IN THE COURT OF APPEALS OF THE STATE OF ALASKA

SUZETTE M. WELTON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12010 Trial Court No. 3PA-10-1160 CI MEMORANDUM OPINION No. 6553 — December 6, 2017

Appeal from the Superior Court, Third Judicial District, Palmer, Vanessa H. White, Judge.

Appearances: William F. Dewey, Law Office of William F. Dewey, 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, Coats, Senior Judge,[*] and Hanley, District Court Judge.[**]

Judge MANNHEIMER.

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

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

Suzette M. Welton was convicted of first-degree murder, attempted first-degree murder, and first-degree arson for setting fire to her house in the early morning hours of September 15, 2000, with the intent of killing her two sleeping teenage sons. One of Welton's sons managed to escape the fire, but the other boy died.

Welton appealed to this Court, and we affirmed her convictions. [1] Welton then filed a petition for post-conviction relief. The superior court denied that first post-conviction relief petition, and this Court affirmed the superior court's decision on appeal. [2]

While that first petition for post-conviction relief was still pending, Welton filed a second petition for post-conviction relief. The superior court ultimately denied that second petition for post-conviction relief — thus giving rise to the present appeal.

Welton raises two claims in this appeal.

First, Welton asserts that she received ineffective assistance of counsel from the attorney who represented her during the litigation of her first petition for post-conviction relief, and that the superior court was wrong to conclude otherwise.

Second, Welton argues that the superior court should have given her funds to hire a new arson expert. According to Welton, she had identified an arson expert who was prepared to offer testimony that would undermine the conclusions of the three experts who testified for the State at Welton's trial.

The State's three experts all reached the same conclusion — that someone intentionally started the fire in Welton's house with the aid of an "accelerant" (*i.e.*, liquid fuel). Welton contends that, in her petition, she offered new evidence showing that these experts' conclusions were scientifically unfounded. And based on this assertion, Welton

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[1] *Welton v. State* (I), unpublished, 2004 WL 1837692 (Alaska App. 2004).

[2] *Welton v. State* (II), unpublished, 2011 WL 2151850 (Alaska App. 2011).

argues that the superior court should have given her money to hire the arson expert, so that this expert could further develop this new rebutting evidence.

For the reasons explained in this opinion, we uphold the superior court's ruling on Welton's ineffective assistance of counsel claim, and we conclude that the superior court could properly deny Welton's request for funds to hire the new arson expert.

The litigation of Welton's second petition for post-conviction relief

Welton's defense at trial was that the State had failed to prove that she started the fire. Although the State presented expert witnesses who testified that the fire was the result of arson, Welton's trial attorneys argued that the State's experts had not performed an adequate investigation — and that the fire remained an "unexplained tragedy".

In her second petition for post-conviction relief, Welton asserted that her trial attorneys were incompetent for failing to present the testimony of an expert witness who would support their assertion that the cause of the fire remained unexplained — someone with expertise in assessing the cause and/or origin of fires, who could dispute the conclusions of the State's experts.

(As we explain later in this opinion, Welton's trial attorneys *did* present an expert witness who testified regarding these matters, and who actively disputed the conclusions of the State's experts.)

Because this was Welton's second petition for post-conviction relief, Welton was legally barred from attacking the competence of her trial attorneys directly. Welton had already pursued one petition for post-conviction relief, and her attack on the

competence of her trial attorneys was a claim that could have been raised in that earlier petition. [3]

For this reason, Welton framed her argument in the second petition as an attack on the competence of the attorney who represented her in the earlier petition for post-conviction relief: she asserted that her former post-conviction relief attorney was incompetent for failing to attack the competence of her trial attorneys on this basis.

(In *Grinols v. State*, 10 P.3d 600, 620 (Alaska App. 2000), we referred to this type of argument as a "layered" claim of ineffective assistance of counsel.)

In addition to this layered claim of ineffective assistance of counsel, Welton raised a claim of newly discovered exculpatory evidence. Welton asserted that this exculpatory evidence came to light when television journalists investigated Welton's case for a "Dateline NBC" segment.

Finally, Welton asked the superior court to provide her with funds to hire a fire investigator named Douglas Carpenter. According to Welton, Carpenter would testify that the State's experts had relied on faulty science when they concluded that someone had deliberately set the fire in Welton's house. However, Welton did not provide the superior court with affidavits or any other information supporting her characterization of Carpenter's testimony.

The superior court ultimately dismissed Welton's petition because the court concluded that the materials supporting Welton's petition failed to set forth a *prima facie* case — either with respect to her claim that her earlier post-conviction attorney was incompetent, or with respect to her claim that the Dateline NBC materials constituted significant exculpatory evidence.

