IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JESSIE EVAN SERGIE, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13565 Trial Court No. 3AN-16-07436 CR MEMORANDUM OPINION No. 7095 — March 13, 2024

Appeal from the Superior Court, Third Judicial District, Anchorage, Catherine M. Easter, Judge.

Appearances: Michael Horowitz, Law Office of Michael Horowitz, Kingsley, Michigan, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Heather A. Stenson, 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.

On the morning that his trial was scheduled to begin, Jessie Evan Sergie pleaded guilty to a single count of second-degree sexual assault for penetrating an

incapacitated person.[1] But before he was sentenced, Sergie moved to withdraw his plea, arguing that "his attorney failed to file appropriate pretrial motions and resisted developing a litigation strategy for trial as an alternative to pleading," and that, as a result, he lacked confidence in his attorney's ability or willingness to vigorously defend him at trial. Sergie argued that this constituted a "fair and just reason" for plea withdrawal under Alaska Criminal Rule 11(h)(2). After conducting an evidentiary hearing, the superior court denied Sergie's motion.

On appeal, Sergie argues that the superior court misapplied the fair and just reason standard and erroneously held him to an ineffective-assistance-of-counsel standard in denying his motion to withdraw his plea. We conclude that it is unclear from the superior court's ruling whether the court made factual findings under an improper legal framework, or simply concluded that Sergie had not established a fair and just reason that would allow him to withdraw his plea in this case. We therefore remand this case to the superior court so that it may clearly apply the correct legal standard.

Background facts and proceedings

In September 2016, Sergie was charged by complaint with multiple counts of second-degree and third-degree sexual assault for sexually penetrating a woman while she was incapacitated. In October 2017, Sergie was indicted on multiple counts of first-, second-, and third-degree sexual assault for this conduct. Sergie was represented by two different appointed attorneys from the Office of Public Advocacy (OPA) until a third OPA attorney was assigned to his case in October 2017, following his indictment.

Over time, Sergie became dissatisfied with the attorney's representation and sent multiple letters to the court claiming the attorney was ineffective because he had

[1] AS 11.41.420(a)(3).

failed to take certain actions that Sergie requested. In April 2018, the superior court held a representation hearing. After hearing from Sergie and his attorney, the court denied Sergie's request for substitution of counsel.

Four months later (and nearly two years after the charges against Sergie were filed), in August 2018, the court held another representation hearing and pretrial conference. Sergie asked that his case proceed to trial and declined to agree to any further continuances.[2] The court ultimately scheduled the trial for October 2018, a date that was over one year after the attorney had first entered his appearance.

Sergie's attorney moved to continue the trial over Sergie's objections. The attorney stated that, because of the "extensive investigation" the case required, he "would not be providing effective and competent representation to . . . Sergie" if the matter proceeded to trial in October 2018 as scheduled.[3] The court denied the attorney's request to continue the trial.

During the October pretrial conference, Sergie's attorney told the court that he would not be prepared to start trial that month due to discovery issues and his unavailability. The court reset the trial to begin in November 2018.

On the scheduled trial day, Sergie's attorney informed the court that Sergie had decided to enter into a plea agreement with the State. After determining that Sergie was knowingly and voluntarily waiving his right to a trial, the court accepted Sergie's guilty plea to a single count of second-degree sexual assault. As part of the plea agreement, the State dismissed the remaining charges. The parties agreed to a sentence

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[2] *See* Alaska R. Crim. P. 45(d)(2); *Alaska Pub. Def. Agency v. Superior Ct.*, 530 P.3d 604, 607 (Alaska App. 2023).

[3] The attorney told the court that in addition to his general case load, his investigator had retired and he had not been assigned a new one, hindering his trial preparation.

of 25 years with 5 years suspended (20 years to serve), with 5 years of probation. The court scheduled the sentencing hearing to take place at a future date.

