

SUPREME COURT OF MONTANA

State v. Hendricks

75 P.3d 1268 (Mont. 2003) · No. No. 02-510 · Decided August 25, 2003

SUMMARY

The Supreme Court of Montana considered whether trial counsel was ineffective for failing to assert a justifiable use of force defense in a prosecution for aggravated assault. The court held that the direct appeal record was insufficient to determine whether counsel's decision was reasonable trial strategy, affirmed the judgment, and dismissed the ineffective-assistance claim without prejudice to being raised in a postconviction proceeding.

CASE DETAILS

COURT	Supreme Court of Montana
WRITING FOR THE COURT	Karla M. Gray; James C. Nelson; Jim Regnier; Jim Rice; W. William Leaphart
JURISDICTION	Montana
DECIDED	August 25, 2003
DOCKET	No. 02-510
DISPOSITION	affirmed
PROCEDURAL POSTURE	Hendricks appealed his judgment and sentence following a jury conviction for aggravated assault, arguing that trial counsel was ineffective for failing to assert a justifiable use of force defense. The Montana Supreme Court held that the ineffective-assistance claim could not be resolved on the direct-appeal record and dismissed that claim without prejudice to a postconviction proceeding.
STANDARD OF REVIEW	The court applied the two-pronged Strickland v. Washington test to the ineffective-assistance claim, requiring proof of deficient performance and prejudice. On direct appeal, the court determined whether the existing record was sufficient to resolve counsel's performance and strategy.
PRECEDENTIAL VALUE	Published Montana Supreme Court opinion; precedential
PARTIES	John Tice Hendricks v. State of Montana

TOPICS

ineffective assistance

post-conviction relief

appellate procedure

criminal procedure

PRACTICE AREAS

criminal procedure

post-conviction relief

appellate procedure

QUESTIONS PRESENTED

1. Whether trial counsel provided ineffective assistance by failing to give notice of and present a justifiable use of force defense.
2. Whether an ineffective-assistance claim that cannot be resolved from the record on direct appeal must be dismissed without prejudice so it may be raised in a postconviction relief proceeding.

HOLDINGS

1. The court could not determine on the direct-appeal record whether counsel's conscious decision not to assert a justifiable use of force defense was an unreasonable defense strategy; therefore, Hendricks's ineffective-assistance claim could not be resolved on direct appeal.
2. When the record in a direct appeal is insufficient to determine whether counsel provided ineffective assistance, the direct appeal must be dismissed as to the claim without prejudice to the defendant's raising it in a postconviction relief proceeding.

KEY QUOTATIONS

“In other words, we will dismiss the direct appeal and require the defendant to raise the ineffective assistance claim via a postconviction relief proceeding, if at all.” (¶ 11)

FACTUAL BACKGROUND

During an early-morning altercation with Don Scott on October 26, 2001, Hendricks stabbed Scott with a kitchen knife, causing severe injuries. Hendricks's counsel expressly stated before trial that he would not assert a justifiable use of force defense or offer related jury instructions. The record did not disclose counsel's reasons for that decision.

PROCEDURAL HISTORY

Hendricks was charged in the Nineteenth Judicial District Court, Lincoln County, with attempted deliberate homicide and aggravated assault. The jury acquitted him of attempted deliberate homicide but convicted him of aggravated assault, after which the District Court entered judgment and imposed sentence. He appealed directly to the Montana Supreme Court, which affirmed the judgment and dismissed the ineffective-assistance claim without prejudice.

DISPOSITION

affirmed

CASES CITED

- Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)
- State v. Rogers, 2001 MT 165, ¶¶ 8-9, 306 Mont. 130, 32 P.3d 724
- State v. Harris, 2001 MT 231, ¶¶ 18-19, 21-22, 306 Mont. 525, 36 P.3d 372
- State v. Hubbel, 2001 MT 31, ¶¶ 15, 20-22, 304 Mont. 184, 20 P.3d 111
- State v. Herrman, 2003 MT 149, ¶ 34, 316 Mont. 198, 70 P.3d 738
- State v. Turnsplenty, 2003 MT 159, ¶¶ 18-21, 316 Mont. 275, 70 P.3d 1234

OPINION

State v. Hendricks 2003 MT 223

GRAY, J.

75 P.3d 1268 (2003) 2003 MT 223 STATE of Montana, Plaintiff and Respondent, v. John Tice HENDRICKS, Defendant and Appellant. No. 02-510. Supreme Court of Montana. Submitted on Briefs May 8, 2003. Decided August 25, 2003.

*1269 For Appellant: Kristina Guest, Appellate Defender, Helena, Montana.

For Respondent: Hon. Mike McGrath, Attorney General; C. Mark Fowler, Assistant Attorney General, Helena, Montana, Bernard G. Cassidy, Lincoln County Attorney, Libby, Montana. Chief Justice KARLA M. GRAY delivered the Opinion of the Court. ¶ 1 John Tice Hendricks (Hendricks) appeals from the judgment entered by the Nineteenth Judicial District Court, Lincoln County, on a jury verdict finding him guilty of aggravated assault. The issue raised by Hendricks is whether his counsel was ineffective for failing to raise the affirmative defense of justifiable use of force. We conclude, however, that Hendricks' claim of ineffective assistance of counsel cannot be addressed without considering matters outside the record and, accordingly, this appeal must be dismissed.

