IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

RICHARD D. POMEROY,

Appellant,

vs.

MUNICIPALITY OF ANCHORAGE,

Appellee.

Case No. 3AN-17-10292 CI

ORDER

This is an appeal to the Superior Court from a Post Conviction Relief Application dismissed by the District Court. Appellant Richard Pomeroy was arrested on October 8, 2009. He was charged in Case No. 3AN-09-11606 CR with one count of refusal under AMC 9.28.022 and one count of operating under the influence under AMC 9.28.020. As part of a plea agreement, Pomeroy plead no contest to the charge of refusal. The OUI charge was dismissed as part of the plea. He was sentenced on October 12, 2010.

Six years later Pomeroy filed a motion to dismiss which was treated by the District Court as a motion to withdraw his plea which was denied. Pomeroy then filed a new case, 3AN-16-8347 CI to appeal that decision to the Superior Court. In a written Decision and Order issued February 2, 2017 Judge Aarseth affirmed the District Court's Decision dismissing Pomeroy's motion to the extent he was attempting to withdraw his plea. But because there was some indication that Pomeroy, a self-represented litigant, was attempting, albeit inadequately, to file

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a post-conviction relief petition, Judge Aarseth remanded the matter to the District Court to determine if, in fact, he was trying to initiate a post-conviction relief proceeding and to allow Pomeroy to do so if that were his intent.

Upon remand, in 3AN-09-11606 CR the District Court appointed counsel for Mr. Pomeroy. The court indicated that further proceedings would be scheduled once counsel had a chance to meet with Mr. Pomeroy and schedule a hearing.

Mr. Pomeroy then filed a new case, 3AN-17-4677 CI in which he filed an Application for Post-Conviction Relief under Criminal Rule 35.1. He appears to have filed the Application on his own although counsel was initially appointed to represent him. Mr. Pomeroy then filed a Notice of Self-Representation. A representation hearing was held on an expedited basis and Mr. Pomeroy was allowed to represent himself. He has continued to do so and has never subsequently requested counsel be appointed.

The Municipality subsequently filed a Motion to Dismiss the Application for Post-Conviction Relief along with a Motion to Accept Late-Filed Motion to Dismiss. The latter motion was granted by the District Court.[1] Ultimately the District Court in 3AN-17-4677 CI, in an Order on Respondent's Motion to Dismiss

[1] Mr. Pomeroy then filed an appeal of that decision to the Superior Court in 3AN-17-7317 CI. Judge Pfiffner in a Decision and Order dated September 14, 2017 ruled that this appeal was improper and dismissed the appeal, thus upholding the late filing of the Motion to Dismiss. Mr. Pomeroy has appealed Judge Pfiffner's decision to the Alaska Court of Appeals. That appeal is pending under Case No. A12975.

dated October 11, 2017, granted the Motion to Dismiss and dismissed the Application for Post-Conviction Relief filed in that case.

Once again Mr. Pomeroy has filed a brand new case to appeal to the Superior Court the District Court's dismissal of his Application for Post-Conviction Relief.

The court wishes to emphasize that this is an appeal of a decision by the District court and not an original proceeding. The record in this appeal consists of the entire District Court file. *See* Appellate Rule 604(a)(A). Evidence outside the record on appeal should not be considered. *Cf. City of Whittier v. Whittier Fuel & Marine Corp.*, 577 P.2d 216 (Alaska 1978); *Pacifica Marine, Inc. v. Soloman Gold, Inc.*, 356 P.3d 780 (Alaska 2015).

Post-Conviction Relief applications are governed by Criminal Rule 35.1 and AS 12.72.010 - .040. There are requirements in AS 12.72.020 that bar post conviction relief applications that are untimely or which could have been raised on direct appeal. Normally, this statute would bar a claim such as Pomeroy's that is brought six years after the initial conviction without an appeal having been filed. But Pomeroy seems to rely on two other basis for his application that would not be barred by statute.[2] First he claims that the United States Supreme Court's decision in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) creates new law that should be applied retroactively and applies to his case. Second he

[2] The court notes the Municipality did not rely on the failure of Pomeroy to file his petition in a timely fashion as the basis for the Motion to Dismiss, nor did the District Court use that as a basis for dismissal.

