

SUPREME COURT OF NEBRASKA

State v. Wabashaw, 274 Neb. 394

740 N.W.2d 583 (2007) · No. S-06-642 · Decided October 26, 2007

SUMMARY

The Supreme Court of Nebraska affirmed Elroy L. Wabashaw's convictions for robbery and use of a firearm to commit a felony. The court held that Nebraska had jurisdiction over the offense committed in Indian country under Public Law 280 and that the 1868 Treaty did not require dismissal of the prosecution. The court also upheld use of a South Dakota conviction for habitual-criminal sentencing and rejected the defendant's claims concerning substitute counsel and ineffective assistance.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Connolly, J.; Wright, J.; Gerrard, J.; Stephan, J.; McCormack, J.; Miller-Lerman, J.
JURISDICTION	Nebraska
DECIDED	October 26, 2007
DOCKET	S-06-642
DISPOSITION	affirmed
PROCEDURAL POSTURE	Wabashaw appealed his convictions for robbery and use of a firearm to commit a felony, as well as his habitual-criminal sentences. He challenged the district court's jurisdiction over an offense committed in Indian country, the denial of motions concerning substitute counsel, the use of a South Dakota conviction for sentence enhancement, and several claims of ineffective assistance of counsel.
STANDARD OF REVIEW	Questions of law presented by a motion to quash are reviewed independently of the lower court's conclusions. Ineffective-assistance claims raised on direct appeal are reviewed when the record is sufficient; otherwise, they are not addressed on direct appeal.
PRECEDENTIAL VALUE	Published Nebraska Supreme Court opinion; precedential
PARTIES	Elroy L. Wabashaw v. State of Nebraska

TOPICS

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QUESTIONS PRESENTED

1. Whether Nebraska's district court had criminal jurisdiction over the robbery committed in Indian country under Public Law 280 and the 1868 Treaty between the United States and different Tribes of Sioux Indians.
2. Whether the district court erred by failing to hold an evidentiary hearing on Wabashaw's motions to withdraw counsel and appoint substitute counsel.
3. Whether the State sufficiently proved that Wabashaw was the person named in the 1977 South Dakota conviction used for sentence enhancement.
4. Whether Nebraska could use the 1977 South Dakota conviction for habitual-criminal enhancement even though South Dakota law would no longer permit use of that conviction for enhancement.
5. Whether Wabashaw established ineffective assistance of counsel based on an alleged conflict of interest and counsel's failure to request an evidentiary hearing, and whether the remaining ineffective-assistance claims were reviewable on direct appeal.

HOLDINGS

1. Nebraska had criminal jurisdiction over the robbery under Public Law 280 because the offense occurred in Indian country, and jurisdiction existed regardless of whether Wabashaw or the victim was Indian.
2. Nebraska did not lose jurisdiction over the robbery when federal acceptance of retrocession became effective in 2006 because the offense occurred before acceptance.
3. The 1868 Treaty did not divest the district court of jurisdiction. Even assuming the treaty imposed a notice-and-delivery requirement, Congress abrogated that requirement through Public Law 280.
4. The district court did not err by failing to hold an evidentiary hearing on Wabashaw's second motion for substitute counsel because dissatisfaction with appointed counsel did not establish grounds for substitution.
5. The State sufficiently proved that Wabashaw was the person convicted in the 1977 South Dakota robbery case.
6. Nebraska could use Wabashaw's 1977 South Dakota conviction to enhance his sentence, and the Full Faith and Credit Clause did not require Nebraska to adopt South Dakota's limitation on use of the conviction.
7. Wabashaw was not denied effective assistance based on counsel's alleged conflict of interest or failure to request an evidentiary hearing on the motion to quash.
8. The record was insufficient to review on direct appeal the claims concerning failure to object to references to recovered evidence, failure to move to suppress the confession, failure to cross-examine

Vance during the State's case, and failure to obtain a handwriting expert.

KEY QUOTATIONS

“We conclude that even if we construe the 1868 Treaty language to impose a notice requirement, Congress abrogated the provision by enacting Public Law 280.” (592)

“We conclude that the Full Faith and Credit Clause does not prevent a Nebraska court from using Wabashaw's 1977 robbery conviction.” (596)

FACTUAL BACKGROUND

A masked robber entered a gas station in Knox County, Nebraska, within the Santee Sioux Nation's Indian country, pointed a firearm at the station employee, and took slightly more than \$500. After receiving Miranda warnings and signing a waiver, Wabashaw confessed orally and in writing to the robbery. The State presented testimony, the written confession, handwriting evidence, and fingerprint evidence, and the court used a 1977 South Dakota robbery conviction to sentence Wabashaw as a habitual criminal.

PROCEDURAL HISTORY

The Nebraska district court overruled Wabashaw's motion to quash the information, and a jury convicted him of robbery and use of a firearm to commit a felony. The court sentenced him as a habitual criminal to consecutive prison terms of 12 to 14 years and 10 to 12 years. The Nebraska Supreme Court affirmed the convictions and sentences, concluding that the district court had jurisdiction, that the prior conviction was properly used for enhancement, and that some ineffective-assistance claims could not be resolved on the direct-appeal record.

DISPOSITION

affirmed

CASES CITED

- State v. Gozzola, 273 Neb. 309, 729 N.W.2d 87 (2007)
- State v. Goham, 187 Neb. 34, 187 N.W.2d 305 (1971)
- State v. Goham, 191 Neb. 639, 216 N.W.2d 869 (1974)
- United States v. McBratney, 104 U.S. 621 (1881)
- Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 119 S. Ct. 1187, 143 L. Ed. 2d 270 (1999)
- United States v. Drapeau, 414 F.3d 869 (8th Cir. 2005), cert. denied, 546 U.S. 1119 (2006)
- State v. Bjorklund, 258 Neb. 432, 604 N.W.2d 169 (2000)
- State v. Luna, 211 Neb. 630, 319 N.W.2d 737 (1982)
- State v. Thomas, 268 Neb. 570, 685 N.W.2d 69 (2004)
- State v. King, 272 Neb. 638, 724 N.W.2d 80 (2006)
- State v. Laymon, 217 Neb. 464, 348 N.W.2d 902 (1984)
- State v. Edmondson, 112 N.M. 654, 818 P.2d 855 (N.M. Ct. App. 1991)

- Hughes v. Fetter, 341 U.S. 609, 71 S. Ct. 980, 95 L. Ed. 1212 (1951)
- State v. Faust, 265 Neb. 845, 660 N.W.2d 844 (2003)
- State v. Dunster, 262 Neb. 329, 631 N.W.2d 879 (2001)
- State v. Narcisse, 260 Neb. 55, 615 N.W.2d 110 (2000)
- State v. Ehlers, 262 Neb. 247, 631 N.W.2d 471 (2001)

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