

In the Supreme Court of the State of Alaska

Ben J. Latham,
Petitioner,

v.

State of Alaska,
Respondent.

Supreme Court No. S-18653

Order Petition for Hearing

Date of Order: 7/7/2023

Court of Appeals No. A-13764
Trial Court Case No. 3AN-18-08176CI

Before: Maassen, Chief Justice, and Carney, Borghesan, Henderson,
and Pate, Justices

On consideration of the Petition for Hearing filed on 2/16/2023, and the
Response filed on 4/18/2023,

IT IS ORDERED:

The Petition for Hearing is DENIED.

Entered at the direction of the court.

Clerk of the Appellate Courts



Meredith Montgomery

cc: Court of Appeals Judges
Judge Zeman
Trial Court Clerk – Anchorage

Distribution:

Email:
Latham, Ben J.
Beach, RuthAnne

APPENDIX  C

NOTICE

This is a summary disposition issued under Alaska Appellate Rule 214(a). Summary dispositions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d).

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

BEN J. LATHAM,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13764
Trial Court No. 3AN-18-08176 CI

SUMMARY DISPOSITION

No. 0303 — January 18, 2023

Appeal from the Superior Court, Third Judicial District,
Anchorage, Adolf V. Zeman, Judge.

Appearances: Ben J. Latham, *in propria persona*, Anchorage, Appellant. RuthAnne Beach, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Wollenberg, Harbison, and Terrell, Judges.

Ben J. Latham appeals the dismissal of his second application for post-conviction relief. Because all of the claims Latham made in his application were either untimely or had previously been raised and rejected in other cases, we affirm the superior court's order.¹

¹ See AS 12.72.020(a)(5) (providing that an application for post-conviction relief may not include a claim that was decided on its merits or on procedural grounds in any previous proceeding); AS 12.72.025 (establishing that an application based on an allegation that an attorney provided ineffective assistance in a prior application must be filed within one year after the court's decision on the prior application is final).

APPENDIX A

In 1986, Latham pleaded no contest to one count of second-degree criminal mischief. He was given an entirely suspended sentence and placed on probation.² In 1997, the superior court found that Latham had violated his probation, and it extended Latham's probation by 1 year but declined to impose any term of imprisonment. Latham subsequently filed two separate applications for post-conviction relief.

In this appeal, Latham challenges the superior court's order dismissing the second of these applications. In this second application, Latham focused on a 1995 change in the law relating to sentence appeals. Prior to 1995, AS 12.55.120(a) permitted a defendant to appeal a sentence of 1 year or more to this Court on the grounds that the sentence was excessive. But the legislature amended AS 12.55.120(a) in 1995 to bar a defendant from filing an excessive sentence appeal to this Court in a felony case unless their sentence of imprisonment exceeds 2 years. (The amendment does not impact the defendant's right to file a petition for sentence review to the Alaska Supreme Court.³)

In his application, Latham claimed that the 1995 change in the law impacted his right to appeal the sentence that was imposed when he violated his probation. Latham asserted that, because he did not know that the law would change at the time he entered his original plea to criminal mischief in 1986, he did not enter a knowing plea. Latham also claimed that the attorney who represented him in his probation case was incompetent for failing to advise him to withdraw his plea based on the change in law and for failing to file a petition for sentence review in the supreme court following the order extending his probation. The superior court dismissed Latham's application, and this appeal followed.

² We affirmed Latham's conviction and sentence on direct appeal. *Latham v. State*, 790 P.2d 717, 719 (Alaska App. 1990).

³ AS 12.55.120(a); *Rozkydal v. State*, 938 P.2d 1091, 1095 (Alaska App. 1997); Alaska R. App. P. 215(a)(5).

As the superior court noted, Latham raised and lost claims relating to the 1995 change in law in three previous cases: (1) his first application for post-conviction relief;⁴ (2) a civil suit he filed against the Alaska Public Defender Agency;⁵ and (3) a civil suit he filed against former Governor Sarah Palin.⁶ In the most recent of those cases, the Alaska Supreme Court explained that “[p]rior litigation has conclusively established that Latham was not injured by the 1995 law” because “Latham would have been unable to appeal his sentence as excessive under either the pre-1995 version [of the statute] or the post-1995 version.”⁷

Because the claims Latham raised in his second application for post-conviction relief were nearly identical to the claims he raised and lost in these three previous cases, we affirm the superior court’s order dismissing Latham’s application as successive.