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asserts that his conviction is "illegal" and that the trial court "lost personal jurisdiction over [him] when accepting a plea to a legally impossible crime, to wit, refusal to submit to a chemical test when in fact a chemical test was administered to [him]." Finally, he asserts he received ineffective assistance of counsel when his counsel "failed to attack the warrantless taking of [his] blood at the time of arrest."

None of these assertions has any merit. In order to proceed on his claim Pomeroy has the burden to show that:

1. There has been a significant change in law applied in the process leading to the person's conviction;

2. The change in the law was not reasonably foreseeable by a judge or competent attorney;

3. It is appropriate to retroactively apply the change in law; and

4. The failure to retroactively apply the change in law would result in a fundamental miscarriage of justice.

AS 12.72.010(7). Pomeroy cannot make this showing. First, *Birchfield* is not applicable to this case. In *Birchfield* the United States Supreme Court held that a law enforcement officer may require a warrantless alcohol breath test from a person who is arrested for driving while intoxicated from alcohol (as was Pomeroy) because a breath test is a reasonable search incident to that arrest. But an officer cannot require a warrantless blood test unless the officer has probable cause to require the blood test and demonstrates exigent

circumstances.[3] *Birchfield, Supra,* 136 S.Ct. at 2184-86. Thus, under *Birchfield* a person arrested for DWI may be punished for refusing to submit to a breath test under an implied consent law but may not be punished for refusing to consent to or submit to a blood test under an implied consent law unless the officer either obtains a warrant or proves probably cause to require a blood test in addition to exigent circumstances. Pomeroy plead guilty to refusal to take a breath test. His plea and conviction had nothing to do with the blood test. Even if *Birchfield* were to be applied retroactively it would not affect his conviction which is entirely consistent with the holding in *Birchfield.*

Further, a number of cases from other jurisdictions have held that *Birchfield* should not be applied retroactively. *See Hanzik v. Davis*, 2017 WL 5178796 (S.D. Texas 2017); *Commonwealth v. Grays*, 167 A. 3d 793 (Super. Ct. of Penn. 2017); *Commonwealth v. Olsen*, 2018 WL 847859 (Super. Ct. of Penn 2018); *State v. Davies*, 2017 WL689766 (Ct. App. Ohio 2017); *But see State v. Vargas*, 404 P.3d 416 New Mexico 2017) (applying *Birchfield* retroactively to cases pending on direct appeal). When *Birchfield* was decided there were no direct appeals or collateral proceedings filed in this matter and under the circumstances the court does not believe *Birchfield*

This is the point, the judge should had been informed.

[3] At some point a blood test on Pomeroy was conducted. It is not entirely clear from the record whether Pomeroy was required to submit to the test in a manner contrary to *Birchfield* or whether he voluntarily agreed to take the test on his own. The blood test itself is not part of the record. The police report attached as Exhibit 1 to Pomeroy's Appellate Brief would suggest that Pomeroy voluntarily chose to get an independent test at the Municipalities' expense.

retroactively would be given collateral affect, even if *Birchfield* were applicable to the proceeding.

Pomeroy also argues that his conviction is illegal and that the trial court "lost jurisdiction" over him when it accepted his plea to what he alleges is a legally impossible crime. The latter claim is legally incorrect. Pomeroy is charged with a crime and as a result the trial court has jurisdiction over him, including jurisdiction to dismiss the case if there is no legal basis for the charge. That would be his remedy but it has nothing to do with jurisdiction.

