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

PETER JASON CHUNAK, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12051 Trial Court No. 3DI-10-137 CI MEMORANDUM OPINION No. 6464 — May 17, 2017

Appeal from the Superior Court, Third Judicial District, Anchorage, John Suddock, Judge.

Appearances: Olena Kalytiak Davis, Attorney at Law, and Richard Allen, Public Advocate, Anchorage, for the Appellant. Diane L. Wendlandt, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard, Judge.

Judge ALLARD.

This is an appeal challenging the superior court's denial of an application for post-conviction relief. For the reasons explained here, we affirm the superior court's decision.

Peter Jason Chunak and Peter Yukluk were indicted for first-degree murder, second-degree murder, and first-degree burglary based on the State's allegations that they set fire to a house, ultimately killing the occupant.[1] The two cases were severed for trial, with Chunak's trial occurring first.

On the fifth day of Chunak's trial, after the State had presented ten of its witnesses, the parties informed the trial judge, Superior Court Judge Donald Hopwood, that they had entered into a plea agreement. Under the plea agreement, Chunak would plead guilty to one count of murder in the second degree on the theory that he had caused the victim's death by acting with extreme indifference to the value of human life. The remaining charges would be dismissed. The parties agreed that Chunak's sentence would be 30 years with 15 years suspended (15 years to serve), followed by 10 years of probation.

After an extensive colloquy in which the judge confirmed that Chunak understood that any plea he entered would be final, and after giving Chunak additional opportunities to speak with his attorney, Judge Hopwood accepted the plea as "knowing, intelligent, and voluntary." Sentencing was scheduled for four months later.

Two weeks after the change of plea, Chunak notified his trial attorney that he wanted to withdraw his plea. However, Chunak's attorney did not file the motion to withdraw Chunak's plea until more than three months later. In the interim, Chunak's co-defendant went to trial and was acquitted.

The attorney affidavit accompanying the motion to withdraw Chunak's plea made clear that the delay in filing the motion was caused by the attorney. The attorney stated that she had delayed filing the motion because she wanted to make sure that

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[1] *Chunak v. State*, 2010 WL 3273923, at *1 (Alaska App. Aug. 18, 2010) (unpublished).

Chunak truly wanted to withdraw his plea and because of her own workload, which included back-to-back unclassified felony trials.

After reviewing the recording of the change of plea and the parties' pleadings, Judge Hopwood denied Chunak's motion to withdraw his plea. The judge found that Chunak's plea was voluntary and that Chunak did not meet his burden of establishing a fair and just reason for withdrawing it. The judge concluded that Chunak was merely suffering "buyer's remorse," a condition exacerbated by his co-defendant's acquittal. The judge also found that the State would be substantially prejudiced if forced to try the case for what would effectively be the third time.

Chunak appealed the denial of his motion to withdraw the plea to this Court.[2] We affirmed the judge's determination that Chunak failed to establish a fair and just reason to withdraw his plea.[3]

Chunak then filed an application for post-conviction relief, alleging that his trial attorney provided ineffective assistance of counsel by (1) coercing him into pleading guilty; and (2) delaying filing his motion to withdraw the plea for more than three months.

Superior Court Judge John Suddock held an evidentiary hearing on these two claims. After the evidentiary hearing, Judge Suddock rejected Chunak's claim that he was coerced into his mid-trial plea, finding that the trial attorney gave good advice with respect to the plea and that she did not cross the line into coercion.

With regard to the delay in filing the motion to withdraw the plea, Judge Suddock found that Chunak's attorney acted incompetently in failing to timely file the motion. However, Judge Suddock also found that Chunak was not prejudiced by this

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[2] *Chunak v. State*, 2010 WL 3273923 (Alaska App. Aug. 18, 2010) (unpublished).

[3] *Id.* at *2.

incompetence. Judge Suddock agreed with Judge Hopwood that Chunak failed to establish any fair or just reason to withdraw his plea — a finding that Judge Suddock determined was "time neutral." In other words, Judge Suddock concluded that Chunak was not prejudiced by the delay because Judge Hopwood's decision would have been the same even if the motion to withdraw plea had been timely filed.

On appeal, Chunak argues that Judge Suddock erred in finding there was no prejudice from the attorney's delay in filing the motion to withdraw plea. (Chunak does not challenge Judge Suddock's ruling with regard to the alleged coercion.)

Because Judge Suddock denied Chunak's post-conviction relief application on the merits, we review his factual findings for clear error, while his legal conclusions are reviewed *de novo*.[4]

We have reviewed the record and we agree with Judge Suddock's analysis. Although presentencing motions to withdraw plea should be granted liberally, the defendant still bears the burden of proving a fair and just reason for withdrawing his plea.[5] Here, the record is clear that Chunak failed to present a fair and just reason for withdrawing his plea, and the result would have remained the same, even if the attorney had filed the motion to withdraw plea as soon as Chunak asked her, rather than three months later.

Accordingly, we AFFIRM the superior court's judgment.

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[4] *Lindeman v. State*, 244 P.3d 1151, 1154 (Alaska App. 2001).

[5] *Perry v. State*, 928 P.2d 127, 1228 (Alaska App. 1996).