Two weeks later, Sergie filed a *pro se* motion seeking to withdraw his plea. He asserted that his attorney "had not done anything that [he] had asked him to do," "didn't try to prepare for [trial]," "went out of his way to manipulate [Sergie] into taking a deal," and "used a tactic of scaring [him] to take a deal."

The court held a representation hearing in January 2019. Because Sergie was still represented by counsel, the superior court rejected his *pro se* motion and instructed Sergie's attorney to file a motion to withdraw the guilty plea on Sergie's behalf. Several months later, in April 2019, a new attorney (from a different section at OPA) entered a limited appearance to represent Sergie in his plea withdrawal request.[4]

In July 2019, Sergie's new attorney filed a motion to withdraw Sergie's plea, arguing that Sergie had only accepted the plea agreement because "his [trial] attorney failed to file appropriate pre-trial motions and resisted developing a litigation strategy for trial as an alternative to pleading."

The State opposed Sergie's motion, arguing that it would be substantially prejudiced if Sergie withdrew his plea because many of the State's witnesses had moved out of the area. The State also argued that Sergie was precluded from arguing that his trial attorney was unprepared for trial since he had refused to consent to a continuance even though his attorney was not yet prepared. In reply, Sergie's counsel stated that due to Sergie's "legitimate lack of confidence that his attorney would adequately represent him at trial, Sergie had little alternative but to enter into an unfavorable plea bargain."

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[4] *See Nelson v. State*, 440 P.3d 240, 248 (Alaska 2019) (concluding that "a defendant is entitled to conflict counsel immediately after raising an ineffective assistance of counsel claim in the context of an attempt to withdraw a plea").

The superior court held an evidentiary hearing, during which Sergie, his trial attorney, and a paralegal for the State testified. Sergie testified that his trial attorney failed to file a number of pretrial motions he requested, which caused him to lose faith in the attorney. Sergie testified that he was unaware of his attorney filing any pretrial motions in his case, and he never met with an investigator for his case or discussed potential witnesses to be interviewed. He also testified that his attorney never discussed trial strategy with him or made him feel like he was part of the decision-making process. Sergie explained that he ultimately accepted the plea agreement because he was concerned his attorney "wouldn't be able to properly represent [him]."

The superior court issued a written order denying Sergie's motion. The court explained that "[e]ven assuming Sergie's attorney should have filed [certain pretrial motions], this failure, in and of itself, does not, as Sergie asserts, constitute a fair and just reason to allow Sergie to withdraw his plea." The court also rejected Sergie's claim that his trial attorney failed to aggressively litigate his case, noting that "Sergie did not allow his attorney the opportunity to take [additional] steps [to prepare for trial] by repeatedly refusing to toll time under Criminal Rule 45."

For these reasons, the court concluded that Sergie had simply changed his mind about pleading guilty and that there was no fair and just reason that would allow him to withdraw his plea.

This appeal followed.

Why we remand for further proceedings

On appeal, Sergie argues that the superior court erred when it denied his request to withdraw his guilty plea. After reviewing the record, we conclude that it is not clear whether the superior court fully understood the scope of its discretion to grant

Sergie's request to withdraw his plea. We therefore remand for further proceedings consistent with this decision.

Alaska Rule of Criminal Procedure 11(h)(2) allows a defendant to seek withdrawal of their plea prior to sentencing in two circumstances: (1) to correct manifest injustice, or (2) for any fair and just reason, within the trial court's discretion, unless the prosecution has been substantially prejudiced by its reliance on the defendant's plea.

Generally, "presentence requests for withdrawal of pleas should be granted liberally."[5] But "[l]iberality does not require . . . that a plea be set aside for no reason at all."[6] "[T]he defendant bears the burden of establishing a fair and just reason for withdrawal of [their] plea."[7] A trial court should consider the totality of the circumstances surrounding the request, including "the delay preceding the request, the extent of prejudice to the prosecution, and the likelihood that the defendant is attempting to manipulate the system to obtain an unfair advantage."[8] We review a trial court's ruling on a defendant's motion to withdraw their plea for an abuse of discretion.[9]

As we have explained, Sergie sought to withdraw his plea based on concerns about the representation provided by his trial counsel and about whether trial counsel would be able to competently represent him at trial (which was scheduled to

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[5] *Wahl v. State*, 691 P.2d 1048, 1051 (Alaska App. 1984).

