IN THE COURT OF APPEALS OF THE STATE OF ALASKA

RONALD PAUL RATHBUN SR., Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13438 Trial Court No. 3AN-16-08999 CI MEMORANDUM OPINION No. 7083 — December 27, 2023

Appeal from the Superior Court, Third Judicial District, Anchorage, Dani Crosby, Judge.

Appearances: Doug Miller, The Law Office of Douglas S. Miller, Anchorage, for the Appellant. Elizabeth T. Burke, 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 Terrell, Judges.

Judge TERRELL.

Ronald Paul Rathbun Sr. appeals the denial of his application for post-conviction relief following an evidentiary hearing. We reject his claims of error and affirm.

Background facts and proceedings

Anchorage police found over 32,000 images and videos of nude children and adults, child and adult pornography, and computer-generated child pornography on Rathbun's computer, external hard drive, and flash drive. An Anchorage police technician estimated that over 4,000 of the files met the legal definition of child pornography. Rathbun used the peer-to-peer file sharing software BitTorrent and was therefore also distributing the images.

Rathbun was indicted on one count of distribution of child pornography, a class B felony, and one count of possession of child pornography, a class C felony.[1] Even though the felonies were of different classes, both carried a presumptive sentencing range of 2 to 12 years (although the distribution count required at least 3 years of suspended time and 10 years of probation, while the possession count required only 2 years of suspended time and 5 years of probation).[2]

The State conveyed a plea offer to Rathbun's privately retained attorney. Under the terms of the offer, Rathbun would plead guilty to the distribution count, and the State would dismiss the possession count. Rathbun would agree to an active sentence of at least 10 years and a fine of at least $10,000, admit to two aggravating factors, agree not to propose any mitigating factors or request referral to the three-judge sentencing panel, admit to possessing all of the images and videos the police had found, and forfeit all seized items. The prosecutor stated that if Rathbun did not accept the

[1] AS 11.61.125(a) and AS 11.61.127, respectively. Under AS 11.61.125(e), distribution of child pornography is a class A felony if the defendant has previously been "convicted of distribution of child pornography in this jurisdiction or a similar crime in this or another jurisdiction." Otherwise the offense is a class B felony. Rathbun did not have a record of prior criminal history, so he was convicted of distribution of child pornography at the class B felony level.

[2] Former AS 12.55.125(i)(4)(A) (pre-July 2019); former AS 12.55.125(o) (pre-July 2016).

offer, he would seek indictment on more counts of distribution and possession of child pornography, and he provided a "conservative[]" estimate that there would be thirty counts of both distribution and possession after a second indictment. The prosecutor also set a deadline for the expiration of the offer.

Rathbun's attorney convinced the prosecutor to remove the fine, and, with this change, Rathbun accepted the offer. The superior court sentenced Rathbun to 14 years with 4 years suspended (10 years to serve) and 10 years of probation.

Rathbun filed a timely application for post-conviction relief. He sought to withdraw his plea, alleging that his attorney provided ineffective assistance of counsel. The superior court held an evidentiary hearing, at which Rathbun and his attorney testified. At the conclusion of the hearing, the court issued a detailed written order denying the application.

Based on the allegations made in the application itself and on the arguments of Rathbun's post-conviction attorney, the court construed the application as raising three claims: "(1) that [Rathbun's attorney] failed to investigate the evidence against [Rathbun]; (2) that [Rathbun's attorney] misrepresented the contents of the plea agreement[;] and[] (3) that [Rathbun's attorney] failed to communicate adequately with [Rathbun]." The court found Rathbun's testimony not credible because Rathbun's testimony was inconsistent with the other evidence which included the written copy of the plea agreement that Rathbun signed and the record of the change of plea hearing. The court found the attorney's testimony credible because the attorney's testimony was consistent with the other evidence. The court concluded that Rathbun's attorney provided competent advice.

On appeal, Rathbun raises a number of challenges to the denial of his post-conviction relief application.

Why we reject Rathbun's challenges to the superior court's ruling

To establish ineffective assistance of counsel, a defendant must show that the attorney's performance fell below the standard of the minimal competence expected of an attorney experienced in criminal law.[3] We review the superior court's findings of fact for clear error, and its conclusions as to whether the attorney was ineffective *de novo*.[4]

Rathbun argues that his attorney was ineffective in connection with his advice regarding the State's plea offer, in multiple aspects. He asserts that the attorney: (1) failed to correctly explain the class of offense that he was pleading to, (2) failed to advise him of the correct presumptive sentencing range for the distribution-of-child-pornography count, (3) overestimated the relative seriousness of his conduct, and overestimated the increase to his potential sentencing exposure that might result if the prosecutor indicted on additional counts, leading him to push Rathbun to accept the State's offer, (4) failed to recognize that two proposed aggravating factors did not apply to his offenses, and (5) misunderstood the duration of time that Rathbun's conduct spanned. We examine these contentions in turn.

