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1275 (File No. 2505), 550 P.2d 1268 (1976).

The original reason for the type of jurisdictional limitation as in paragraph (1) was to prevent the complex and intricate questions which frequently arise in a title dispute from being decided by a court presided over by a person who was not learned in the law. As applied to the district courts of this state, however, the distinction is an anachronism, since a district court judge must be licensed to practice law in Alaska. Nevertheless, the jurisdictional limitation remains. Stephens v. Hammersley, Sup. Ct. Op. No. 1275 (File No. 2505), 550 P.2d 1268 (1976).

Repeal of paragraph (1) not implied from enactment of AS 22.15.030(a)(7). — AS 22.15.030(a)(7), authorizing actions for foreclosure of liens under $10,000 (now $35,000) in district courts, was enacted subsequent to paragraph (1) prohibiting actions in district court where title to real property is at issue. But repeal of paragraph (1) will not be implied since the two provisions can be reconciled by holding that lien foreclosures under $10,000 (now $35,000), including those on real property, are permissible as long as title to real property is not in question. Stephens v. Hammersley, Sup. Ct. Op. No. 1275 (File No. 2505), 550 P.2d 1268 (1976).

Issue of title must appear on trial from the evidence. — A magistrate [now judge] not only has the right, but the duty, to enter upon the trial of a cause for which there otherwise is jurisdiction, notwithstanding an issue of title is made by the pleadings, and, unless it appears on the trial from the evidence that the title to land is actually in dispute, to proceed to try the cause out and render judgment. Blue v. Green, 7 Alaska 47 (1923).

Forcible entry and detainer action. — Where plaintiff attempted in a forcible entry and detainer action to litigate the merits of defendant's title, defendant's motion to dismiss the action should have been granted pursuant to AS 09.45.150 and this section. Johnson v. Robinson, Sup. Ct. Op. No. 2452 (File No. 5948), 637 P.2d 1051 (1981).

Suing for money after disaffirmance of fraudulently induced contract. — Where the plaintiff sued for moneys paid by him on a contract which he alleged he was induced to enter into through misrepresentations and fraud of the defendant, and plaintiff disaffirmed the contract by reason of such misrepresentations and fraud, this was an action at law, and it was the duty of the court to have entertained such action. Blue v. Green, 7 Alaska 47 (1923).

Plaintiff seeking equitable relief. — If the plaintiff is seeking equitable relief, then a motion to dismiss can properly be laid before the magistrate [now judge] for want of jurisdiction to entertain the action. Blue v. Green, 7 Alaska 47 (1923).

District court lacks jurisdiction to hear parole eligibility complaints. — The legislature did not intend to empower the district court to hear complaints regarding eligibility for parole. Bishop v. Municipality of Anchorage, Ct. App. Op. No. 392 (File No. A-169), 685 P.2d 103 (1984).

District court lacked jurisdiction to decide challenges to parole board's interpretation of AS 33.15.180 [now repealed] and to the constitutionality of the section as interpreted; such challenges must be brought in the superior court. Bishop v. Municipality of Anchorage, Ct. App. Op. No. 392 (File No. A-169), 685 P.2d 103 (1984).

Or Criminal Rule 35(c) proceedings. — The district court lacks jurisdiction over Alaska R. Crim. P. 35(c) proceedings. Bishop v. Municipality of Anchorage, Ct. App. Op. No. 392 (File No. A-169), 685 P.2d 103 (1984).

Applied in Oxereok v. State, Sup. Ct. Op. No. 2076 (File No. 3902), 611 P.2d 913 (1980).

Quoted in Anchorage Helicopter Serv., Inc. v. Anchorage Westward Hotel, Sup. Ct. Op. No. 361 (File No. 628), 417 P.2d 903 (1966).

Cited in Buckalew v. Holloway, Sup. Ct. Op. No. 1988 (File No. 4058), 604 P.2d 240 (1979).

Sec. 22.15.060. Criminal jurisdiction. (a) The district court has jurisdiction of the following crimes:

(1) a misdemeanor unless otherwise provided in this chapter;

(2) a violation of an ordinance of a political subdivision.

(b) Insofar as the criminal jurisdiction of the district courts and the superior court is the same, such jurisdiction is concurrent. (§ 5 ch 184 SLA 1959)

NOTES TO DECISIONS

Where defendant was first charged in the district court and then, for the same offense, in the superior court, it was held that there was no need to establish in Alaska the rule that the matter must be tried in the court first obtaining jurisdiction. Theodore v. State, Sup. Ct. Op. No. 305 (File No. 550), 407 P.2d 182 (1965), cert. denied, 384 U.S. 951, 86 S. Ct. 1570, 16 L. Ed. 2d 547 (1966).

Serving as a district court judge constitutes the "practice of law." In re Brewer, Sup. Ct. Op. No. 864 (File No. 1643), 506 P.2d 676 (1973).

The district judge is continuously involved with legal problems of a wide variety as indicated by the statutory jurisdiction of the district court, and the nature of the duties includes conducting court hearings, ruling on questions of evidence and adjudicating issues of law and fact, so as clearly to constitute the "practice of law." In re Brewer, Sup. Ct. Op. No. 864 (File No. 1643), 506 P.2d 676 (1973).

Applied in State v. Pete, Sup. Ct. Op. No. 372 (File No. 673), 420 P.2d 338 (1966); Oxereok v. State, Sup. Ct. Op. No. 2076 (File No. 3902), 611 P.2d 913 (1980).

