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

GAVIN HIGGINS, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13132 Trial Court No. 3AN-17-06287 CI MEMORANDUM OPINION No. 7038 — January 18, 2023

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael L. Wolverton, Judge.

Appearances: Margot Knuth and Marilyn J. Kamm, Attorneys at Law, Anchorage, under contract with the Office of Public Advocacy, for the Appellant. Ryan T. Bravo, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Clyde "Ed" Sniffen Jr., Acting Attorney General, Juneau, for the Appellee.

Before: Wollenberg, Harbison, and Terrell, Judges.

Judge TERRELL.

Gavin Higgins appeals the superior court's dismissal of his post-conviction relief application as untimely. Higgins argues that he established a *prima facie* case that he met two exceptions to the statute of limitations — first, that he suffered from a mental disease or defect that precluded him from filing a timely application, and second, that he

had newly discovered evidence that was not known within the statute of limitations. Higgins thus asserts that he was entitled to an evidentiary hearing to establish these exceptions.

For the reasons discussed in this opinion, we reject Higgins's claims, and we therefore affirm the dismissal of Higgins's post-conviction relief application.

Background facts and proceedings

In 2012, Higgins was charged with two counts of third-degree fear assault and one count of driving under the influence of alcohol based on an incident where his vehicle almost struck two teenage girls who were walking by the side of a road.[1] He pleaded guilty to a single consolidated count of third-degree assault and to driving under the influence. He was sentenced on November 16, 2012.

Because Higgins did not appeal his convictions, he had eighteen months to file a post-conviction relief application — *i.e.*, until May 16, 2014.[2] He did not meet that deadline. Instead, on April 24, 2017, nearly three years after the deadline, Higgins filed a *pro se* post-conviction relief application. (Higgins later asserted that he first filed a post-conviction relief application in February 2016, but that it was refused by the clerk of court due to deficiencies. Higgins claims that he then made multiple attempts to file a post-conviction relief application before his application was accepted in April 2017. But even accepting February 2016 as the filing date, Higgins's application was still untimely.[3])

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[1] AS 11.41.220(a)(1)(A) and AS 28.35.030(a)(1), respectively.

[2] AS 12.72.020(a)(3)(A).

[3] A deficient application is generally sufficient to stop the running of the statute of limitations. *Mullin v. State*, 996 P.2d 737, 738-40 (Alaska App. 2000).

In his application, Higgins asserted that he was innocent and that he had three grounds for relief: (1) that he had newly discovered evidence, in the form of screenshots of Facebook messages between him and another person, purportedly showing that the other person was driving the car at the time of the underlying incident; (2) that his plea was involuntary because at the time of the plea, he was on medications that affected his judgment; and (3) that his attorney took advantage of his diminished capacity and told him to plead guilty. Higgins attached photographs of the Facebook messages to his application for post-conviction relief. In these messages — which are out of order and difficult to fully understand — the other person appears to state that, while he may have driven Higgins's car on the *day* of the assault, he was not driving at the *time* of the assault. The court subsequently appointed an attorney to represent Higgins.

The State moved to dismiss Higgins's post-conviction relief application as untimely. Higgins, through counsel, opposed the State's motion to dismiss, claiming that his application fit within two exceptions to the statute of limitations. First, Higgins asserted that he met a statutory exception based on the fact he "suffered from . . . a mental disease or defect that precluded the timely assertion of [his] claim."[4] Second, Higgins asserted that the Facebook messages constituted newly discovered evidence.[5]

Higgins's opposition was accompanied by a personal affidavit. In the affidavit, Higgins set out the factual bases for his claimed exceptions to the timeliness bar.

First, Higgins elaborated on his mental health issues. Higgins asserted that he had several prior mental-health hospitalizations, and in April 2013, he was diagnosed

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[4] *See* AS 12.72.020(b)(1)(A).

[5] *See* AS 12.72.020(b)(2).

by a Department of Corrections clinician with "bipolar I disorder, with psychotic features, [a] history of antisocial personality traits, and a history of chemical dependence." Higgins stated that, later that year, he underwent a neuropsychological examination that indicated he might suffer from bipolar disorder and post-traumatic stress disorder. This examination also recommended the appointment of a guardian or conservator, as he did not appear capable of making informed decisions regarding personal care. (Higgins attached the corroborating examination report to his application.) Higgins asserted that, between 2012 and 2015, he was "committed to a series of assisted living homes" due to his mental health issues, and in 2015, he was released from probation and taken off the drug regimen imposed as a mandatory probation condition.[6] Higgins did not provide any specific information about his mental health after his release from probation in 2015.

Second, Higgins explained the timeline of his new evidence claim. Higgins stated that the relevant Facebook message exchange occurred in late January 2015. Higgins asserted that he then "attempted to lodge several complaints with the Anchorage Police Department," but the department "declined to investigate." He first tried to file a post-conviction relief application in February 2016, but the application was refused as deficient. After "multiple attempts," his application was accepted on April 24, 2017.

The superior court granted the State's motion to dismiss Higgins's application, finding that he had failed to set out a *prima facie* case as to either of the timeliness exceptions.

First, as to Higgins's claim that he satisfied the mental disease or defect exception in AS 12.72.020(b)(1)(A), the court seemed to accept that Higgins had genuine mental health issues, noting both Higgins's own self-reporting of issues in his affidavit

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[6] There is no further information about this medication regimen in the record.

and the results of his neuropsychological assessment. But the court nonetheless concluded that Higgins had failed to establish a *prima facie* case that his mental health issues "prevented him from timely filing his [post-conviction relief application]."

