IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ARIC TOLEN, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13370 Trial Court No. 3PA-11-02804 CI MEMORANDUM OPINION No. 7042 — February 8, 2023

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

Appearances: Olena Kalytiak Davis, Attorney at Law, Anchorage, under contract with the Office of Public Advocacy, for the Appellant. Ann B. Black, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Harbison and Terrell, Judges, and Mannheimer, Senior Judge.[*]

Judge TERRELL.

Aric Tolen appeals the dismissal of his post-conviction relief application from his convictions for first-degree sexual assault and second- and third-degree assault.

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

Tolen's post-conviction relief application alleged that he did not receive effective assistance from the attorney who represented him at trial and from the separate attorney who represented him at sentencing. After an evidentiary hearing, the superior court denied Tolen's post-conviction relief application, concluding that Tolen had failed to establish that he received ineffective assistance from his lawyers.

Tolen now appeals, raising multiple challenges to the superior court's judgment. Because we find Tolen's appellate claims to be without merit, we affirm the superior court's denial of Tolen's post-conviction relief application.

Background facts and proceedings

The facts of Tolen's offenses are fully set out in our decision in his direct appeal.[1] To summarize: In early January 2007, Tolen was living in Wasilla with S.C., who was his girlfriend and the mother of his two young children (a three-year-old boy and a six-month-old girl).[2] On the evening and early morning of January 1 and 2, over the course of several hours, Tolen held S.C. captive at knifepoint while he physically and sexually assaulted her.[3] Tolen interrogated S.C. about her purported unfaithfulness to him, and he repeatedly used his knife to cut S.C. on her legs, foot, and neck when he was dissatisfied with her answers.[4] Tolen also threatened to kill S.C. or to permanently injure her.[5] Much of this conduct took place in front of the couple's three-year-old boy — who,

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1 *Tolen v. State*, 2012 WL 104477 (Alaska App. Jan. 11, 2012) (unpublished).

2 *Id.* at *1.

3 *Id.* at *1-2.

4 *Id.* at *2.

5 *Id.*

the sentencing judge found, was old enough to understand that Tolen was brutally assaulting his mother.[6]

Ultimately, when Tolen went to use the bathroom, S.C. was able to escape and run to a neighbor's trailer.[7] S.C. phoned 911, and police responded to the scene.[8] Tolen was arrested, and S.C. was taken to the hospital.[9]

At his trial, Tolen testified that his sexual activity with S.C. was consensual and that S.C. was a "cutter" who inflicted the knife wounds on herself.[10] The jury convicted Tolen on all counts.[11]

Shortly after Tolen's trial, his trial attorney, Stephen Hale, was transferred to another office of the Alaska Public Defender Agency, so a different attorney, Andrew Weinraub, was appointed to represent Tolen at sentencing. For the crimes of first-degree sexual assault, second-degree assault, and third-degree assault,[12] Tolen received a composite sentence of 85 years with 15 years suspended (70 years to serve).[13] We affirmed Tolen's convictions and sentence on direct appeal.[14]

During the pendency of his direct appeal, Tolen filed a post-conviction relief application in the superior court, and new counsel was appointed to represent him.

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6 *Id.* at *5.

7 *Id.* at *2.

8 *Id.*

9 *Id.*

10 *Id.* at *3.

11 *Id.*

12 *Id.* at *6.

13 *Id.*

14 *Id.* at *8.

Tolen's amended post-conviction relief application raised multiple claims of ineffective assistance of counsel, on the part of both his trial attorney and his sentencing attorney.

Tolen's trial attorney, Hale, died during the prehearing stage of the post-conviction relief litigation, and he was thus unavailable to provide an affidavit in response to Tolen's claims or to testify when the superior court held an evidentiary hearing on those claims.

However, at that evidentiary hearing, Joseph Van De Mark, a supervising attorney from the Office of Public Advocacy, testified as an expert witness in support of Tolen's claims — attacking the performance of both Tolen's trial attorney, Hale, and Tolen's sentencing attorney, Weinraub.