The basis for Pomeroy's claim that his conviction is legally impossible is not entirely clear but it seems to reflect a fundamental mischaracterization of the crime for which he has been convicted. Pomeroy was convicted for violating AMC 9.28.022(c) for his refusal to take a chemical breath test. It is undisputed that Pomeroy refused to submit to a breath test, even after being read an implied consent warning by the arresting officer. Pomeroy may be arguing that since a subsequent blood test was taken later, a "chemical test" was in fact conducted and he, therefore, could not have been convicted of refusal. But this argument would be foreclosed under *Mattox v. State*, 191 P.3d 148 (Alaska App. 2008) and *Hamilton v. Municipality of Anchorage*, 878 P.2d 653 (Alaska App. 1994). *Hamilton* is particularly instructive. It involves the same Municipal Statute for which Pomeroy was convicted. There, the Alaska Court of Appeals made clear that an arrested motorist does not have the right to insist on other forms of chemical testing until he or she has first

complied with the statutory duty to submit to a breath test. *Id.* at 655. It was his refusal to take the breath test that supports Pomeroy's conviction and there is nothing about the subsequent blood test that makes that conviction "illegal." Once a person refuses to take a breath test they can be convicted under the refusal statute regardless whether a blood test is later administered.

Finally, Pomeroy asserts he received ineffective assistance of counsel due to his counsels' failure to "attack the warrantless taking of [his] blood at the time of arrest." It is doubtful that this claim is timely under AS 12.72.020. But even if timely, the taking of Pomeroy's blood had nothing to do with Pomeroy's conviction for refusal to submit to a breath test. Pomeroy cannot satisfy the requirement for a showing of ineffective assistance of counsel. Nothing he alleges his counsel did or did not do resulted in an adverse impact that contributed to his conviction.[4]

The District Court's October 11, 2017 decision dismissing Pomeroy's Application for Post-Conviction Relief is Affirmed.

DATED at Anchorage, Alaska, this 26th day of February 2018.

I certify that on February 27, 2018 a copy of the above was mailed to:
R. Pomeroy MOA
Administrative Assistant

MARK RINDNER
Superior Court Judge

[4] Without an affidavit from counsel and the results of the blood test, Pomeroy cannot show that his counsel's representation was ineffective. If Pomeroy voluntarily took the blood test and if the blood test showed Pomeroy was intoxicated the decision not to challenge the blood test may well have been strategic. It is Pomeroy's burden to show that his counsel was ineffective and he has not made such a showing.

IN THE DISTRICT COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

RICHARD POMEROY,

Applicant,

v.

MUNICIPALITY OF ANCHORAGE,

Respondent.

FILED in the Trial Courts
State of Alaska Third District
OCT 11 2017
Clerk of the Trial Courts
By _____ Deputy

Case No. 3AN-17-04677 Ci.

ORDER ON RESPONDENT'S MOTION TO DISMISS

Respondent, Municipality of Anchorage, moves to dismiss Applicant, Richard Pomeroy's Application for Post-Conviction Relief. For the reasons set forth below, this court grants Respondent's motion.

I. Brief statement of facts

Applicant was arrested on October 8, 2009 for operating a motor vehicle while under the influence. It is undisputed that Applicant refused to submit to a breath test, even after being read an implied consent warning by the arresting officer. However, it is disputed whether Applicant subsequently voluntarily elected to receive an independent chemical test of his blood. Applicant was handcuffed and the officer signed a consent form allegedly on Applicant's behalf.

Applicant was charged with one count of Refusal under AMC 9.28.022 and one count of Operating Under the Influence (OUI) under AMC 9.28.020. As part of a plea agreement, Applicant pled no contest to the charge of Refusal and Respondent dropped the OUI charge.

Applicant has now filed an application for post-conviction relief seven years after the sentencing, claiming that (1) he should be allowed to withdraw his plea pursuant to

Criminal Rule 11(h); (2) his counsel provided ineffective assistance; and (3) the 2016 United States Supreme Court decision Birchfield v. North Dakota, 136 S.Ct. 2160 (2016) made his blood draw illegal.

