

# SUPREME COURT OF NEBRASKA

## State v. Malone

308 Neb. 929 (2021) · No. Nos. S-20-118, S-20-460 · Decided April 16, 2021

### SUMMARY

The Nebraska Supreme Court affirmed the denial, without an evidentiary hearing, of Kevin W. Malone's motion for postconviction relief and the denial of his request to amend the bill of exceptions. The court addressed procedures for amending a bill of exceptions, ineffective assistance of counsel, conflicts of interest, prosecutorial misconduct, Brady disclosures, and related trial issues. The court concluded that Malone's claims were without merit and that the record did not warrant relief.

### CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
|-----------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Nebraska                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| WRITING FOR THE COURT | Heavican, C.J.; Miller-Lerman, J.; Cassel, J.; Stacy, J.; Funke, J.; Papik, J.; Freudenberg, J.                                                                                                                                                                                                                                                                                                                                                                                                        |
| JURISDICTION          | Nebraska                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| DECIDED               | April 16, 2021                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| DOCKET                | Nos. S-20-118, S-20-460                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| DISPOSITION           | affirmed                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| PROCEDURAL POSTURE    | Malone appealed the denial, without an evidentiary hearing, of his motion for postconviction relief and separately appealed the denial of his motion to amend the bill of exceptions. The Nebraska Supreme Court consolidated the appeals after granting bypass of the Nebraska Court of Appeals.                                                                                                                                                                                                      |
| STANDARD OF REVIEW    | Compliance with the Nebraska rules of appellate procedure is reviewed de novo. In postconviction appeals, whether the motion alleges sufficient facts showing a constitutional violation or the record affirmatively shows entitlement to no relief is reviewed de novo. Ineffective-assistance claims present mixed questions: factual findings are reviewed for clear error and legal determinations de novo. Voluntariness, knowingness, and intelligence of a waiver are reviewed for clear error. |
| PRECEDENTIAL VALUE    | published precedential opinion                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| PARTIES               | Kevin W. Malone v. State of Nebraska                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |

## TOPICS

appellate procedure   state post-conviction relief   ineffective assistance   right to counsel  
prosecutorial misconduct

## PRACTICE AREAS

criminal procedure   post-conviction relief   appellate procedure   ineffective assistance of counsel  
prosecutorial misconduct   evidence

## QUESTIONS PRESENTED

1. Whether Malone properly invoked the procedure under Neb. Ct. R. App. P. § 2-105(B)(5) to amend the bill of exceptions.
2. Whether the district court erred by denying postconviction relief without an evidentiary hearing.
3. Whether trial counsel's distant familial relationship with the victim's family constituted an actual conflict of interest requiring a presumption of prejudice.
4. Whether Malone knowingly and intelligently waived any conflict of interest.
5. Whether counsel was ineffective for failing to assert that the victim's negligence was the sole proximate cause of the death.
6. Whether counsel was ineffective for failing to pursue additional cross-examination, suppression of photographs and statements, challenges to toxicology evidence, or bifurcation of the trial.
7. Whether alleged prosecutorial misconduct involving withheld evidence, misstatements of evidence, and comments on Malone's credibility warranted postconviction relief.

## HOLDINGS

1. Under Neb. Ct. R. App. P. § 2-105(B)(5), a motion to amend a bill of exceptions must be filed in the district court, not in an appellate court. Malone's application for remand filed in the Court of Appeals did not comply with the rule, so the court did not reach the merits of his proposed amendments.
2. A postconviction evidentiary hearing is not required when the motion lacks factual allegations of a constitutional violation, alleges only conclusions, or the files and records affirmatively show that the prisoner is entitled to no relief.
3. A defendant seeking postconviction relief for ineffective assistance must show both deficient performance and prejudice under Strickland; prejudice requires a reasonable probability that the proceeding's result would have differed absent counsel's deficient performance.
4. A distant familial relationship between defense counsel and the victim's family did not constitute an actual conflict of interest requiring a presumption of prejudice where the record did not show divided loyalties or adverse effect on counsel's performance.
5. A defendant may knowingly and intelligently waive the right to conflict-free counsel, and no formal litany is required; the court considers the totality of the circumstances and the waiver must affirmatively

appear in the record.

6. Contributory negligence is not a defense to motor vehicle homicide; victim negligence can absolve the defendant only if it was the sole proximate cause of the death. The victim's defensive act of laying down his motorcycle was not the sole proximate cause here.
7. Malone failed to show deficient performance or prejudice from counsel's handling of cross-examination, autopsy photographs, pre-Miranda statements, toxicology evidence, or bifurcation. The autopsy photographs were admissible when properly founded and relevant, the challenged statement was cumulative, and the record did not establish invalid toxicology testing or prejudice from trying the counts together.
8. The alleged withholding of evidence, misstatements of evidence, and closing-argument comments did not establish prosecutorial misconduct or a due process violation. Prosecutors may draw reasonable inferences from the evidence and criticize a defense theory or witness credibility, but may not express personal beliefs or opinions; the comments at issue were reasonable inferences rather than personal opinions.