Following the evidentiary hearing, the superior court issued a lengthy written decision rejecting Tolen's various claims of ineffective assistance of counsel and denying his post-conviction relief application.

This appeal followed.

Why we affirm the denial of Tolen's post-conviction relief application

A. The law governing Tolen's post-conviction relief claims

To establish a claim of ineffective assistance of counsel, an applicant for post-conviction relief must show that (1) their attorney's performance fell below the minimum level of competence required of criminal law practitioners (the performance prong), and (2) there is a reasonable possibility that the outcome of the proceeding would have been different but for the attorney's incompetent performance (the prejudice prong).[15]

[15] *Risher v. State*, 523 P.2d 421, 424-25 (Alaska 1974); *State v. Jones*, 759 P.2d 558, 567-68, 572 (Alaska App. 1988).

We defer to the superior court's findings of fact under the "clearly erroneous" standard of review, but we independently assess the court's conclusions of law — in particular, the court's conclusions as to whether an attorney's performance fell below the minimum level of competence required of criminal law practitioners.[16]

B. Tolen has not shown that the superior court abdicated its duty to make independent findings of fact and conclusions of law

Tolen claims that the superior court's written decision denying his post-conviction relief application is simply a recitation of the State's proposed findings of fact and conclusions of law, and that the wording of the decision shows that the court ignored the evidence supporting Tolen's claims and failed to independently evaluate the facts.

A court may adopt attorney-prepared findings of fact and conclusions of law so long as the proposed findings and conclusions "reflect the court's independent view of the weight of the evidence."[17] Moreover, the law presumes that a court has fulfilled its duty to independently decide the issues before it, and a litigant who asserts that a court has acted otherwise bears the burden of proof.[18] The record in Tolen's case does not rebut this presumption.

Tolen is wrong when he asserts that the superior court's order is simply a carbon copy of the State's proposed findings of fact and conclusions of law. A comparison of the two documents reveals that the superior court did not include several sentences and paragraphs found in the State's pleading, and the court's order contains

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[16] *State v. Laraby*, 842 P.2d 1275, 1280 (Alaska App. 1992).

[17] *Jackson v. State*, 31 P.3d 105, 111 (Alaska App. 2001) (quoting *Indus. Indem. Co. v. Wick Constr. Co.*, 680 P.2d 1100, 1108 (Alaska 1984)).

[18] *See Smith v. State*, 484 P.3d 610, 617 (Alaska App. 2021) (discussing the "presumption of regularity," *i.e.*, the presumption that public officials properly fulfill their duties, as applied to the acts of courts).

several paragraphs that are not found in the State's proposed findings and conclusions. The superior court also made significant modifications to the section of the State's proposed order discussing the performance of Tolen's sentencing attorney.

In addition, the record shows that the superior court was given a CD containing the transcripts of Tolen's criminal trial, and the court's written order stated that the court had "considered the arguments and evidence presented."

Given this record, we conclude that Tolen has failed to present any substantial reason to doubt the presumption that the superior court independently evaluated the facts of Tolen's case and reached its own conclusions about the legal significance of those facts.

C. The superior court's ruling that Tolen failed to prove his claims of ineffective assistance of trial counsel

1. Tolen's trial attorney's failure to seek exclusion of all references to Tolen's prior imprisonments, and the attorney's reference in his opening statement to Tolen's criminal history

At Tolen's trial, the judge did not allow the State to introduce any details of Tolen's prior convictions, with the exception of a 2006 incident of domestic violence which the trial judge ruled was admissible under Alaska Evidence Rule 404(b)(4) — a ruling Tolen did not challenge on direct appeal. But in his post-conviction relief case, Tolen argued that his trial attorney, Hale, was incompetent for (1) failing to ask the trial judge to exclude all evidence that Tolen had been imprisoned in the past, and for (2) referring to Tolen's past imprisonments himself in his opening statement.

