

SUPREME COURT OF NEBRASKA

State v. Thomas, 262 Neb. 138

629 N.W.2d 503 (2001) · No. No. S-99-1412 · Decided July 6, 2001

SUMMARY

The Supreme Court of Nebraska affirmed the denial of Rickey R. Thomas' motion for postconviction relief. The court held that his prosecution and conviction for possession with intent to deliver were not barred by double jeopardy because jeopardy attached in the criminal case when he pleaded guilty before evidence was presented in the related forfeiture proceeding. The court also rejected his ineffective-assistance claim and upheld the denial of postconviction counsel and an evidentiary hearing.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Gerrard, J.; Hendry, C.J.; Wright, J.; Connolly, J.; Stephan, J.; McCormack, J.; Miller-Lerman, J.
JURISDICTION	Nebraska
DECIDED	July 6, 2001
DOCKET	No. S-99-1412
DISPOSITION	affirmed
PROCEDURAL POSTURE	Thomas appealed the denial, without an evidentiary hearing, of his motion for postconviction relief challenging his guilty-plea conviction for possession with intent to deliver a controlled substance. He claimed ineffective assistance of counsel based on counsel's failure to file a plea in bar asserting double jeopardy.
STANDARD OF REVIEW	Questions of law are reviewed independently. Findings in postconviction proceedings are not disturbed unless clearly erroneous. The appointment of postconviction counsel is reviewed for abuse of discretion.
PRECEDENTIAL VALUE	Published, precedential opinion of the Supreme Court of Nebraska.
PARTIES	Rickey R. Thomas v. State of Nebraska

TOPICS

post-conviction relief

ineffective assistance

double jeopardy

appellate procedure

criminal procedure

PRACTICE AREAS

criminal procedure

post-conviction relief

constitutional law

appellate procedure

QUESTIONS PRESENTED

1. Whether Thomas was entitled to postconviction relief because prosecution and sentencing on the possession-with-intent-to-deliver conviction violated the Double Jeopardy Clauses of the Fifth Amendment and the Nebraska Constitution.
2. Whether trial counsel rendered ineffective assistance by failing to file a plea in bar based on double jeopardy.
3. Whether the district court erred by denying postconviction counsel and by denying an evidentiary hearing.
4. Whether arguments first raised on appeal concerning counsel's failure to respond to the forfeiture action and the validity of the forfeiture could be considered.

HOLDINGS

1. The criminal prosecution was not barred by double jeopardy because jeopardy attached in the criminal case when the court accepted Thomas's guilty plea on August 14, before evidence was presented in the forfeiture proceeding on August 25. The later forfeiture proceeding could be constitutionally endangered as the subsequent proceeding, but it could not retroactively bar the earlier criminal conviction.
2. Thomas failed to establish ineffective assistance of counsel because he was not prejudiced by counsel's failure to file a plea in bar; such a filing would not have resulted in dismissal of the possession charge.
3. The court would not consider Thomas's arguments that counsel was ineffective for failing to respond to the forfeiture action or plead not guilty, or that the forfeiture judgment should be overturned, because those arguments were not presented to or decided by the district court.
4. The district court did not err in denying postconviction counsel or an evidentiary hearing because Thomas's allegations and arguments did not establish a meritorious constitutional claim.

KEY QUOTATIONS

“The Double Jeopardy Clause is a shield against the oppression inherent in a duplicative, punitive proceeding; it is not a tool by which a defendant can avoid the consequences of the proceeding in which jeopardy first attached.” (510)

FACTUAL BACKGROUND

Police executed a no-knock search warrant at Thomas's residence and found 22 individually wrapped hits of heroin, scales, and \$4,892 in cash. Thomas pleaded guilty on August 14, 1992, to possession with intent to deliver a controlled substance and was later sentenced to 10 to 20 years' imprisonment. The State filed a separate forfeiture action concerning the cash, and evidence was presented in that proceeding on August 25, 1992, after

Thomas's guilty plea and conviction but before his sentencing. Thomas did not challenge the forfeiture or appeal his criminal conviction and later sought postconviction relief based on alleged double jeopardy and ineffective assistance of counsel.

PROCEDURAL HISTORY

Thomas pleaded guilty to possession with intent to deliver a controlled substance and was sentenced to 10 to 20 years' imprisonment. Separately, the State obtained forfeiture of \$4,892 seized from Thomas. The district court denied postconviction counsel and denied Thomas's postconviction motion without an evidentiary hearing, concluding that jeopardy did not attach in the forfeiture proceeding until after Thomas's criminal conviction. The Nebraska Supreme Court moved the appeal to its docket and affirmed.

DISPOSITION

affirmed

CASES CITED

- State v. Soukharith, 260 Neb. 478, 618 N.W.2d 409 (2000)
- State v. Becerra, 261 Neb. 596, 624 N.W.2d 21 (2001)
- State v. Buckman, 259 Neb. 924, 613 N.W.2d 463 (2000)
- State v. Silvers, 260 Neb. 831, 620 N.W.2d 73 (2000)
- State v. Suggs, 259 Neb. 733, 613 N.W.2d 8 (2000)
- State v. Hess, 261 Neb. 368, 622 N.W.2d 891 (2001)
- State v. Franco, 257 Neb. 15, 594 N.W.2d 633 (1999)
- State v. Spotts, 257 Neb. 44, 595 N.W.2d 259 (1999)
- State v. White, 254 Neb. 566, 577 N.W.2d 741 (1998)
- Crist v. Bretz, 437 U.S. 28, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978)
- United States v. Pierce, 60 F.3d 886 (1st Cir. 1995)
- United States v. Aliotta, 199 F.3d 78 (2d Cir. 1999)
- United States v. Faber, 57 F.3d 873 (9th Cir. 1995)
- Fransaw v. Lynaugh, 810 F.2d 518 (5th Cir. 1987)
- Bally v. Kemna, 65 F.3d 104 (8th Cir. 1995)
- State v. Falcon, 260 Neb. 119, 615 N.W.2d 436 (2000)
- United States v. Idowu, 74 F.3d 387 (2d Cir. 1996)
- State v. Nissen, 252 Neb. 51, 560 N.W.2d 157 (1997)
- Turney v. Werner Enters., 260 Neb. 440, 618 N.W.2d 437 (2000)