Latham raises one additional claim on appeal. He asserts that, although he lodged an amended application, the superior court erred in declining to consider the amended application before dismissing it. But we have reviewed the amended application, and it contains only one new claim — that Latham’s first post-conviction relief attorney provided him with ineffective assistance of counsel for not submitting affidavits explaining why Latham did not file a petition for review of his sentence with the supreme court.

⁴ *Latham v. State*, 2003 WL 22250341 (Alaska App. Oct. 1, 2003) (unpublished).

⁵ *Latham v. Alaska Pub. Def. Agency*, 2006 WL 1667661 (Alaska June 14, 2006) (unpublished).

⁶ *Latham v. Palin*, 251 P.3d 341 (Alaska 2011).

⁷ *Id.* at 342, 344-45.

Under AS 12.72.025, a claim that the applicant received ineffective assistance from the attorney who represented them in a prior application must be filed within one year after the court's decision on the prior application is final.⁸ Latham's second application was not filed until 2018 — long after the statutory deadline. We accordingly conclude that this claim was untimely.

The judgment of the superior court is AFFIRMED.

⁸ Alaska Statute 12.72.025 was enacted under SLA 2007, ch. 24, § 25, which took effect on July 1, 2007. This statute included a grace period — giving a person whose application for post-conviction relief was denied before its effective date until July 1, 2008 to file a claim. *See* SLA 2007, ch. 24, § 36(c). Thus, Latham became statutorily barred from filing after July 1, 2008.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

BEN LATHAM,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

3AN-18-08176CI

T/W 3PA-86-1986CR

ORDER GRANTING STATE OF ALASKA'S MOTION TO DISMISS

Respondent State of Alaska (State) moves to dismiss Petitioner Ben Latham's (Latham) post-conviction relief application. The State contends that Latham's application is barred because it is untimely and successive.

Latham asserts that his second post-conviction relief application is not untimely because his sentence was illegal, to which there is no time limit to bring a post-conviction relief claim. Latham's main arguments are that a 1995 change in legislation affected his appellate rights, and his post-conviction relief counsel failed to argue in his first post-conviction relief application that his trial counsel provided ineffective assistance of counsel.

Background

In 1986 the State charged Latham with four counts of theft in the second degree and one count of criminal mischief in the second degree. Latham pled no contest to the charge of criminal mischief in the second degree. Latham was sentenced on all counts to

a composite term of eight and one half years, and four years of probation. This sentence was to begin after Latham served his sentence in a separate case. Latham appealed his convictions and sentence as excessive, however the Court of Appeals affirmed his convictions and sentence.¹

In 1994 while on probation from his 1986 conviction, Latham was convicted of another charge of criminal mischief in the second degree, thus violating his probation. Latham's probation was subsequently extended an additional year.

In 1997, Latham through counsel, John Pharr (Pharr), filed a notice of appeal arguing that the trial court erred in finding he violated his parole and that his probation extension was excessive. However, the court dismissed the appeal for lack of jurisdiction and stated that Latham could petition the Alaska Supreme Court to review whether his sentence was excessive. Latham did not file a petition with the Supreme Court.

In 1998, Latham filed his first post-conviction relief application arguing that he was entitled to post-conviction relief because of: 1) changes in the law removing the right to appeal certain sentences; and 2) ineffective assistance of counsel. Latham claimed that a 1995 law changing the jurisdiction of the court of appeals effectively eliminated his right to appeal his sentence, a right upon which he relied when entering his 1986 plea. Latham's application was ultimately denied because the Court of Appeals found that

¹ *Latham v. State*, 790 P.2d 717 (Alaska Ct. App. 1990).

Latham was not affected by the 1995 legislation.² It therefore affirmed the decision of the Superior Court.

