IN THE COURT OF APPEALS OF THE STATE OF ALASKA

SAMUEL DUANE MISHLER, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11548 Trial Court No. 3AN-11-4193 CR MEMORANDUM OPINION No. 6504 — August 2, 2017

Appeal from the Superior Court, Third Judicial District, Anchorage, Jack Smith, Judge.

Appearances: Kevin G. Brady, Brady Law Office, Anchorage, for the Appellant. Timothy W. Terrell, 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.

Appellant Samuel Duane Mishler and his domestic partner, C.K.A., were involved in a drunken altercation with George Brower that resulted in Brower's death. Mishler, C.K.A., and Brower had been drinking in Mishler and C.K.A.'s tent, located in

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

a homeless camp in Anchorage. According to Mishler, he awoke to find Brower attempting to sexually assault C.K.A. Mishler strangled Brower using a tent strap, while C.K.A. punched Brower. After Brower's death, Mishler burned the clothes Mishler was wearing, because they had Brower's blood on them.

Mishler was charged with first- and second-degree murder for strangling Brower and with evidence tampering for burning his clothing.[1] C.K.A. was jointly charged with second-degree murder for her alleged participation in Brower's death.[2]

Mishler ultimately pleaded guilty to second-degree murder, and the State dismissed the other two charges against him. Before sentencing, Mishler moved to withdraw his plea on the grounds that: (1) his plea was involuntary because he entered it under the false impression that C.K.A. would only receive a favorable resolution in her case if Mishler accepted the State's offer; and (2) his attorney failed to adequately investigate the case. Following an evidentiary hearing, Superior Court Judge Jack Smith denied Mishler's motion, finding that Mishler had "simply changed his mind" about whether to accept the plea bargain. Mishler appeals the judge's denial of his motion to withdraw his plea.

Plea withdrawal is governed by Alaska Criminal Rule 11(h)(2), which provides in relevant part:

> Before sentencing, the trial court shall allow a defendant to withdraw a plea whenever the defendant, upon timely motion, proves that withdrawal is necessary to correct manifest injustice. Absent a showing that withdrawal is necessary to correct manifest injustice, the trial court may in its discretion allow the defendant to withdraw a plea for any fair and just reason unless the prosecution has been

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[1] AS 11.41.100(a)(1)(A), AS 11.41.110(a)(1), and AS 11.56.610(a)(1), respectively.

[2] AS 11.41.110(a)(1).

> substantially prejudiced by reliance upon the defendant's plea.

A defendant seeking to withdraw his plea must establish a fair and just reason for the withdrawal.[3] A defendant's mere change of mind does not constitute a fair and just reason justifying withdrawal of a plea.[4]

Mishler now argues that the judge was wrong to conclude that he merely changed his mind. Mishler contends that his conduct at the change of plea hearing manifested his reluctance to plead guilty, because he "required encouragement" from his defense attorney, his co-defendant C.K.A., and her attorney before deciding to enter a guilty plea. But Mishler did not raise this argument — that a showing of indecision before he decided to enter his plea justified a plea withdrawal — in the superior court, and so he has not preserved it for appeal.

Mishler's motion to withdraw his plea was instead based on a different ground: his contention that he entered his plea because of his mistaken belief that the State had conditioned C.K.A.'s plea deal on Mishler's acceptance of the plea deal offered to him. The judge found that this claim was rebutted by the defense attorney's testimony that he had shown Mishler emails from the prosecutor in which the State withdrew its earlier requirement of joint plea negotiations. The judge's factual finding that Mishler knew that the State's plea offer to C.K.A. was no longer contingent on Mishler's acceptance of the State's offer to him is not clearly erroneous.

Mishler also argues that plea withdrawal was warranted because his defense attorney did not investigate potential defenses and thus was incompetent.[5] C.K.A. had

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[3] *Wahl v. State*, 691 P.2d 1048, 1051 (Alaska App. 1984).

[4] *Monroe v. State*, 752 P.2d 1017, 1020 (Alaska App. 1988).

[5] *See Shetters v. State*, 751 P.2d 31, 36 (Alaska App. 1988) (addressing whether defense (continued...)

alleged that Brower attempted to sexually assault her, thus giving rise to a potential defense by Mishler that he strangled Brower in defense of C.K.A. or, alternatively, to a defense that Mishler strangled Brower in a heat of passion.

The judge rejected this claim of attorney incompetence. According to the defense attorney's testimony at the evidentiary hearing, he was aware of the potential defense that Mishler had attacked Brower to defend C.K.A. from a sexual assault — thus either justifying Mishler's actions (as a defense of others) or at least mitigating his crime (under a heat of passion theory). The defense attorney was also aware that Brower was reputed to be a dangerous drunk and that, when Brower's body was located, his pants were found unzipped. The judge credited the defense attorney's explanation that he had not begun to prepare these potential defenses for trial because the case was on a settlement track. As the defense attorney explained, he used the sexual assault allegation as leverage to convince the State to offer more favorable terms to Mishler: reducing the charge from first- to second-degree murder, and reducing the sentence from 65 years to 40 years to serve. The judge concluded that the defense attorney engaged in appropriate "tactical triage" when he decided to see if a plea bargain could be reached before he fully developed Mishler's potential defenses for trial. The judge's conclusion is supported by the evidence.

We accordingly AFFIRM the judgment of the superior court.

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[5] (...continued)
counsel's failure to consider a particular defense prior to advising his client to change his plea constituted ineffective assistance of counsel).