#### KEY QUOTATIONS

*“The terms of § 2-105(B)(5) require that a motion to amend the bill of exceptions be filed in the district court and not in an appellate court.” (943)*

*“An evidentiary hearing is not required if (1) the motion does not contain factual allegations of a violation or infringement of the prisoner’s constitutional rights, (2) the motion alleges only conclusions of fact or law, or (3) the record affirmatively shows that the prisoner is entitled to no relief.” (945)*

*“An actual conflict of interest therefore encompasses any situation in which a defense counsel faces divided loyalties such that regard for one duty tends to lead to disregard of another.” (947)*

*“In such a case, a victim’s negligence cannot absolve the defendant of a motor vehicle homicide charge unless the actions of the victim were the sole proximate cause of the accident.” (955)*

*“Thus, in cases where the prosecutor comments on the theory of defense, the defendant’s veracity, or the defendant’s guilt, the prosecutor crosses the line into misconduct only if the prosecutor’s comments are expressions of the prosecutor’s personal beliefs rather than a summation of the evidence.” (966-967)*

#### FACTUAL BACKGROUND

In 2016, Malone ran a red light in Omaha and collided with Justin Hart's motorcycle, causing Hart's death. A jury convicted Malone of motor vehicle homicide, manslaughter, leaving the scene of a personal injury accident resulting in serious bodily injury or death, and driving without an ignition interlock device. Malone later alleged that trial and appellate counsel were ineffective, including because trial counsel had a distant familial relationship with Hart's family, failed to pursue several defenses and suppression motions, and failed to challenge prosecutorial misconduct. He also alleged that the bill of exceptions omitted portions of trial exchanges.

#### PROCEDURAL HISTORY

Malone was convicted by a jury in the Douglas County District Court of motor vehicle homicide, manslaughter, leaving the scene of a personal injury accident resulting in serious bodily injury or death, and driving without an ignition interlock device. He received an aggregate sentence of 40 to 50 years' imprisonment and a 15-year driver's-license revocation; the Court of Appeals affirmed the convictions and sentences. The district court later denied Malone's postconviction motion without an evidentiary hearing and denied his motion to amend the bill of exceptions. The Nebraska Court of Appeals consolidated the appeals, and the Nebraska Supreme Court granted bypass. The Supreme Court affirmed both district court orders.

## DISPOSITION

affirmed

## CASES CITED

- State v. Catlin, 308 Neb. 294, 953 N.W.2d 563 (2021)
- State v. Parnell, 305 Neb. 932, 943 N.W.2d 678 (2020)
- State v. Russell, 307 Neb. 499, 954 N.W.2d 920 (2021)
- TransCanada Keystone Pipeline v. Tanderup, 305 Neb. 493, 941 N.W.2d 145 (2020)
- State v. Dyer, 245 Neb. 385, 513 N.W.2d 316 (1994)
- Millennium Laboratories v. Ward, 289 Neb. 718, 857 N.W.2d 304 (2014)
- State v. Kays, 289 Neb. 260, 854 N.W.2d 783 (2014)
- State v. Dalton, 307 Neb. 465, 949 N.W.2d 752 (2020)
- State v. Tyler, 301 Neb. 365, 918 N.W.2d 306 (2018)
- Cinatal v. Proski, 307 Neb. 477, 949 N.W.2d 505 (2020)
- Strickland v. Washington, 466 U.S. 668 (1984)
- State v. Avina-Murillo, 301 Neb. 185, 917 N.W.2d 865 (2018)
- State v. Edwards, 294 Neb. 1, 880 N.W.2d 642 (2016)
- State v. Jackson, 275 Neb. 434, 747 N.W.2d 418 (2008)
- State v. Armstrong, 290 Neb. 991, 863 N.W.2d 449 (2015)
- State v. Brown, 258 Neb. 330, 603 N.W.2d 419 (1999)
- State v. Ring, 233 Neb. 720, 447 N.W.2d 908 (1989)
- State v. Irish, 292 Neb. 513, 873 N.W.2d 161 (2016)
- Miranda v. Arizona, 384 U.S. 436 (1966)
- State v. Britt, 305 Neb. 363, 940 N.W.2d 270 (2020)
- Webb v. Nebraska Dept. of Health & Human Servs., 301 Neb. 810, 920 N.W.2d 268 (2018)
- Brady v. Maryland, 373 U.S. 83 (1963)
- United States v. Bagley, 473 U.S. 667 (1985)
- Giglio v. United States, 405 U.S. 150 (1972)
- State v. Price, 306 Neb. 38, 944 N.W.2d 279 (2020)

- State v. Gonzales, 294 Neb. 627, 884 N.W.2d 102 (2016)

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