As to Latham's second point of appeal, he argued that Pharr was ineffective for failing to challenge his sentence in the appellate courts and failing to withdraw his 1986 plea.³ The Superior Court rejected his argument, and the Court of Appeals affirmed. Both courts held that Pharr did not provide incompetent representation because Pharr: 1) filed Latham's notice of appeal and preserved Latham's appellate rights; 2) Pharr filed a sentencing memorandum contesting Latham's excessive probation; and 3) Latham did not support his ineffective assistance of counsel claim with an affidavit from Pharr addressing the alleged incompetence or explaining why the applicant could not obtain an affidavit.⁴

After Latham's unsuccessful post-conviction relief petition, Latham brought a civil action on behalf of himself and over 100,000 other criminal defendants seeking to

² *Latham v. State*, 2003 WL 22250341 (Alaska Ct. App. 2003) (unpublished opinion). The Court of Appeals, reviewing the Superior Court's denial of Latham's petition for post-conviction relief, summarized the 1995 legislation as follows:

In 1986, AS 12.55.120(a) stated that “[a] sentence of imprisonment lawfully imposed by the superior court for a term or for aggregate terms of one year or more may be appealed to the court of appeals by the defendant on the ground that the sentence is excessive.” (At that time, Appellate Rule 215(a) provided that a defendant could appeal a sentence of 45 days or more.) After the 1995 amendments, AS 12.55.120(a) stated that “[a] sentence of imprisonment lawfully imposed by the superior court for a term or for aggregate terms exceeding two years of unsuspended incarceration for a felony offense ... may be appealed to the court of appeals by the defendant on the ground that the sentence is excessive....” The statute also limited the ability of a defendant to bring a sentence appeal when the sentence was imposed “in accordance with a plea agreement.”

Because Latham was not sentenced to any term of imprisonment when his probation was extended, the court of appeals held that he was not entitled to bring a sentence appeal under either version of AS 12.55.120(a), or even under the more lenient terms of Appellate Rule 215(a).

³ *Id.* at *3.

⁴ *Newby v. State*, 967 P.2d 1008, 1016 (Alaska App. 1998) (“The law presumes that an attorney has acted competently, and that the attorney's decisions were prompted by sound tactical considerations. To prevail in a post-conviction relief action based on [an] ineffective assistance of counsel claim, the defendant must rebut this presumption.” In order to establish a *prima facie* case, an applicant must provide an affidavit from the attorney that addresses the alleged incompetence or that explains why the applicant could not obtain an affidavit).

invalidate the 1995 change in law. The Honorable Judge William H. Morse denied the class certification and dismissed the lawsuit. Latham appealed and the Supreme Court of Alaska affirmed the judgment, holding that Latham's lawsuit was an attempt to relitigate his unsuccessful post-conviction appeal, which was barred by the doctrine of res judicata.⁵

Latham, then for the third time, brought suit challenging the constitutionality of the 1995 legislation that modified the jurisdiction of the court of appeals to hear excessive sentence appeals. The Honorable Judge Sharon Gleason dismissed the lawsuit on the grounds of res judicata and collateral estoppel. Latham appealed and the Supreme Court of Alaska affirmed the Superior Court's dismissal of Latham's lawsuit.⁶ The Supreme Court found that “[p]rior litigation has conclusively established that Latham was not injured by the 1995 law. To the extent that Latham's claims are predicated on injury from that law, they are precluded by collateral estoppel.”⁷

In 2018, Latham filed this second post-conviction relief application again asserting that Pharr denied him of effective assistance of counsel.⁸ Latham also argues that his 1987 conviction and his 1994 probation violation are “void judgment[s]” due to the 1995 change in legislation.⁹ Latham states that he suffers from a mental disease that has precluded him from timely filing his claims.¹⁰

⁵ *Latham v. Alaska Pub. Defender Agency*, 2006 WL 1667661 (Alaska 2006) (unpublished opinion).

⁶ *Latham v. Palin*, 251 P.3d 341 (Alaska 2011).

⁷ *Id.*

⁸ Post-Conviction Relief Application, *Latham v. State*, Case No, 3PA-18-08176CI (Jun. 19, 2018).

⁹ *Id.*

¹⁰ *Id.* at 13, ¶ 8. Latham has not provided documents to support these claims.

In September of 2018, the State filed a Motion to Dismiss pursuant to statute of limitations and res judicata. On July 27, 2020, Latham filed his opposition¹¹ asserting that his underlying convictions were “illegal therefore his sentence was illegal and there is no time limit to Latham’s PCR claims.”¹² The State’s reply was due August 17, 2020, however it did not file a reply. Oral argument was held September 29, 2020.

Legal Standard

Alaska Civil Rule of Procedure 12(b)(6) allows the dismissal of a complaint for “failure to state a claim upon which relief can be granted.” To survive a motion to dismiss, a “complaint need only allege a set of facts consistent with and appropriate to some enforceable cause of action.”¹³ “[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief.”¹⁴

Applicable Law

AS 12.72.020 Limitations on applications for post-conviction relief.