The Superior Court has already heard Applicant's claim that he should be allowed to withdraw his plea, and held that his "[p]lea withdrawal is barred by Alaska Criminal Rule 11(h)(3) and (4)."[1]

II. Applicable law

a. Requirements for a claim of ineffective assistance of counsel

To establish a claim for ineffective assistance of counsel, Applicant has the initial burden of proving by clear and convincing evidence "that his counsel's performance fell below the range of competence displayed by one of ordinary training and skill."[2] This burden necessitates overcoming "the strong presumption that the trial attorney's actions were the product of sound tactical considerations."[3] Applicant must further show that his counsel's incompetence had an "adverse impact" on his case.[4] Applicant "need only create a reasonable doubt that the attorney's incompetence contributed to his conviction."[5]

b. Requirements for a claim for post-conviction relief

This court may grant a motion for summary disposition of an application for post-conviction relief when it appears from the record before the court "that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."[6]

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[1] *Pomeroy v. Municipality of Anchorage*, No. 3AN-16-08347CI, Decision and Order, 2, (Alaska Super. Ct., Feb. 2, 2017).

[2] *Tall v. State*, 25 P.3d 704, 708 (Alaska App. 2001).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] AK Rules of Crim. Pro. 35.1(f)(3).

A pro se applicant for post-conviction relief is "held to the same burden of proof and persuasion as an applicant proceeding with counsel."[7] To succeed in a claim for post-conviction relief, the convicted party must show that:

1) there has been a significant change in law applied in the process leading to the person's conviction;

2) the change in the law was not reasonably foreseeable by a judge or competent attorney;

3) it is appropriate to retroactively apply the change in law; and

4) the failure to retroactively apply the change in law would result in a fundamental miscarriage of justice.[8]

A claim for post-conviction relief must be brought before 18 months have passed since "the entry of judgment of the conviction or, if the conviction was appealed, one year after the court's decision is final."[9] However, there is no time limit on the claim "if the applicant claims that the sentence was illegal."[10]

III. Application of law

a. Applicant has not satisfied the requirements for a showing of ineffective assistance of counsel.

Applicant has not met his burden of proving his counsel's lack of competence by clear and convincing evidence. Applicant bases his ineffective assistance of counsel claim on an allegation that his counsel knew or should have reasonably known that his plea of Refusal was "a legally impossible crime," because Applicant "did submit to a chemical test at the time of arrest," namely the blood test.[11]

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[7] AK Rules of Crim. Pro. 35.1(f)(1).

[8] AS 12.72.010(7).

[9] AS 12.72.020(a)(3)(A).

[10] AS 12.72.020(a)(3).

[11] Applicant's Memorandum of Law, 8-9 (Apr. 21, 2017).

Under AMC 9.28.021 motor vehicle operators are "considered to have given consent to a chemical test of the person's breath." Refusing "to submit to the chemical test of breath" is a misdemeanor violation under AMC 9.28.022(C). Even though Applicant submitted to a blood test does not change the fact that he refused to submit to the breath test. It is Applicant's refusal to submit to the breath test that violated the law and led to his conviction of Refusal. Applicant was therefore not convicted of "a legally impossible crime."

Since Applicant has failed to show that his counsel's performance fell below the normal range of competence, he therefore cannot show that such incompetence resulted in an "adverse impact on the case that contributed to [his] conviction."

b. Applicant has not satisfied the requirements for post-conviction relief.

i. Applicant's application is not time barred.

Respondent claims that Applicant's post-conviction relief application is barred by AS 12.72.020(a)(3)(A) since more than 18 months have passed since the entry of judgment.[12] Respondent makes this claim even though expressly acknowledging that Applicant bases his application on belief that Birchfield "makes his original sentence illegal."[13]

Although AS 12.72.020(a)(3)(A) bars claims brought more than "18 months after the entry of judgment of the conviction," subsection (3) expressly exempts claims brought on grounds "that the sentence was illegal." Since Applicant's claims is based on the assertion that Birchfield retroactively makes his conviction illegal, his application is within the exemption of AS 12.72.020(a)(3).

ii. There has been no significant change in law applicable to Applicant's conviction.

[12] Respondent's Motion to Dismiss, 2 (May 22, 2017).

[13] Respondent's Motion to Dismiss, 2 (May 22, 2017).

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Applicant claims that Birchfield made his conviction illegal. However, Birchfield has no bearing on his conviction of Refusal under AMC 9.28.022.