The superior court found (as a factual matter) that Hale made a tactical decision to allow the jury to hear about Tolen's past incarcerations because this evidence bolstered a portion of the defense theory of the case — the theory that S.C. falsely accused Tolen of assault and sexual assault because she was aware of his criminal record

and believed that, because of his record, Tolen would receive a long sentence for any new felony offense. At the close of the trial, Hale argued that S.C. no longer had any love for Tolen and she knew she would benefit in two ways if Tolen was sentenced to a lengthy term of imprisonment: (1) she would receive public assistance funds for their two young children and (2) she would not have to fight Tolen for custody of the children.

The superior court further found that Tolen had failed to show that Hale's tactic was incompetent — *i.e.*, failed to show that no minimally competent defense attorney would have relied on this tactic.

The superior court's factual finding regarding Hale's deliberate choice of tactics is not clearly erroneous. Early in the proceedings, Hale told the trial judge that evidence of Tolen's past imprisonments was "going to come in anyway" (possibly because Hale had already decided to use this evidence in the defense case). Indeed, Hale later introduced some of this evidence himself. Moreover, we agree with the superior court's legal conclusion that this tactic did not constitute deficient performance.

2. Tolen's claim that his trial counsel was ineffective for delaying the defense opening statement until the prosecutor had concluded the State's case-in-chief

Tolen's counsel opted to defer his opening statement until the start of the defense case. In this appeal, Tolen suggests that his attorney's decision was incompetent because, according to Tolen, there was no good reason for delaying the defense opening statement.

But Tolen never obtained a ruling from the superior court on this claim, so he failed to preserve it for appeal.[19] We therefore need not address it further.

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[19] *See, e.g.*, *Bryant v. State,* 115 P.3d 1249, 1258 (Alaska App. 2005) ("Normally, an appellant may only appeal issues on which he has obtained an adverse ruling from the trial court."); *Mahan v. State*, 51 P.3d 962, 966 (Alaska App. 2002) (same).

3. Tolen's trial attorney's failure to object to the scope of the investigating officer's hearsay testimony regarding S.C.'s complaint of sexual assault

Trooper Michelyn Grigg was the first officer to formally interview S.C. following Tolen's arrest. When Grigg testified at Tolen's trial, the prosecutor asked Grigg to recount key details of the statements S.C. made during that interview.

Initially, Tolen's attorney Hale objected that this proposed testimony was hearsay, and he argued that the testimony was not covered by the "first complaint of sexual assault" doctrine because, before S.C. was interviewed by Grigg, she had already told another trooper that she had been sexually assaulted. But the trial judge overruled these objections, and Hale made no further objection when Grigg proceeded to recount the main aspects of S.C.'s description of the assault.

In Tolen's post-conviction relief application, he argued that any competent defense attorney would have objected to Grigg's testimony on another basis: that Grigg's description of S.C.'s complaint of sexual assault exceeded the permissible scope of the *detail* allowed under the first-complaint doctrine.

The superior court rejected this claim. The court noted that, once the trial judge overruled Hale's objections to Grigg's testimony and allowed Grigg to describe the statements S.C. made during the interview, Hale used this opportunity to elicit the fact that S.C. had made statements to Trooper Grigg that were inconsistent with S.C.'s trial testimony. Based on this, the superior court concluded that Tolen had failed to prove either the performance prong or the prejudice prong of his ineffective assistance of counsel claim.

We question whether the superior court's ruling was fully responsive to Tolen's claim that a competent defense attorney should have objected to the amount of detail that Grigg described in her testimony. The transcript of Trooper Grigg's testimony supports Tolen's argument that the amount of detail described by Grigg exceeded the

bounds of the first-complaint doctrine. Indeed, it appears that Trooper Grigg was reading from a detailed description of her interview with S.C. (either from a previously prepared transcript of that interview, or from her police report).

Nonetheless, we affirm the superior court's ruling because the record supports its conclusion that Tolen failed to show that there was a reasonable possibility that Hale's failure to raise this objection prejudiced the outcome of his case. S.C. was an adult witness who testified at length and in great detail regarding what happened, so Trooper Grigg's description of what S.C. had said did not present the scenario where the testimony of an adult witness is used to bolster and more cogently restate the testimony of an inarticulate child's first complaint of sexual assault or abuse. Moreover, Grigg's challenged testimony took up only approximately seven minutes out of a five-day trial. And Trooper Grigg repeatedly stated that her testimony on this issue was based solely on what S.C. told her. We therefore uphold the superior court's ruling that Tolen failed to show a reasonable possibility that Hale's failure to object affected the verdict.