Quoted in State v. City of Anchorage, Sup. Ct. Op. No. 932 (File No. 1743), 513 P.2d 1104 (1973).

Stated in City of Fairbanks v. Schrock, Sup. Ct. Op. No. 567 (File No. 1032), 457 P.2d 242 (1969).

Cited in State v. Browder, Sup. Ct. Op. No. 699 (File No. 1323), 486 P.2d 925 (1971); Buckalew v. Holloway, Sup. Ct. Op. No. 1988 (File No. 4058), 604 P.2d 240 (1979); Rollins v. State ex rel. Municipality of Anchorage, Ct. App. Op. No. 769 (File No. A-1928), P.2d (1988).

Sec. 22.15.070. Extent of jurisdiction. The civil jurisdiction and the criminal jurisdiction of the district court of the State of Alaska extend over the entire state. (§ 6(1) ch 184 SLA 1959; am § 3 ch 36 SLA 1972)

NOTES TO DECISIONS

This section expressly confers statewide jurisdiction upon the district courts. Aguchak v. Montgomery Ward Co., Sup. Ct. Op. No. 1026 (File No. 1940), 520 P.2d 1352 (1974).

Distinction between jurisdiction and venue. — This section and AS 22.15.080 establish a distinction between jurisdiction and venue. "Jurisdiction" connotes the inherent power of a court to hear and adjudicate the subject matter in a given case, while "venue" designates the particular place or locality in which a court having such jurisdiction may in the first instance properly hear and determine the case. Leege v. Strand, Sup. Ct. Op. No. 157 (File No. 301), 384 P.2d 665 (1963).

Cited in Pete v. State, Sup. Ct. Op. No. 137 (File No. 290), 379 P.2d 625 (1963).

Sec. 22.15.080. Change of venue. The court in which an action is pending shall change the place of trial of the action from one place to another place in the same judicial district or to a designated place in another judicial district when the court finds any of the following:

(1) there is reason to believe that an impartial trial cannot be had;

(2) the convenience of witnesses and the ends of justice would be promoted by the change;

sentence is not subject to modification thereafter pursuant to this ... Gabrieloff v. State, Op. No. 533, 758 P2d 128 (Alaska App. ...).

Superior court did not have authority under this rule, which ... the court to modify a sentence in light of changed circumstances, to order the release of a sentenced prisoner to attend a ... potlatch for a period of four days, absent evidence that ... potlatch directly related to any basic sentencing goal or that the ... sentencing goal of rehabilitation would be defeated if the prisoner ... not attend the potlatch. State v. Ambrose, Op. No. 840, 758 P2d ... (Alaska App. 1988).

The trial court has discretion to consider a person's rehabilita... while incarcerated in evaluating an application for reduction of ... pursuant to Criminal Rule 35(a). Fowler v. Alaska, Op. ... 891, 766 P2d 588 (Alaska App. 1988).

The prerequisites to relief under Criminal Rule 35(b) are: (1) ... change in conditions or circumstances affecting the defendant ... occur after the original sentence is imposed; (2) the change ... relate to the purposes of the original sentence; and (3) the ... of the subsequent change in conditions or circumstances must ... significant as to defeat or substantially frustrate implementa... of the sentencing goal or objective. Mitchell v. State, Op. No. ... 767 P2d 203 (Alaska App. 1988).

A trial court has no power to impose a sentence, pursuant to ... Rule 35(b), which it would not have been permitted to ... at initial sentencing. Mitchell v. State, Op. No. 894, 767 P2d ... (Alaska App. 1989).

Prisoner's contention that his original sentence was excessive ... that he had been rehabilitated during his period of imprison... were factors properly addressed in a sentence appeal or in an ... tion under Criminal Rule 35(a), but not a motion under ... Rule 35(b). Mitchell v. State, Op. No. 894, 767 P2d 203 ... (Alaska App. 1988).

3 Specific Grounds

Where change in defendant's testimony would be considered ... discovered evidence only by concluding that he had lied at ... hearing, it did not provide grounds for reducing sentence. Davis v. State, Op. No. 1453, 566 P2d 640 (Alaska 1977).

The imposition by the superior court of a ten-year sentence with ... years suspended upon an eighteen-year-old who committed a ... of burglaries was not clearly mistaken. Winslow v. State, Op. ... 587 P2d 738 (Alaska 1978).

IV. Procedure

Where a magistrate revoked a suspended sentence without ... the supreme court remanded the case in order that a ... of sentence could be considered in accordance with Cr. R. ... Pete v. State, Op. No. 137, 379 P2d 625 (Alaska 1962).

A sentence is imposed at the time it is first announced upon the ... by the court. State v. Trunnel, Op. No. 1260, 549 P2d 550 ... (Alaska 1976).

Rule 35(b) proceeding is separate from original criminal pro... is governed by civil procedure, results in a final judgment ... may be appealed by either state or applicant. State v. Hann..., Op. No. 1374, ... P2d 1059 (Alaska 1977).

When a criminal appeal has been dismissed, though no man... has been issued, the appellant may seek relief in superior court ... Criminal Rule 35(a). Singletary v. State, Op. No. 1711, 583 ... 847 (Alaska 1978).

Criminal Rule 35(a) is not the appropriate procedural vehicle to ... relief as to conditions within custodial institutions or the civil ... of inmates. Rust v. State, Op. No. 1668, 584 P2d 38 (Alaska ...).

