IN THE COURT OF APPEALS OF THE STATE OF ALASKA

RONALD F. WYATT, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13947 Trial Court No. 1JU-05-00620 CI MEMORANDUM OPINION No. 7101 — April 10, 2024

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

Appearances: Chris Peloso, Law Offices of Chris Peloso, Juneau, for the Appellant. Kenneth M. Rosenstein, 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.

Ronald F. Wyatt was convicted of first-degree murder and evidence tampering in connection with the death of his wife.[1] This Court, and then the Alaska

[1] AS 11.41.100(a) and AS 11.56.610(a)(1), respectively.

Supreme Court, affirmed Wyatt's convictions.[2] Wyatt also filed an application for post-conviction relief, which the superior court dismissed on the pleadings for failure to plead a *prima facie* case for relief. This Court affirmed.[3]

Wyatt subsequently filed a second application for post-conviction relief, claiming that his first post-conviction attorney was ineffective because he had abandoned Wyatt's litigable claim — that his trial attorney obstructed his right to testify — in favor of a meritless claim. The superior court dismissed Wyatt's second application on the pleadings, but after Wyatt appealed, this Court determined that Wyatt had established a *prima facie* case for relief and remanded for further proceedings.[4]

On remand, the superior court conducted an evidentiary hearing in which multiple witnesses testified, including Wyatt, Wyatt's original trial attorney, and Wyatt's first post-conviction relief attorney. Following the evidentiary hearing, the superior court denied Wyatt's application for post-conviction relief, finding that Wyatt had not established that his trial attorney obstructed his right to testify. Wyatt now appeals the denial of his application, renewing his argument that his trial counsel obstructed his right to testify.

For the reasons explained in this opinion, we affirm the superior court's denial of Wyatt's application for post-conviction relief.

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[2] *Wyatt v. State* (*Wyatt I*), 1997 WL 250441, at *11 (Alaska App. May 14, 1997) (unpublished); *Wyatt v. State* (*Wyatt II*), 981 P.2d 109, 110 (Alaska 1999).

[3] *Wyatt v. State* (*Wyatt III*), 2004 WL 2966177, at *5 (Alaska App. Dec. 22, 2004) (unpublished).

[4] *Wyatt v. State* (*Wyatt IV*), 393 P.3d 442, 448 (Alaska App. 2017).

Background facts and proceedings

In October 1992, Ronald and Diane Wyatt were living in Ketchikan and had been married for seven years.[5] Diane had grown unhappy in the marriage, and after Wyatt had engaged in intimidating behavior, family members became concerned for her safety. On October 22, Diane failed to meet her friend as scheduled and could not be located. After a days-long search, Diane's body was found in the water near Ward Cove; she had blunt force trauma and a gunshot wound to the head, and had been weighted down with two anchors and a chain.

At trial, the State argued that the Wyatts' marriage was falling apart, and that Wyatt killed Diane either because he was a controlling husband who would rather kill her than lose her, or because he would not receive any of Diane's money if she divorced him.[6] The State introduced evidence that, on the night Diane disappeared, a security guard found the Wyatts' car parked near the log sorting yard at Ward Cove and saw a man muddy from the waist down approaching the vehicle and acting nervously. The State also introduced evidence that, approximately one month before Diane's death, Wyatt had told a co-worker — during a discussion about another Ketchikan murder case — that if he were to kill his wife, he would dispose of the body by wrapping it in a tarp and weighting it down. In addition, the State introduced evidence that traces of blood were found in the Wyatts' basement.

Toward the end of Wyatt's trial, after defense counsel presented his final witness and advised the court that Wyatt would not testify, the trial judge conducted a

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[5] The underlying facts are taken from the decisions by the Alaska Supreme Court and this Court on Wyatt's direct appeal. *See Wyatt II*, 981 P.2d at 110-11; *Wyatt I*, 1997 WL 250441, at *1-2.

[6] Shortly before Diane's death, $53,000 had been transferred from Diane's personal accounts into a joint account held by Ronald and Diane Wyatt and a personal account of Ronald Wyatt. *Wyatt II*, 981 P.2d at 111.

colloquy with Wyatt, as required by *LaVigne v. State*.[7] During this colloquy, the judge informed Wyatt that he had the "absolute right to testify" and that the decision was his personally. Wyatt responded that he understood. The court did not expressly confirm with Wyatt that he was waiving his right to testify. Wyatt did not testify in his own defense.

