IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DONNA ARMEY, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12351 Trial Court No. 4FA-03-1863 CI MEMORANDUM OPINION No. 6568 — January 10, 2018

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Douglas L. Blankenship, Judge.

Appearances: Maureen E. Dey, Gazewood & Weiner, P.C., Fairbanks, for the Appellant. Eric A. Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and James E. Cantor, Acting Attorney General, Juneau, for the Appellee.

Before: Allard and Wollenberg, Judges, and Coats, Senior Judge.[*]

Senior Judge COATS.

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

Donna Armey filed an application for post-conviction relief. After an evidentiary hearing, the superior court dismissed the application as untimely. Armey appeals. We affirm the superior court's dismissal.

Background

In 1987, Armey and her then-husband Geoffrey Mathis were convicted of first-degree murder, kidnapping, and first-degree robbery.[1] The convictions arose from a drug-related killing in late 1986.[2]

Years later, in March 1998, Armey filed an application for post-conviction relief, which was subsequently dismissed in 1999. She did not appeal this dismissal. She then filed a second application in 2003 — the application at issue in this appeal — alleging that she had received ineffective assistance both from her attorney in her 1998 post-conviction relief application and from her trial attorney during her criminal trial.[3] The 2003 application was summarily dismissed as untimely, and Armey appealed.

In that appeal, Armey contended that she had been diligent in filing her 2003 application. But we pointed out that, in 1995, the legislature passed a two-year statute of limitations on applications for post-conviction relief.[4] When the legislature did so, it provided that "a person whose conviction was entered before July 1, 1994, has until

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[1] AS 11.41.100(a)(1)(A), AS 11.41.300(a)(1)(C), and AS 11.41.500(a)(1), respectively. *See Mathis v. State*, 778 P.2d 1161, 1163 (Alaska App. 1989). A co-defendant, Clyde Denbo, pleaded no contest to first-degree murder. *Denbo v. State*, 756 P.2d 916, 917 (Alaska App. 1988).

[2] *Mathis*, 778 P.2d at 1163.

[3] *Armey v. State*, 2006 WL 2458567, at *1 (Alaska App. Aug. 23, 2006) (unpublished).

[4] *Id.* at *2.

July 1, 1996 to file a claim under AS 12.72 [the post-conviction relief statute]."[5] Because Armey was convicted before July 1, 1994, she had to file her application before July 1, 1996.

Based on the record before us, we concluded that Armey had not filed an application before the deadline of July 1, 1996.[6] Because Armey failed to file before the 1996 deadline, she would be unable to show in her 2003 application for post-conviction relief any prejudice from the alleged incompetence of the attorney who represented her in the 1998 application. In other words, by failing to file a timely first post-conviction relief application, Armey would not be entitled to post-conviction relief even if her 1998 post-conviction relief attorney had been ineffective.[7]

But we also noted that the post-conviction relief statute provided exceptions to the statute of limitations.[8] *See* AS 12.72.020(b)(1). Because Armey had not been given an opportunity to show she might be excused for failing to file prior to the deadline, we remanded Armey's case to allow her to advance "any claim that would excuse her from complying with the statute of limitations."[9]

Once the case was back in the superior court, Armey filed an affidavit in which she stated she had filed a post-conviction relief application in the spring of 1996

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[5] *Id.* (quoting SLA 1995, ch. 79, § 40).

[6] *Id.* at *3.

[7] *State v. Jones*, 759 P.2d 558, 567-68 (Alaska App. 1988) (to prevail on an ineffective assistance of counsel claim, an applicant must show that counsel was incompetent and that this incompetency resulted in prejudice).

[8] *Armey*, 2006 WL 2458567, at *3.

[9] *Id.*

— that is, before the July 1, 1996 deadline.[10] She also presented an affidavit from her second husband, Douglas Armey, who said that he had telephoned the courthouse in Anchorage in 1996 to inquire about the status of the application and a clerk had informed him that the application had been received, although it was deficient.[11] The State argued that Armey had not provided evidence that would support an exception to the untimely filing of her application.[12]

The superior court again summarily dismissed Armey's application, and Armey appealed. We again reversed the superior court's ruling, holding that if Armey's allegations were accepted as true (as they must be at the pleading stage of a post-conviction relief proceeding), then her uncontested affidavits established a prima facie case that she had filed prior to the expiration of the statute of limitations.[13] We remanded the case to the superior court for a hearing to determine if Armey had filed before the 1996 deadline.

In doing so, we explained that Armey might be able to show she was entitled to post-conviction relief if she could prove a "layered claim" of ineffective assistance of counsel.[14] But this potential claim for post-conviction relief was completely dependent on Armey proving she had actually filed her first application before the July 1, 1996 deadline. If Armey was unable to prove she had filed her application before this

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[10] *Armey v. State*, 2008 WL 5101798, at *5 (Alaska App. Dec. 3, 2008) (unpublished).

