IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JOHN NELSON HUNTER, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12203 Trial Court No. 3AN-08-12424 CI MEMORANDUM OPINION No. 6481 — June 14, 2017

Appeal from the Superior Court, Third Judicial District, Anchorage, Philip R. Volland, Judge.

Appearances: Jane B. Martinez, Law Office of Jane B. Martinez, LLC, and Richard Allen, Public Advocate, Anchorage, for the Appellant. Diane L. Wendlandt, 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 Coats, Senior Judge.[*]

Judge ALLARD.

In 2004, John Nelson Hunter was convicted of five counts of first-degree sexual assault, two counts of first-degree robbery, one count of second-degree assault,

[*] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

and one count of third-degree assault based on a series of attacks on five different women over a five-year period. Hunter was sentenced to a composite term of 95 years to serve for these crimes. Hunter's convictions and sentence were affirmed on direct appeal.[1]

Shortly after his direct appeal was final, Hunter filed an application for post-conviction relief, alleging two claims of ineffective assistance of counsel against his trial attorney. The superior court held an evidentiary hearing on the first claim, ultimately dismissing it on its merits. The superior court dismissed the second claim on the pleadings for failure to plead a *prima facie* case for relief.

For the reasons explained here, we affirm the superior court's dismissal of Hunter's first claim, but we vacate the dismissal of the second claim and we remand this case to the superior court for further proceedings on that claim consistent with this decision.

Hunter's first claim of ineffective assistance of counsel

Hunter's first claim of ineffective assistance of counsel against his trial attorney, William F. Dewey, was based on an alleged conflict of interest. Hunter alleged that Dewey's wife and law partner, Mary Ellen Ashton, had represented one of the sexual assault victims, a woman named M.N., in an unrelated child-in-need-of-aid (CINA) case. According to Hunter, "Ashton possessed confidential information, not otherwise part of the CINA case file," that was relevant to impeaching M.N.'s testimony and attacking her credibility. Hunter further alleged that Dewey was reluctant to use any of the material or information he received from the CINA file or to investigate M.N.'s background any further because it could mean that his wife would become a witness in the case.

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[1] *Hunter v. State*, 182 P.3d 1146, 1147 (Alaska App. 2008); *Hunter v. State*, 2007 WL 2405208, at *2 (Alaska App. Aug. 22, 2007) (unpublished).

The superior court held an evidentiary hearing on these allegations. At the evidentiary hearing, Hunter admitted that he had incorrectly identified Ashton as M.N.'s attorney; she was actually the attorney of the adoptive parents of M.N.'s children. Hunter also admitted that he was aware Ashton did not, in fact, represent M.N. when he signed his affidavit. Hunter further conceded that Dewey introduced a significant amount of information from the CINA case file at trial — information that was obtained by Dewey through discovery. Hunter continued to assert, however, that Dewey had access to additional impeaching information about M.N. that he refused to use because it might cause Dewey's wife to become a witness.

Ashton and Dewey also testified at the evidentiary hearing. Ashton testified that she represented the adoptive parents in the CINA case after M.N.'s parental rights had been terminated. She further testified that she does not request confidential information about biological parents in these types of cases. Dewey testified that he had never told Hunter that he or Ashton had any information regarding M.N. that could not be obtained through the ordinary discovery process or that was not already available to the district attorney. Dewey further testified that his representation of Hunter was not affected by Ashton's representation of the adoptive parents and that he did not take any actions (or fail to take any actions) because of this fact.

The superior court concluded that Hunter had failed to show any conflict of interest and had likewise failed to show that his attorney's performance was adversely affected by any purported conflict of interest. The court also found that Ashton and Dewey's testimony was credible and that Hunter's claim of secret information was not credible.

On appeal, Hunter argues that the superior court erred in crediting Dewey and Ashton's testimony over his testimony. But it is the function of the trial court, not

of the appellate court, to judge witnesses' credibility and to weigh conflicting evidence.[2] Clear error exists only when, after a review of the entire record, we are left with a definite and firm conviction that a mistake has been made.[3] Having conducted a thorough review of the record in this case, we find no error in the superior court's factual findings or conclusions of law, and we uphold the court's dismissal of Hunter's first claim.

Hunter's second claim of ineffective assistance of counsel

Hunter's second claim was based on his assertion that Dewey provided ineffective assistance of counsel with regard to advising Hunter about whether to accept a plea offer from the State.

In the affidavit accompanying his application, Hunter alleged that the State offered him a plea agreement that would have resulted in a sentence of 25 years to serve. (Hunter could not remember any of the details of the plea agreement other than the amount of time to serve.) Hunter further alleged that he told his attorney that the 25-year offer "seemed like too much time to serve" and his attorney then "dropped the subject and did not give [him] any further explanation of the plea offer." Hunter also alleged that Dewey "did not advise me of his estimate of the probability that I would be convicted and he did not advise me of the probable sentencing range I would face if I rejected the offer, went to trial, and was convicted." Hunter claimed that if he "had known, before trial, that [he] would probably be convicted and that [he] would receive a sentence as long as the one [he] got, [he] would have waived [his] right to a trial, accepted the 25-year offer, and changed [his] plea to 'guilty'."