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[3] *See* AS 12.72.020(a)(6); *Larson v. State*, 254 P.3d 1073, 1077 (Alaska 2011).

Having dismissed Welton's petition, the superior court then issued an order denying Welton's request for funds to hire the proposed fire investigation expert, Douglas Carpenter.

In response to this last order, Welton filed a motion for reconsideration of her funding request. In conjunction with this motion, Welton for the first time submitted an affidavit from Carpenter explaining what he would testify about.

In this affidavit, Carpenter gave his preliminary opinion that there was "no scientifically reliable evidence" to support the conclusion that the fire in Welton's house was "incendiary" (*i.e.*, that someone deliberately set the fire). Carpenter likewise asserted that the three experts who testified for the State at Welton's trial gave testimony that was "scientifically unreliable", especially with regard to their analysis of the "burn patterns" observed in the house and the "charring of studs under a floor".

But even though Carpenter asserted that he had formed his preliminary opinion after "eight (8) hours of detailed review of materials", and even though Carpenter asserted that he had explained his preliminary opinion to Welton's attorney during a two-hour meeting, Carpenter's affidavit provided no specifics of that opinion — no specifics to support Carpenter's conclusory assertions of scientific unreliability. Nor did Welton's attorney offer the superior court any details of Carpenter's analysis.

The superior court never ruled on this motion for reconsideration; thus, after the passage of 30 days, the motion was denied by operation of law. [4]

[4] Alaska Civil Rule 77(k)(4).

Welton's claims in this appeal

Welton does not challenge the superior court's ruling with respect to the Dateline NBC information. However, Welton argues that the superior court committed error when it dismissed her ineffective assistance of counsel claim, and when it denied her request for funds to hire Douglas Carpenter.

Welton's ineffective assistance of counsel claim

In order to explain Welton's ineffective assistance of counsel claim, and why the superior court dismissed it, we need to describe the litigation of Welton's underlying criminal case in some detail.

As explained in this Court's opinion resolving Welton's direct appeal, [5] a fire started in Welton's house in the early morning hours of September 15, 2000. One of Welton's neighbors testified that he was awakened around 4:20 a.m. by a concussive "whoompf" — an explosion that shook his entire house.

Firefighters who responded to the fire testified that they could smell the odor of gasoline or diesel fuel in Welton's house. It was later discovered that, two days before the fire, someone using Welton's grocery rewards card had purchased a 2.5-gallon gas can. Fire investigators later ruled out electrical or mechanical problems as possible causes of the fire.

It was determined that the fire had started in the upstairs level of the house, where Welton's two sons slept. Welton and her six-year-old daughter were sleeping downstairs. There were indications that the smoke detectors in the house had either been removed or disabled, and some of the hand cranks were missing from the upstairs

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[5] *Welton I*, 2004 WL 1837692 at *1.

windows. Jeremiah, the son who escaped the fire, had to break a window to get out of the house.

On the same day that someone using Welton's grocery card purchased the gas can, a person using that same card purchased a quantity of Sleepinol, a non-prescription sleeping aid that contains the chemical diphenhydramine. Two days later, on the day of the fire, someone using Welton's grocery card purchased Pepsi Cola and fruit drinks. Welton's surviving son, Jeremiah, testified that his mother gave those drinks to him and his brother Samuel on the night of the fire, and he remembered that the drinks tasted "funny". Investigators later tested the bottles that contained these drinks: the liquid residue inside the bottles contained diphenhydramine.

According to Jeremiah, the drinks made him and his brother feel tired; his brother Samuel even asked him if he thought their mother had poisoned them. After the fire, the autopsy performed on Samuel revealed that he had a high level of diphenhydramine in his system. According to the trial testimony, a person who had consumed that amount of diphenhydramine would be sleepy, disoriented, and mentally impaired.

Three months before the fire, Welton purchased two $100,000 whole-life insurance policies, one for Jeremiah and one for Samuel. Welton was the beneficiary of both insurance policies.

One of the primary contested issues at Welton's trial was whether the fire was "incendiary" — *i.e.*, whether someone had deliberately started the fire. The State presented three expert witnesses (three fire investigators) who all concluded that someone had deliberately started the fire by pouring an accelerant (*i.e.*, a liquid fuel) on the upstairs level of the house.

To rebut this testimony, Welton's defense attorneys relied on the expert testimony of Dr. Vytenis "Vito" Babrauskas. Dr. Babrauskas was a fire safety scientist

who worked as a forensic consultant in fire investigations and fire litigation, and who also worked as a university instructor on fire dynamics — *i.e.*, the principles of fire ignition, the development and spreading of fires, the behavior of various materials such as furniture, upholstery, and mattresses when subjected to fire, and the types of emissions that fire produces (*e.g.*, smoke and toxic gases). He was a member of various professional groups devoted to the study of fire and fire safety — among them, the International Association of Arson Investigators.