4. Tolen's claim that his trial attorney failed to adequately prepare for the testimony of the SART nurse who examined S.C. for signs of sexual assault

After the police arrived, S.C. was taken to a hospital where a SART nurse (a sexual assault response team nurse) examined S.C. for evidence of sexual assault. This nurse, Angela Morris, testified at Tolen's trial regarding the results of this exam.

In his application for post-conviction relief, Tolen claimed that his trial attorney, Hale, was so unprepared for Morris's testimony that his cross-examination of Morris amounted to ineffective assistance of counsel. At the post-conviction relief evidentiary hearing, Tolen's expert, attorney Van De Mark, asserted that Hale's cross-examination of Morris was deficient in several ways.

However, as the superior court noted in its decision, most of Van De Mark's criticisms of Hale's cross-examination of Morris consisted of "conclusory statements [that were] not supported by the evidence." The superior court further found that Hale's cross-examination of Morris "addressed the issues that appeared to [support Tolen's] theory of the defense." Thus, the superior court concluded, Van De Mark's criticisms of Hale's performance "failed to overcome the presumption of [Hale's] competence," and these criticisms likewise failed to establish any reasonable possibility that the outcome of Tolen's trial would have been any different if Hale had pursued the avenues of cross-examination that Van De Mark suggested.

The record supports the superior court's resolution of Tolen's claim. In particular, we note that Van De Mark himself conceded that Hale "didn't do a bad job" of cross-examining Morris about the amount of pressure that Tolen would have had to exert on S.C.'s carotid artery if he had strangled S.C. in the manner she reported — and how S.C.'s claim of strangulation was seemingly inconsistent with the fact that Morris failed to find any petechiae in S.C.'s eyes.

Moreover, as the superior court noted in its decision, when Hale cross-examined Morris, he got her to acknowledge (twice) that a SART examination could not establish whether a sexual encounter was consensual.

Finally, even though Van De Mark suggested various ways in which Hale might have cross-examined Morris differently, Van De Mark conceded that even if Hale had cross-examined Morris in these suggested ways, the outcome of Tolen's trial would have been the same.

We therefore conclude that the record supports the superior court's ruling that Tolen failed to establish both the performance and prejudice prongs of his ineffective assistance of counsel claim on this issue.

5. Hale's failure to object to the jury instruction that S.C.'s marijuana use was not relevant to the jury's decision

At Tolen's underlying criminal trial, the prosecutor sought a protective order barring any references to S.C.'s statement to the state troopers that she occasionally used marijuana. Tolen's trial attorney, Hale, told the trial judge that he did not oppose the prosecutor's motion because he did not think that this evidence was relevant.

By telling the judge that evidence of S.C.'s occasional marijuana use was irrelevant to the case, Hale implicitly conceded that there was no evidence that S.C.'s marijuana use had materially impaired her ability to perceive or remember the events at issue in Tolen's trial. The trial judge then granted the prosecutor's request for the protective order.

This issue arose again during the testimony of Nurse Morris. The judge who presided over Tolen's trial allowed the jurors to submit written proposed questions to each witness after the attorneys had completed their examinations of that witness. After Nurse Morris testified that her SART examinations included drug and alcohol screening, two jurors submitted questions asking Morris to describe the results of her drug and alcohol screening of S.C. But the trial judge did not approve these jurors' proposed questions; instead, the judge told the jury that "any drug and alcohol use by [S.C.] is not relevant in this case, and you should not speculate as to that issue at all."[20]

Hale did not object to the judge's rejection of the jurors' proposed questions, nor did Hale object to the judge's instruction to the jury.

In his application for post-conviction relief, Tolen challenged Hale's initial decision to non-oppose the prosecutor's request for a protective order, and he also argued that Hale should have objected to the judge's later ruling and jury instruction in response to the jurors' proposed questions inquiring about S.C.'s possible use of drugs or alcohol.

