

IN THE COURT OF APPEALS FOR THE STATE OF ALASKA

DAVID HAEG)
)
Appellant,)
)
vs.)
)
STATE OF ALASKA,)
)
Appellee.)

Case No.: A-09455

Trial Court Case #4MC-S04-024 CR.

Consolidated Response to Appellant's Expedited Motions

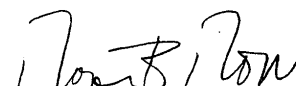
Comes now the State of Alaska, by and through Assistant Attorney General Roger B. Rom, in response to Appellant's various motions filed with this court seeking expedited relief. These motions include:

- 1) Emergency Motion for Return of Property and to Suppress Evidence
- 2) Motion to Stay Appeal Pending Post Conviction Relief Procedure
- 3) Motion to Supplement the Record
- 4) Motion for Summary Judgment Reversing Conviction with Prejudice
- 5) Motion to Correct and Stay Guide License Suspension

The State opposes Appellant's motions, the basis for which is set forth in the attached Memorandum of Law. This opposition is also supported by the attached Affidavit of Counsel.

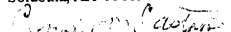
Dated and signed 8th, day of November, 2006, at Anchorage, Alaska.

DAVID W. MÁRQUEZ
ATTORNEY GENERAL

By: 
Roger B. Rom
Assistant Attorney General
Alaska Bar No. 9011128

This is to certify that a copy of the Consolidated Response to Appellant's Expedited Motions, Affidavit of Counsel, Memorandum of Law and Order is being ~~Mailed~~ faxed/delivered to:

David Haeg
PO Box 123
Soldotna, AK 99669


Signed 11/8/2006

STATE OF ALASKA
DEPARTMENT OF LAW
OFFICE OF SPECIAL PROSECUTIONS AND APPEALS
310 K STREET, SUITE 308
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Affidavit of Counsel

1. I am an Assistant Attorney General assigned to the Office of Special Prosecutions and Appeals. This case was assigned to me after the trial and sentencing were concluded and appellant filed his notice of appeal.

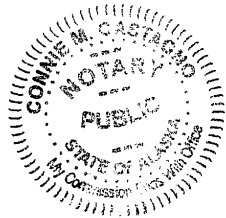
2. I have reviewed the State's file and most of the pleadings filed in this case. I represented the State during the remand to the trial court to determine whether appellant's counsel should be allowed to withdraw and whether appellant should be permitted to represent himself.

3. Any factual assertions made in the memorandum of law are based upon my best belief and information and are true and accurate to the best of my knowledge.

By: *Roger B. Kom*
 Roger B. Kom
 Assistant Attorney General
 Alaska Bar No. 9011128

SUBSCRIBED AND SWORN to before me this 5th day of November, 2006, at Anchorage, Alaska.

Conrad M. Castagna
 Notary Public in and for Alaska
 My commission expires: w/office



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ORDER

Based upon Appellant's motion and supporting arguments, and the State's responses thereto, IT IS HEREBY ORDERED:

1. Appellant's Emergency Motion for Return of Property and to Suppress Evidence is DENIED;
2. Appellant's Motion to Stay Appeal Pending Post Conviction Relief Procedure is DENIED;
3. Appellant's Motion to Supplement the Record is DENIED;
4. Appellant's Motion for Summary Judgment Reversing Conviction with Prejudice is DENIED;
5. Appellant's Motion to Correct and Stay Guide License Suspension is DENIED in part. It is FURTHER ORDERED that Appellant may supplement his points on appeal to permit him to raise on appeal whether the trial court erred in revoking his guide license for a five year period. His request to stay the license suspension is DENIED.

Dated and Entered this ___ day of _____, at Anchorage, Alaska.