Defendant's request that he be given credit for time spent in jail ... parole violation arising out of same conduct for which he was ... of crime in question should have been considered a ... for discretionary relief under this rule, and while trial court was not obligated to provide credit for that period of incarceration, it clearly had discretion to do so. Hawley v. State, Op. No. 112, 648 P2d 1035 (Alaska App. 1982).

Presence of defendant at a hearing attacking the sentence was not mandatory where there were no substantial issues of fact as to the events in which the petitioner participated. Rivett v. State, Op. No. 249, 395 P2d 264 (Alaska 1964).

It is discretionary with the trial court whether to hold an evidentiary hearing, hear oral argument, or require the defendant's presentence in connection with decision on a Rule 35(a) application. Fowler v. State, Op. No. 891, 766 P2d 588 (Alaska App. 1988).

Criminal Rule 35(b) does not permit the trial court to refer a case to a three-judge sentencing panel based upon a nonstatutory mitigating factor (institutional rehabilitation) arising after the defendant has served a significant part of his sentence. Fowler v. State, Op. No. 891, 766 P2d 588 (Alaska App. 1988).

Since prisoner's motion for modification of sentence under Criminal Rule 35(b) did not state a prima facie case, for modification under the standards adopted in State v. Ambrose, Op. No. 840, 758 P2d 639 (Alaska App. 1988), the trial court did not abuse its discretion in denying the motion without a hearing. Mitchell v. State, Op. No. 894, 767 P2d 203 (Alaska App. 1989).

V. Time Limits

Where motion to modify sentence was filed two years after sentence was imposed, trial court did not abuse discretion in refusing to relax rule imposing 60-day limitation on such motions. Taylor v. State, Op. No. 1436, 564 P2d 1219 (Alaska 1977).

Where defendant's counsel had a bona fide belief that a motion for reduction or modification of sentence had been timely filed, defendant had requested such a motion and tried to learn if it had been filed, within prescribed period, and defendant was imprisoned in institution that could not afford him treatment for alcoholism, to fail to relax the 60-day limit of Criminal Rule 35(a) pursuant to Rule 53 would work an injustice. Wheeles v. State, Op. No. 3046, 566 P2d 1013 (Alaska 1977).

Superior Court is without authority to modify sentence absent a timely motion under this rule. Szeratics v. State, Op. No. 1525, 572 P2d 63 (Alaska 1977).

The filing of a supplemental application for correction of sentence did not terminate the running of the time for filing an appeal from the denial of the original application for correction of sentence. Abraham v. State, Op. No. 1747, 585 P2d 526 (Alaska 1978).

By relaxing the rules to permit a late sentence appeal because it was unclear whether counsel for defendant had failed him in not making a timely appeal, the court did not relax Rule 35(a) so as to allow defendant to take advantage of that rule in a manner which would not be available to an ordinary criminal defendant who appeals in a timely fashion. Davis v. State, Op. No. 2101, 612 P2d 49 (Alaska 1980).

The time limitations in this rule are subject to the trial court's power to relax rules in the interest of justice. Mitchell v. State, Op. No. 894, 767 P2d 203 (Alaska App. 1988).

A motion to modify a sentence which is not brought within the 120-day time limitation prescribed in Criminal Rule 35(a) is governed by the narrower prerequisites of Criminal Rule 35(b). Mitchell v. State, Op. No. 894, 767 P2d 203 (Alaska App. 1988).

Rule 35.1. Post Conviction Procedure.

(a) Scope. Any person who has been convicted of, or sentenced for, a crime and who claims:

(1) that the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of Alaska;

(2) that the court was without jurisdiction to impose sentence;

(3) that the sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;

(4) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(5) that his sentence has expired, his probation, parole or conditional release have been unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint;

(6) that the conviction or sentence is otherwise subject to collateral attack upon any ground or alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy; or

(7) that there has been a significant change in law, whether substantive or procedural, applied in the process leading to applicant's conviction or sentence, when sufficient reasons exist to allow retroactive application of the changed legal standards; may institute a proceeding under this rule to secure relief.

(b) Not a Substitute for Remedies in Trial Court — Replaces All Other Remedies for Challenging the Validity of a Sentence. This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction. It is intended to provide a standard procedure for accomplishing the objectives of all of the constitutional, statutory or common law writs.

(c) Commencement of Proceedings — Filing — Service. A proceeding is commenced by filing an application with the clerk of the court in which the conviction occurred. Application forms will be furnished by the clerk of court. An application may be filed at any time. The clerk shall open a new file for the application, promptly bring it to the attention of the court and give a copy to the district attorney.

(d) Application — Contents. The application shall (1) identify the proceedings in which the applicant was convicted, (2) state the date shown in the clerk's certificate of distribution on the judgment complained of, (3) state the sentence complained of and the date of sentencing, (4) specifically set forth the grounds upon which the application is based, and (5) clearly state the relief desired. Facts within the personal knowledge of the applicant shall be set forth separately from other allegations of facts and shall be under oath. Affidavits, records, or other evidence supporting its allegations shall be attached to the application or the application shall recite why they are not attached. The application shall identify all previous proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or sentence. Argument, citations and discussion of authorities are unnecessary. Applications which are incomplete shall be returned to the applicant for completion.

