appeal with this Court. *See* Court of Appeals File No. A-13049.

what happened during the proceedings. He testified that one of the Spanish interpreters told him that she thought Martinez understood what was going on during the trial.

That same Spanish interpreter also testified at the evidentiary hearing. She testified that she believed that Martinez was able to understand her during trial, and that he had responded affirmatively when she asked him if he could understand her. According to the interpreter, Martinez's answers to the questions he was asked during trial were logical and made sense.

Following the evidentiary hearing, the superior court issued a thirty-one page written decision in which the court denied Martinez's claims related to the Spanish interpretation at trial. After summarizing the proceedings and the testimony at the evidentiary hearing, the court found Martinez's claim that he was unable to understand the trial court proceedings "not tenable" in light of Martinez's prior statements and behaviors. The court focused, in particular, on Martinez's statements and behaviors at the police interview, at trial, at sentencing, and at the post-conviction relief hearing, which the court found demonstrated that Martinez had a sufficient level of understanding. The court noted that it had repeatedly observed Martinez during the evidentiary hearing "beginning his answers *during* the Spanish translations of the questions and *before* hearing the Triqui translations." Based on these findings, the superior court rejected Martinez's claim that he had been deprived due process because he did not have a Triqui interpreter at trial.

The superior court also rejected Martinez's claim that his trial attorney was ineffective for failing to secure a Triqui interpreter. The court did not rule on whether the attorney was incompetent in failing to secure a Triqui interpreter. Instead, the court ruled specifically that there was "no reasonable possibility" that the outcome of Martinez's trial would have been different if his attorney *had* secured a Triqui interpreter. In making this finding, the court emphasized that Martinez's current version

of events — that he did not have sex with I.C. — was inconsistent with the physical evidence.

This appeal now follows.

Martinez's arguments on appeal

Martinez raises two arguments on appeal. First, Martinez asserts that the superior court violated Alaska Judicial Canon 3B(12) by conducting what Martinez claims was an "independent investigation" into facts that were not in evidence. Martinez asserts that the superior court's actions created an appearance of bias, requiring reversal of the court's order and a reassignment of the case to a different judge.

Second, Martinez argues that the superior court erred when it rejected his ineffective assistance of counsel claim. Martinez argues that he was prejudiced by the failure to secure a Triqui interpreter and that the superior court erred in failing to rule on the performance prong of the ineffective assistance of counsel claim.

(Notably, Martinez does not challenge the superior court's rejection of his due process claim — that is, he does not directly challenge the superior court's finding that he understood Spanish well enough to satisfy the requirements of due process.)

Did the superior court conduct an "independent investigation" into facts that were not in evidence, violating the Code of Judicial Conduct?

The Alaska Code of Judicial Conduct establishes standards for the ethical conduct of judges. The text of the canons and sections that make up the Code govern the conduct of judges and are binding upon them.[6] Judicial Canon 3B(12) provides that "[w]ithout prior notice to the parties and an opportunity to respond, a judge shall not

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[6] Alaska Code Jud. Conduct Preamble.

engage in independent *ex parte* investigation of the facts of a case."[7] Martinez argues that the superior court violated this canon by referring to Martinez's arraignment and sentencing allocution in its post-conviction relief order. We find no merit to this claim.

Contrary to Martinez's assertions, both the arraignment and the sentencing allocution were part of the record before the superior court. As the State points out, in his second amended post-conviction relief application, Martinez moved the superior court to "incorporate all of the court records in 3AN-10-7995 CR as part of the record," and the superior court did incorporate those records in an October 2016 order. Martinez also submitted various transcripts to the superior court, including a transcript of the sentencing hearing. Moreover, as Martinez acknowledges, the post-conviction relief judge had independent knowledge of the sentencing allocution because he was the same judge who had presided over Martinez's trial and sentencing and had personally heard the allocution.[8] Thus, both the arraignment and the sentencing allocution were properly before the court and could be considered as part of its analysis of Martinez's post-conviction relief claims.

Martinez's case is therefore distinguishable from *Vent v. State*, which Martinez relies on in his briefing.[9] In *Vent*, the post-conviction relief judge rejected the applicant's claim that his trial counsel had been ineffective in his efforts to introduce

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[7] Alaska Code Jud. Conduct Canon 3B(12) (emphasis added).

[8] *Cf. Plyler v. State*, 10 P.3d 1173, 1175-76 (Alaska App. 2000) (holding that a judge could not be peremptorily challenged by a post-conviction relief applicant because the same judge presided over the applicant's trial, in part because it is useful for a judge hearing an ineffective assistance of counsel claim to have witnessed the counsel's performance).

[9] *Vent v. State*, 288 P.3d 752 (Alaska App. 2012).

expert testimony at trial.[10] In doing so, the post-conviction relief judge relied on his own independent research of materials outside the record. The outside research included court records of cases from other jurisdictions in which the expert witness had been involved.[11] Based on this research, the judge declared that the expert had been "less than candid" in his testimony at the criminal trial and evidentiary hearing.[12] Because the applicant had no notice of the judge's independent research, the applicant did not have any opportunity to argue that the judge's findings were mistaken or based on inadequate information.[13]

On appeal, the applicant argued that the judge's decision to engage in extensive independent research and extrajudicial factfinding regarding the expert's involvement in other cases without giving the parties notice or an opportunity to be heard gave rise to an appearance of bias in favor of the State.[14] This Court agreed. Concluding that a reasonable person would question whether the judge made an impartial decision on the applicant's claims, this Court vacated the judgment and remanded the case for further post-conviction relief proceedings in front of a different judge.[15]

Here, in contrast to *Vent*, the parties had notice of the materials that the court would rely on. Indeed, the parties were responsible for submitting those materials

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[10] *Id.* at 754-55.