Judge of the Court of Appeals

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Memorandum of Law

I. Introduction

Appellant was convicted at jury trial for various misdemeanor offenses alleging violations of Title 8, 11 and 16, and regulations promulgated under those statutes. He was sentenced on September 30, 2005, by District Court Judge Margaret L. Murphy for the nine counts upon which he was found guilty. Counts I through V were convictions for Unlawful Acts by a Guide for Taking Game on the Same Day Airborne (AS 8.54.720(a) (15), Counts VI and VII for Unlawful Possession of Game (5AAC 92.140(a), Count VIII for Unsworn Falsification (AS 11.56.210(a)(2), and Count IX for Trapping in a Closed Season (5 AAC 84.270(14). He timely filed his notice of appeal.

After various extensions of time to file appellant's brief, appellant substituted attorneys. On April 16, 2006, appellant moved for a stay of the forfeiture and his license suspension pending appeal in this court. The State opposed his request and on May 16, 2006, this court granted the stay of the order of the trial court imposing

restitution, but denied the motion to stay the order of the trial court suspending appellant's guide license and forfeiture of his airplane. Thereafter, appellant sought an order of this court for permission to represent himself.

On June 23, 2006, this court remanded the case to the district court to determine whether appellant knowingly and intelligently waived his right to counsel and whether he was competent to represent himself on appeal. Following the recommendation of the trial court, this court granted appellant's request to represent himself in his appeal.

This court's order of June 23, 2006, denied without prejudice appellant's motion for reconsideration of the order denying a stay on the suspension of his guide license and forfeiture of his aircraft. On September 21, 2006, this court denied appellant's motion to supplement the record. However, the basis for the court's denial was that the filing was premature since the court had not yet determined that appellant could represent himself on appeal. Therefore, it appears that he has now properly brought before the court the issue of reconsideration of the stay on his guide license and forfeiture of his aircraft and his request to supplement the record. The court has directed the State to respond by November 8, 2006. The State opposes the Appellant's request.

I. Legal Argument.

A. Appellant's emergency motion for return of property and to suppress evidence should be denied.

Appellant seeks an order of this court directing the State to return evidence lawfully seized and forfeited in this case. He claims that he needs a court order because he intends to confront the troopers on November 16, 2006, demanding return of the evidence.

Appellant's argument is essentially a due process argument. He claims that the State was required to provide him with a hearing so he could challenge the search warrant which led to the collection of the evidence and eventual forfeiture in the judgment of conviction. Because he is both legally and factually mistaken, his motion should be denied. Additionally, it is questionable whether this court is the proper forum to grant the relief requested.

According to the police report, the Aniak District Court authorized two search warrants which appear to apply to appellant's arguments. Search warrant 4MC-04-002SW permitted the troopers to search appellant's residence in Soldotna, as well as his hangar and outbuildings for evidence pertaining to his illegal taking of wolves. Search warrant 4MC-04-003SW permitted the search and seizure of appellant's Piper Pa-12 Supercruiser aircraft for evidence, also pertaining to the illegal taking of wolves. On April 1, 2004, the warrants were executed and a copy of the warrant and inventory was left with appellant at his residence. The return was properly filed with the Aniak District Court. Appellant was eventually charged with the crimes for which he was convicted. He was represented by counsel in the criminal case.

A criminal case is procedurally governed by the Alaska Rules of Criminal Procedure. Criminal Rule 37 addresses search warrants. Subsection (c) provides:

Motion for return of property and to suppress evidence. A person aggrieved by an unlawful search and seizure may move the court in the judicial district in which the property was seized or the court in which the property may be used for the return of the property and to suppress for use as evidence anything so obtained on the ground that the property was illegally seized.

Since appellant was served with the search warrant he had notice that the State had seized his property pursuant to a warrant. Criminal Rule 37 (c) provided a mechanism for him to challenge the lawfulness of the seizure. Whether he exercised his right or not is irrelevant. The law provided due process for him to do so if he made that choice. Once he was charged, Criminal Rule 12 applied. Subsection (b) regulates pretrial motions and permits a defendant to challenge the evidence which may be used against him at trial. Alaska Criminal Rule 12 (b) (3) specifically provides a mechanism for a defendant charged with a crime to suppress evidence on the ground that it was illegally obtained. Failure to move to suppress evidence constitutes a waiver. Criminal Rule 12 (e) provides:

Effect of failure to raise defenses or objections. Failure by the defendant to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to section (c), or prior to any extension thereof made by the court, shall constitute waiver thereof but the court for cause shown may grant relief from the waiver.