The defense offered Dr. Babrauskas as an expert on "fire science and forensics". During the prosecutor's ensuing *voir dire* questioning, Babrauskas clarified that he was not a "fire investigator" in the sense that he did not go to fire scenes to collect evidence or take photographs, nor did he interview witnesses. Rather, his expertise was in scientifically evaluating the *results* of this evidence-collecting process. Babrauskas was an expert in the kind of analysis that a fire investigator must necessarily perform *after* the evidence has been collected.

Because Dr. Babrauskas had never personally participated in an on-the-scene investigation of a fire, the prosecutor argued that Babrauskas should not be allowed to give any testimony about the cause or origin of the fire at Welton's house. The trial judge rejected the prosecutor's argument — declaring that it was "clear" from Babrauskas's testimony that he was "qualif[ied] to testify in the field of fire safety science and forensics, including [the] causation of fires". Thus, the judge ruled, Dr. Babrauskas would be permitted to testify on these matters.

In his ensuing testimony, Dr. Babrauskas told the jury that he had reviewed the reports of the fire investigators in Welton's case, as well as the grand jury testimony in Welton's case. Based on his review of the case, Babrauskas took issue with one of the major conclusions reached by the State's expert witnesses — the conclusion that the burn

pattern of the wood in Welton's house showed that the fire was started with an accelerant.

Babrauskas told the jury that the State's experts were relying on "bad science" when they reached this conclusion — that, in fact, there was no provable connection between the type of burn patterns found in Welton's house and the use of accelerants. Babrauskas explained that, based on his studies and on studies conducted by other scientists, the burn patterns found in Welton's case could easily be attributable to the radiant heat of the fire and the flow of the ventilation in Welton's house. Even though these burn patterns might look like the result of poured liquid to a lay person, "these [patterns] are readily caused by natural phenomena, and not by ... incendiarism".

Dr. Babrauskas also testified that "there [was] no way that a liquid accelerant by itself [could] cause damage like that." And he disputed the notion that the duration and intensity of the fire, or the fact that the fire kept re-igniting, were proof that someone used an accelerant to start the fire. Again, according to Dr. Babrauskas, one could expect to observe these same phenomena in non-incendiary fires.

In sum, Dr. Babrauskas critiqued and disputed the analysis of the State's fire investigators, and he explained at some length why he believed that many aspects of the State's analysis were scientifically unjustified.

In Welton's petition for post-conviction relief, Welton argued that her trial attorneys were incompetent for relying on Dr. Babrauskas rather than a "fire cause and origin expert".

In particular, Welton asserted that, because Babrauskas was a fire scientist rather than a fire investigator, the trial judge refused to qualify him "as a fire origin investigator", and Babrauskas was therefore unable to testify about the origin of the fire "as a 'cause and origin' expert". According to Welton, her trial attorneys' choice of

Babrauskas as an expert witness meant that the defense was "[prevented] from asserting that the fire in this case was not an incendiary fire".

Based on this claim about how her defense at trial was restricted, Welton contended that her trial attorneys were incompetent for choosing to rely on Babrauskas as their expert witness — and that the trial attorneys' incompetence was so obvious that it was incompetent for her first post-conviction relief attorney to fail to perceive this incompetence and raise it as a claim in Welton's first post-conviction relief litigation.

The superior court concluded that Welton's argument did not state a *prima facie* case for relief.

First, the superior court noted that Welton had mischaracterized the trial record when she declared that Babrauskas was precluded from offering an opinion on the cause or origin of the fire. The court pointed out that Babrauskas "gave extensive testimony as to the cause of the fire", and that he "testified directly" that there was no convincing proof that it was an incendiary fire.

(*See LaBrake v. State*, 152 P.3d 474, 481 (Alaska App. 2007): "The court need not assume the truth of assertions that are patently false or unfounded, based on the existing record or based on the court's own judicial notice.")

The superior court also noted that Welton's trial attorneys adopted the approach of not committing themselves to a specific alternative theory of how the fire started. Rather, the defense attorneys chose to point out the weaknesses in the analysis offered by the State's experts, and to argue that the State's accusation of arson was based on insufficient evidence. The court concluded that it was competent for Welton's trial attorneys to implement this strategy by presenting expert testimony "that the fire could have been accidental and that the burn patterns did not necessarily point to arson."

Thus, the superior court concluded, Welton failed to offer a *prima facie* case that her previous post-conviction relief attorney was incompetent for failing to attack Welton's trial attorneys' handling of this aspect of the case.