(e) Indigent Applicant. If the applicant is indigent, filing fees, transcript and other court costs shall be borne by the state. Where the court determines that the application shall not be summarily disposed of on the pleadings and record pursuant to subdivision (f) of this rule, but that the issues raised by the application require an evidentiary hearing, counsel shall be appointed to assist indigent applicants.

(f) Pleadings and Judgment on Pleadings.

(1) Within 30 days after the filing of the application, or within such further time as the court may fix, the state shall respond by answer or by motion which may be supported by affidavits. At any time prior to entry of judgment the court may grant leave to withdraw the application. The court may make appropriate orders for amendment of the application or any pleading or motion, for pleading over, for filing further pleadings or motions, or for extending the time of the filing of any pleading. In considering the application the court shall consider substance and disregard defects of form. If the application is not accompanied by the record of the proceedings challenged therein, the respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application.

(2) When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to postconviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed or grant leave to file an amended application or direct that the proceedings otherwise continue. Disposition on the pleadings and record shall not be made when a material issue of fact exists.

(3) The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

(g) Hearing — Evidence — Order. The application shall be heard in, and before any judge of, the court in which the conviction took place. An electronic recording of the proceeding shall be made. All rules and statutes applicable in civil proceedings, including pre-trial and discovery procedures, are available to the parties. The court may receive proof by affidavits, depositions, oral testimony, or other

evidence. The court may order the applicant brought before it for the hearing. If the court finds in favor of the applicant, it shall enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper. The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented. The order made by the court is a final judgment.

(b) **Waiver of or Failure to Assert Claims.** All grounds for relief available to an applicant under this rule must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

(Added by SCO 822, effective August 1, 1987)

Annotations

Cases

I. In General
II. Vacation of Conviction
  A. In General
  B. Specific Grounds
III. Procedure
  A. In General
  B. Hearing on Motion
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IV. Time Limits

I. In General

Appellate Rule 46 was invoked where strict adherence to the 40-day time limit for appeal under Criminal Rule 35 would have prevented consideration of appellant's contentions that his conditions of imprisonment deprived him of his right to rehabilitation and reformation and to be free of cruel and unusual punishment. Abraham v. State, Op. No. 1747, 585 P2d 526 (Alaska 1978).

Postconviction relief proceeding is not another trial; it is separate from the original criminal proceeding and is governed primarily by rules of civil procedure. Hensel v. State, Op. No. 1983, 604 P2d 222 (Alaska 1979).

The Criminal Rules promulgated by the Alaska Supreme Court are part of the general "laws" of Alaska as the term is used in this rule. Price v. State, Op. No. 100, 647 P2d 611 (Alaska App. 1982).

An attorney, appointed to represent an indigent in bringing his first application for post-conviction relief based on alleged ineffective assistance of counsel, was not permitted to withdraw on the basis that there were no nonfrivolous issuance to be presented to the court where the indigent was unwilling to forego the application; the court, rather than counsel, had to determine the merits of petitioner's contention. Hertz v. State, Op. No. 806, 755 P2d 406 (Alaska App. 1988).

II. Vacation of Conviction

A. In General

At a fact hearing upon a postconviction petition which alleged that petitioner was coerced by appointed trial counsel to enter a guilty plea and also alleged that trial counsel had given the petitioner false assurance regarding probation, specific findings must be made in the record as to as many of the following matters that may be applicable in addition to others possibly raised, namely the court's jurisdiction, the adequacy of petitioner's representation, intelligent waiver of counsel if there was such, questions of suppression of evidence or knowing use of perjured testimony, use of involuntary confessions, competency of petitioner to understand the proceedings and statutory range of sentence. Thompson v. State, Op. No. 334, 412 P2d 628 (Alaska 1966).

Order denying petition to vacate on ground that plea of guilty was coerced by threats and promises of probation officer was reversed and remanded directing the court below to place the probation officer under oath, to afford full opportunity for cross-examination at a full fact hearing on petitioner's charges, to weigh the testimony and to file written findings and decision. Nichols v. State, Op. No. 398, 425 P2d 247 (Alaska 1967).

If the record of a postconviction hearing is silent with regard to an issue and the witnesses are unable to remember, the State has not failed to substantiate its case. Instead, the prisoner has failed in his collateral attack on the judgment of conviction. Merrill v. State, Op. No. 568, 457 P2d 231 (Alaska 1969).

To secure relief in a habeas corpus proceeding, the petitioner has the burden of alleging and proving by a preponderance of the evidence all facts necessary to overturn the prior judgment of conviction. Merrill v. State, Op. No. 568, 457 P2d 231 (Alaska 1969).

Where the counsel for a prisoner seeking postconviction relief is unable to find witnesses having information to substantiate a jury-tampering claim, the trial court may dismiss the claim. Flores v. State, Op. No. 642, 475 P2d 37 (Alaska 1970).

A defendant is precluded from raising on application for postconviction relief the contention that the jury was improperly constituted where no challenge to the composition of the jury panel was made at the trial. Fajeriak v. State, Op. No. 1761, 520 P2d 795 (Alaska 1974).

A genuine issue of material fact, precluding summary disposition of an application for postconviction relief, is presented where it is alleged that the district attorney, by resort to threats and intimidation, prevented potential defense witnesses from testifying. Fajeriak v. State, Op. No. 1021, 520 P2d 795 (Alaska 1974).

Vacation of conviction for failure to comply with Criminal Rule 11 will only be granted when noncompliance affected substantial rights of defendant. Lewis v. State, Op. No. 1447, 565 P2d 846 (Alaska 1977).