[6] *Shetters v. State*, 751 P.2d 31, 35 (Alaska App. 1988); *see also Ortberg v. State*, 751 P.2d 1368, 1376 (Alaska App. 1988) ("It is not sufficient that [the defendant] simply changed [their] mind, re-evaluated the evidence against [them], or became more optimistic about [their] chances at trial than [they were] at the time of [their] plea.").

[7] *Wahl*, 691 P.2d at 1051.

[8] *Monroe v. State*, 752 P.2d 1017, 1019 (Alaska App. 1988) (quoting *McClain v. State*, 742 P.2d 269 (Alaska App. 1987)).

[9] *Ningealook v. State*, 691 P.2d 1053, 1055-56 (Alaska App. 1984).

begin on the same day Sergie pleaded guilty). Review of our case law reveals two distinct (although reconcilable) lines of cases that are relevant to whether Sergie's factual assertions establish a fair and just reason to withdraw his plea.

On the one hand are those cases holding that a defendant's mere disagreement with their counsel's strategic decisions or dissatisfaction with their counsel's performance does not create a fair and just reason to withdraw a plea. Emblematic of this approach is *Monroe v. State*.[10] In that case, we noted that "Monroe was represented by a skilled, experienced attorney who spent a substantial amount of time explaining the law and facts to him," and we held that Monroe's "argu[ment] over strategy and tactics with counsel" and his "dissatisf[action] with counsel's performance" were not "fair and just reason[s] for plea withdrawal."[11] We reached this conclusion because "[t]he right to effective assistance of counsel does not encompass the right to reject appointed counsel and have new counsel appointed in the absence of any showing of cause for that change," and "[t]he due process clauses of the state and federal constitutions do not guarantee a 'meaningful relationship' between client and [their] appointed counsel."[12]

Standing alone, *Monroe* could be read as holding that a defendant can never seek withdrawal of their plea based on their disagreement with the decisions of counsel unless they can establish that their counsel was constitutionally ineffective. But a second

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[10] *Monroe*, 752 P.2d at 1020.

[11] *Id.*

[12] *Id.* (citing *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983)).

line of cases — *Love v. State*, *Wahl v. State*, and *Harrison v. State* — make clear that this is not the case.[13]

In *Love*, we held that a complete breakdown in the attorney-client relationship could establish a fair and just reason to allow a defendant to withdraw their plea.[14] In *Wahl*, we concluded that "under appropriate circumstances a defendant's reliance on a mistaken but good faith belief that a sentencing agreement has been made can constitute a fair and just reason for withdrawal of a guilty plea prior to sentencing, even if the mistaken belief is unilateral."[15] And in *Harrison*, we explained that "even in the absence of a showing of ineffective assistance of counsel, the superior court had broad discretion to find a 'fair and just reason' to allow withdrawal of [the defendant's] plea if it accepted [the defendant's] basic assertion that, in initially deciding to plead no contest, he was confused — for whatever reason — as to the [applicable law]."[16]

Broadly speaking, these cases stand for the proposition that when a defendant moves to withdraw their plea prior to sentencing under the fair and just reasons standard based on a complaint about their attorney's representation, they are not required to demonstrate that their attorney's pre-plea performance constituted ineffective assistance of counsel. We have applied the approach of *Love*, *Wahl*, and *Harrison* in a number of unpublished cases.[17]

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[13] *Love v. State*, 630 P.2d 21 (Alaska App. 1981); *Wahl v. State*, 691 P.2d 1048 (Alaska App. 1984); *Harrison v. State*, 860 P.2d 1280 (Alaska App. 1993).