First, Rathbun asserts that his attorney was ineffective in explaining the class of crime to which he was pleading. At the evidentiary hearing, he testified that he believed he was pleading guilty to a class C felony, not a class B felony. He testified that the "sentencing agreement" he signed said "class C" on it and that he was surprised at the sentencing hearing to learn that he was actually pleading to a class B felony.

But the only document in the record that Rathbun signed regarding his plea deal was a "notice of plea agreement," which did not state the level of crime to which Rathbun was pleading. Rathbun's attorney testified that he reviewed the terms

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[3] *Risher v. State*, 523 P.2d 421, 425 (Alaska 1974).

[4] *Lindeman v. State*, 244 P.3d 1151, 1154 (Alaska App. 2011).

of the plea offer with Rathbun and that he did not misrepresent the class of felony to which Rathbun would be pleading. Rathbun introduced into evidence a copy of the print-out of the State's offer that Rathbun's attorney showed Rathbun when explaining the offer. This document contains handwritten notes of the attorney, one of which says "'B' felony."

The superior court, crediting the testimony of Rathbun's attorney, found that his attorney had not misrepresented the class of felony to which Rathbun was pleading. "When reviewing factual findings we ordinarily will not overturn a trial court's finding based on conflicting evidence, and will not reweigh evidence when the record provides clear support for the trial court's ruling."[5] Having reviewed the record, we conclude that the court's finding is not clearly erroneous.

Rathbun also argues that his attorney incorrectly advised him that the presumptive range for the distribution charge was 5 to 15 years, instead of 2 to 12 years. For support, he points to the presentence report and the superior court's sentencing remarks, which both misstated the presumptive range. He also notes that his attorney stated this incorrect presumptive range in his testimony at the evidentiary hearing on his application for post-conviction relief.

But the attorney also testified that he told Rathbun the presumptive range when he went over the offer with Rathbun. And another handwritten note on the print-out of the State's offer that he showed Rathbun says "max 99 — 2-12." The court also stated the correct range at the change of plea hearing. The post-conviction relief court credited the attorney's testimony and found that the attorney accurately advised Rathbun as to the presumptive range of the distribution count. This finding is not clearly erroneous.

Rathbun argues that his attorney was ineffective because his attorney misunderstood the relative seriousness of his conduct. He argues that his attorney was

[5] *In re Est. of Rodman*, 498 P.3d 1054, 1066 (Alaska 2021) (cleaned up).

overly concerned about the sheer number of files that Rathbun possessed. According to Rathbun, his attorney failed to appreciate that most of the files he possessed were not legally child pornography and that the files that met the legal definition of child pornography were not particularly graphic. He argues that this misunderstanding caused his attorney to provide him incompetent advice about whether to accept the plea offer.

Rathbun's attorney testified that (1) he viewed the files that had been seized, (2) he was already familiar with one of the series of child pornography that Rathbun possessed because of his work on other child pornography cases, and (3) Rathbun did not dispute possessing thousands of images of child pornography. Additionally, the prosecutor in the case said that he planned to indict Rathbun on many more counts if Rathbun did not accept the offer, and Rathbun's attorney testified that, based on his prior experience with this prosecutor, he believed that the prosecutor would do this.

The superior court did not clearly err in crediting the testimony of Rathbun's attorney and in concluding that his investigation of the images and advice to Rathbun based on this investigation were competent.

Rathbun also argues that his attorney was ineffective because he misunderstood the danger posed by indictment on more counts. He notes that, for each additional conviction, AS 12.55.127(d) only required that "some additional term of imprisonment" — *i.e.*, at least one day of imprisonment — be imposed,[6] and argues that his trial attorney did not seem to understand this aspect of the law and significantly overestimated the potential effect of more convictions on his realistic sentencing exposure. But Rathbun did not clearly allege in the superior court that his trial attorney misunderstood AS 12.55.127(d), and the superior court made no findings on the

[6] *Cf. Osborne v. State*, 182 P.3d 1155, 1158 (Alaska App. 2008) (interpreting "some additional term of imprisonment," as used in AS 12.55.127(c)(2)(F), to require "as little as one extra day").

attorney's understanding of the law. The superior court did find that "[b]ecause of the circumstances of the case, the [prosecutor] would not budge on his offer, and the threat of re-indictment on multiple counts of possession and distribution was very real." The court could reasonably find on this record that the attorney's concern about the threat of reindictment on a significant number of additional charges was justified. We therefore affirm the superior court's rejection of the claim before it.