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[20] *Tolen*, 2012 WL 104477, at *3.

At the post-conviction relief evidentiary hearing, Van De Mark testified that he "could see a lot of reasons" why an attorney in Hale's position would not oppose the prosecutor's pretrial request for a protective order, but he stated that Hale should have altered his position when the two jurors indicated an interest in this topic. Based on Van De Mark's testimony, Tolen argued that Hale should have asked the trial judge to revisit the protective order and allow evidence of S.C.'s occasional marijuana use.

But evidence that S.C. occasionally used marijuana was not relevant unless that evidence could be specifically linked to S.C.'s mental condition at the time of the assaults.[21] And as this Court pointed out when we decided Tolen's direct appeal, there was absolutely no evidence presented at Tolen's criminal trial suggesting that S.C. was under the influence of drugs (or alcohol) at the time of the assaults.[22]

Thus, in order for Tolen to prove that Hale acted incompetently when he failed to ask the trial judge to reconsider the protective order and allow the defense to present evidence of S.C.'s marijuana use, Tolen had to show that there was, in fact, evidence available to Hale which tended to prove, not just that S.C. occasionally used marijuana, but rather that S.C.'s ability to perceive the events at issue was materially impaired by contemporaneous marijuana use.[23]

Tolen's post-conviction relief attorney presented no such evidence. Thus, Tolen failed to show that Hale was ineffective when he failed to object to the trial judge's

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[21] *Compare Dorman v. State*, 622 P.2d 448, 460 (Alaska 1981), *with Moss v. State*, 620 P.2d 674, 676 n.4 (Alaska 1980).

[22] *Tolen*, 2012 WL 104477, at *4.

[23] *See State v. Jones*, 759 P.2d 558, 573-74 (Alaska App. 1988) (holding that when a petitioner for post-conviction relief criticizes their trial attorney's failure to pursue avenues of cross-examination, it is the petitioner's burden to produce evidence "to show . . . that potential witnesses would actually have given favorable testimony, or that additional cross-examination would have weakened the state's case").

instruction to the jury about S.C.'s potential drug use, and when he failed to ask the trial judge to reconsider the protective order.

6. Tolen's claim that Hale failed to adequately prepare for S.C.'s testimony and failed to adequately cross-examine her

The main component of the prosecution's case against Tolen was the testimony of the victim, S.C. In his application for post-conviction relief, Tolen claimed that his trial attorney, Hale, was incompetent for failing to directly confront S.C. with several inconsistencies between her trial testimony and the various statements she gave to the authorities before trial. To support this claim, Tolen relied on Van De Mark's testimony that any competent defense attorney would have "walk[ed]" S.C. through all of these inconsistencies.

The superior court rejected this claim, noting that the content and structure of Hale's cross-examination of S.C. was "a tactical decision for counsel to make." The court found that one factor influencing Hale's decision was the risk that "if [he] were to confront [S.C.] directly[,] she [might] explain the [apparent] inconsistencies away." For this reason, the superior court concluded, Hale chose not to pursue a strategy of directly confronting S.C. with the inconsistencies, but rather to "bring[] out the inconsistencies through [the testimony of] all the witnesses [S.C.] talked to, [thus] plant[ing] the seed that [she was] not a credible witness" and allowing Hale to argue all these apparent inconsistencies in his summation to the jury.

The record supports the superior court's findings. In Hale's summation to the jury, he told the jury that it was obvious that *someone* was lying about what happened that night, and that the jury's task was to figure out "who [was] lying," or at least "who ha[d] more motive to lie."

Hale told the jury that Tolen's trial testimony was fairly consistent with what he told the state troopers immediately following his arrest — but that, in contrast, many aspects of S.C.'s trial testimony were inconsistent with "what she [had previously] told investigators and medical personnel." Hale detailed several of these inconsistencies to the jurors.

This record supports the superior court's finding that Hale chose, as a tactical matter, not to directly confront S.C. with the inconsistencies between her pretrial statements and her trial testimony, but rather to bring out the inconsistencies through the testimony of other witnesses, and then to argue these inconsistencies in his summation.

