

NEBRASKA SUPREME COURT

State v. Russell

308 Neb. 499 (2021) · No. No. S-20-283 · Decided February 26, 2021

SUMMARY

The Nebraska Supreme Court affirmed the denial of Stephen Russell’s motion for postconviction relief. Russell claimed trial counsel was ineffective for failing to file a direct appeal after being instructed to do so. The court held that the district court did not clearly err in finding that Russell had not directed counsel to file an appeal, and therefore counsel was not deficient.

CASE DETAILS

COURT	Nebraska Supreme Court
WRITING FOR THE COURT	Freudenberg, J.; Heavican, C.J.; Miller-Lerman, J.; Cassel, J.; Stacy, J.; Funke, J.; Papik, J.
JURISDICTION	Nebraska
DECIDED	February 26, 2021
DOCKET	No. S-20-283
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from the denial of a motion for postconviction relief after an evidentiary hearing. Russell sought a new direct appeal based on alleged ineffective assistance of counsel for failing to file a notice of appeal.
STANDARD OF REVIEW	Ineffective-assistance claims present mixed questions of law and fact. The appellate court reviews the lower court's factual findings for clear error and independently reviews legal determinations concerning counsel's performance and prejudice. Factual findings from a postconviction evidentiary hearing, including credibility determinations, are upheld when supported by competent evidence.
PRECEDENTIAL VALUE	Published Nebraska Supreme Court opinion; precedential
PARTIES	Stephen Russell v. State of Nebraska

TOPICS

- state post-conviction relief
- ineffective assistance
- right to counsel
- appellate procedure
- standard of review

PRACTICE AREAS

criminal procedure

post-conviction relief

ineffective assistance of counsel

appellate procedure

QUESTIONS PRESENTED

1. Whether trial counsel was ineffective for failing to file a direct appeal after Russell allegedly directed counsel to do so.
2. Whether Russell was entitled to postconviction relief in the form of a new direct appeal based on counsel's alleged failure to advise him of his right to appeal.
3. Whether the district court clearly erred in finding that Russell did not direct trial counsel to file a direct appeal.

HOLDINGS

1. A defendant seeking a new direct appeal as postconviction relief must prove by a preponderance of the evidence that counsel's negligence or incompetence caused the denial of the right to appeal and that the defendant was not at fault. A defendant must show that counsel was directed to file the appeal before counsel's failure to file can establish deficient performance.
2. A defendant who had actual knowledge of the right to appeal and did not prove that counsel was asked to file an appeal cannot establish prejudice merely from counsel's failure to advise the defendant of that right.
3. The appellate court reviews postconviction factual findings, including credibility determinations, for clear error and will not substitute its factual findings when competent evidence supports the district court's findings.

KEY QUOTATIONS

"A lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." (308 Neb. at 507)

"It is fundamental to a claim of ineffective assistance of counsel based on failure to appeal that the defendant directed that such appeal be filed." (308 Neb. at 508)

"Where competent evidence supports the district court's findings, the appellate court will not substitute its factual findings for those of the district court." (308 Neb. at 509)

FACTUAL BACKGROUND

Pursuant to a plea agreement, Stephen Russell pleaded no contest to second-degree murder and received a sentence of 60 to 70 years' imprisonment. No direct appeal was filed. Russell testified by deposition that he attempted to contact trial counsel by telephone and letter within the 30-day appeal period and asked counsel to file an appeal, but he offered little corroborating evidence. Trial counsel testified that he did not recall receiving such communications, and the district court found Russell's account not credible.

PROCEDURAL HISTORY

Russell pleaded no contest to second-degree murder pursuant to a plea agreement and was sentenced to 60 to 70 years' imprisonment. No direct appeal was filed. He moved for postconviction relief, alleging that trial counsel failed to file a direct appeal despite Russell's request. After an evidentiary hearing, the Douglas County District Court found that Russell had not directed counsel to file an appeal and denied relief. The Nebraska Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- State v. Dalton, 307 Neb. 465, 949 N.W.2d 752 (2020)
- Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)
- State v. Weathers, 304 Neb. 402, 935 N.W.2d 185 (2019)
- State v. Assad, 304 Neb. 979, 938 N.W.2d 297 (2020)
- State v. Curtright, 262 Neb. 975, 637 N.W.2d 599 (2002)
- Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)
- Peguero v. United States, 526 U.S. 23, 119 S. Ct. 961, 143 L. Ed. 2d 18 (1999)
- State v. Trotter, 259 Neb. 212, 609 N.W.2d 33 (2000)
- Quarles v. Fuqua Industries, Inc., 504 F.2d 1358 (10th Cir. 1974)
- Fitzke v. City of Hastings, 255 Neb. 46, 582 N.W.2d 301 (1998)
- Burgardt v. Burgardt, 304 Neb. 356, 934 N.W.2d 488 (2019)