And Rathbun argues that two aggravating factors that the State proposed and he ultimately agreed to — that he knew that his offense involved more than one victim and that his conduct was among the most serious conduct included within the definition of the offense — did not apply to this case.[7] But even if this is correct — an issue which we do not decide — Rathbun's attorney could reasonably conclude that agreeing to these aggravating factors for one conviction would lead to a better result than allowing the State to indict on more counts.

Finally, Rathbun argues that his attorney was ineffective because the attorney misunderstood the duration of time that Rathbun was downloading and distributing child pornography. He notes that, in its sentencing memorandum, the State asserted, without support, that Rathbun had been collecting child pornography for many years and that his attorney did not challenge this assertion. But, as the superior court explained in its decision, any failure to object to this characterization at sentencing had no impact on Rathbun's decision whether to accept the State's plea offer. At the time Rathbun's attorney was evaluating the evidence and advising Rathbun about whether to accept the State's offer, the State had not yet claimed that Rathbun had been collecting child pornography for many years. Accordingly, we reject this claim.

[7] AS 12.55.155(c)(9)-(10).

Why we reject many of Rathbun's claims as unpreserved

On appeal, Rathbun makes a number of additional claims that he did not make in the superior court and that the court therefore did not resolve. He argues for the first time that (1) "it is unclear how late in the whole process" his attorney told him that the distribution count required a minimum suspended sentence of 3 years and a minimum probation term of 10 years; (2) the State's offer to dismiss the possession count was "largely illusory" because the possession count would have merged into the distribution count; (3) there may not have been sufficient evidence that he knew that BitTorrent distributed files and therefore that he might not have been found guilty of the distribution count; (4) his attorney might not have informed him of the burden of proof for aggravating factors or that he had the right to a jury trial on aggravating factors; and (5) his attorney provided incompetent representation at sentencing.

"Both this Court and the Alaska Supreme Court have held that when a party objects to a ruling or other action of the lower court, the party must specify their grounds for objecting, or else the issue is not preserved for appeal."[8] "[B]efore a litigant can invoke the authority of an appellate court to reverse or vacate a trial court's decision, the litigant must demonstrate that they gave the trial judge reasonable notice of their request or objection, and gave the judge a reasonable opportunity to respond to that request or objection."[9]

The requirement that a party obtain a ruling from the trial judge before raising an issue on appeal serves to reinforce the burden of proof in post-conviction relief cases. In post-conviction relief cases, the actions of a trial attorney are presumed to be competent, and the defendant has the burden of rebutting this presumption.[10] "If

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[8] *Pierce v. State*, 261 P.3d 428, 432 (Alaska App. 2011).

[9] *Id.* at 433.

[10] *State v. Jones*, 759 P.2d 558, 569 (Alaska App. 1988).

the record of a post-conviction hearing is silent with regard to an issue . . . , the state has not failed to substantiate its case; to the contrary, the prisoner has failed in his collateral attack on the judgment of conviction."[11]

Rathbun had the opportunity to assert these claims of ineffectiveness in the superior court and to question his attorney on these points when his attorney testified at the evidentiary hearing, but he failed to do so. And, as a result, the superior court did not make findings on these issues. Rathbun has therefore failed to preserve these claims for appellate review.[12]

Conclusion

The judgment of the superior court is AFFIRMED.

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[11] *Id.* at 574 n.8 (quoting *Merrill v. State*, 457 P.2d 231, 234 (Alaska 1969)).

[12] Rathbun also argues on appeal that in assessing his attorney's advice to accept the State's plea offer, the superior court "made much" of the fact that the prosecutor imposed a deadline on his decision whether to accept the plea offer and that this was error. We disagree with characterization that the court "made much" of this fact: it stated twice that there was a deadline, once in the fact section of its order and once in the analysis section. Regardless, Rathbun states in his brief that his attorney "would have been correct in his urgency" if the State's offer was good and that the deadline was only "something of a red herring in the case" because "it was not a good offer." Because we have rejected Rathbun's other claims, we also reject this claim.