[11] *Id.*

[12] *Id.* at 755.

[13] *Id.* at 756.

[14] *Id.* at 755.

[15] *Id.* at 757-59.

to the court.[16] In other words, there was no "independent research" by the judge in this case.

Martinez's true complaint appears to be that the superior court did not expressly tell the parties that it might rely on parts of the record that were not directly discussed by the parties in their pleadings or at the hearings. We are not aware of any authority requiring the court to do so, although we acknowledge that it is often considered best practice to provide that additional notice to the parties. Providing such notice and allowing the parties an additional opportunity to be heard can help ensure the accuracy of the court's interpretation of the record and eliminate the need for a future motion for reconsideration.[17] But it is not error for a post-conviction relief court to rely on parts of the record already known to the parties. Nor does doing so give rise to an appearance of bias as Martinez claims.

On appeal, Martinez argues that the superior court's description of the arraignment is "slanted in the state's favor." We disagree. Having reviewed the arraignment hearing, we conclude that the court's description of the hearing is reasonably accurate. We also note that the court's description of the arraignment hearing is part of the court's overall discussion of the factual background; it is not part of the court's analysis.

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[16] Alaska R. Crim. P. 35.1(d) ("Affidavits, records, or other evidence supporting [the application's] allegations shall be attached to the application or the application shall recite why they are not attached. The application shall identify all previous proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from the conviction or sentence including any previous applications for post-conviction relief.").

[17] *See* Alaska R. Crim. P. 42(k)(1)(B)-(C) ("A party may move the court to reconsider a ruling previously decided if, in reaching its decision, . . . (B) the court has overlooked or misconceived some material fact or proposition of law; or (C) the court has overlooked or misconceived a material question in the case.").

In sum, we find no basis for Martinez's claim that the superior court's actions gave rise to an appearance of bias, and we therefore reject this claim of error on appeal.

Did the superior court err in finding that Martinez had failed to prove prejudice on his ineffective assistance of counsel claim?

In his application for post-conviction relief, Martinez argued that his trial attorney provided ineffective assistance of counsel when he failed to secure a Triqui interpreter. To prove ineffective assistance of counsel in a post-conviction relief proceeding under Alaska law, a defendant must prove, by clear and convincing evidence, that (1) their attorney's performance fell below the standard of competence expected of an attorney with ordinary training and skill in the criminal law; and (2) that there is a reasonable possibility that, but for the attorney's deficient performance, the outcome of the case would have been different.[18] The first prong of this test is typically referred to as the performance prong; the second prong is typically referred to as the prejudice prong.[19]

Here, the superior court bypassed the performance prong and ruled only on the prejudice prong, finding that Martinez had failed to prove that there was a reasonable possibility that a Triqui interpreter would have resulted in a different outcome at trial. On appeal, Martinez argues that it was error for the superior court to bypass the performance prong. But, as we have explained, a defendant must prove both prongs of

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[18] Alaska R. Crim. P. 35.1(g); *Risher v. State*, 523 P.2d 421, 424-25 (Alaska 1974); *see also Ahvakana v. State*, 475 P.3d 1118, 1122 (Alaska App. 2020).

[19] *See Reinhold v. State*, 2006 WL 3759344, at *2 (Alaska App. Dec. 20, 2006) (unpublished).

the ineffective assistance of counsel test to obtain relief. Thus, if a court finds that one of the prongs has not been met, there is no need for the court to address the other prong.[20]

Martinez also argues that the superior court erred in finding that Martinez had failed to prove the prejudice prong. We find no error. On appeal, Martinez argues that having a Triqui interpreter could have helped the defense better address the language difficulties that occurred during the police interview. But, during the post-conviction proceedings before the superior court, Martinez did not have his Triqui interpreter (or a Triqui expert) review the police interview or provide any additional analysis or insight into the contents of the interview. Nor did he obtain a direct ruling from the superior court on this issue.

Martinez also argues that his ability to assist in his defense was "universally compromised" by the lack of a Triqui interpreter. But the superior court found that Martinez's understanding of Spanish was sufficient to satisfy the requirements of due process, and Martinez does not directly challenge that finding on appeal. There is therefore little reason to believe that Martinez's ability to assist in his defense was "universally compromised" as Martinez claims.

Nor is there any reason to believe that having Martinez testify through a Triqui interpreter would have changed the jury's guilty verdict. As an initial matter, we note that Martinez was never asked at the evidentiary hearing whether he would have testified if a Triqui interpreter had been available. The record is therefore unclear whether Martinez would have chosen to testify if a Triqui interpreter had been available. But, even assuming that he would have testified, we agree with the superior court that the testimony would not have made any difference to the outcome of the trial. As the superior court pointed out, Martinez's testimony at the evidentiary hearing — that he did

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[20] *Larson v. State*, 614 P.2d 776, 780 (Alaska 1980).

not have sex with I.C. — is directly contradicted by the presence of his sperm in I.C.'s vagina; it is also inconsistent with the version of events that he told the police. Given this, we agree with the superior court that there is no reasonable possibility that such testimony would have affected the jury's verdict.

Conclusion

The judgment of the superior court is AFFIRMED.