The jury found Wyatt guilty of one count of first-degree murder and two counts of tampering with evidence, and the court imposed a composite sentence of 104 years.[8] We affirmed Wyatt's convictions and sentence on direct appeal,[9] and the Alaska Supreme Court accepted review of Wyatt's case and affirmed his convictions in 1999.[10]

In 2000, Wyatt filed a *pro se* application for post-conviction relief. In his application, Wyatt alleged that his trial attorney had obstructed his right to testify at trial.[11] After the court appointed counsel to represent Wyatt, Wyatt's post-conviction attorney submitted an amended application.[12] The final amended application did not contain the claim that Wyatt's trial attorney had obstructed Wyatt's right to testify, and instead pursued the claim that the trial judge was required, under *LaVigne*, to obtain Wyatt's express waiver of his right to testify.[13]

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[7] *LaVigne v. State*, 812 P.2d 217 (Alaska 1991).

[8] *Wyatt I*, 1997 WL 250441, at *1.

[9] *Id.*

[10] *Wyatt II*, 981 P.2d at 110.

[11] *Wyatt v. State* (*Wyatt IV*), 393 P.3d 442, 443 (Alaska App. 2017).

[12] *Id.*

[13] *Id.* at 444.

The superior court found that Wyatt had failed to set forth a *prima facie* case for post-conviction relief.[14] This Court affirmed, holding that the trial judge had complied with *LaVigne* by confirming that Wyatt understood that the decision to testify was his alone, even though the court did not obtain from Wyatt an express waiver of his right to testify.[15]

Wyatt then filed a second application for post-conviction relief, alleging that his first post-conviction relief attorney was ineffective because he had abandoned Wyatt's initial claim of trial counsel obstruction in favor of a meritless claim that Wyatt did not expressly waive his right to testify.[16]

The superior court dismissed Wyatt's application on the pleadings, but this Court reversed.[17] We determined that Wyatt's second application for post-conviction relief contained "well-pleaded assertions of fact which, if ultimately proved, would establish":

> (1) that Wyatt's first post-conviction relief attorney abandoned a litigable claim (the claim that Wyatt's trial attorney obstructed Wyatt from exercising his right to testify) in favor of a "lack of express waiver" claim that was clearly meritless under existing law, and (2) that the attorney's choice of issues was incompetent — *i.e.*, below

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[14] *Wyatt v. State* (*Wyatt III*), 2004 WL 2966177, at *5 (Alaska App. Dec. 22, 2004) (unpublished).

[15] *Id.* at *3-5 (noting that the critical inquiry under *LaVigne* is whether the defendant understands that the decision to testify is their own personal decision and is not governed by their attorney's advice).

[16] *Wyatt IV*, 393 P.3d at 443. Under *Grinols v. State*, when a defendant files a second application for post-conviction relief alleging ineffective assistance by their first post-conviction relief counsel, the defendant must show, *inter alia*, that their first post-conviction counsel's failure to pursue a particular claim was incompetent, and that if the issue had been litigated, the defendant would have prevailed. *Grinols v. State*, 10 P.3d 600, 619-20 (Alaska App. 2000), *aff'd in part*, 74 P.3d 889 (Alaska 2003).

[17] *Wyatt IV*, 393 P.3d at 443-44.

> the minimal level of competence that we require of criminal law practitioners.[18]

We concluded that Wyatt was entitled to proceed to discovery on this claim, and we remanded his case for further proceedings.[19]

Overview of the evidentiary hearing on remand

On remand, the superior court held an evidentiary hearing, where it heard testimony from Wyatt, Wyatt's son (who was acting as Wyatt's third-party custodian for the duration of Wyatt's trial), Wyatt's trial attorney, and Wyatt's first post-conviction relief attorney.

Wyatt testified that he told his trial attorney several times throughout his trial that he wanted to testify, but that his attorney did not permit him to do so. According to Wyatt, his attorney never informed him that he had a constitutional right to testify, or that he could choose to testify against his attorney's advice.

Wyatt further testified that he was caught by surprise when the trial judge advised him that he had the right to testify.[20] Wyatt noted that, even though his attorney

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[18] *Id.* at 448.