Again, it is irrelevant whether the defendant chose to exercise his right or not.

The law provided a mechanism for him to do so and his due process rights were

satisfied. Apparently his attorney did not seek suppression and this court should not be in a position to second guess the decision. It is also legally irrelevant whether the defendant personally assented to the attorney's tactical decision not to seek suppression. *Beltz v State*, 895 P.2d 513 (Alaska App. 1995); *see Cornwall v. State*, 909 P.2d 360 (Alaska App. 1996).

Appellant claims that the State was required to provide him with more process than this. He claims that the State was required to provide him with a hearing immediately upon seizure of his property. However, his argument fails because he relies upon the civil rules which necessarily do not apply to the criminal case. Specifically, his reliance on Alaska Rule of Civil Procedure 89 is misplaced. Civil Rule 89 pertains to prejudgment attachment, and the very first sentence states: "After a civil action is commenced, the plaintiff may apply to the court to have the property of the defendant attached under AS 09.40.010-.110 as security for satisfaction of a judgment that may be recovered." No civil action commenced and appellant's reliance on other portions of the rule is simply misplaced.

Because appellant misconstrues the procedural rules, his reliance on the case law is also misplaced. Appellant relies upon two cases in support of his argument: *F/V American Eagle v. State*, 620 P.2d 657 (Alaska 1980) and *Waiste v. State*, 10 P.3d 1131 (Alaska 2000). Both of these cases indicate that the procedural protections granted by the criminal rules and as they were followed here, satisfies a defendant's right to due process. In *F/V American Eagle* the court recognized that both the Alaska and Federal Constitutions require notice and an opportunity for hearing at a meaningful time when

property is seized. In that case the court found that the owners of the vessel were provided sufficient due process because the vessel was seized pursuant to a judicially authorized warrant, the vessel owners were formally notified of the State's action, and the vessel owners had "an immediate and unqualified right to contest the State's justification for the seizure before a judge under Criminal Rule 37 (c)." *F/V American Eagle*, 620 P.2d at 677.¹ In *Waiste* the court revisited some of the issues raised in *F/V American Eagle* including seizure and forfeiture of a fishing vessel where the criminal charges resulted in acquittal, but the State still could have proceeded with a civil forfeiture. The court reviewed dicta in *American Eagle* and *State v. F/V Baranof*, 677 P.2d 1245 (Alaska 1984) and federal law to determine whether the Due Process Clause of the Alaska Constitution would require more than a prompt post seizure hearing. *Waiste*, 10 P.3d at 1147. In deciding this issue in *Waiste*, the Court stated: "[W]e balance the State's interest in avoiding removal or concealment with the likelihood and gravity of error in the relevant class of cases, and, in so doing, we hold that a blanket rule of *ex parte* seizure comports with due process." *Id.* at 1152.

There was no lack of due process and appellants motion should be denied.²

B. Opposition to Motion to Stay Appeal Pending Post Conviction Relief Procedure

¹ A review of the file suggests that forfeiture of the aircraft was contemplated at all times throughout the plea negotiations in this case. The return of the aircraft was apparently not a consideration.

² Although the judgments do not reflect the statutory authorization for forfeiture of the aircraft, and appellant does not directly raise this in his brief, AS 16.05.190-.195 and AS 08.54.720(f)(4) authorize forfeiture upon conviction. See *Waiste*, 10 P.3d at 1152-53.

Appellant seeks an order staying his appeal so that he may file a petition for post conviction relief. There is no basis in the law for to support appellant's request and policy reasons suggest it would be improper to grant his motion.

A petition for post conviction relief is a civil matter. Conclusion of appellant's post conviction relief case could be years away. If by chance he concluded his post conviction relief matter and returned to his appeal, and the court granted an appeal overturning his conviction, the State would be in the unenviable position of having to retry a case that would be several years old. There is substantial prejudice to the State in the event this were to unfold, including loss of witnesses and the impact of time on the memory of witnesses.