Tolen argues that if Hale consciously chose this strategy, it was one that no minimally competent defense attorney would have pursued. But the superior court ruled that Hale's strategy was within the range of competence expected of criminal law practitioners, and we agree with the superior court's assessment.

7. Tolen's claim of cumulative prejudice

Tolen argues that even if no single one of Hale's alleged errors was sufficiently prejudicial to warrant reversal of Tolen's convictions, the sum of Hale's errors, taken as a whole, justified the reversal of Tolen's convictions under the doctrine of cumulative error.

"But the doctrine of cumulative error is really a doctrine of cumulative prejudice," and it only comes into play after a defendant has demonstrated that two or more errors actually occurred.[24] There is no cumulative prejudice when a defendant's underlying claims of attorney incompetence have no merit — that is, when a defendant fails to establish the *performance* prong of his ineffective assistance of counsel claims.

[24] *See State v. Savo*, 108 P.3d 903, 916 (Alaska App. 2005).

In all but one instance, we have upheld the superior court's rulings that Tolen failed to prove that Hale's actions and decisions fell below the minimum level of competence expected of criminal defense attorneys. In only one instance have we upheld the superior court's rejection of an ineffective assistance of counsel claim based on Tolen's failure to show that he was prejudiced by his trial attorney's actions. Thus, Tolen's case does not present a situation of "cumulative" prejudice.

D. The superior court's finding that Hale conveyed the State's plea offer to Tolen

One week before Tolen's trial was scheduled to begin, the prosecutor contacted Hale and offered to resolve Tolen's case with a plea bargain. Under the terms of this proposed bargain, Tolen would plead guilty and agree to receive a composite sentence of 20 years' imprisonment. Two days later, Hale responded to this offer in an e-mail to the prosecutor. In his e-mail, Hale told the prosecutor that Tolen "maintains his innocence on the sexual assault [charge]. His position is that it was consensual. He will take a plea to fourth-degree assault. I told him not to hold his breath [waiting for the State to accept this counter-offer]."

At the post-conviction relief evidentiary hearing, Tolen took the stand and declared that Hale never informed him of the prosecutor's proposed plea bargain — that, in fact, Tolen did not even know (before the evidentiary hearing) that Hale and the prosecutor had exchanged e-mails on this subject. And Tolen testified that he would have accepted the prosecutor's offer if he had known about it.

The superior court found that Tolen's testimony on this subject was not credible — that Hale conveyed the State's plea offer to Tolen, and that Tolen rejected it.

Under the "clearly erroneous" standard of review that applies to a lower court's findings of fact, we must defer to the superior court's assessment of Tolen's

credibility.[25] Here, the other evidence presented to the superior court gave the court a reasoned basis for rejecting Tolen's assertion that he was never informed of the State's plea offer. We therefore uphold the superior court's ruling on this claim.[26]

E. The superior court's rejection of Tolen's claims that he received ineffective assistance from the attorney who represented him in connection with his sentencing

The final group of Tolen's claims for post-conviction relief involve the performance of Weinraub, the attorney who represented Tolen in connection with his sentencing. Tolen asserted that Weinraub performed incompetently in various respects, but the superior court rejected these claims because the court concluded that the claims were supported by little more than Weinraub's expressions of regret over the outcome of the sentencing proceedings.[27]

First, Weinraub declared that he should have provided the sentencing court with Tolen's mental health and other records to support an argument in favor of a

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[25] *See, e.g.*, *Booth v. State*, 251 P.3d 369, 373 (Alaska App. 2011).

[26] Tolen also claims that Hale failed to explain to him the applicable law setting out his potential sentencing exposure and failed to adequately explain the strength of the State's case against him and the risks of going to trial. But Van De Mark testified at the evidentiary hearing that the available records offered little basis for him to opine in support of that claim, while noting that if the court found Tolen's evidentiary hearing testimony on this point credible then Hale's conduct was *per se* ineffective. The superior court did not discuss these points regarding Tolen's ineffective assistance claims related to pretrial advisement about taking a plea, implicitly finding Tolen's assertions on this point not credible. The record supports this view of the matter.