[14] *Love*, 630 P.2d at 24-25.

[15] *Wahl*, 691 P.2d at 1052.

[16] *Harrison*, 860 P.2d at 1285.

[17] *See, e.g.*, *Erdmann v. State*, 2021 WL 2134983, at *2 (Alaska App. May 26, 2021) (unpublished) (defendant's unilateral, good-faith misunderstanding of attorney's description (continued...)

Admittedly, none of these cases definitively resolve the issue presented here. In *Love*, the defendant pleaded guilty after a "complete breakdown" of the attorney-client relationship; in *Wahl*, the defendant pleaded guilty based on his mistaken belief that a sentencing agreement had been reached; and in *Harrison*, the defendant pleaded no contest based on his misunderstanding about the applicable substantive law.

Here, by contrast, Sergie asserted that he pleaded guilty because he was concerned his attorney "wouldn't be able to properly represent [him]" and was not confident in his attorney's preparation for trial. Arguably, this claim appears similar to "dissatisf[action] with counsel's performance," which we held in *Monroe* is not a "fair and just reason for plea withdrawal."[18]

But we have previously considered and rejected that characterization of a nearly identical claim in an unpublished case, *Amos v. State*.[19] Like in this case, the defendant in *Amos* asked the court to discharge his attorney for ineffective assistance of counsel and expressed that there had been an irreparable breakdown in the attorney-client relationship.[20] But, again, like in this case, the superior court denied the defendant's request, concluding that the defendant's attorney had provided adequate representation and there was no basis for providing a different attorney.

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[17] (...continued)
of how pleas worked could qualify as a fair and just reason for withdrawal); *Lockwood v. State*, 1984 WL 908690, at *1-2 (Alaska App. Apr. 4, 1984) (unpublished) (defendant's genuine, but mistaken, belief that he could not proceed to trial after losing evidentiary hearing was a fair and just reason to withdraw plea).

[18] *Monroe v. State*, 752 P.2d 1017, 1020 (Alaska App. 1988).

[19] *Amos v. State*, 2000 WL 530711 (Alaska App. May 3, 2000) (unpublished).

[20] *Id.* at *1.

Shortly after this ruling, the defendant pleaded no contest to one count of robbery and one count of sexual assault.[21] A few weeks later, the defendant moved to withdraw his plea, alleging that his attorney had provided him with ineffective assistance of counsel. The superior court denied his motion.[22]

In his appeal to this Court, the defendant claimed that the superior court had applied the wrong legal standard when it ruled on his motion. He argued that even if his attorney's pre-plea performance was not objectively ineffective, his subjective (*i.e.*, actually personally held) impression that his attorney's ongoing and likely future performance was deficient could constitute a fair and just reason to allow him to withdraw his plea. The State disagreed and urged us instead to "hold that a defendant's subjective perception about the adequacy of their representation does not constitute a fair and just reason for plea withdrawal."[23]

Relying on *Love* and *Harrison*, we rejected the State's argument and agreed with the defendant "that he could establish a fair and just reason to withdraw his plea without showing that his counsel had actually provided ineffective assistance [of counsel]."[24] We explained:

> [A] defendant should not be able to withdraw his plea merely because he alleges that he had no confidence in his counsel. But . . . there are circumstances, not amounting to breakdowns in the attorney-client relationship which can become so extreme that they establish a fair and just reason

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[21] *Id.*

[22] *Id.* at *2

[23] *Id.*

[24] *Id.*

> for plea withdrawal, even when counsel has acted competently.[25]

We explained that we were unable to tell whether the court "adopted the state's contention that a defendant's subjective perception about the adequacy of his representation could never constitute a fair and just reason for plea withdrawal," and we thus remanded for clarification of the court's ruling.[26]

In this case, we are similarly uncertain whether the superior court denied Sergie's motion because it believed that Sergie's complaints about his representation could only constitute a fair and just reason to withdraw his plea if he established the objective inadequacy of the attorney's performance, as opposed to his subjective concerns about his representation. In its opposition to Sergie's motion, the State asserted that Sergie's arguments "look a good deal like a claim of ineffective assistance of counsel," and that Sergie was making "an end-run around the more stringent requirements established in proving ineffective assistance of counsel." The court acknowledged that Sergie claimed he was not arguing ineffective assistance of counsel,[27] but the court nonetheless stated in its ruling that "Sergie's arguments in support of his motion appear to the court to be ineffective assistance of counsel claims."