Moreover, appellant's reason behind this request for a stay is to gather additional evidence upon which he hopes to base his appeal. None of the evidence he generates in a post conviction relief procedure would be permitted to be included in the record on appeal in this case. This appeal has to do with his criminal trial and the record on appeal is already complete. See Alaska Rule of Appellate procedure 210.

Appellant seems to recognize that he is unable to bring his ineffective of counsel claim before this court on a direct appeal. For this reason, he has essentially argued that his appeal is fruitless. If that is the case, and because his sole interest is in furthering an ineffective assistance claim, then he should dismiss his appeal and file his petition for post conviction relief.

C. Opposition to Motion to Supplement the Record

Appellant seeks to supplement the record with matters that were not before the trial court, including proceedings before the Alaska Bar Association, appellant's representation hearing on remand, and proceedings before the Alaska Commission on Judicial Conduct.

Alaska Rule of Appellant Procedure 210 governs this request. Subsection (a) states:

Composition of record. The record on appeal consists of the entire Superior Court file, including the original papers and exhibits filed in the Superior Court, and the electronic records of proceedings before the Superior Court.

All of the items appellant seeks to include in the record are excluded by this rule. Since the items he wants to include in the record would not advance his appeal, his motion should be denied.

D. Opposition to Motion for Summary Judgment Reversing Conviction With Prejudice

Appellant seeks summary judgment in his appeal. He misconstrues Alaska Rule of Appellant Procedure 214. Rule 214 applies to summary disposition, not summary judgment. Apparently, appellant believes he can demonstrate with supporting affidavits that he is entitled to summary judgment pursuant to Alaska Rule of Civil Procedure 56. Because there is no legal basis for the court to grant the relief appellant requests, his motion should be denied.

E. Opposition to Motion to Correct and Stay Guide License Suspension

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Appellant raises two issues in this motion. First, he claims that the trial court should have suspended his license, rather than revoke it for five years. Second, he again seeks a stay on his license suspension.

Modification of the sentence from revocation to suspension should not be brought by motion. Rather, appellant should have included this issue in his points on appeal. The State would not oppose the court permitting appellant to revise his points on appeal to raise this single issue. The judgment states, as appellant claims, that his license is revoked for a five year period. The judgment is a prepared form, and it does not appear that the trial court considered the distinction between revocation and suspension when it entered its order. Since AS 08.54.720(f) (3) requires the court to order the [big game commercial services] board "to suspend the guide license...for a specified period of not less than three years, or to permanently revoke the guide license" upon conviction for taking game while same day airborne, appellant at least raises a colorable argument.

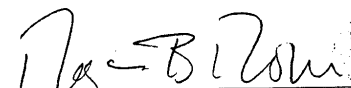
Appellant also seeks to stay his guide license suspension. The State opposes this request. Appellant made this request in the trial court and it was denied. He made this request through counsel in this court and it was denied. After his motion for reconsideration was filed, his attorney withdrew and it appears that this court has not addressed his motion for reconsideration. Alternatively, the court has permitted him to renew his motions. The court should deny his request and permit the license suspension to continue during his appeal.

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The trial court was in the best position to determine whether appellant should be permitted to act as a guide during his appeal. The trial court rejected his request. Appellant was duly convicted by a jury of his peers and the court found that it was in the public interest to suspend his guide license. Appellant was convicted of multiple counts of violating fish and game laws, and taking game on the same day one was airborne is one of the more egregious wildlife violations under the fish and game code. Guides are held to a certain standard of conduct and are expected to maintain ethical and professional conduct in their affairs. Appellant failed to adhere to one of the most basic principals in hunting: fair chase. Additionally, he engaged in the taking of nine wolves out side of the permitted area in a controversial predator control program. It would not be in the public's interest for appellant to continue to operate as a big game guide based on his practice of engaging in illicit conduct involving wildlife laws.

Dated this 8th day of November, 2006 at Anchorage, Alaska.

DAVID W. MÁRQUEZ
ATTORNEY GENERAL

By: 
Roger B. Rom
Assistant Attorney General
Alaska Bar No. 9011128