[19] *Id.*

[20] Here is the colloquy that occurred between the court and Wyatt regarding Wyatt's right to testify:

> *Court*: The jury's left the courtroom. Mr. Wyatt, [your attorney] has indicated that he is ready to rest. You understand that you have an absolute right to testify if you wish to testify?
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> *Wyatt*: Yes, I do, sir.
>
> *Court*: You understand that you can take the advice of [your attorney] but ultimately, it's your decision and you make that decision yourself. You understand that?
>
> *Wyatt*: Yes, sir.

advised the court that Wyatt would not testify, the judge never asked him personally if he wanted to testify, and he did not believe he could interject to explain that he did want to testify because he had been admonished by his attorney not to interrupt the judge or speak out of turn.

Wyatt's son, Mark Wyatt, testified that, throughout the trial, Wyatt repeatedly told him that he wished to testify, and never changed his mind about wanting to do so. Mark Wyatt also testified to one specific incident in which he witnessed Wyatt tell his trial attorney that he wanted to testify, and the trial attorney responded, "No, [Wyatt], you're not going to testify."

Wyatt's trial attorney testified that he informed Wyatt of his right to testify, but the attorney could not recall specific details of the conversation. The attorney explained that it was his general practice to tell his criminal defense clients that they had the right to testify and could do so if they wanted, and the attorney believed that he had followed this practice with Wyatt. The trial attorney acknowledged that Wyatt had expressed his desire to testify, but the attorney was opposed to Wyatt testifying. The trial attorney stated that he thought Wyatt understood that he had the right to testify, but that Wyatt had accepted the attorney's advice and chosen not to do so.

Wyatt's first post-conviction relief attorney testified that, during his discussions with Wyatt, Wyatt was emphatic that he had wanted to testify and that his trial attorney did not allow him to do so. But the post-conviction attorney abandoned the trial counsel obstruction claim because he had misread *LaVigne*. The post-conviction attorney conceded that Wyatt's application for post-conviction relief would have been significantly stronger if it had been based on a claim that was legally correct.

After consideration of this testimony, the superior court denied Wyatt's application for post-conviction relief. In a written order, the superior court explained that Wyatt had indeed established that his first post-conviction relief attorney was incompetent for pursuing a meritless argument instead of Wyatt's claim of attorney obstruction.

But to succeed on a claim of ineffective assistance of post-conviction counsel, Wyatt needed to demonstrate that, had his claim of attorney obstruction been pursued in the first application for post-conviction relief, the claim would have been successful.[21] As the superior court acknowledged, this question "call[ed] for the court to evaluate the merits of the obstruction claim" — *i.e.*, the court was put in the same position it would have been in if the claim were being brought for the first time. On this question, the superior court found that Wyatt's trial attorney was a more credible witness than Wyatt, and found that Wyatt had failed to establish that his trial attorney obstructed his right to testify.

Wyatt now appeals the denial of his second post-conviction relief application.

Why we uphold the superior court's denial of Wyatt's application for post-conviction relief

On appeal, Wyatt argues that the superior court erred in finding that his trial attorney did not obstruct his right to testify.[22]

In *LaVigne v. State*, the Alaska Supreme Court explained that "[t]he constitutional right to testify is both personal to the criminal defendant and fundamental to the dignity and fairness of the judicial process."[23] The court recognized that "[t]he ultimate decision whether to exercise the right therefore rests with the defendant, not

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[21] *See Grinols*, 10 P.3d at 619-20.

[22] In its brief on appeal, the State argued that some or all of Wyatt's claim regarding his right to testify was procedurally barred due to various preclusion doctrines. In his reply brief, Wyatt clarified that his argument was limited to a single claim that his first post-conviction relief attorney was ineffective for failing to argue that his right to testify was usurped by his trial attorney. At oral argument, the State indicated that it was no longer pursuing its preclusion argument.

[23] *LaVigne v. State*, 812 P.2d 217, 219 (Alaska 1991).

with defendant's counsel."[24] Thus, the defendant's attorney may not usurp the defendant's decision whether to testify.[25] To be entitled to relief on a claim of trial attorney obstruction of the right to testify, a defendant bears the initial burden of showing that their attorney obstructed their decision to testify.[26]

We addressed a similar obstruction issue in *Hurn v. State*.[27] In *Hurn*, the defendant filed an application for post-conviction relief, claiming that his trial attorney had obstructed his right to testify.[28] The superior court held an evidentiary hearing on this claim.[29] The defendant testified that he wanted to take the stand, but his trial attorney would not allow him to do so, while the trial attorney testified that the defendant was hesitant to take the stand and appeared to accept the attorney's advice not to testify.[30] The superior court resolved the factual conflict against the defendant and rejected the obstruction claim, finding that the defendant had not met his burden of

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[24] *Id.*

[25] *See id.* at 219-20.