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[25] *Id.* at *3.

[26] *Id.*

[27] Indeed, at the evidentiary hearing, the superior court sought clarification from Sergie's plea withdrawal attorney about the standard under which Sergie was arguing he should be permitted to withdraw his plea. The plea withdrawal attorney was adamant that Sergie was not arguing that he was entitled to withdraw his plea because his trial attorney was ineffective — rather, that Sergie was only making an argument that his trial attorney's failure to file pretrial motions, and Sergie's resulting lack of confidence in his attorney's ability to adequately represent him at trial, constituted a "fair and just reason" to withdraw his plea.

The court then proceeded to find that Sergie had not established a fair and just reason to withdraw his plea, but the court never mentioned *Love*, *Wahl*, *Harrison*, or *Amos* in its ruling. Instead, relying primarily on *Monroe*, the court rejected Sergie's argument that he was "under pressure from his attorney to enter a plea and did so without adequate consideration of the consequences." And the court noted that it "disagree[d] with Sergie's argument that his attorney failed to aggressively litigate his [case]," finding that, "[t]o the extent Sergie's attorney should have taken additional steps to aggressively litigate his [case], Sergie did not allow his attorney the opportunity to take these steps by repeatedly refusing to toll time under Criminal Rule 45."[28]

It is therefore unclear whether the court ever considered whether Sergie's subjective beliefs about his trial attorney's inability to represent him at trial, if held in good faith, could constitute a fair and just reason to withdraw his plea.

As in *Amos*, we must therefore remand for clarification and further consideration of Sergie's motion to withdraw his plea. If the superior court concluded that a defendant's subjective perception about the adequacy of his representation could never constitute a fair and just reason for plea withdrawal, that ruling would be erroneous and should be reconsidered. At the same time, we acknowledge that the superior court made certain findings that suggest that it may have understood that the defendant's belief in the breakdown in the attorney-client relationship could constitute a fair and just reason for plea withdrawal, but nonetheless rejected Sergie's assertion as a factual matter. For example, the court found that Sergie had "not proven that his attorney's actions made him feel as though he had no alternative but to enter into a plea agreement with the State." However, we are uncertain whether these factual findings were made under the

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[28] We note that, at the time Sergie began to assert his right to a speedy trial, his case had been ongoing for two years, and the trial attorney that was currently representing him had been appointed in his case for almost a year.

proper legal framework, with full understanding of the permissible bases for plea withdrawal at this stage.

We therefore remand this case to the superior court so that it can apply the proper legal standard and clarify its findings (or reconsider its ruling, as necessary).

We also note that, in its written order denying Sergie's plea withdrawal request, the court did not reach the State's argument that it would suffer prejudice if Sergie were allowed to withdraw his plea. If, on remand, the court finds that Sergie was able to establish a fair and just reason to withdraw his plea, then the court must consider whether allowing Sergie to withdraw his plea in this case would result in substantial prejudice to the State.[29]

Conclusion

We REMAND this case to the superior court for further consideration of Sergie's motion to withdraw his plea, consistent with this opinion. The court shall make its findings within 120 days, although this date can be extended for good cause. Within thirty days of the court's ruling, Sergie shall inform this Court of the superior court's ruling, and either party may seek review of the court's decision. We retain jurisdiction.

[29] *See* Alaska R. Crim. P. 11(h)(2) (establishing that "the trial court may in its discretion allow the defendant to withdraw a plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea").