

NEBRASKA SUPREME COURT

State v. Epp

299 Neb. 703 (2018) · No. No. S-17-297 · Decided April 20, 2018

SUMMARY

The Nebraska Supreme Court affirmed the dismissal of William A. Epp’s motion for postconviction relief as untimely under Neb. Rev. Stat. § 29-3001(4)(e). The court held that no evidentiary hearing or appointment of counsel was required because the motion was filed outside the limitations period and presented no justiciable issue of law or fact. The court also declined to address Epp’s constitutional challenge to the limitations statute because he failed to comply with the required notice rule.

CASE DETAILS

COURT	Nebraska Supreme Court
WRITING FOR THE COURT	Heavican, C.J.; Miller-Lerman, J.; Stacy, J.; Luther, District Judge; O’Gorman, District Judge; Funke, J., participating on briefs
JURISDICTION	Nebraska
DECIDED	April 20, 2018
DOCKET	No. S-17-297
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from the dismissal of a motion for postconviction relief without an evidentiary hearing or appointment of counsel.
STANDARD OF REVIEW	The date on which a statute of limitations begins to run is reviewed as a question of law when the facts are undisputed. The failure to appoint postconviction counsel is reviewed for abuse of discretion. The denial of an evidentiary hearing in a postconviction proceeding is proper when the motion alleges only conclusions or the files and records affirmatively show that the defendant is entitled to no relief.
PRECEDENTIAL VALUE	Published precedential opinion
PARTIES	William A. Epp v. State of Nebraska

TOPICS

state post-conviction relief

post-conviction relief

appellate procedure

constitutional law

criminal procedure

PRACTICE AREAS

state post-conviction relief

criminal procedure

appellate procedure

constitutional law

QUESTIONS PRESENTED

1. Whether Epp's postconviction motion was untimely under Neb. Rev. Stat. § 29-3001(4)(e).
2. Whether the district court erred by dismissing the postconviction motion without an evidentiary hearing.
3. Whether the district court abused its discretion by denying appointment of postconviction counsel.
4. Whether the court could address Epp's constitutional challenge to § 29-3001(4)(e) when he failed to comply with Neb. Ct. R. App. P. § 2-109(E).

HOLDINGS

1. Epp's postconviction motion, filed November 28, 2016, was untimely because it was filed more than one year after August 27, 2011, the applicable limitations date under Neb. Rev. Stat. § 29-3001(4)(e).
2. The district court properly dismissed Epp's postconviction motion without an evidentiary hearing because the motion was untimely and the files and records showed that Epp was entitled to no relief.
3. The district court did not abuse its discretion by refusing to appoint counsel because Epp's postconviction action presented no justiciable issue of law or fact.
4. The court declined to address Epp's claim that § 29-3001(4)(e) violated the federal and state ex post facto clauses because Epp failed to comply with Neb. Ct. R. App. P. § 2-109(E).

KEY QUOTATIONS

“Strict compliance with § 2-109(E) is necessary whenever a litigant challenges the constitutionality of a statute, regardless of how that constitutional challenge may be characterized.” (299 Neb. at 707-708)

“If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.” (299 Neb. at 708)

FACTUAL BACKGROUND

In 2007, William A. Epp was convicted of robbery and possession of a deadly weapon by a felon and received consecutive 60-to-60-year sentences. His convictions and sentences became final on October 27, 2009, after the Nebraska Supreme Court affirmed them on direct appeal. Epp filed a verified motion for postconviction relief on November 28, 2016, raising constitutional challenges and an insufficient-evidence claim. The motion was filed more than one year after August 27, 2011, the statutory date specified in Neb. Rev. Stat. § 29-3001(4)(e).

PROCEDURAL HISTORY

Epp was convicted in 2007 of robbery and possession of a deadly weapon by a felon, and his convictions and sentences were affirmed on direct appeal. He filed a postconviction motion on November 28, 2016, asserting constitutional and sufficiency-of-the-evidence claims. The Gage County District Court dismissed the motion as untimely under Neb. Rev. Stat. § 29-3001(4)(e), alternatively finding the claims procedurally barred or meritless,

and denied an evidentiary hearing and appointment of counsel. The Nebraska Supreme Court moved the appeal to its docket and affirmed.

DISPOSITION

affirmed

CASES CITED

- State v. Epp, 278 Neb. 683, 773 N.W.2d 356 (2009)
- State v. Johnson, 290 Neb. 369, 859 N.W.2d 877 (2015)
- State v. Huggins, 291 Neb. 443, 866 N.W.2d 80 (2015)
- State v. Ely, 295 Neb. 607, 889 N.W.2d 377 (2016)
- State v. Boche, 294 Neb. 912, 885 N.W.2d 523 (2016)
- State v. Amaya, 298 Neb. 70, 902 N.W.2d 675 (2017)
- State v. Goynes, 293 Neb. 288, 876 N.W.2d 912 (2016)
- State v. Custer, 298 Neb. 279, 903 N.W.2d 911 (2017)

OPINION

PER CURIAM.

