NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

RICHARD GERALD POCOCK, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11917 Trial Court No. 3PA-10-2582 CI MEMORANDUM OPINION No. 6463 — May 17, 2017

Appeal from the Superior Court, Third Judicial District, Palmer, Eric Smith, Judge.

Appearances: Brooke Berens, Assistant Public Advocate, and Richard Allen, Public Advocate, Anchorage, for the Appellant. Terisia K. Chleborad, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge SUDDOCK.

After unsuccessful plea negotiations on charges of second- and fourth-degree misconduct involving a controlled substance (MICS), Richard Gerald Pocock

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[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

proceeded to trial and was found guilty. Pocock then filed a petition for post-conviction relief, arguing that his trial attorneys were ineffective for failing to inform him of one of the State's pretrial change of plea offers. After an evidentiary hearing, the superior court found that Pocock had in fact received the State's offer after some delay, and denied the petition.

Pocock now challenges this ruling on appeal. For the reasons explained below, we affirm the judge's dismissal of Pocock's petition for post-conviction relief.

Factual and procedural background

The State charged Pocock with three counts of second-degree MICS and three counts of fourth-degree MICS for selling small quantities of heroin to a confidential informant.[1] Prior to trial, Bruce Brown of the Public Defender Agency was appointed to represent Pocock.

The State sent Brown a plea offer on December 29, 2008. Under this offer, Pocock would plead guilty to one count of attempted second-degree MICS (a Class B felony) and the case would proceed to open sentencing. But Brown was by then aware of a potential conflict of interest, so he did not convey this offer to Pocock. The Public Defender Agency informed the State about this conflict. The State withdrew its offer two days later.

Krista Maciolek of the Office of Public Advocacy began representing Pocock in January of 2009. On January 13th, the State renewed the earlier offer that it had initially presented to Brown on December 29th. On February 19th, Maciolek met with Pocock and discussed the State's offer with him; after the two met, Maciolek emailed the prosecutor to inform him that Pocock had rejected the offer.

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[1] AS 11.71.020(a)(1) and AS 11.71.040(a)(3)(A), respectively.

The case proceeded to trial, and the jury found Pocock guilty of all charges. The judge merged the fourth-degree MICS convictions with the second-degree MICS convictions. Pocock requested a mitigated sentence based on either the "least serious" or the "small quantity" mitigator.[2] The court rejected both mitigators and imposed concurrent sentences of 15 years to serve. Then, on appeal, this Court reversed the trial court's rejection of the "small amounts" mitigator.[3] The superior court thereafter resentenced Pocock to a composite term of 15 years' imprisonment with 7½ years suspended.

Pocock subsequently filed a petition for post-conviction relief. He claimed that his attorneys each provided him with ineffective assistance of counsel because neither had informed him of the State's offer of a plea to attempted second-degree MICS with open sentencing. At an evidentiary hearing on the petition, defense attorney Brown testified and agreed that he had not communicated the State's offer to Pocock. Brown's explanation was that the Agency was investigating a potential conflict of interest and, until that issue was resolved, he could not advise Pocock on the offer.

Pocock's second attorney, Krista Maciolek, testified that she had "definitely told [Pocock] about the [State's renewed] offer." Maciolek's notes of her February 19th meeting with Pocock reflected that she reviewed the State's offer with him, as well as his potential exposure if he decided to proceed to trial. After this advisement, Pocock told Maciolek that he was unwilling to accept any offer of more than 2 years to serve.

Pocock testified that neither of his attorneys had informed him of the State's offer. He claimed that he "would have definitely considered it and most likely taken the

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[2] AS 12.55.155(d)(9) & (13).

[3] *See Pocock v. State*, 270 P.3d 823, 826 (Alaska App. 2012).

offer." Pocock acknowledged that he had intentionally refrained from disclosing an out-of-state felony conviction to his attorneys.

The judge denied Pocock's petition, finding that Maciolek was credible and Pocock was not. And because Maciolek informed Pocock of the State's offer, the judge concluded that Pocock had suffered no prejudice from Brown's earlier failure to communicate the offer.

This appeal followed.

Why we affirm the denial of Pocock's petition for post-conviction relief

On appeal, Pocock challenges the trial court's finding that Maciolek relayed the State's offer to him at their February 19th meeting. We review a trial judge's factual findings for clear error.[4] Under this standard, this Court will reverse "only when, after reviewing the whole record, [the Court is] left with a definite and firm conviction that the trial court erred in its ruling."[5]

The judge's finding is amply supported by the record. We give great deference to a trial court's decision on credibility of witnesses because "that court has the opportunity to hear testimony when it is given and to observe the demeanor of witnesses who appear before it."[6]

Having reviewed the record, we perceive no basis for disturbing Judge Smith's credibility determination. Maciolek's contemporaneous notes of her February 19th meeting with Pocock show that she had discussed the State's offer with Pocock and then immediately emailed the prosecutor that Pocock rejected the offer. We conclude

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[4] *Meyer v. State*, 368 P.3d 613, 617 (Alaska App. 2016).

[5] *Hewitt v. State*, 188 P.3d 697, 699 (Alaska App. 2008).

[6] *Figueroa v. State*, 689 P.2d 512, 513 (Alaska App. 1984).

that the judge's findings that Maciolek informed Pocock of the offer, and that Pocock rejected it, were not clearly erroneous.

We note that Brown testified that his potential conflict of interest prevented him from communicating the plea offer to Pocock until the conflict was resolved. We disagree; Brown had a duty to convey all formal plea offers.[7] Here, Brown should have informed Pocock of the offer, and also should have told Pocock that he could not advise Pocock regarding the offer due to a potential conflict of interest.

But the fact that Maciolek later communicated the same offer to Pocock rendered Brown's earlier failure to communicate it harmless. We accordingly agree with the trial court that Pocock is not entitled to post-conviction relief based on Brown's failure to tell him of the offer.

Conclusion

We AFFIRM the judgment of the superior court.

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[7] *Missouri v. Frye*, 566 U.S. 133, 145 (2012).