A defendant seeking to set aside a conviction on grounds of newly discovered evidence must prove by a preponderance of the evidence those facts which entitle him to have the conviction set aside. Hensel v. State, Op. No. 1983, 604 P2d 222 (Alaska 1979).

Defendant has the burden of proving by a preponderance of the evidence that newly discovered evidence would be likely to change the result of the trial, that is, that the evidence would be sufficient to create a reasonable doubt as to his guilt. Hensel v. State, Op. No. 1983, 604 P2d 222 (Alaska 1979).

Defendant had burden of proving by a preponderance of the evidence that newly discovered evidence of diminished capacity would be sufficient to create a reasonable doubt in a new trial. Hensel v. State, Op. No. 1983, 604 P2d 222 (Alaska 1979).

B. Specific Grounds

Conviction set aside under this rule and case remanded for new trial, because trial court's exclusion from evidence of tape recorded inconsistent statements of state witness had resulted in keeping from jury relevant and important facts on the trustworthiness of crucial testimony even though witness had admitted making the statements. Bentley v. State, Op. No. 270, 397 P2d 976 (Alaska 1965).

Motion to vacate judgment of conviction under this provision based on the ground that plea of guilty made in 1952 was not voluntary in the meaning of federal criminal rule 11, was properly denied where records showed that the petitioner had discussed the plea with counsel of his own choice and that the judge had made a determination that the plea was not improvidently made. Oughton v. State, Op. No. 377, 420 P2d 452 (Alaska 1966).

Record of postconviction hearing on remand disclosed sufficient basis for superior court's finding that appellant's change of plea to guilty was made voluntarily and with understanding of the nature of the charge. Thompson v. State, Op. No. 408, 426 P2d 995 (Alaska 1967).

The allegations of a petitioner for postconviction relief that he had taken drugs some 12 hours prior to time he changed his plea to guilty and that at the time he appeared in court to enter his change of plea he was under the influence of drugs, and thus rendered incompetent, were sufficient to require an evidentiary hearing. Despite the apparent regularity of the competency hearing, the change of plea and the sentencing proceedings, the possibility still exists that the petitioner did not knowingly and understandingly plead to the offense as charged. Widermyre v. State, Op. No. 540, 452 P2d 885 (Alaska 1969).

Where a prisoner seeking postconviction relief refuses to waive the attorney-client privilege so that his trial counsel can testify on the question of the adequacy of representation, and the prisoner thus forestalls further inquiry into such ground for relief, the claim of inadequate representation by trial counsel is deemed to have been abandoned. Flores v. State, Op. No. 642, 475 P2d 37 (Alaska 1970).

A defendant is not deprived of a public trial merely because a newspaper reporter is unable to enter the building in which the courtroom is located, where such exclusion is unintentional, is for less than one hour and takes place at a time after submission of the case to the jury, while the jury is listening to a replay of certain recorded testimony. Flores v. State, Op. No. 642, 475 P2d 37 (Alaska 1970).

Proof that the State intimidated potential material defense witnesses and prevented them from testifying requires the granting of a new trial. A defendant, seeking postconviction relief, will not have to demonstrate prejudice. Fajeriak v. State, Op. No. 1021, 520 P2d 795 (Alaska 1974).

Where a defendant successfully proves on application for postconviction relief that his confidential communications with his attorney were electronically monitored, he ordinarily must be granted a new trial, even without demonstrating that he was prejudiced by such action. Fajeriak v. State, Op. No. 1021, 520 P2d 795 (Alaska 1974).

After conviction as accomplice to burglary not in a dwelling and malicious destruction of property, evidence of diminished capacity was admissible to negate showing by state that defendant had knowledge of the criminal enterprise and that defendant specifically intended, by his conduct, to aid, abet, assist or participate in the criminal enterprise. Hensel v. State, Op. No. 1983, 604 P2d 222 (Alaska 1979).

Where attorney did not inform his client of the possibility of a diminished capacity defense, but did himself consider it in preparing for trial, his failure to explain the possible defense did not render his legal assistance ineffective when the chances of acquittal or conviction on a lesser offense due to the use of the diminished capacity defense were improbable. Larson v. State, Op. No. 2128, 614 P2d 776 (Alaska 1980).

In order to obtain postconviction relief for ineffective assistance of counsel, defendant must first show that his lawyer's skill fell below that of a lawyer with ordinary training and skill in the criminal law, and second, that the lawyer's defective performance contributed in some way to defendant's conviction. Larson v. State, Op. No. 2128, 614 P2d 776 (Alaska 1980).

In attempting to eliminate consideration of the nature of the offense from its consideration of relevant factors at sentencing, the superior court committed reversible error. Kelly v. State, Op. No. 2268, 622 P2d 432 (Alaska 1981).

III. Procedure

A. In General

A petitioner seeking postconviction relief on the grounds that she was transported out of the state for purposes of out-of-state incarceration prior to the expiration of the ten-day period within which she is required to file a notice of appeal, should attempt to show what impact her physical removal from the state has had on her ability to file a timely notice of appeal. She should further show what attempt she has made during the period between the imposition of sentence and the alleged removal from the state to engage services of trial counsel. Pore v. State, Op. No. 537, 452 P2d 433 (Alaska 1969).

An appeal from the denial of a petition for writ of habeas corpus is characterized as one from the denial of a motion for postconviction relief. Knaub v. State, Op. No. 489, 443 P2d 44 (Alaska 1968).

