IN THE COURT OF APPEALS OF THE STATE OF ALASKA

SEAMUS M. MCCLOUD, f/k/a Chad Kreftmeyer, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13870 Trial Court No. 1JU-19-00822 CI MEMORANDUM OPINION No. 7103 — May 1, 2024

Appeal from the Superior Court, First Judicial District, Juneau, Amy Mead, Judge.

Appearances: Megan R. Webb, Assistant Public Defender, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Michal Stryszak, 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 WOLLENBERG.

Seamus M. McCloud appeals the superior court's dismissal of his application for post-conviction relief. On appeal, McCloud raises two issues.

First, McCloud argues that his post-conviction relief attorney was facially ineffective under our decisions in *Tazruk v. State* and *Demoski v. State*. Second, McCloud argues that the superior court dismissed his application for reasons other than those stated in the State's motion to dismiss and that he should have been given an opportunity to respond to those alternative reasons before dismissal.

For the reasons explained in this decision, we reject both arguments and affirm the superior court's dismissal of McCloud's application for post-conviction relief.

Background facts

In 2018, Seamus M. McCloud, then known as Chad Kreftmeyer, pleaded guilty to two counts of first-degree promoting contraband pursuant to a Criminal Rule 11 agreement.[1] The State dismissed additional charges as part of the plea agreement.

McCloud subsequently filed a *pro se* application for post-conviction relief, and the superior court appointed an attorney to represent McCloud. McCloud's post-conviction attorney filed an amended application for post-conviction relief arguing that McCloud had received ineffective assistance of counsel prior to his guilty plea. Specifically, the post-conviction attorney alleged that McCloud understood his trial attorney's advice to accept a plea offer as an admission that the attorney would be ineffective at trial.

McCloud's amended application was supported by an affidavit in which McCloud asserted that he only pleaded guilty because he did not believe his trial attorney would provide effective assistance at trial. In particular, McCloud alleged that his attorney's failure to litigate a particular motion, along with the attorney's advice to

[1] AS 11.56.375(a)(1) and (a)(3), respectively.

accept the State's plea offer, led McCloud to believe he would not receive effective assistance of counsel at trial.

McCloud's post-conviction attorney also submitted an affidavit from McCloud's trial attorney. In the affidavit, the trial attorney recounted at length his representation of McCloud. With respect to the plea agreement, McCloud's trial attorney stated:

> a. I did suggest that Mr. McCloud take a plea agreement.
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> b. I thought there was a good chance he would be convicted in both cases. . . .
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> c. I thought Mr. McCloud's risk was more than six years of jail.
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> d. I talked about that analysis with Mr. McCloud several times.
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> e. The offer was for five years. I thought I could get the offer down to four years (which is what ultimately happened), and I thought that his best result was to take an offer which resulted in four years to serve . . . .
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> f. Mr. McCloud is correct that I talked to him about a plea agreement and recommended that he take the offer. However, I did not talk to him only about that course of action. I also talked to him many times about the strengths and weaknesses of the case, and about trial strategies.
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> g. Finally, I did not indicate to Mr. McCloud that if he did not take the [plea offer] I would be ineffective at a trial. I talked to Mr. McCloud about risk analysis — the risk of trial compared to the certainty of a plea bargain.

McCloud's post-conviction attorney asserted that the affidavits showed a factual dispute between McCloud's version of events and the trial attorney's version of events, and she therefore asked the court to schedule an evidentiary hearing to resolve the disputes.

The State asked the court to dismiss McCloud's application for failure to state a *prima facie* case for relief. The State argued that McCloud "never explained what

advice he received that was ineffective," but rather expressed "his own subjective belief that his attorney *would be* ineffective" if the case proceeded to trial. The State also argued that McCloud "failed to establish that his decision to plead would have been different had he received different advice." McCloud's post-conviction attorney opposed the dismissal, arguing that McCloud's application established that his trial attorney was not prepared to represent him effectively and that McCloud would not have entered into the plea agreement had he received effective counsel.

The superior court granted the State's motion to dismiss. The court explained that McCloud was required to present specific allegations to support a finding that his trial attorney was incompetent, and that McCloud's "explanation and surface-level assertions are insufficient to state a prima facie case of ineffective assistance of counsel."

Why we conclude that a remand is not required under Tazruk and Demoski

On appeal, McCloud does not argue that the superior court erred in concluding that he failed to state a *prima facie* case for relief. Instead, McCloud asserts that the record demonstrates that his post-conviction relief attorney was facially ineffective, and that we should therefore remand for further proceedings.

In *Tazruk v. State*, we remanded a post-conviction relief case to the superior court for further proceedings because the post-conviction relief attorney relied on a facially deficient *pro se* application and the record "contain[ed] no indication that Tazruk's attorney ever investigated these claims, sought to adduce support for them through discovery, or sought to reformulate them so that they might survive a motion to dismiss."[2]

[2] *Tazruk v. State*, 67 P.3d 687, 691 (Alaska App. 2003).