[27] *See, e.g.*, *Simeon v. State*, 90 P.3d 181, 185 (Alaska App. 2004) (citing *Dolchok v. State*, 639 P.2d 277, 295 (Alaska 1982), for the proposition that "a defense counsel's negative evaluation of her own performance may be more a reflection of her dedication to her representation of the client, and remorse at a disappointing result, than it is an objective assessment of her representation").

mitigated sentence. But Tolen did not supply the superior court with any such records during the post-conviction relief proceedings. The only evidence pertaining to the contents of Tolen's mental health records was a handwritten note which was contained in the defense attorney's file and was prepared by a defense investigator who examined those records.

According to the investigator's note, the mental health records were "not a big help, [although] not particularly damning." When Van De Mark was asked at the evidentiary hearing whether the defense investigator's note actually suggested that the mental health records would *not* have supported a mitigation of Tolen's sentence, Van De Mark could only answer, "I don't know what's in there."

Tolen bore the burden of proof on this post-conviction relief claim. When a petitioner claims that favorable testimony or evidence existed and any competent defense attorney should have presented it, the petitioner must provide this testimony or evidence to the court, and not simply make speculative assertions that the testimony or evidence was substantially favorable to the petitioner and would have made a difference to the outcome of the underlying criminal proceeding.[28]

Second, Van De Mark criticized Weinraub's failure to seek an adjournment and continuance of the sentencing hearing after it became apparent that the sentencing judge and the prosecutor were in possession of some "write-ups" (prison disciplinary infraction reports) that Tolen had incurred in prison. Van De Mark suggested that the contents of these "write-ups" had potentially influenced the court's sentencing decision, and he declared that any competent defense attorney would have asked for time to study the write-ups and respond to them.

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[28] *See, e.g.*, *Allen v. State*, 153 P.3d 1019, 1024 (Alaska App. 2007); *State v. Jones*, 759 P.2d 558, 574 & n.8 (Alaska App. 1988); *Byford v. State*, 2017 WL 1040352, at *2-3 (Alaska App. Mar. 15, 2017) (unpublished).

But here, again, Van De Mark did not know the contents of the documents at issue. Tolen never presented copies of the write-ups to the superior court during the post-conviction relief proceedings, and Van De Mark testified that he did not know what was in the write-ups. Moreover, Tolen never offered any evidence of what Weinraub might have done to respond to the information in these write-ups. Thus, Tolen's claim that he was prejudiced by Weinraub's failure to seek a continuance of the sentencing hearing remained completely speculative.

Third, Van De Mark asserted that Weinraub should have argued for a lesser sentence based on the fact that this was Tolen's first conviction for a sex offense. But given the facts of Tolen's case, the superior court found that there was no reasonable possibility that such an argument would have affected the sentencing judge's decision in Tolen's case. As the superior court noted:

> Mr. Tolen's expert [Van De Mark] presented a conclusory opinion on what should have been done in this case without applying the facts of the case to the decisions [that Weinraub] made. [Tolen's offenses] were aggravated; this was a domestic violence situation with a kidnapping and sexual assault element, and the defendant was a third-time felon at the age of twenty-two who was on [bail] release and on probation when this offense occurred.

Van De Mark also criticized Weinraub's decision to allow Tolen to participate in a presentencing interview with a presentence investigator from the Department of Corrections. Van De Mark declared that he would have advised Tolen not to participate in such an interview — that, from a defense point of view, there was nothing to be gained from Tolen's participation in the interview.

But the record shows that Weinraub did not counsel Tolen to participate in this interview. Weinraub's testimony (the sole evidence on this point) was that Tolen's

interview with the presentence investigator had already been set up — at Tolen's or Hale's request, or by their agreement — by the time he was assigned to Tolen's case.

Weinraub was present at the interview, but he could not recall any specific advice that he gave to Tolen with respect to participating in this interview. Weinraub testified that he had no recollection of trying to dissuade Tolen from participating in the interview, but he testified that his standard practice was to tell defendants that the decision whether to participate in such an interview was theirs to make.

