

NEBRASKA SUPREME COURT

State of Nebraska v. Jeffery S. Smith

State v. Smith, 302 Neb. 154 (2019) · No. No. S-18-178 · Decided February 1, 2019

SUMMARY

The Nebraska Supreme Court affirmed Jeffery S. Smith’s convictions and sentences for first degree sexual assault of a child and felony child abuse following a bench trial. The court addressed the defendant’s confrontation challenge to allowing the alleged victim to testify outside his presence, ineffective-assistance claims, sufficiency of the evidence, and excessive sentencing claims.

CASE DETAILS

COURT	Nebraska Supreme Court
WRITING FOR THE COURT	Miller-Lerman, J.; Heavican, C.J.; Cassel, J.; Stacy, J.; Funke, J.; Papik, J.; Freudenberg, J.
JURISDICTION	Nebraska
DECIDED	February 1, 2019
DOCKET	No. S-18-178
DISPOSITION	affirmed
PROCEDURAL POSTURE	Direct appeal from convictions and sentences following a bench trial in the District Court for Harlan County, Nebraska.
STANDARD OF REVIEW	Statutory interpretation is reviewed independently as a question of law. Confrontation Clause protections are reviewed de novo, with underlying factual findings reviewed for clear error. Whether an ineffective-assistance claim can be decided on direct appeal is a question of law, limited to whether the record is sufficient to conclusively determine deficient performance and prejudice. Sufficiency of the evidence is reviewed by asking whether, viewing the evidence most favorably to the prosecution, any rational trier of fact could have found the essential elements beyond a reasonable doubt; credibility determinations and evidentiary conflicts are not reweighed. A sentence within statutory limits is reviewed for abuse of discretion.
PRECEDENTIAL VALUE	Published Nebraska Supreme Court opinion; precedential.
PARTIES	Jeffery S. Smith v. State of Nebraska

TOPICS

sixth amendment

right to counsel

ineffective assistance

criminal procedure

sentencing

PRACTICE AREAS

criminal procedure

constitutional law

evidence

appellate procedure

sentencing

post-conviction relief

QUESTIONS PRESENTED

1. Whether Nebraska's child-witness accommodation statute, Neb. Rev. Stat. § 29-1926, authorized the 16-year-old victim to testify in camera outside the defendant's presence.
2. Whether the district court violated Smith's federal and state constitutional confrontation rights by allowing the victim to testify outside Smith's presence without the findings and procedural safeguards required by *Maryland v. Craig* and *State v. Warford*.
3. Whether the confrontation violation was harmless beyond a reasonable doubt in the bench trial.
4. Whether Smith's ineffective-assistance claims could be resolved on direct appeal or were sufficiently alleged to preserve them for postconviction review.
5. Whether sufficient evidence supported the convictions for first degree sexual assault of a child and felony child abuse.
6. Whether the district court abused its discretion by imposing excessive sentences.

HOLDINGS

1. Section 29-1926 applies only to a person who is 11 years of age or younger at the relevant time; it does not encompass a 16-year-old witness merely because the witness has a younger functional or mental age.
2. A court may dispense with face-to-face confrontation only upon case-specific findings that doing so is necessary to further an important public policy and that the reliability of the testimony is otherwise assured. The district court's procedure was constitutionally deficient because it made no required findings concerning trauma caused by the defendant's presence, did not allow Smith to view the witness's testimony, and did not provide continuous communication between Smith and counsel.
3. The constitutional confrontation error was harmless beyond a reasonable doubt and did not require reversal of the convictions.
4. Smith's ineffective-assistance claims could not be resolved on the direct-appeal record, but he alleged them with sufficient particularity to preserve them for postconviction review.
5. Evidence that Smith touched R.F. between the labia or lips of the vagina was sufficient to prove sexual penetration and support the conviction.
6. The evidence was sufficient to support felony child abuse because it showed that Smith knowingly and intentionally placed R.F. in a situation to be sexually abused and permitted the other adult to sexually assault her.
7. The district court did not abuse its discretion by imposing concurrent sentences of 20 to 30 years for first degree sexual assault of a child and 2 to 3 years for felony child abuse.

KEY QUOTATIONS

“a defendant’s right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.” (at 171-172)

“where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child’s ability to communicate, the Confrontation Clause does not prohibit use of a procedure that, despite the absence of face-to-face confrontation, ensures the reliability of the evidence by subjecting it to rigorous adversarial testing and thereby preserves the essence of effective confrontation.” (at 174)

“Harmless error review ultimately looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.” (at 180)

FACTUAL BACKGROUND

Smith was charged with sexually assaulting and abusing R.F., his wife’s 15-year-old daughter, during a sexual encounter involving Smith, R.F., Smith’s wife, and another adult. At trial, Smith denied sexually touching R.F., while his wife testified that Smith brought R.F. into the bedroom, touched her genital area, and permitted the other adult to sexually assault her. R.F. testified outside Smith’s physical presence, without being visible to him or communicating with him during the testimony and cross-examination. The district court relied principally on the wife’s testimony and statements Smith allegedly made to a jail cellmate, found Smith guilty, and imposed concurrent sentences of 20 to 30 years for first degree sexual assault of a child and 2 to 3 years for felony child abuse.

PROCEDURAL HISTORY

The State charged Smith with first degree sexual assault of a child and felony child abuse. After amending the information to one count of each offense, the district court conducted a bench trial, permitted the alleged victim to testify in camera outside Smith’s presence, found Smith guilty beyond a reasonable doubt, and imposed concurrent prison sentences. Smith appealed, challenging the in-camera testimony, ineffective assistance of trial counsel, sufficiency of the evidence, and the excessiveness of his sentences. The Nebraska Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- State v. Kennedy, 299 Neb. 362, 908 N.W.2d 69 (2018)
- State v. Draper, 289 Neb. 777, 857 N.W.2d 334 (2015)
- State v. Golyar, 301 Neb. 488, 919 N.W.2d 133 (2018)

- State v. Mueller, 301 Neb. 778, 920 N.W.2d 424 (2018)
- State v. McGuire, 301 Neb. 895, 921 N.W.2d 77 (2018)
- State v. Swindle, 300 Neb. 734, 915 N.W.2d 795 (2018)
- State v. Wright, 261 Neb. 277, 622 N.W.2d 676 (2001)
- Maryland v. Craig, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990)
- State v. Warford, 223 Neb. 368, 389 N.W.2d 575 (1986)
- State v. Leibel, 286 Neb. 725, 838 N.W.2d 286 (2013)
- Coy v. Iowa, 487 U.S. 1012, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988)
- State v. Archie, 273 Neb. 612, 733 N.W.2d 513 (2007)
- State v. Kays, 21 Neb. App. 376, 838 N.W.2d 366 (2013)
- State v. Filholm, 287 Neb. 763, 848 N.W.2d 571 (2014)
- State v. Newman, 21 Neb. App. 29, 838 N.W.2d 317 (2013)