IN THE COURT OF APPEALS OF THE STATE OF ALASKA

RORIE C. MILLER, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13664 Trial Court No. 1JU-15-00860 CI MEMORANDUM OPINION No. 7060 — June 14, 2023

Appeal from the Superior Court, First Judicial District, Juneau, Philip M. Pallenberg, Judge.

Appearances: Barbara Dunham, Attorney at Law, under contract with the Public Defender Agency, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Madison M. Mitchell, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Wollenberg, Harbison, and Terrell, Judges.

Judge TERRELL.

Rorie C. Miller appeals the dismissal of his application for post-conviction relief for failure to state a prima facie case entitling him to relief. Miller argues that he presented a prima facie case that his attorney in his underlying criminal cases failed to meaningfully consult with him about a potential appeal. Having reviewed the record,

we agree with Miller that he presented a prima facie case. We therefore vacate the dismissal of his application.

Underlying facts

Miller entered into a plea agreement that resolved three criminal cases and two petitions to revoke probation. He pleaded guilty to second- and fourth-degree misconduct involving a controlled substance, first-degree promoting contraband, and tampering with physical evidence. He also admitted to violating his probation in the two probation revocation cases. Sentencing was largely left open to the court's discretion.

Prior to sentencing, the State proposed multiple aggravating factors and recommended a sentence of 35 years to serve. Miller's sentencing memorandum proposed multiple mitigating factors and requested that his case be referred to the three-judge sentencing panel. He also proposed a sentence of 14.5 years to serve.

At sentencing, Miller presented an expert witness. The superior court found four aggravating factors proposed by the State. The court also found one of the mitigating factors proposed by Miller — that his conviction for second-degree misconduct involving a controlled substance involved only small quantities of a controlled substance[1] — but concluded that this mitigator should "not hugely" impact the sentence. The court declined to refer Miller's case to the three-judge panel. Ultimately, the court imposed a sentence of 25 years with 5 years suspended (20 years to serve). Miller did not appeal this sentence.

Miller filed a timely pro se application for post-conviction relief, and he was subsequently appointed counsel. In his amended application, he argued that the attorney representing him at sentencing unreasonably failed to engage in a meaningful consultation with him about appealing his sentence. He noted the many issues involved

[1] AS 12.55.155(d)(13).

in his sentencing and asserted that any competent attorney would have consulted with him about whether he wanted to appeal his sentence.

The attorney who represented Miller at his sentencing provided an affidavit in which she stated that she did consult with Miller about a potential appeal. Specifically, she asserted:

> My recollection is that Mr. Miller and I were both pleased with the outcome of the sentencing hearing; he received less time than the state recommended, which was surprising given the totality of his conduct. I recall the fight with the judge over the small quantity mitigator, and that I was prepared to appeal if the court had not found the existence of the mitigator. After sentencing, I spoke with Mr. Miller; neither one of us believed that an appeal would result in a lesser sentence. Mr. Miller agreed that there would be no point to a sentence appeal.

Miller responded to this assertion in his own affidavit. He stated, in relevant part:

> 2. I do not recall the conversation with [the attorney] about a sentence appeal post-sentencing, nor do I remember agreeing not to appeal the sentence. I thought that my attorney was appealing the sentence. When I heard nothing further from her, I filed a post-conviction relief application;
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> 3. My priority was that the presumptive term in the MICS 2 case would be reduced as much as possible by the existence of the mitigating factor. I believe my attorney was aware of this. That was part of the reason I took a deal for open sentencing instead of for a set sentence.

The State moved to dismiss Miller's application for failure to state a prima facie case. The State interpreted Miller's statements — that he did not recall the conversation that his attorney alleged had happened and did not remember agreeing not to appeal — to mean that Miller did not remember *whether* the conversation happened or *whether* he agreed not to appeal. Thus, in the State's view, there was one witness (the attorney) saying that she had consulted with Miller about appealing and one witness

(Miller) who did not remember whether the attorney had consulted with him about appealing. The State therefore argued that the only evidence as to whether a consultation occurred was the attorney's statement that it did occur and that Miller had not established a prima facie case for relief.

The superior court held oral argument on the State's motion. After the attorneys completed argument, the court afforded Miller the opportunity to speak. During his comments, Miller discussed the disputed language in his affidavit:

> [T]he whole thing with me saying I don't remember is I don't want to make — I don't want to lie to you guys and tell — and tell the court that oh, yeah, this is what happened, like I'm going to be dead honest with you.
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> It was a while ago and I don't recall exactly what was said, but I know for sure it wasn't explained to me, you know, what I could and couldn't do. . . . So like when I said I don't remember, I'm not saying like oh, well, I just don't remember what she told me. They just didn't explain it to me. And I can't recall exactly what was said, but it wasn't explained to me properly because I mean like the whole reason I went in there and even took the deal trying to get the mitigator was because I was trying to save the rights and took an open sentencing so that I could preserve my rights for appeal.

The superior court denied Miller's application, agreeing with the reasoning of the State. Miller now appeals.

Why we conclude that Miller presented a prima facie case for relief

At the conclusion of a criminal case in the trial court, a defense attorney has a duty to engage in meaningful consultation with the defendant about a potential appeal (1) if the defendant "has given the attorney a reasonable indication that they are interested in appealing, or (2) when there are objective reasons to think that a rational

person in the defendant's position might want to appeal."[2] A defendant is entitled to file a late appeal if the defendant can show that the defense attorney failed to perform this duty and that, but for this failure, the defendant would have filed a timely appeal.[3]

At the motion to dismiss stage of post-conviction relief proceedings, the question is whether the application sets out a prima facie case for relief — that is, whether the application sets out facts which, if true, would entitle the defendant to relief.[4] At this initial pleading stage in the proceedings, the court must view all factual assertions in the light most favorable to the defendant.[5] Whether an application for post-conviction relief sets forth a prima facie case for relief is a question of law that we review *de novo*.[6]

Having reviewed the record, including Miller's affidavit, we conclude that Miller stated a prima facie case for relief. When viewed in the light most favorable to Miller, the assertions in Miller's affidavit that he did not recall the conversation with his attorney about filing a sentence appeal and did not remember agreeing not to appeal are best understood as statements that he did not think he had any conversations with his attorney explaining his appellate rights and that he did not think he had ever agreed not to file an appeal. In context, Miller's affidavit contradicts his attorney's affidavit, which stated that the conversation and agreement had occurred.

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[2] *Harvey v. State*, 285 P.3d 295, 305 (Alaska App. 2012) (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000)).

[3] *State v. Carlson*, 440 P.3d 364, 380 (Alaska App. 2019) (citing *Flores-Ortega*, 528 U.S. at 476-77).

[4] *State v. Jones*, 759 P.2d 558, 565 (Alaska App. 1988).

[5] *Steffensen v. State*, 837 P.2d 1123, 1125-26 (Alaska App. 1992); *see also LaBrake v. State*, 152 P.3d 474, 480 (Alaska App. 2007).

[6] *See Burton v. State*, 180 P.3d 964, 974 (Alaska App. 2008).

Moreover, directly following these assertions, Miller stated that he thought his attorney *was* appealing the sentence. He also stated that one of the reasons he accepted a plea agreement with open sentencing, instead of an agreed-upon sentence, was because he wanted to be able to argue that his sentence should be significantly reduced by the small-quantities mitigator. Viewed in Miller's favor, these statements support Miller's assertion that he intended to appeal his sentence and they more logically follow an assertion that there was no conversation about whether to appeal and no agreement not to appeal, rather than an assertion of lack of memory.[7]

Further, this interpretation of Miller's affidavit is also consistent with his unsworn statements at oral argument. However, because we conclude that the statements in the affidavit themselves are sufficient to state a prima facie case, we need not decide whether Miller's additional unsworn statements could be considered to provide context for the statements in his affidavit.

Conclusion

We VACATE the judgment of the superior court dismissing Miller's application for post-conviction relief, and we remand for further post-conviction relief proceedings.

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[7] *Compare Marrese v. State*, 2008 WL 54155, at *2 (Alaska App. Jan. 2, 2008) (unpublished) (concluding that the statement in the defendant's affidavit that he had "no memory of not wanting to go forward on an appeal" was not sufficient to state a prima facie case because the statement appeared to be solely about "his own thought processes and his own decision-making" but also "acknowledg[ing] that there are times when people say that they have 'no memory' of an event, when, in context, what they actually mean is that they do not think that the event occurred").