The superior court found that Weinraub's testimony on this point was credible — *i.e.*, the court found that Weinraub informed Tolen that he could decline to participate in the interview with the presentence report writer, that the decision was Tolen's, and that Tolen voluntarily decided to participate in the interview.

Even assuming for the sake of argument that, as Tolen contends, Weinraub should have affirmatively advised Tolen to refrain from participating in this interview, Tolen failed to identify any statements he made during the presentence interview that would have affected his sentence. Tolen's expert, Van De Mark, did not assert that Tolen was prejudiced by participating in the presentence interview, but rather only that he saw no benefit to Tolen participating in the presentence interview. And Tolen made the same argument in his post-hearing written closing argument. Given this record, Tolen failed to show that he was prejudiced by Weinraub's advice.

Tolen's final claim is that Weinraub failed to adequately prepare Tolen to present his allocution at the sentencing hearing.

At the evidentiary hearing, Van De Mark testified that he suspected Tolen might not have been adequately prepared for his allocution because, a few seconds after Tolen started speaking, he began to insist on his innocence: he disavowed any responsibility for what had happened to S.C., and portrayed himself as the victim of an unjust criminal prosecution. Tolen told the sentencing judge:

> I've got no choice but to stand here in front of you today and ask for a lenient sentence for something I didn't do. I mean, I can't take responsibility nor accept the punishment for something I didn't do. . . . [F]or the rest of my life, I'm going to be devastated by this.

Tolen then proceeded to speak at length about how he had been wronged over the years by various people.

Van De Mark suggested that Tolen had hurt himself by protesting his innocence. But the record of Tolen's sentencing shows that, as soon as Tolen finished speaking, the sentencing judge immediately declared that he would *not* hold Tolen's protestations of innocence against him — because Tolen "[had] every right in the world . . . to maintain his innocence notwithstanding the jury['s] verdict[s]." Nevertheless, the judge noted that even when Tolen discussed matters that were "not directly related to this case," his remarks revealed "a pattern . . . of pointing fingers at everybody but himself, which raises some questions for rehabilitation."

But more importantly for present purposes, Van De Mark conceded that he did not know whether Weinraub made efforts to prepare Tolen for his allocution.

As Van De Mark noted, the very first thing that Tolen said when he began his allocution was, "I wrote something out, but I figured I'd just wing it and see how it goes." Given Tolen's statement about ignoring his written-out remarks, Van De Mark conceded that it was possible that Weinraub "spent days with the guy and then [Tolen] just decided to go off [on his own]." In addition, Van De Mark acknowledged that a defense lawyer cannot stop a client from presenting an ill-advised allocution.

Thus, Van De Mark never directly asserted that Weinraub handled this aspect of the case incompetently. Rather, Van De Mark said only that *if* Weinraub failed to advise Tolen about the allocution, then Weinraub performed incompetently.

When Tolen's post-conviction relief attorney called Weinraub to the stand to respond to Van De Mark's critique, Weinraub testified that he always informs clients about their right of allocution (and their complementary right to let Weinraub speak for them). Weinraub added that he normally does not advise clients (unless they ask) about what they should say during their allocution — except to tell them, "[I]f you're going to speak, be honest, [and] you have to be remorseful." (Weinraub then clarified that he does not advise clients to "be remorseful" if that would mean speaking dishonestly.)

The superior court found that Weinraub's testimony on this subject was credible — that Weinraub *did* advise Tolen about his allocution, and that Tolen then made his own final decision about how to present it. Based on these findings of fact, the superior court rejected Tolen's claim of ineffective assistance of counsel. Because the record supports the superior court's findings of fact, we uphold the court's ruling.

Tolen raises one other claim in this section of his brief — a claim that Weinraub relied on outdated merger law at the sentencing hearing. But Tolen's conclusory briefing of this issue constitutes a waiver of this point.[29]

Conclusion

For the reasons explained in this opinion, we AFFIRM the judgment of the superior court.

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[29] *See Katmailand, Inc. v. Lake and Peninsula Borough*, 904 P.2d 397, 402 n.7 (Alaska 1995).