Nebraska Supreme Court Online Library www.nebraska.gov/apps-courts-epub/ 07/06/2018 09:12 AM CDT - 703 - Nebraska Supreme Court Advance Sheets 299 Nebraska Reports STATE v. EPP Cite as 299 Neb. 703 State of Nebraska, appellee, v. William A. Epp, appellant. ___ N.W.2d ___ Filed April 20, 2018. No. S-17-297. 1. Limitations of Actions. If the facts in a case are undisputed, the issue as to when the statute of limitations begins to run is a question of law.

2. Postconviction: Right to Counsel: Appeal and Error. Failure to appoint counsel in postconviction proceedings is not error in the absence of an abuse of discretion. 3. Constitutional Law: Rules of the Supreme Court: Courts: Statutes. Strict compliance with Neb. Ct. R. App. P. § 2-109(E) (rev. 2014) is necessary whenever a litigant challenges the constitutionality of a statute, regardless of how that constitutional challenge may be characterized.

4. Postconviction: Proof. If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing. 5. Postconviction: Justiciable Issues: Right to Counsel: Appeal and Error. Where the assigned errors in the postconviction petition before the district court are either procedurally barred or without merit, establishing that the postconviction action contained no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint appellate counsel for an indigent defendant.

Appeal from the District Court for Gage County: Vicky L. Johnson, Judge. Affirmed. William A. Epp, pro se. Douglas J. Peterson, Attorney General, and Erin E. Tangeman for appellee. - 704 - Nebraska Supreme Court Advance Sheets 299 Nebraska Reports STATE v. EPP Cite as 299 Neb. 703 Heavican, C.J., Miller-Lerman, and Stacy, JJ., and Luther and O’Gorman, District Judges.

Heavican, C.J. NATURE OF CASE This case presents an appeal from the dismissal of a motion for postconviction relief without an evidentiary hearing or the appointment of counsel. The district court dismissed the motion as filed outside the 1-year limitations period set forth in Neb. Rev. Stat. § 29-3001 (Reissue 2016).

We affirm. BACKGROUND In 2007, William A. Epp was charged with robbery, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a felon. The information also alleged that Epp was a habitual criminal. A jury convicted Epp of robbery and possession of a deadly weapon by a felon, but acquitted him of use of a deadly weapon to commit a felony.

Epp was sentenced to 60 to 60 years’ imprisonment on both his conviction for robbery and his conviction for possession of a deadly weapon by a felon. The court ordered the sentences to be served consecutively. Epp appealed his convictions and sentences, which were affirmed by this court.¹ As pertinent here, we found in *State v. Epp* 2 that we did not need to address Epp’s argument that Neb. Rev. Stat. § 25-1233 (Reissue 2016), which limits transportation of inmate witnesses, was unconstitutional, because the trial court did not err in finding that the inmate testimony Epp proffered was inadmissible hearsay.

We also rejected Epp’s argument that there was insufficient evidence supporting his conviction for possession of a deadly weapon by a felon. Finally, we rejected Epp’s argument that the trial court had erred in admitting evidence supporting habitual 1 See *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009). 2 Id. - 705 - Nebraska Supreme Court Advance Sheets 299 Nebraska Reports STATE v. EPP Cite as 299 Neb. 703 criminal enhancement.

Epp’s sentences became final on October 27, 2009. Epp filed a motion for postconviction relief on November 28, 2016, alleging four claims for relief. Epp alleged, first, that the 1-year period of limitation set forth in § 29-3001 violated the ex post facto clauses of the U.S. and Nebraska Constitutions.

Second, Epp alleged that Neb. Rev. Stat. § 29-2221 (Reissue 2016) violates the Sixth Amendment right to an impartial jury by allowing a judge instead of a jury to find the existence of prior convictions. Third, Epp alleged there was insufficient evidence for his conviction of possession of a deadly weapon by a felon, which conviction was allegedly inconsistent with the jury’s acquittal on the charge of use of a deadly weapon to commit a felony.

Fourth, Epp alleged that § 25-1233 violated equal protection under the U.S. and Nebraska Constitutions. The district court dismissed Epp’s motion without an evidentiary hearing or the

appointment of counsel. The court found that the postconviction motion was barred by the 1-year period of limitation set forth in § 29-3001(4)(e), which provides that the 1-year period will run from the date of August 27, 2011 (the effective date of the statute's enactment), if the other subsections do not apply.

The court found no merit to Epp's argument that the limitations period was unconstitutional. Alternatively to the court's conclusion that the motion was filed outside the 1-year limitations period, the court concluded that the allegations in the motion for postconviction relief either failed to state a claim that Epp's convictions were void or voidable, lacked merit as a matter of law, or were procedurally barred.

Specifically, the court found that Epp's claim regarding the constitutionality of § 29-3001(4)(e) failed to allege a constitutional violation that would render his convictions void or voidable; thus, it did not present a valid claim for postconviction relief.