BACKGROUND

¶ 2 In the early morning hours of October 26, 2001, Hendricks became involved in an altercation with Don Scott (Scott). During the altercation, Hendricks stabbed Scott with a kitchen knife. The knife entered Scott's right side between his ribs and penetrated his liver and diaphragm, causing severe physical injuries. ¶ 3 On November 6, 2001, the State of Montana (State) charged Hendricks by information with the felony offenses of attempted deliberate homicide and aggravated assault based on the circumstances surrounding the altercation. Hendricks pleaded not guilty to the charges and the District Court scheduled a jury trial for March 5, 2002. Hendricks did not give the State pretrial notice of any affirmative defenses and he proceeded to trial asserting a defense of general denial.

*1270 ¶ 4 The jury trial was held as scheduled and the jury returned a verdict acquitting Hendricks of attempted deliberate homicide and finding him guilty of aggravated assault. The District Court sentenced Hendricks and entered judgment on the conviction and sentence. Hendricks appeals.

DISCUSSION

¶ 5 Was Hendricks' counsel ineffective for failing to raise the affirmative defense of justifiable use of force? ¶ 6 In determining whether a defendant received effective assistance of counsel at trial, we apply the two-pronged test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. See, e.g., *State v. Rogers*, 2001 MT 165, ¶ 8, 306 Mont. 130, ¶ 8, 32 P.3d 724, ¶ 8; *State v. Harris*, 2001 MT 231, ¶ 18, 306 Mont. 525, ¶ 18, 36 P.3d 372, ¶ 18. Pursuant to this test, a defendant bears the burden of establishing that his counsel's performance fell short of the range of competence required of attorneys in criminal cases and that his counsel's deficient performance was prejudicial to his case. *Rogers*, ¶ 8; *Harris*, ¶¶ 18-19. Hendricks contends that his trial counsel's performance was deficient for failing to give notice of, and offer a jury instruction on, a justifiable use of force defense when evidence presented at trial supported such a defense. He further contends that his counsel's deficient performance prejudiced him because he was denied a defense which potentially was meritorious. ¶ 7 As stated above, the first prong of the *Strickland* test requires Hendricks to establish that his trial counsel's performance fell short of the range of competence required of attorneys in criminal cases. In order to constitute ineffective assistance, counsel's conduct must flow from ignorance or neglect rather than from strategic decisions and trial tactics. *Rogers*, ¶ 9. Moreover, there is a strong presumption that counsel's performance was based on sound trial strategy and falls within a wide range of reasonable professional conduct. *Harris*, ¶ 18; *State v. Hubbel*, 2001 MT 31, ¶ 15, 304 Mont. 184, ¶ 15, 20 P.3d 111, ¶ 15. ¶ 8 Here, in a disclosure statement filed by the parties prior to the omnibus hearing, Hendricks' counsel specifically noted that he would not be asserting a justifiable use of force defense. Moreover, on the morning of trial, counsel stated to the District Court that he was not offering jury instructions on a justifiable use of force defense. Thus, Hendricks' counsel's decision to forego such a defense was made consciously and was not the result of ignorance or neglect. Consequently, this decision is presumed to be sound trial strategy falling within the realm of reasonable professional conduct absent evidence to the contrary. *Rogers*, ¶ 9; *Hubbel*, ¶¶ 20-21. ¶ 9 In his appellate brief, Hendricks does not set forth any reason for his trial counsel's decision not to assert a justifiable use of force defense and the record in this case is silent as to the reasoning for counsel's strategy. Absent evidence of record demonstrating the reasons underlying counsel's actions, we are unable to determine whether the decision not to assert a justifiable use of force defense constituted an unreasonable defense strategy overcoming the presumption that counsel's actions fall within the range of reasonable professional conduct. *Harris*, ¶¶ 21-22; *Hubbel*, ¶¶ 20-21. ¶ 10 Finally, we observe that in *Hubbel*, we concluded *Hubbel* had failed to establish the first prong of the *Strickland* test because the record did not contain sufficient evidence on which to determine whether counsel's actions fell within the range of reasonable professional conduct. We held, on that basis, that *Hubbel* had not met his burden of demonstrating that his counsel was ineffective. *Hubbel*, ¶¶ 21-22. In more recent cases, however, we have held that, where the record in a direct appeal is insufficient to determine whether counsel rendered ineffective assistance, it is more appropriate for the defendant to raise the ineffective assistance claim via a postconviction relief

proceeding and the direct appeal must be dismissed. See, e.g., *State v. Herrman*, 2003 MT 149, ¶ 34, 316 Mont. 198, ¶ 34, 70 P.3d 738, ¶ 34; *State v. Turnsplenty*, 2003 MT 159, ¶¶ 18-21, 316 Mont. 275, ¶¶ 18-21, 70 P.3d 1234, ¶¶ 18-21.

*1271 ¶ 11 In light of these conflicting lines of authority, we take this opportunity to clarify that in future cases we will utilize the procedure set forth in *Herrman* and *Turnsplenty* when the record in a direct appeal is insufficient to determine whether the defendant's counsel provided ineffective assistance. In other words, we will dismiss the direct appeal and require the defendant to raise the ineffective assistance claim via a postconviction relief proceeding, if at all. We will no longer use the approach set forth in *Hubbel*.

¶ 12 Accordingly, the judgment of the District Court is affirmed, and the ineffective assistance of counsel claim is dismissed without prejudice to its being raised in a postconviction relief proceeding. We Concur: JAMES C. NELSON, JIM REGNIER, JIM RICE and W. WILLIAM LEAPHART, JJ.