[11] *Id.* at *6.

[12] *Id.*

[13] *Id.* at *8.

[14] *Id. See Grinols v. State*, 10 P.3d 600, 618 (Alaska App. 2000), *affirmed in part*, 74 P.3d 889 (Alaska 2003) (holding that a petitioner may litigate a second application for post-conviction relief alleging incompetent representation in the petitioner's first post-conviction relief application).

deadline, then her ultimate claim for relief — that her trial attorney was incompetent — would be time-barred.[15] And if she had proven she had filed before the 1996 deadline, she would still have to prove she had been diligent in filing her 2003 application.

Following this second remand, Armey sought to prove that she had filed her first application prior to the July 1, 1996 deadline, and that she had acted diligently in filing her 2003 application. Additionally, she tried to show that she was entitled to spoliation remedies because the State seized and disposed of evidence that Armey contended would have corroborated her assertion that she had filed her first application before the 1996 deadline (and that she had acted diligently in filing in 2003).

The superior court's decision

After our second remand, Armey and the State litigated the case from 2008 until February 2015, when Superior Court Judge Douglas L. Blankenship held an evidentiary hearing. After the hearing, Judge Blankenship issued lengthy findings and conclusions of law, and then dismissed the case.

Although Judge Blankenship addressed a number of issues, he ultimately found that Armey had not filed her first application before July 1, 1996. Judge Blankenship also denied Armey's request for spoliation remedies. With regard to the spoliation claim, he primarily found that Armey was responsible, through her own actions and choices, for the loss of any evidence that had been disposed of. But he also found that Armey had not proven intentional or negligent spoliation of evidence.

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[15] *Armey*, 2008 WL 5101798, at * 7.

The superior court's findings are not clearly erroneous

On appeal, Armey contends that Judge Blankenship's findings of fact concerning the timeliness of the 1996 filing are clearly erroneous. But Armey bases her contention almost wholly on her disagreement with Judge Blankenship's assessment of Armey's and her witnesses' credibility, and she downplays the extensive documentary evidence and circumstantial evidence supporting the findings. It was Armey's burden to prove that she filed her first application for post-conviction relief before July 1, 1996. Based on the evidence from the hearing, Judge Blankenship found that Armey had not done so.

Among other things, Judge Blankenship found that despite Armey's numerous pleadings, the first reference regarding her alleged 1996 application appears in her October 2006 affidavit, which was filed after this Court's August 23, 2006 decision noting that it appeared Armey had failed to file the first application before the statute of limitations expired on July 1, 1996. Additionally, except for Armey's second husband, no witness — including her attorneys — corroborated Armey's claim that she had filed before the 1996 deadline.

A trial court's historical factual findings are reviewed under the deferential "clearly erroneous" standard of review.[16] That is, this Court must accept the historical facts as found by the superior court unless, based on the record, it is left "with a definite and firm conviction ... that a mistake has been made."[17] An appellate court gives "'particular deference' to [a] trial court's factual findings when they are based primarily

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[16] *See Majaev v. State*, 223 P.3d 629, 631 (Alaska 2010); *Waring v. State*, 670 P.2d 357, 364 n.15 (Alaska 1983).

[17] *Meyer v. State*, 368 P.3d 613, 615 (Alaska App. 2016) (quoting *Mathis v. Meyers*, 574 P.2d 447, 449 (Alaska 1978)).

on oral testimony" because a trial court, not an appellate court, judges the credibility of witnesses and weighs conflicting evidence.[18]

We have reviewed the extensive record in this case — both the testimony and the documentary evidence — and conclude that Judge Blankenship's findings supporting his conclusion that Armey did not file an application before the 1996 deadline are not clearly erroneous.

With respect to Armey's request for spoliation remedies, it was again her burden to prove that she was entitled to those remedies based on the State's seizure and the later disposal of her property. But Judge Blankenship found that the State had valid penological reasons to initially seize eighteen or more boxes of Armey's property from her cell, and to then require her to disburse property that exceeded the amount she was allowed to possess.

Judge Blankenship also found that Armey was not credible concerning the contents of the boxes the State seized, and that Armey did not avail herself of a number of opportunities to preserve the property.

Again, we must accept the historical facts as found by the superior court unless, based on the record, we are left with a definite and firm conviction that a mistake has been made. We have reviewed the record, and we conclude that Judge Blankenship's findings supporting his conclusion that Armey did not prove she was entitled to spoliation remedies are not clearly erroneous.

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[18] *Ebertz v. Ebertz*, 113 P.3d 643, 646 (Alaska 2005) (quoting *In re adoption of A.F.M.*, 15 P.3d 258, 262 (Alaska 2001)); *see also Pease v. State*, 54 P.3d 316, 331 (Alaska App. 2002) (deferring to trial judge who weighed witness testimony to resolve a motion for a new trial).

Conclusion

The judgment of the superior court is AFFIRMED.