The court concluded Epp's argument - 706 - Nebraska Supreme Court Advance Sheets 299 Nebraska Reports STATE v. EPP Cite as 299 Neb. 703 regarding § 29-2221 had no merit and has been rejected by this court in State v. Johnson.³ Lastly, the court found that Epp's claims challenging the constitutionality of § 25-1233 and the sufficiency of the evidence to support his conviction for felon in possession were litigated on direct appeal and, therefore, procedurally barred.

Epp appealed. We moved the appeal to our docket on our own motion, in accordance with this court's authority to regulate the caseloads of the appellate courts of this state.⁴ Epp did not file notice that he was raising an issue involving the constitutionality of a statute as required by Neb. Ct. R. App. P. § 2-109(E) (rev. 2014). ASSIGNMENTS OF ERROR Epp assigns that the district court erred in failing to (1) grant an evidentiary hearing, (2) appoint counsel, and (3) grant postconviction relief.

STANDARD OF REVIEW [1] If the facts in a case are undisputed, the issue as to when the statute of limitations begins to run is a question of law.⁵ [2] Failure to appoint counsel in postconviction proceedings is not error in the absence of an abuse of discretion.⁶ ANALYSIS Postconviction motions are subject to the limitations period set forth in § 29-3001(4), which states: A one-year period of limitation shall apply to the filing of a verified motion for postconviction relief.

The one-year limitation period shall run from the later of: 3 State v. Johnson, 290 Neb. 369, 859 N.W.2d 877 (2015). 4 See Neb. Rev. Stat. § 24-1106(3) (Supp. 2017). 5 State v. Huggins, 291 Neb. 443, 866 N.W.2d 80 (2015). 6 State v. Ely, 295 Neb. 607, 889 N.W.2d 377 (2017). - 707 - Nebraska Supreme Court Advance Sheets 299 Nebraska Reports STATE v. EPP Cite as 299 Neb. 703 (a) The date the judgment of conviction became final by the conclusion of a direct appeal or the expiration of the time for filing a direct appeal; (b) The date on which the factual predicate of

the constitutional claim or claims alleged could have been discovered through the exercise of due diligence; (c) The date on which an impediment created by state action, in violation of the Constitution of the United States or the Constitution of Nebraska or any law of this state, is removed, if the prisoner was prevented from filing a verified motion by such state action; (d) The date on which a constitutional claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court, if the newly recognized right has been made applicable retroactively to cases on postconviction collateral review; or (e) August 27, 2011.

The parties agree that subsections (4)(a) through (d) do not apply. Under the facts of this case, the latest date from which the 1-year limitations period runs is August 27, 2011, as set forth in § 29-3001(4)(e). Epp argues, however, that application of any provision of § 29-3001 violates the ex post facto clauses of the U.S. and Nebraska Constitutions.⁷ [3] Epp did not file notice as required by § 2-109(E).

Section 2-109(E) requires that a party presenting a case involving the federal or state constitutionality of a statute must file and serve notice thereof with the Supreme Court Clerk by a separate written notice in a petition to bypass at the time of filing such party's brief. Strict compliance with § 2-109(E) is necessary whenever a litigant challenges the constitutionality of a statute, regardless of how that constitutional challenge may be characterized.⁸ Therefore, we do not address Epp's 7 U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16.

8 *State v. Boche*, 294 Neb. 912, 885 N.W.2d 523 (2016). - 708 - Nebraska Supreme Court Advance Sheets 299 Nebraska Reports *STATE v. EPP* Cite as 299 Neb. 703 claim that § 29-3001(4)(e) violates prohibitions against ex post facto laws.

However, we note that we recently held in *State v. Amaya* 9 that § 29-3001 does not violate the ex post facto clauses of the U.S. and Nebraska Constitutions. [4] There is no dispute that Epp's motion for postconviction relief, filed on November 28, 2016, was outside the 1-year limitations period set forth in § 29-3001(4)(e).

Accordingly, the district court did not err in dismissing the motion as outside the limitations period without conducting an evidentiary hearing. If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.¹⁰ [5] For similar reasons, the district court did not err in denying Epp's motion for appointment of counsel.

Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant.¹¹ Where the assigned errors in the postconviction petition before the district court are either procedurally barred or without merit, establishing that the postconviction action contained no justiciable issue of law or fact, it is not an

abuse of discretion to fail to appoint appellate counsel for an indigent defendant.¹² Epp's motion presented no justiciable issue of law or fact because it was barred by the limitations period set forth by § 29-3001(4)(e).

CONCLUSION Because Epp's motion for postconviction relief was filed more than 1 year from August 27, 2011, it was untimely.¹³ We 9 State v. Amaya, 298 Neb. 70, 902 N.W.2d 675 (2017). 10 State v. Goynes, 293 Neb. 288, 876 N.W.2d 912 (2016). 11 State v. Custer, 298 Neb. 279, 903 N.W.2d 911 (2017). 12 Id. 13 See § 29-3001(4)(e). - 709 - Nebraska Supreme Court Advance Sheets 299 Nebraska Reports STATE v. EPP Cite as 299 Neb. 703 affirm the district court's dismissal of the motion without an evidentiary hearing or the appointment of counsel.

Affirmed. Funke, J., participating on briefs. Wright and Cassel, JJ., not participating.