

SUPREME COURT OF MONTANA

State v. Gary Tennell

2007 MT 266 (2007) · No. DA 06-0304 · Decided October 22, 2007

SUMMARY

The Montana Supreme Court affirmed Gary Curtis Tennell’s convictions for negligent homicide and three counts of criminal endangerment arising from a fatal head-on collision. The court held that his ineffective-assistance claim concerning withdrawal of a juror challenge was not record-based and should be pursued through post-conviction relief, while claims concerning prosecutorial closing argument and character evidence did not warrant reversal. The court also rejected Tennell’s cumulative-error argument.

CASE DETAILS

COURT	Supreme Court of Montana
WRITING FOR THE COURT	Justice Jim Rice; Karla M. Gray; James C. Nelson; John Warner; Brian Morris
JURISDICTION	Montana
DECIDED	October 22, 2007
DOCKET	DA 06-0304
DISPOSITION	affirmed
PROCEDURAL POSTURE	Direct appeal from a jury conviction for one count of negligent homicide and three counts of criminal endangerment.
STANDARD OF REVIEW	Ineffective-assistance claims are mixed questions of law and fact reviewed de novo. A record-based ineffective-assistance claim may be decided on direct appeal only when the record contains the answer as to why counsel acted or failed to act.
PRECEDENTIAL VALUE	Published Montana Supreme Court opinion; precedential.
PARTIES	Gary Curtis Tennell v. State of Montana

TOPICS

- ineffective assistance
- post-conviction relief
- prosecutorial misconduct
- character evidence
- appellate procedure

PRACTICE AREAS

criminal law

criminal procedure

appellate practice

post-conviction relief

QUESTIONS PRESENTED

1. Whether defense counsel's withdrawal of a challenge for cause to a juror constituted record-based ineffective assistance of counsel or should be reviewed for plain error.
2. Whether defense counsel was ineffective for failing to object to the prosecutor's closing argument misstating a witness's testimony and expressing a personal opinion about Tennell's case.
3. Whether defense counsel was ineffective for failing to object to evidence of Tennell's erratic and aggressive driving as improper character evidence.
4. Whether cumulative error rendered Tennell's trial unfair.

HOLDINGS

1. The ineffective-assistance claim concerning counsel's withdrawal of the challenge for cause could not be decided on direct appeal because the record did not reveal why counsel withdrew the challenge. The claim was dismissed without prejudice to being raised in post-conviction proceedings. Plain-error review was unavailable because the record did not establish that an error had occurred.
2. The prosecutor improperly exaggerated the sleep-apnea testimony and briefly expressed a personal opinion, but the comments did not prejudice Tennell or render the trial unfair. Any error in counsel's failure to object was harmless.
3. Counsel was not ineffective for failing to object to evidence of Tennell's erratic and aggressive driving because the evidence was relevant to the charged offenses and an objection on relevance grounds would have been groundless.
4. Cumulative error did not require reversal because the errors identified by Tennell, considered together, did not prejudice his right to a fair trial.

KEY QUOTATIONS

“The test to determine if an ineffective assistance claim is properly brought on direct appeal is whether the record contains the answer as to ‘why’ counsel took, or failed to take, action in providing a defense.” (¶ 17)

“A fundamental aspect of ‘plain error,’ is that the alleged error indeed must be ‘plain.’” (¶ 19)

“The doctrine of cumulative error requires reversal of a conviction where a number of errors, taken together, prejudiced a defendant’s right to a fair trial.” (¶ 31)

FACTUAL BACKGROUND

On February 2, 2005, Gary Tennell drove south on Highway 93 and struck an oncoming vehicle head-on, killing Alice Day. Witnesses observed Tennell driving erratically and aggressively for approximately ten miles, including weaving through traffic, passing in an oncoming lane, and traveling at seventy or eighty miles per hour in a fifty-five-mile-per-hour construction zone. Tennell told a trooper that he swerved to avoid an animal, but no

witness saw an animal, and later Tennell claimed he had no memory of the driving, collision, or statements made at the hospital. The defense presented evidence that Tennell had severe obstructive sleep apnea, which he argued explained his conduct.

PROCEDURAL HISTORY

Tennell was convicted in the Twenty-First Judicial District Court of Ravalli County following a jury trial. The district court sentenced him to concurrent ten-year terms with six years suspended. He appealed, asserting several ineffective-assistance claims and cumulative error. The Montana Supreme Court dismissed one ineffective-assistance claim without prejudice to post-conviction proceedings and affirmed the convictions on all remaining issues.

DISPOSITION

affirmed

CASES CITED

- State v. Morgan, 2003 MT 193, ¶ 7, 316 Mont. 509, 74 P.3d 1047
- Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2025 (1984)
- State v. Hendricks, 2003 MT 223, ¶¶ 6-7, 317 Mont. 177, 75 P.3d 1268
- State v. Upshaw, 2006 MT 341, ¶¶ 32-34, 335 Mont. 162, 153 P.3d 579
- Hagen v. State, 1999 MT 8, ¶ 12, 293 Mont. 60, 973 P.2d 233
- State v. Hermann, 2003 MT 149, ¶ 30, 316 Mont. 198, 70 P.3d 738
- State v. Godfrey, 2004 MT 197, ¶¶ 22, 38, 322 Mont. 254, 95 P.3d 166
- State v. Ferguson, 2005 MT 343, ¶ 126, 330 Mont. 103, 126 P.3d 463