The United States Supreme Court in Birchfield upheld the right of the states under the Fourth Amendment to conduct warrantless breath tests incident to lawful arrests for drunk driving.[14] The Court further retained the right of jurisdictions to impose penalties for refusing to submit to such tests.[15] What Birchfield established was that the Fourth Amendment does not permit warrantless blood draws or criminal penalties for refusing to submit to a blood draw.[16]

Applicant was not sentenced on findings from his blood draw, but rather for refusing to submit to a breath test – a fact undisputed by Applicant. Since Birchfield did not change the right of the states to conduct warrantless breath tests, Alaska's law regarding implied consent to breath tests remained Constitutional. Therefore, no change in law has occurred regarding the process leading to Applicant's conviction of Refusal.

iii. Birchfield does not apply retroactively.

Applicant claims that Birchfield applies retroactively. However, neither the decision itself nor standing principle leads this court to believe the decision applies retroactively. Generally when a decision results in a new rule of law, "the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review."[17]

Applicant was sentenced on October 12, 2010 and Birchfield was not decided until June 23, 2016. Therefore, even if Birchfield had any bearing on Applicant's conviction, since Applicant's case was not pending at the time of the Birchfield decision and nothing

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[14] *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2184 (2016).

[15] *Id.* at 2185.

[16] *Id.* at 2184-2185.

[17] *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987).

within the decision indicates intent for retroactive application, this court would not retroactively apply its holding to his case.

iv. Not applying Birchfield retroactively does not result in a fundamental miscarriage of justice.

Applicant claims that there will be a fundamental miscarriage of justice by not applying Birchfield retroactively. However, since the ruling in Birchfield did not significantly change the process which led to Applicant's conviction, no fundamental miscarriage of justice would ensue by not applying Birchfield retroactively. Applicant would still be guilty of Refusal, since implied consent laws regarding breath tests remained unchanged following the decision.

IV. Conclusion

Since the record before this court shows that there is neither a genuine issue of material fact, nor legal basis to support Applicant's Application for Post-Conviction Relief or claim of ineffective assistance of counsel, Respondent's Motion to Dismiss is hereby granted and Applicant's Application for Post-Conviction Relief is dismissed. Applicant's Motion to Compel Discovery, dated September 27, 2017, is DENIED since the underlying Post-conviction Relief motion has been DISMISSED.

DATED this 11th day of October, 2017 in Anchorage, Alaska.

GREGORY J. MOTYKA
District Court Judge

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In the Court of Appeals of the State of Alaska

Richard D. Pomeroy, Petitioner, v. **Municipality of Anchorage,** Respondent.	Court of Appeals No. **A-13121** **Order** Petition for Hearing Date of Order: **8/6/18**

Trial Court Case # **3AN-17-04677CI**

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

On consideration of the Petition for Hearing filed on 5/23/18, and the response filed on 7/11/18,

IT IS ORDERED: The Petition for Hearing is **DENIED**.

Entered by the direction of the court.

Clerk of the Appellate Courts

Marilyn May

Marilyn May

cc: Court of Appeals Judges
Judge Motyka
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Trial Court Appeals Clerk - Anchorage

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Appendix C

In the Supreme Court of the State of Alaska

Richard D. Pomeroy,	)	
	)	Supreme Court No. **S-17212**
Petitioner,	)	
v.	)	**Order**
	)	Petition for Hearing
Municipality of Anchorage,	)	
	)	
Respondent.	)	Date of Order: **11/5/2018**
	)	

Trial Court Case No. **3AN-17-04677CI**
Court of Appeals No. **A-13121**

Before: Bolger, Chief Justice, Winfree, Stowers, Maassen, and Carney, Justices.

On consideration of the Petition for Hearing filed on **9/4/2018**, and the notice of no response filed on **10/09/2018**,

IT IS ORDERED:

The Petition for Hearing is **DENIED**.

Entered by the direction of the court.

Clerk of the Appellate Courts

Marilyn May

Marilyn May

cc: Supreme Court Justices
Court of Appeals Judges
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Appendix D