Second, as to Higgins's claim that he satisfied the newly discovered evidence exception in AS 12.72.020(b)(2), the court observed that Higgins had failed to address the time period between when he discovered the new evidence and the date he reportedly first attempted to file a post-conviction relief application: "Higgins does not identify any reasonable efforts that he made to present his PCR claim from January 2015 to February 2016, nor does he provide any explanation as to why he could not make such efforts." The court therefore found that Higgins had failed to satisfy the due diligence requirement of the newly discovered evidence exception to the statute of limitations.

This appeal followed.

Why we reject Higgins's claims

Under AS 12.72.020(a)(3)(A), a criminal defendant who does not appeal their conviction may file for post-conviction relief within eighteen months after the entry of judgment of conviction. Under AS 12.72.020(b)(1)(A) — the mental disease or defect exception — an applicant filing a late post-conviction relief application must "establish[] due diligence in presenting the claim and set[] out facts supported by admissible evidence establishing that the applicant suffered from a physical disability or from a mental disease or defect that precluded the timely assertion of the claim." Further, under AS 12.72.020(b)(2) — the newly discovered evidence exception — an applicant must "establish[] due diligence in presenting the claim and set[] out facts supported by [admissible] evidence" that was not known within the statute of limitations, was not cumulative or impeachment evidence, and establishes the applicant's innocence by clear

and convincing evidence. Common to both exceptions is the requirement of due diligence.

Whether an application for post-conviction relief set forth a *prima facie* case for relief is a question of law that we review *de novo*.[7]

Like the superior court, we accept that Higgins suffered from a "mental disease or defect" within the meaning of that term in AS 12.72.020(b)(1)(A). Higgins presented substantial evidence that, in 2013 — during the eighteen-month period following the entry of his criminal judgment — he received multiple mental health diagnoses and was having sufficient difficulty making informed decisions about his basic care such that a clinician recommended the appointment of a guardian or conservator. To the extent the superior court found that Higgins failed to establish a *prima facie* case that his mental health issues precluded him from filing an application for post-conviction relief within the eighteen-month limitations period, we disagree. When viewed in the light most favorable to Higgins, the record is sufficient at this stage to show that Higgins's mental health issues during that period of time precluded him from timely filing an application for post-conviction relief.[8]

But that does not end the matter. Both statutory exceptions advanced by Higgins require a showing of due diligence in the pursuit of his claims.[9] And Higgins failed to meet his burden of establishing a *prima facie* case of due diligence with respect to either of the statutory exceptions he proposed.

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

[8] *See LaBrake v. State*, 152 P.3d 474, 480 (Alaska App. 2007) (when deciding a motion for summary disposition on the pleadings, a court must accept all well-pleaded factual assertions as true).

[9] *See* AS 12.72.020(b)(1)(A); AS 12.72.020(b)(2).

Although Higgins established that he suffered from a mental disease or defect during the eighteen-month period following his conviction, Higgins presented no evidence that any of his mental health issues hindered his ability to file an application for post-conviction relief after January 2015. Indeed, the record shows that, around this time, Higgins was released from probation, he was no longer residing in assisted living facilities, he had been taken off his medication regimen, and he was able to file requests for investigation with the police after he exchanged messages with the purported driver. Further, Higgins presented no evidence that his mental health issues were ongoing after this point. Without such evidence, it remains unclear why he was not able to pursue his post-conviction relief claims until, at the earliest, February 2016.

Similarly, with respect to the newly discovered evidence exception, the record shows that Higgins obtained the evidence underlying his newly discovered evidence claim in January 2015. Around the same time, as we discussed, he ended probation, departed assisted living, and was taken off his medication regimen. Higgins apparently appreciated the relevance of the message exchange when it happened in late January 2015 because, according to his affidavit, he asked the Anchorage Police Department to open an investigation based on the messages. Notwithstanding his pursuit of this remedy, and his understanding of his asserted legal injury, he did not attempt to file an application for post-conviction relief until over a year later.[10]

Finally, Higgins argues that the court should have applied a "discovery rule" in order to ascertain when the limitations period began to run. Under a discovery

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[10] *See Richardson v. Anchorage*, 360 P.3d 79, 88 (Alaska 2015) (holding that civil plaintiff failed to establish *prima facie* case of mental illness or disability sufficient to overcome the statute of limitations, where the plaintiff's medical records showed that he had explained the basics of his claim to his physicians and thus appreciated the nature of his injuries at that earlier time).

rule, a statute of limitations does not begin to run if the claimant, by exercising reasonable diligence, "could not have [earlier] discovered essential information bearing on his or her claim."[11] But Higgins's claims for post-conviction relief — that someone else was the driver of the vehicle when the assault occurred, that he was on medications at the time of his change of plea, and that his attorney told him to plead guilty — were within his personal knowledge on the date of his change of plea, sentencing, and entry of judgment. Accordingly, there is no basis in this case to depart from the rule, set out in AS 12.72.020, that the statute of limitations began to run from the entry of the criminal judgment.

For these reasons, we conclude that the superior court properly found that Higgins failed to establish a *prima facie* case that he met an exception to the statute of limitations and that Higgins's application was not timely filed given that no exception applied.

Conclusion

The order of the superior court dismissing Higgins's post-conviction relief application is AFFIRMED.

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[11] *Kaiser v. Umialik Ins.*, 108 P.3d 876, 882 (Alaska 2005) (quoting *Abbot v. State*, 979 P.2d 994, 998 (Alaska 1999)).