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[2] *Lentine v. State*, 282 P.3d 369, 375-76 (Alaska 2012).

[3] *Sanders v. State*, 364 P.3d 412, 419 (Alaska 2015) (internal quotations omitted).

In Dewey's affidavit in response to Hunter's allegations, he challenged the truth of Hunter's claims. Dewey had "no recollection" of any 25-year plea offer, and he specifically recalled that the State "was not interested in any plea offer ... which would not result in Mr. Hunter spending the rest of his life in jail." Dewey stated that he and Hunter may have discussed the idea of making a plea offer to the State of 25 years to serve, but Hunter made it clear that he was "not interested" in making any such offer to the State "due to his ill health ... and the chances that any significant sentence would result in him dying in jail."

Dewey also categorically denied that he had failed to advise Hunter about the probability that he would be convicted and the range of sentences that he would face if convicted. Dewey stated that he repeatedly "gave Mr. Hunter advice that his case would be extremely difficult to win due to the number of victims and ... the cumulative effect of five victims being heard by the jury." Dewey also stated that he advised Hunter "that he was essentially facing life (in the aggregate) due to the nature of the charges and his prior criminal record which included acts of violence." Dewey asserted that "[t]his advice was given on numerous occasions during his case and in preparation of his case."

The State moved to dismiss Hunter's second claim of ineffective assistance of counsel, arguing that he had failed to plead a *prima facie* case for relief. Among other deficiencies, the State argued that Hunter failed to provide any "admissible evidence" that the State had ever made a 25-year plea offer in his case.

The superior court granted the State's motion to dismiss. In its order, the court recognized that it was required to accept Hunter's allegations as true at this initial stage of the proceedings. The court was also required to accept as true Hunter's assertion under oath that the State had offered him a 25-year plea agreement. The court nevertheless concluded that, even accepting all of Hunter's allegations as true, Hunter

had still failed to plead sufficient facts to satisfy the two-prong test for ineffective assistance of counsel under *Risher v. State*.[4]

Whether a defendant's pleadings in an application for post-conviction relief plead a *prima facie* case for relief is a question of law that we review *de novo*.[5] As the superior court acknowledged, at the pleading stage, a court is "obliged to treat all of the well-pleaded assertions of fact in [the] petition as true, and then decide whether these assertions of fact (if ultimately proved) would entitle [the petitioner] to post-conviction relief."[6]

To prove a *prima facie* case of ineffective assistance of counsel under *Risher*, a defendant must allege facts that, if proven true, show (1) that the attorney's performance fell below the standard of the minimal competence expected of an attorney experienced in criminal law; and (2) that, but for the attorney's incompetent performance, there is a reasonable possibility that the outcome of the proceedings would have been different.[7]

The law is well-settled that when the State proposes a plea agreement in a criminal case, "the defendant is entitled to competent advice from their attorney regarding whether to accept the State's proposal."[8] A defense counsel's advice regarding a change of plea "should permit the accused to make an informed and conscious choice."[9]

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[4] 523 P.2d 421 (Alaska 1974).

[5] *David v. State*, 372 P.3d 265, 269 (Alaska App. 2016).

[6] *LaBrake v. State*, 152 P.3d 474, 480 (Alaska App. 2007).

[7] *Risher*, 523 P.2d at 425.

[8] *Ferguson v. State*, 242 P.3d 1042, 1049 (Alaska App. 2010).

[9] *Arnold v. State*, 685 P.2d 1261, 1267 (Alaska App. 1984).

Here, Hunter stated, under oath, that the State had made him an offer that involved 25 years to serve. Hunter also alleged that, in discussing this plea offer with Hunter, Dewey did not inform him of the probable sentencing ranges that he faced if he were convicted at trial; nor did Dewey provide him with any estimate of his chances at trial. Hunter further alleged that if he had been given competent advice on these issues, he would have accepted the State's 25-year plea offer. Although Dewey contested the truth of these assertions and also questioned the existence of any 25-year plea offer, we agree with Hunter that his allegations were sufficient to plead a *prima facie* case of ineffective assistance of counsel entitling his case to proceed to the next stage of the post-conviction relief process.

On appeal, the State interprets Hunter's pleadings as also including an argument that Dewey was ineffective for failing to actively engage the State in plea-bargaining Hunter's case, even if there never was a 25-year plea offer from the State. To the extent that Hunter is trying to raise this argument, we agree with the State that such a claim was properly dismissed at the pleading stage.

Conclusion

We AFFIRM the superior court's judgment on Hunter's first claim. We REVERSE the court's judgment on Hunter's second claim and REMAND for further proceedings consistent with this decision. We do not retain jurisdiction.