We reached a similar conclusion in *Demoski v. State*.[3] In that case, the appointed attorney abandoned a previously-raised claim of ineffective assistance of counsel and filed an amended application that raised a single procedurally barred claim for relief.[4] Then, when the State moved to dismiss the case based on the obvious procedural bar, the attorney filed a non-responsive pleading that provided no substantive argument for why the claim was not barred.[5] As in *Tazruk*, we concluded that further proceedings were required to ensure that the defendant's right to a competent and zealous advocate at the post-conviction relief stage was adequately protected.[6]

As we explained in *Demoski*, and as we recently reaffirmed in *Amarok v. State*, our focus in such cases has been on: "(1) whether the application before the court was 'plainly deficient on its face'; (2) whether the attorney 'sought to defend' the application; and (3) whether the record revealed that the attorney had 'investigated or analyzed the petitioner's claims or potential claims.'"[7]

In a footnote in *Demoski*, we further elaborated on what types of applications qualify as plainly deficient:

> 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 procedural barred; 2) the claims clearly are factually inaccurate (as in *Tazruk*); 3) the claims are unsupported by any evidence or argument; or 4) the petition alleges ineffective assistance of counsel, but does

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[3] *Demoski v. State*, 449 P.3d 348 (Alaska App. 2019).

[4] *Id.* at 349.

[5] *Id.*

[6] *Id.* at 350-51.

[7] *Amarok v. State*, 543 P.3d 259, 263 (Alaska App. 2024) (quoting *Demoski*, 449 P.3d at 350).

> not contain either the required affidavit from trial counsel or an explanation as to why the affidavit could not be obtained.[8]

McCloud's petition was not "plainly deficient on its face," as we defined that phrase in *Demoski*: it was not procedurally barred, or factually inaccurate (as in *Tazruk*), and it was supported by both evidence and argument, including affidavits from both McCloud and McCloud's trial attorney.[9] Furthermore, McCloud's post-conviction relief attorney "sought to defend" McCloud's application in response to the State's motion to dismiss, and the record, including the aforementioned affidavits, reveals that McCloud's attorney investigated and analyzed McCloud's claims.[10]

As we explained in *Amarok*, our rejection of a *Tazruk*/*Demoski* claim does not mean that the appellate attorney's criticisms of the post-conviction relief attorney's performance are necessarily invalid.[11] A litigant who fails to obtain a remand under *Tazruk*/*Demoski* may nonetheless file, and potentially succeed on, a subsequent application for post-conviction relief arguing that their original post-conviction relief attorney was incompetent.[12] "But a *Tazruk*/*Demoski* remand is limited to those situations where the representation is so facially inadequate as to obviate the need to show prejudice."[13] Because the record does not demonstrate facially inadequate representation in this case, we conclude that McCloud is not entitled to a remand under *Tazruk*/*Demoski*.

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8 *Demoski*, 449 P.3d at 351 n.18.

9 *Id.*

10 *Amarok*, 543 P.3d at 263 (quoting *Demoski*, 449 P.3d at 350).

11 *Id.* at 265.

12 *See Grinols v. State*, 74 P.3d 889 (Alaska 2003).

13 *Amarok*, 543 P.3d at 265.

The trial court did not dismiss McCloud's application on grounds not articulated in the State's motion to dismiss

McCloud also argues on appeal that the superior court dismissed his application on grounds that were never articulated in the State's motion to dismiss. He notes that, although a superior court may dismiss an application on grounds that were not raised by the State, the superior court must give the defendant notice and an opportunity to respond before doing so.[14]

We reject this argument because the superior court dismissed McCloud's application for the same reason articulated in the State's motion to dismiss. The State argued that McCloud's application should be dismissed because "[t]he entirety of [McCloud's] affidavit is his own subjective belief that his attorney *would be* ineffective if [McCloud's case] proceeded to trial." The State asserted that "McCloud's subjective belief of the hypothetical situation of his attorney's ineffectiveness at trial does not diminish his attorney's competence in providing advice on accepting the plea." In granting the State's motion, the superior court relied on this same rationale, concluding that McCloud's "personal expectations and impressions" about his attorney's performance were not sufficient to establish a *prima facie* case that his counsel was incompetent.

Because the superior court dismissed McCloud's application for the same reason articulated in the State's motion to dismiss, the superior court was not required to give McCloud notice and an opportunity to respond.

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[14] *See Tall v. State*, 25 P.3d 704, 707 (Alaska App. 2001), *abrogated on other grounds by David v. State*, 372 P.3d 265 (Alaska App. 2016) (holding that a court need not provide a litigant advance notice of its intent to dismiss an application for post-conviction relief when the court grants the dismissal "in response to a motion by the State and for the reasons advanced in that motion").

Conclusion

The judgment of the superior court is AFFIRMED.