IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JASON THOMAS ROGERS,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13706
Trial Court No. 3AN-14-10922 CI

MEMORANDUM OPINION

No. 7056 — May 17, 2023

Appeal from the Superior Court, Third Judicial District, Anchorage, Peter R. Ramgren, Judge.

Appearances: Jay A. Hochberg, Attorney at Law, Ewa Beach, Hawai'i, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Eric A. Ringsmuth, 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 ALLARD.

Jason Thomas Rogers was convicted of multiple counts of sexual abuse of a minor based on evidence that he sexually abused his stepdaughter over a number of years.[1] This Court affirmed Rogers's convictions on direct appeal.[2]

Following the issuance of our decision on direct appeal, Rogers applied for post-conviction relief under Alaska Criminal Rule 35.1. In his amended application, Rogers raised two ineffective assistance of counsel claims.[3] Because Rogers was raising ineffective assistance of counsel claims, his post-conviction relief attorney was required to obtain an affidavit from the trial attorney responding to Rogers's allegations, and the post-conviction relief attorney was required to attach this affidavit to the amended application for post-conviction relief.[4] Alternatively, if the post-conviction relief attorney was unable to secure such an affidavit, the attorney was required to explain in the amended application why the affidavit could not be obtained and to seek the court's assistance in potentially deposing the trial attorney.[5]

Despite this well-established rule under Alaska law, Rogers's post-conviction relief attorney took neither of these actions. Instead, the post-conviction relief attorney filed Rogers's amended application for post-conviction relief without an affidavit from the trial attorney and without any explanation for why the affidavit was not attached or any discussion of the efforts that had been made to secure the affidavit.

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[1] Rogers was also convicted of sexually abusing his stepdaughter's friend during a sleepover.

[2] *Rogers v. State*, 2018 WL 1603435, at *1 (Alaska App. Mar. 28, 2018) (unpublished).

[3] Rogers's application also raised two free-standing claims that he later acknowledged were simply restatements of his ineffective assistance of counsel claims. On appeal, Rogers does not pursue these free-standing claims.

[4] Alaska R. Crim. P. 35.1(d); *State v. Jones*, 759 P.2d 558, 570 (Alaska App. 1988).

[5] Alaska R. Crim. P. 35.1(d); *Jones*, 759 P.2d at 570.

The State subsequently moved to dismiss Rogers's ineffective assistance of counsel claims based, in large part, on the absence of the attorney affidavit. Rogers's post-conviction relief attorney opposed the State's motion to dismiss but still did not provide an affidavit from the trial attorney or an explanation for why the affidavit could not be obtained. The superior court ultimately dismissed Rogers's application for post-conviction relief based, in large part, on the absence of any trial attorney affidavit.

On appeal, Rogers argues that the absence of the attorney affidavit without any explanation for why there was no affidavit rendered his application facially deficient and raised obvious questions about whether his post-conviction relief attorney was providing competent representation. The State agrees that the proper remedy under *Demoski v. State* and our related case law is for this Court to remand Rogers's application to the superior court for proceedings to determine whether Rogers received adequate representation from his post-conviction relief attorney.[6] We agree that the superior court erred and that Rogers's case must be remanded.

In *Demoski v. State*, we explained that:

> When an attorney files an application for post-conviction relief that appears to be facially defective, and when that attorney fails to offer any substantive explanation for why it is not defective, the trial court's dismissal of the application without further action leaves open the possibility that the applicant has not received effective assistance of counsel.[7]

In a footnote in *Demoski*, we made clear that we considered the term "facially defective" to apply only to a narrow category of cases:

> A petition that is "plainly deficient on its face" generally will fall into one or more of the following narrow categories: 1) the claims clearly are procedurally barred; 2) the claims clearly are factually inaccurate (as in *Tazruk*); 3) the claims are unsupported by any evidence or argument; or 4) the

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[6] *Demoski v. State*, 449 P.3d 348 (Alaska App. 2019); *see also Tazruk v. State*, 67 P.3d 687 (Alaska App. 2003).

[7] *Demoski*, 449 P.3d at 351.

> petition alleges ineffective assistance of counsel, but does not contain either the required affidavit from trial counsel or an explanation as to why the affidavit could not be obtained.[8]

The current case falls squarely within the last category. Accordingly, we conclude that a remand is required to determine whether an attorney affidavit can be obtained in this case.[9]

Lastly, we note that the State raises concerns about our *Tazruk/Demoski* line of cases, and argues that we should forgo remands in these types of cases in favor of informing the defendant of their option to file a second application for post-conviction relief alleging that their first post-conviction relief attorney was ineffective (*i.e.*, a *Grinols* application).[10] But the State's arguments overlook the additional administrative and financial burden of litigating a *Grinols* application.[11] The State's arguments also disregard the fact that defendants are not entitled to counsel on a *Grinols* application in the same way they are in their first application for post-conviction relief.[12] Indeed, the *Tazruk*/*Demoski* line of cases applies only to circumstances where the deficiencies of the post-conviction relief application are so extreme that they give rise to serious concerns about the post-conviction relief attorney's basic competency and/or diligence.[13] In all other cases, defendants will be required to file a *Grinols* application

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[8] *Id.* at 351 n.18.

[9] In the interests of judicial economy and efficiency, Rogers's post-conviction relief attorney should also be given the opportunity to cure the other deficiencies in Rogers's application, including the failure to put forward an affidavit from Rogers. *See* Alaska R. Crim. P. 35.1(d).

[10] *See Grinols v. State*, 74 P.3d 889, 894-95 (Alaska 2003).

[11] *See id.*

[12] *Id.* at 894, 896; *see also* Alaska R. Admin. P. 12(e).

[13] *See, e.g.*, *Demoski*, 449 P.3d at 350-51 (explaining that our *Tazruk* remands have been limited to cases where the post-conviction relief application is "plainly deficient on its face" and there are obvious concerns about the attorney's basic competency and

if they believe that they received ineffective assistance of counsel from the attorney litigating their first post-conviction relief application.[14]

The superior court's order dismissing Rogers's post-conviction relief application is VACATED, and this case is REMANDED to the superior court for further proceedings.

diligence); *Vann v. State*, 2016 WL 936765, at *2 (Alaska App. Mar. 9, 2016) (unpublished) (accepting State's concession that case must be remanded under *Tazruk* because the amended application was facially inadequate and the attorney's opposition to the State's motion to dismiss was unresponsive to the State's arguments); *Beshaw v. State*, 2012 WL 1368146, at *6 (Alaska App. Apr. 18, 2012) (unpublished) (remanding under *Tazruk* where counsel did nothing to remedy obvious deficiencies in a pro se post-conviction relief application despite being provided opportunities to do so by the trial court, and the record was silent as to the attorney's efforts to investigate or analyze the claims).

[14] *See, e.g.*, *David v. State*, 372 P.3d 265, 271 (Alaska App. 2016) (concluding that relief under *Tazruk* was not warranted even where there was some doubt concerning counsel's diligence, because the record suggested that counsel investigated the applicant's claims with competence); *Alexia v. State*, 2018 WL 921535, at *3-40 (Alaska App. Feb. 14, 2018) (unpublished) (concluding that relief under *Tazruk* was not warranted because the record showed that counsel actively investigated and litigated the operative timeliness issue); *Van Doren v. State*, 2012 WL 1232610, at *2-3 (Alaska App. Apr. 11, 2012) (unpublished) (concluding that relief under *Tazruk* was not warranted and the regular presumption of attorney competence should apply because record showed that counsel had actively investigated and litigated the defendant's ineffective assistance of counsel claims and had filed an amended application that was not obviously deficient).