(a) A claim may not be brought under AS 12.72.010 or the Alaska Rules of Criminal Procedure if

...
(3) the later of the following dates has passed, except that if the applicant claims that the sentence was illegal there is no time limit on the claim:

(A) if the claim relates to a conviction, 18 months after the entry of the judgment of the conviction or, if the conviction was appealed, one year after the court’s decision is final under the Alaska Rules of Appellate Procedure;

¹¹ Latham’s Opposition to Motion to Dismiss is over 50 pages long, violating Ak. App. R. 212(c)(4). Latham did not ask for leave of Court to file an over length brief but the Court accepted it.

¹² Opp’n to Mot. to Dismiss.

¹³ *Guerrero v. Alaska House Fin. Corp.*, 6 P.3d 250, 254 (Alaska 2000) (internal quotation marks omitted).

¹⁴ *Angnabooguk v. State*, 26 P.3d 447, 451 (Alaska 2001).

(6) a previous application for post-conviction relief has been filed under this chapter or under the Alaska Rules of Criminal Procedure.

(b) Notwithstanding (a)(3) and (4) of this section, a court may hear a claim

- (1) if the applicant establishes due diligence in presenting the claim and sets out facts supported by admissible evidence establishing that the applicant
 - (A) suffered from a physical disability or from a mental disease or defect that precluded the timely assertion of the claim;

...

(d) The court may not consider a substantive claim in an application brought under AS 12.72.010 or the Alaska Rules of Criminal Procedure until the court has first determined that

- (1) the application is timely; and
- (2) except for an application described in 12.72.025 or allowed under (c) of this section, no previous application has been filed.

AS 12.72.025 Applications based on claim of ineffective assistance of counsel.

An application may not be brought under AS § 12.72.010 or the Alaska Rules of Criminal Procedure if it is based on a claim that the assistance the applicant's attorney provided in a prior application under AS § 12.72.010 or the Alaska Rules of Criminal Procedure was ineffective, unless it is filed within one year after the court's decision on the prior application is final under the Alaska Rules of Appellate Procedure.

AS 12.72.030 Filing of application for post-conviction relief.

(a) An application for post-conviction relief shall be filed with the clerk at the court location where the underlying criminal case is filed.

Alaska Rule of Criminal Procedure 35.1 Post-conviction procedure.

(b) **Commencement of Proceedings—Filing—Service.** A proceeding is commenced by filing an application with the clerk at the court location where the underlying conviction is filed. Application forms will be furnished by the clerk of court. An application must be filed within the time limitations set out in AS 12.72.020 or AS 12.72.025. The clerk shall open a new file for the application, promptly bring attention to the court and give a copy to the prosecuting attorney.

(g) **Hearing—Evidence—Order.** The application shall be heard in the court in which the underlying criminal case was heard...All rules and statutes applicable in civil proceedings, including pretrial discovery procedures are available to the parties except that Alaska Rule of Civil Procedure 26(a)(1)-(4) does not apply to post-conviction relief proceedings.

AS 22.10.040 Change of venue.

The superior court in which the action is pending may change the place of trial in an action from one place to another place in the same judicial district or to a designated place in another judicial district for any of the following reasons:

- (1) when there is reason to believe that an impartial trial cannot be had;
- (2) when the convenience of the witnesses and the ends of justice would be promoted by the change;
- (3) when for any cause the judge is disqualified from acting, but if the judge of another judicial district is assigned to try the action, no change of place of trial need be made;
- (4) if the court finds that the defendant will be put to unnecessary expense and inconvenience, and if the court finds that the expense and inconvenience were intentionally caused, the court may assess costs against the plaintiff.

In *Grinols v. State*, the Alaska Supreme Court held that the due process clause of the Alaska Constitution affords a criminal defendant the right to challenge the competency of the representation provided by the attorney who litigated the defendant's first application for post-conviction relief—thus, necessitating a limited exception to the ban on successive applications for post-conviction relief codified in AS 12.72.020(a)(6).¹⁵ However, although a defendant has the right to file a successive application in this situation, this relief is not available indefinitely.

Under AS 12.72.025, a *Grinols* application, or a "layered" claim of ineffective assistance, must be filed within one year after the court's decision on the prior application is final.