If the trial court determines conclusively that a petitioner is entitled to no postconviction relief after an examination of the files and records of a case, it may properly deny the petition without hearing. Knaub v. State, Op. No. 489, 443 P2d 44 (Alaska 1968).

A trial judge in acting upon a motion for postconviction relief is entitled to rely upon his recollection of the proceedings during the trial. Knaub v. State, Op. No. 489, 443 P2d 44 (Alaska 1968).

It is not necessary to hold an evidentiary hearing concerning an alleged deprivation of the right to appeal where petitioner alleges she requested her trial defense counsel to file an appeal from her conviction, but fails to indicate time, location, manner and circumstances under which she had requested her counsel to make such appeal. Pore v. State, Op. No. 537, 452 P2d 433 (Alaska 1969).

The determination that a petition for postconviction relief alleging the deprivation of the right to appeal does not require the holding of an evidentiary hearing does not preclude the petitioner from making a second application for postconviction relief and presenting evidence supporting the assertion, first presented on appeal from a denial of the first postconviction motion, that she was transported out of the state for purposes of out-of-state incarceration prior to the expiration of the ten-day period within which she was required to file her notice of appeal. Pore v. State, Op. No. 537, 452 P2d 433 (Alaska 1969).

If the trial court can determine conclusively that the petitioner is not entitled to postconviction relief after examining the files and records of the case, it may properly deny the petition without hearing. Widermyre v. State, Op. No. 540, 452 P2d 885 (Alaska 1969).

Post-conviction relief is an appropriate vehicle for the effectuation of the right of appeal where counsel has failed to file a timely notice of appeal. McCracken v. State, Op. No. 677, 482 P2d 269 (Alaska 1971).

Where a convicted defendant presents important questions of substantive criminal law never before decided in the state, the court will consider the merits of the issues, even though the petitioner had not asserted his claims in prior motions. Mead v. State, Op. No. 731, 489 P2d 738 (Alaska 1971).

If an applicant for postconviction relief is represented by counsel in the first application, there will be no presumption in his favor in a second application, and he will incur the burden of showing sufficient reason for any failure to raise grounds for relief in the first application. Thompson v. State, Op. No. 792, 496 P2d 651 (Alaska 1972).

Indigent prisoners seeking relief under this rule must be provided with counsel at the time their application is filed. Donnelly v. State, Op. No. 965, 516 P2d 396 (Alaska 1973).

Generally, a petitioner for postconviction relief has a right to represent himself without counsel in criminal proceedings. McCracken v. State, Op. No. 986, 518 P2d 85 (Alaska 1974).

The right to self-representation on a petition for postconviction relief is not absolute. In order to prevent a perversion of the judicial process, the trial judge should first ascertain whether a prisoner is capable of presenting his allegations in a rational and coherent manner before allowing him to proceed pro se, and the trial judge

should satisfy himself that the prisoner understands precisely what he is giving up by declining assistance of counsel. The advantages of legal representation should be explained to the prisoner in some detail, and in the event of an evidentiary hearing at which the prisoner is present he should be given the option of having legal counsel available for consultation. McCracken v. State, Op. No. 986, 518 P2d 85 (Alaska 1974).

Where a petitioner for postconviction relief desires to represent himself, the trial judge should determine whether the prisoner is willing to conduct himself with at least a modicum of courtroom decorum, but the hearing judge must bear in mind that prisoners are not experienced trial lawyers, and are not practiced in the formalities of courtroom etiquette. McCracken v. State, Op. No. 986, 518 P2d 85 (Alaska 1974).

Where pleadings filed by a petitioner seeking postconviction relief demonstrate a certain knowledge of the merits of his allegations, and indicate at least to some extent that he might have the ability to represent himself, his rights might best be vindicated by an order permitting him to represent himself with the assistance of counsel from the public defender's office appointed by the court. If it should be determined that the prisoner's presence would be necessary at a hearing, a more thorough inquiry into the propriety of permitting him to represent himself could be undertaken at that time. McCracken v. State, Op. No. 986, 518 P2d 85 (Alaska 1974).

Even though postconviction applications are assigned to the original trial judge, he is not chargeable with knowledge of the entire original trial record, where the transcript and record is extremely lengthy and the trial took place several years earlier. Portions of the record relied on for postconviction relief should be specifically presented to the judge. Fajeriak v. State, Op. No. 1021, 520 P2d 795 (Alaska 1974).

All post conviction challenges other than by direct appeal or motion after trial must be initiated in the trial court in which the conviction occurred. McKinnon v. State, Op. No. 1075, 526 P2d 18 (Alaska 1974).

A sentence is imposed at the time it is first announced upon the record by the court. State v. Trunnel, Op. No. 1260, 549 P2d 550 (Alaska 1976).

Rule 35(b) proceeding is separate from original criminal proceeding, is governed by civil procedure, results in a final judgment and may be appealed by either state or applicant. State v. Hannagan, Op. No. 1374, 559 P2d 1059 (Alaska 1977).

When a criminal appeal has been dismissed, though no mandate has been issued, the appellant may seek relief in superior court under Criminal Rule 35(a). Singletary v. State, Op. No. 1711, 583 P2d 847 (Alaska 1978).

Criminal Rule 35(a) is not the appropriate procedural vehicle to seek relief as to conditions within custodial institutions or the civil rights of inmates. Rust v. State, Op. No. 1668, 584 P2d 38 (Alaska 1978).