[26] *See id.* at 220-21; *see also Hurn v. State*, 872 P.2d 189, 197-98 (Alaska App. 1994). In his opening brief, Wyatt argued that the State bore the burden of proving Wyatt validly waived his right to testify. However, as Wyatt clarified in his reply brief, his argument on appeal is limited to a single claim of trial attorney obstruction. When a defendant brings a claim of trial counsel obstruction under *LaVigne*, the burden (of proving that the error was not harmless beyond a reasonable doubt) does not shift to the State until the defendant has first established that their right to testify was obstructed, and that they would have offered relevant testimony had they been allowed to testify at trial. *LaVigne*, 812 P.2d at 220-21; *see also State v Reich*, 1999 WL 34002411, at *2 (Oct. 20, 1999) (unpublished).

[27] *Hurn*, 872 P.2d at 193-98.

[28] *Id.* at 193.

[29] *Id.* at 196-97.

[30] *Id.*

establishing that his attorney had obstructed his right to testify.[31] We affirmed, concluding that the court's factual findings were not clearly erroneous.[32]

In this case, Wyatt and his trial attorney offered conflicting testimony as to whether Wyatt made the ultimate decision, upon his attorney's advice, not to take the stand. The superior court resolved this factual conflict against Wyatt. The court found that Wyatt's trial attorney was a more credible witness than Wyatt, even though parts of Wyatt's testimony were corroborated "to some extent" by the testimony of Wyatt's son, Mark Wyatt. The superior court further found that, "[a]lthough Wyatt may have expressed a desire to testify," he failed to establish "that he ever made a decision to reject his lawyer's strong advice not to testify, or that he had articulated such a decision to his lawyer."

In making this finding, the superior court referenced the colloquy in which the trial judge advised Wyatt of his right to testify but did not expressly ask Wyatt if Wyatt wanted to testify. The superior court noted that immediately after the colloquy, the trial judge and both attorneys engaged in further discussion on the record about trial logistics, and the court found that, during this time, Wyatt had ample opportunity to express his desire to testify, either by communicating with his attorney or by raising his hand to ask the judge directly.

The superior court also found that Wyatt's trial attorney was "a very careful lawyer," specifically noting that the trial record demonstrated the attorney's attention to detail. The court further noted that, at the beginning of the evidentiary hearing, Wyatt's trial attorney was "extraordinarily careful to ensure that there was a clear ruling" on the record that Wyatt had waived his attorney-client privilege before the attorney would testify as to his representation of Wyatt.

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[31] *Id.* at 197-98.

[32] *Id.* at 198.

Additionally, the superior court found that Wyatt's trial attorney was "unquestionably keenly aware of the then-recent decision of the Alaska Supreme Court in *LaVigne v. State*." The court referenced an on-the-record exchange between trial counsel and the trial judge that occurred immediately before the trial judge informed Wyatt of his right to testify:

> *Court*: I think I have to talk to Mr. Wyatt a little bit. The Supreme Court has said that I have to make sure that he understands it's his choice.
>
> *Defense Counsel*: I've been suggesting to them for years that they do that. I'm glad they finally learned.

The superior court found that "with that familiarity [with *LaVigne*], it is difficult to believe" that Wyatt's attorney, "as careful as he was," would have usurped Wyatt's right to testify, as Wyatt claimed.[33]

As the Alaska Supreme Court has explained, it is the role of the superior court "to judge witnesses' credibility and to weigh conflicting evidence."[34] This Court will affirm the superior court's findings of fact unless we are convinced that a finding is clearly erroneous[35] — *i.e.*, we are left with "a definite and firm conviction . . . that a mistake has been made."[36] We have reviewed the record in this case, and we conclude that the superior court's findings are not clearly erroneous.

We therefore affirm the superior court's decision to deny Wyatt's application for post-conviction relief.

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[33] Indeed, at the evidentiary hearing, Wyatt's trial attorney testified that he had been involved in the litigation of *LaVigne*.

[34] *Knutson v. Knutson*, 973 P.2d 596, 599-600 (Alaska 1999).

[35] *Hurn*, 872 P.2d at 198.

[36] *Noyakuk v. State*, 127 P.3d 856, 864 n.7 (Alaska App. 2006) (quoting *Geczy v. LaChappelle*, 636 P.2d 604, 696 n.6 (Alaska 1981)).

Conclusion

The judgment of the superior court is AFFIRMED.