Discussion

As a preliminary matter, the State asserted at oral argument and in a footnote of its motion to dismiss that it does not believe this Court can hear Latham's application. It

¹⁵ *Grinols v. State*, 74 P.3d 889, 895-96 (Alaska 2003).

contends that the order granting venue transfer from Palmer to Anchorage "is of questionable validity."¹⁶

On June 25, 2018, Latham filed a Motion to Change the Venue from Palmer to Anchorage. In his motion he explains that the judge who heard his criminal case has since retired; his witnesses, attorney John Pharr and public defender Marjorie Mock, are located in Anchorage; and Latham himself does not have a vehicle to travel from Anchorage to Palmer for subsequent court hearings.¹⁷ Latham served the motion to the Palmer District Attorney's office via first class mail.¹⁸ The Palmer Superior Court granted Latham's venue transfer request, noting that the motion was unopposed.¹⁹ The order does not state the reasons for granting the motion, however it can be ascertained that it was granted under section (2) of AS 22.10.040.

Alaska Civil Rule of Procedure 12(b) allows objections based on improper venue to be asserted in a responsive pleading or by motion. The Alaska Supreme Court has held that "[t]o withstand a motion based on improper venue, the plaintiff must present a *prima facie* case that the chosen venue is proper."²⁰

Latham correctly initiated his post-conviction relief application under AS 12.72.030 and Alaska Rule of Criminal Procedure 35.1 in Palmer, where his underlying criminal case was heard. Both Palmer and Anchorage Superior Courts are located in the Third Judicial District. The venue transfer is thus proper under

¹⁶ Mot. to Dismiss, n.1.

¹⁷ Mot. to Change Venue from Palmer to Anchorage (June 25, 2018).

¹⁸ Certificate of Service (June 25, 2018).

¹⁹ Order (Palmer Superior Court, July 2, 2018).

²⁰ *Brooks Range Petroleum Corp. v. Shearer*, 425 P.3d 65, 70-71 (Alaska 2018).

AS 22.10.040. Therefore, Latham's venue transfer to Anchorage survives scrutiny and this Court may hear his post-conviction relief application.

The Application is Untimely and Successive

Latham's current post-conviction relief application presents the "layered" claim of an ineffective assistance scenario. Latham argues that his attorney in his first post-conviction relief petition provided incompetent representation and prejudiced him by not arguing that his trial attorney, John Pharr, failed to timely appeal his 1997 probation violation.²¹ Latham argues that Pharr did not keep abreast of the legislature's adoption of AS 12.72.020, which provided that applicants who sought to challenge pre-July 1, 1994 judgments were required to file such post-conviction challenges prior to July 1, 1996.

Latham filed his first post-conviction relief application in 1998. The Superior Court dismissed the application. On October 1, 2003, the Court of Appeals upheld the dismissal.²² Therefore, Latham had until October of 2004 to bring a post-conviction relief claim on the basis of ineffective assistance of counsel.²³

Latham was explicitly informed in the Court of Appeals decision that he was not affected by the 1995 change in legislation and that Pharr did not provide ineffective assistance of counsel.²⁴ Despite this notice, Latham did not take any steps to advance his *Grinols* claim until 2018. Under these facts, Latham's second post-conviction relief claim is barred under the statute of limitations.

²¹ Opp'n to Mot. to Dismiss at 35.

²² *Latham v. State*, 2003 WL 22250341 (Alaska Ct. App. 2003).

²³ AS 12.72.025.

²⁴ *Latham* at *3-4.

It is also noteworthy to mention that in Latham's first post-conviction relief claim, his counsel did indeed argue that the 1995 change in legislation eliminated his right to appeal his sentence and that his trial counsel, John Pharr, provided ineffective assistance of counsel. Both of these claims are the exact claims that Latham attempts to relitigate in his second post-conviction relief claim. The claims failed in his first application and he is barred from attempting to relitigate them again in this successive claim.

Conclusion

It is hereby ordered that Latham's post-conviction relief application is untimely and successive and is therefore DISMISSED.²⁵

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 27 day of October, 2020.



ADOLF V. ZEMAN
Superior Court Judge

I certify that on 27 October, 2020, a copy
was mailed to:
B. Latham; R. Allen

E. Elisabeth Rhea, Law Clerk

²⁵ This Order also disposes of Latham's pending motion to amend his application as well as his discovery requests.