On appeal, Welton reiterates her mistaken characterization of the trial court record — her claim that her trial attorneys failed to present a fire "cause and origin" expert. Welton's trial attorneys *did* present such an expert: Dr. Babrauskas. The trial judge found that Babrauskas was qualified to testify about the potential causes and origins of the fire, and Babrauskas offered lengthy testimony on these subjects. He also explained why he believed that there were significant scientific flaws in the analysis offered by the State's experts.

It is true (as we have explained) that Dr. Babrauskas conceded that he was not a fire *investigator*. But he clarified that this only meant that he had never personally participated in the collection of physical evidence and the interviewing of witnesses. Babrauskas explained that his expertise was in *analyzing* all the evidence to determine the origin or cause of a fire — the same kind of analysis that fire investigators must perform.

Welton did not point the superior court to any specific way in which a different fire expert might have significantly augmented or improved Babrauskas's testimony regarding the potential origin and cause of the fire. Instead, Welton essentially argued that Babrauskas would have been a significantly more convincing witness if he had had a different professional title. The superior court properly concluded that this assertion failed to state a *prima facie* case for post-conviction relief.

Welton's claim that the superior court committed error by refusing her request for funds to retain fire expert Douglas Carpenter

Welton also claims that the superior court committed error when the court refused to give Welton the funds to hire Douglas Carpenter, a fire investigator. As we explained earlier in this opinion, Welton told the court that Carpenter would testify that the State's experts had relied on faulty science when they concluded that someone had deliberately set the fire in Welton's house.

In support of her request, Welton ultimately provided the superior court with an affidavit from Carpenter himself. In this affidavit, Carpenter stated that his "preliminary opinion" was that there was "no scientifically reliable evidence" to support the conclusion that the fire in Welton's house was "incendiary" (*i.e.*, that the fire was deliberately set by someone). Carpenter similarly asserted that the three experts who testified for the State at Welton's trial gave testimony that was "scientifically unreliable", especially with regard to their analysis of the "burn patterns" observed in the house and the "charring of studs under a floor".

But even though Carpenter asserted that he had formed his preliminary opinion after "eight (8) hours of detailed review of materials", and even though Carpenter asserted that he had explained his preliminary opinion to Welton's attorney during a two-hour meeting, Carpenter's affidavit provided no specifics of that opinion — no specifics to support Carpenter's conclusory assertions of scientific unreliability. Nor did Welton's attorney offer the superior court any details of Carpenter's analysis.

The fact that Welton gave the superior court no details of Carpenter's analysis was a fatal defect in Welton's request for funding.

As we have already explained, Dr. Babrauskas gave extensive testimony at Welton's trial on exactly the same subjects addressed in Carpenter's affidavit.

In particular, Babrauskas testified that the State's experts were mistaken — that they relied on bad science — when they concluded that the burn patterns and the charring found in Welton's house were proof that someone started the fire deliberately, using an accelerant.

Because Welton never explained how Carpenter's proposed testimony would show that Babrauskas's testimony on these subjects was so inadequate as to justify granting post-conviction relief, the superior court could properly deny Welton's request for funds to hire Carpenter.

Welton cites the United States Supreme Court's decision in *Ake v. Oklahoma*[6] for the proposition that she was entitled to these funds as a matter of due process. But as we recently explained in *Crawford v. State*, 404 P.3d 204 (Alaska App. 2017):

> [I]ndigent criminal defendants are not entitled to experts at public expense simply for the asking. A defendant who seeks public funding for an expert under *Ake* must make a threshold showing that, given the facts of the case and given how the case will be litigated, the proposed expert's evaluation will be a significant component of the defense case.[7] Absent this showing, a court can properly deny a defendant's request for public funding.

Crawford, 404 P.3d at 208.

The Supreme Court clarified this point in *Caldwell v. Mississippi*, 472 U.S. 320, 323 n. 1; 105 S.Ct. 2633, 2637 n. 1; 86 L.Ed.2d 231 (1985) — where the Court held

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[6] *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

[7] *See*, *e.g.*, *Williams v. Ryan*, 623 F.3d 1258, 1268-69 (9th Cir. 2010); *Smith v. Workman*, 550 F.3d 1258, 1268-69 (10th Cir. 2008); *Williams v. Collins*, 989 F.2d 841, 844-45 (5th Cir. 1993); *State v. Harris*, 866 S.W.2d 583, 585-86 (Tenn. Crim. App. 1992).

that a trial court can properly deny a defendant's request for public funds to hire experts when the defendant has offered only "undeveloped assertions that the requested assistance would be beneficial".

That is the situation in Welton's case. Welton never explained what new evidence she had, or how that new evidence would augment or improve Dr. Babrauskas's testimony to such a degree as to justify granting post-conviction relief and ordering a new trial.

The superior court could therefore properly reject Welton's request for additional money to pay Carpenter's retainer.

Conclusion

The judgement of the superior court is AFFIRMED.