An appeal from denial of a supplemental application for correction of sentence presents only the question of whether the denial of reconsideration of the original application was proper and does not bring up for review the decision denying the original application for correction of sentence. Abraham v. State, Op. No. 1747, 585 P2d 526 (Alaska 1978).

The provisions of Criminal Rule 35(g)(2) [now 35(h)(2)] are applicable only to postconviction proceedings under Criminal Rule 35(b) and are not applicable to requests for relief under Criminal Rule 35(a). Winslow v. State, Op. No. 1767, 587 P2d 738 (Alaska 1978).

Where defendant in probation revocation proceeding did not file motion for postconviction relief on form provided by court, or file the motion in the court where the original conviction occurred, he did substantially comply with requirements of Criminal Rule 35 by filing separate "Motion to Dismiss Probation Revocation Proceeding, or in the Alternative, to Strike Felony Conviction" and by sending copy of the motion to judge who presided in the original case, where judge by special arrangement ruled on the motion while in the jurisdiction where probation revocation hearing was held. Holton v. State, Op. No. 1967, 602 P2d 1228 (Alaska 1979).

Postconviction relief proceeding is not another trial; it is separate from the original criminal proceeding and is governed primarily by rules of civil procedure. Hensel v. State, Op. No. 1983, 604 P2d 222 (Alaska 1979).

An error need not be of constitutional magnitude in order to be attacked under this rule. Price v. State, Op. No. 100, 647 P2d 611 (Alaska App. 1982).

Errors in jury instructions which render a criminal trial fundamentally unfair warrant relief under this rule. Price v. State, Op. No. 100, 647 P2d 611 (Alaska App. 1982).

Defendant's failure to object at trial to jury instruction forfeited his right to challenge the instruction in a postconviction proceeding where the instruction did not significantly change the law so as to excuse a timely failure to object, and defendant did not show either good cause for failing to object or substantial prejudice. Marrone v. State, Op. No. 156, 653 P2d 672 (Alaska App. 1982).

Trial court is not obligated to dismiss an application for postconviction relief sua sponte even if it is convinced it has no merit. Hampton v. Huston, Op. No. 155, 653 P2d 1058 (Alaska App. 1982).

Trial court erred in ruling on pro se appellant's motion for postconviction relief without a knowing, intelligent and voluntary waiver of counsel by appellant and without determining whether or not appellant was competent to represent himself. Hampton v. Huston, Op. No. 155, 653 P2d 1058 (Alaska App. 1982).

Summarily dismissing defendant's motion for postconviction relief which alleged ineffective assistance of counsel, without advance notice to defendant indicating the court's intention to dismiss the motion or its reasons for the proposed dismissal, was reversible error, even though the motion itself did not establish a prima facie case of ineffective assistance of counsel. Wood v. Endell, Op. No. 488, 702 P2d 248 (Alaska App. 1985).

In post-conviction relief actions, particularly in cases involving pro se applicants who are incarcerated and do not have ready access to court documents, the court's discretion to relax technical pleading requirements should be liberally exercised. State v. Jones, Op. No. 832, 759 P2d 558 (Alaska App. 1988).

B. Hearing on Motion

On his first application to vacate or set aside sentence and to withdraw plea of guilty on ground of coercion, an indigent prisoner had a constitutional right to have counsel appointed by the court to represent him at such hearing. Nichols v. State, Op. No. 398, 425 P2d 247 (Alaska 1967).

The allegations of a petitioner for postconviction relief that he had taken drugs some 12 hours prior to time he changed his plea to guilty and that at the time he appeared in court to enter his change of plea he was under the influence of drugs, and thus rendered incompetent, were sufficient to require an evidentiary hearing. Despite the apparent regularity of the competency hearing, the change of plea and the sentencing proceedings, the possibility still exists that the petitioner did not knowingly and understandingly plead to the offense as charged. Widermyre v. State, Op. No. 540, 452 P2d 885 (Alaska 1969).

A prisoner seeking postconviction relief is not denied a fair determination of his motion merely because he is not present in person at hearings on the motion. Flores v. State, Op. No. 642, 475 P2d 37 (Alaska 1970).

In a postconviction proceeding, the attorney who has served as trial counsel for the defendant properly refuses to testify on the question of the adequacy of his representation, in the absence of a waiver of the attorney-client privilege. Flores v. State, Op. No. 642, 475 P2d 37 (Alaska 1970).

Normally, whether to produce the prisoner is a decision left to the discretion of the court, but where the defendant's own testimony would be an essential prerequisite to proper adjudication of

an issue raised on application for postconviction relief. The defendant should be permitted to testify. **Tajeriak v. State**, Op. No. 1021, 520 P2d 795 (Alaska 1974).

Where the court elects to consider a petition for postconviction relief summarily, it must provide advance warning of its decision to the parties in a written order spelling out in some detail its reasons for concluding that the petition warrants summary disposition. **Hampton v. Huston**, Op. No. 155, 653 P2d 1098 (Alaska App. 1982).

C. On Review.

Where appellant claimed that he was coerced into a plea of guilty by court appointed counsel who had also given him alleged false assurances of probation, and upon a postconviction petition under this rule the trial court had found that these charges were unsubstantiated basing its finding upon matter not contained in the record, the case was remanded to the trial court for further proceedings to create a record upon appropriate and specific findings. **Thompson v. State**, Op. No. 334, 412 P2d 628 (Alaska 1966).

