

SUPREME COURT OF NEBRASKA

State v. Tyler

301 Neb. 365 (2018) · No. No. S-17-870 · Decided October 19, 2018

SUMMARY

The Nebraska Supreme Court affirmed the denial of Avery R. Tyler’s motion for postconviction relief without an evidentiary hearing. Tyler alleged prosecutorial misconduct involving witness testimony, closing arguments, and an alleged plea agreement, as well as ineffective assistance of trial and appellate counsel. The court held that certain claims were procedurally barred, while the remaining claims were insufficient or refuted by the record.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Funke, J.; Heavican, C.J.; Miller-Lerman, J.; Cassel, J.; Stacy, J.; Papik, J.
JURISDICTION	Nebraska
DECIDED	October 19, 2018
DOCKET	No. S-17-870
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from the denial of a motion for postconviction relief without an evidentiary hearing.
STANDARD OF REVIEW	Whether a postconviction claim is procedurally barred is reviewed independently as a question of law. The determination that a defendant failed to allege sufficient facts showing a constitutional violation, or that the files and records affirmatively show entitlement to no relief, is reviewed de novo.
PRECEDENTIAL VALUE	Published Nebraska Supreme Court opinion; precedential.
PARTIES	Avery R. Tyler v. State of Nebraska

TOPICS

- state post-conviction relief
- prosecutorial misconduct
- ineffective assistance
- appellate procedure
- criminal procedure

PRACTICE AREAS

criminal law

postconviction litigation

criminal appellate practice

constitutional law

QUESTIONS PRESENTED

1. Whether Tyler's prosecutorial-misconduct claims were procedurally barred because the alleged errors could have been litigated on direct appeal.
2. Whether Tyler alleged sufficient facts to warrant an evidentiary hearing on claims that the State misled the jury concerning Johnson's plea status and violated *Brady v. Maryland*.
3. Whether the State's closing arguments concerning King's immunity and Johnson's pending charge constituted prosecutorial misconduct.
4. Whether trial and appellate counsel were ineffective for failing to object to, correct, or raise the alleged prosecutorial misconduct.
5. Whether the district court properly dismissed the postconviction motion without an evidentiary hearing.

HOLDINGS

1. A postconviction motion cannot be used to litigate issues known to the defendant that were or could have been raised on direct appeal. Prosecutorial-misconduct claims are procedurally barred when their merits can be resolved from the direct-appeal record; they are not barred when an evidentiary hearing is necessary to decide them.
2. A prisoner is entitled to an evidentiary hearing only if the postconviction motion alleges facts that, if proved, would establish a constitutional violation; conclusory allegations or claims affirmatively refuted by the record do not warrant a hearing.
3. A court assessing alleged prosecutorial misconduct in closing argument first determines whether the remarks were improper and then determines whether they prejudiced the defendant's right to a fair trial. A prosecutor may draw reasonable inferences from the evidence, and comments that do not mislead or unduly influence the jury do not constitute misconduct.
4. Tyler did not allege facts establishing a *Brady* violation because the record showed that Johnson had no plea agreement with the State at the time of trial, and the motion did not allege that the State possessed and failed to disclose favorable exculpatory or impeachment evidence before trial.
5. To establish ineffective assistance under *Strickland*, a defendant must show deficient performance and a reasonable probability that, but for counsel's deficient performance, the result would have been different. Counsel is not ineffective for failing to make an objection or raise an issue that lacks merit.

KEY QUOTATIONS

"A motion for postconviction relief is not a substitute for an appeal." (375)

"Where the claim of prosecutorial misconduct is such that a determination of the merits is possible based on the record on direct appeal, it is procedurally barred from being litigated on postconviction." (376)

“A prosecutor must base his or her argument on the evidence introduced at trial rather than on matters not in evidence.” (378)

FACTUAL BACKGROUND

Avery R. Tyler was convicted of killing Delayno Wright outside a nightclub in Omaha, Nebraska, and of using a firearm to commit a felony. The prosecution relied in part on testimony from Ronald King, who received immunity, and Jelani Johnson, who testified that he had no plea agreement at the time of trial but hoped truthful cooperation would improve his situation. In postconviction proceedings, Tyler alleged that the State failed to correct testimony about the authorship of a letter, made improper statements during closing argument, failed to disclose a later disposition involving Johnson, and that counsel was ineffective in failing to address those matters.

PROCEDURAL HISTORY

Tyler was convicted by a jury of premeditated first degree murder and use of a firearm to commit a felony. The Nebraska Supreme Court affirmed the convictions and sentences on direct appeal. Tyler later filed a motion for postconviction relief alleging prosecutorial misconduct and ineffective assistance of trial and appellate counsel. The district court denied the motion without an evidentiary hearing, finding the claims procedurally barred, insufficiently pleaded, or affirmatively refuted by the record. The Nebraska Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- State v. Tyler, 291 Neb. 920, 870 N.W.2d 119 (2015)
- State v. Haynes, 299 Neb. 249, 908 N.W.2d 40 (2018)
- State v. Collins, 299 Neb. 160, 907 N.W.2d 721 (2018)
- State v. Dubray, 294 Neb. 937, 885 N.W.2d 540 (2016)
- State v. Ryan, 287 Neb. 938, 845 N.W.2d 287 (2014)
- State v. Torres, 295 Neb. 830, 894 N.W.2d 191 (2017)
- State v. Dubray, 289 Neb. 208, 854 N.W.2d 584 (2014)
- State v. Johnson, 298 Neb. 491, 904 N.W.2d 714 (2017)
- State v. Nolan, 292 Neb. 118, 870 N.W.2d 806 (2015)
- Brady v. Maryland, 373 U.S. 83 (1963)
- United States v. Bagley, 473 U.S. 667 (1985)
- Giglio v. United States, 405 U.S. 150 (1972)
- State v. Payne, 289 Neb. 467, 855 N.W.2d 783 (2014)
- State v. Vela, 297 Neb. 227, 900 N.W.2d 8 (2017)
- Strickland v. Washington, 466 U.S. 668 (1984)

- United States v. Delgado, 672 F.3d 320 (5th Cir. 2012)
- State v. Stricklin, 300 Neb. 794, 916 N.W.2d 413 (2018)

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