The rule contemplates that the sentencing court should be initially called upon to review the sentence. **State v. Pete**, Op. No. 372, 420 P2d 338 (Alaska 1966).

The sole question before a reviewing court when confronted with an order denying, without hearing, a motion for postconviction relief is whether the petitioner in his application for relief made such a showing as to require a hearing. **Widermyre v. State**, Op. No. 540, 452 P2d 885 (Alaska 1969).

On an appeal from a motion attacking a sentence, the factual findings of the lower court are judged by the same criterion as findings made in a judge-tried civil case. **Merrill v. State**, Op. No. 568, 457 P2d 231 (Alaska 1969).

Where the defendant does not move for an evidentiary hearing or base his motion for a new trial on misconduct by the bailiff, the issue of whether the trial court erred in failing to grant him an evidentiary hearing concerning an allegedly improper statement made by the bailiff to the jury during the course of their deliberations is not properly before the Supreme Court. The defendant is not precluded from raising the issue in a future proceeding on a motion for a new trial or through other means seeking postconviction relief. **Howard v. State**, Op. No. 754, 491 P2d 154 (Alaska 1971).

Trial court's finding that new evidence, if presented at a new trial, would probably not create a reasonable doubt as to defendant's guilt will be upheld unless such finding constitutes an abuse of discretion. **Hensel v. State**, Op. No. 1983, 604 P2d 222 (Alaska 1979).

Standard for review of trial court's denial of motion for postconviction relief is one of abuse of discretion. **Hensel v. State**, Op. No. 1983, 604 P2d 222 (Alaska 1979).

An appellant should not be able to raise issues on appeal from the denial of an application for postconviction relief that he would have been barred from raising on direct appeal from his original conviction. **Marrone v. State**, Op. No. 156, 653 P2d 672 (Alaska App. 1982).

Ad hoc procedural course followed by the trial court departed markedly from the orderly procedure for the expeditious disposition of non-meritorious applications for post-conviction relief contemplated by this rule, depriving the state of a fair opportunity to contest defendant's application for post-conviction relief and requiring reversal of the trial court order setting aside defendant's convictions. **State v. Jones**, Op. No. 832, 759 P2d 558 (Alaska App. 1988).

IV. Time Limits

Appellate Rule 46 was invoked where strict adherence to the 40-day time limit for appeal under Criminal Rule 35 would have prevented consideration of appellant's contentions that his conditions of imprisonment deprived him of his right to rehabilitation and reformation and to be free of cruel and unusual punishment. **Abraham v. State**, Op. No. 1747, 585 P2d 526 (Alaska 1978).

A person moving to withdraw a guilty plea under Criminal Rule 32(d) and moving for postconviction relief under Criminal Rule 35(b) need not show that the former motion was made with "due diligence". **Swensen v. Municipality of Anchorage**, Op. No. 2179, 616 P2d 874 (Alaska 1980).

Rule 35.2. Discharge and Set-Aside of Conviction.

(a) Where the court has suspended imposition of sentence, the defendant has completed the probationary term without imposition of sentence and no petition to revoke probation is pending, the court shall discharge the defendant from probation. At the time discharge is entered, which shall occur 30 days after defendant's probationary term has expired, or at such later time as the court for cause may direct, the court shall consider whether the conviction should be set-aside. If the court determines that the conviction should be set-aside, it shall issue a certificate to that effect to the defendant. If the court determines that the conviction should not be set-aside, it shall set forth with specificity its reasons for that decision.

(b) The court shall notify the state at least 20 days prior to the expiration of defendant's probationary term that the court will consider whether to discharge the defendant from probation and to set aside the defendant's conviction. In the event any party opposes discharge or set-aside of the conviction, that party shall file a motion with appropriate support not less than 20 days prior to the time discharge is to be entered pursuant to paragraph (a). The defendant must be served with a copy of any such motion and have an opportunity to respond. A copy of the motion also must be mailed to defendant's last attorney of record. Any party, or the court on its own motion, may set the matter for hearing.

(c) In the event that no party has filed a motion opposing set-aside of the conviction, the court may refuse to set-aside the conviction only after affording the defendant notice and an opportunity to be heard. Notice must be served on the defendant and a copy mailed to defendant's last attorney of record.

(Added by SCO 901 effective January 15, 1989)

Rule 36. Clerical Mistakes.

Clerical mistakes in judgments, orders or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time and after such notice, if any, as the court orders.

(Adopted by SCO 4 October 4, 1959)

Annotations

Cases

The issue whether a superior court has power to forfeit an aircraft as condition of probation for unlawful possession and transportation of contraband by an airplane is not timely raised by appeal taken after a February 1973 order which amends an August 1972

STATE OF ALASKA
1990 LEGISLATIVE SESSION

Bill Version: SB 498
Publish Date: 2/14/90

FISCAL NOTE

REQUEST:

Revision Date:
Agency Affected: Alaska Court System
Title: An Act amending the jurisdiction of the district court... post conviction relief
BRU: Trial Courts
Sponsor: Judiciary Committee
Components:
Requestor:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Jan Strandberg, General Counsel
Phone: 264-8228
Division: Alaska Court System
Date: 02/21/90

Approved by: Arthur H. Snowden, II, Administrative Director FOR
Date: 02/21/90
Agency: Alaska Court System

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