

SUPREME COURT OF NORTH DAKOTA

Owens v. State

621 N.W.2d 566 (N.D. 2001) · No. Nos. 20000128, 20000129 · Decided January 30, 2001

SUMMARY

The Supreme Court of North Dakota affirmed the dismissal of Earl L. Owens's successive application for post-conviction relief. The majority held that Owens's claim that counsel failed to file a direct appeal was a variation of claims raised in prior proceedings and therefore constituted a misuse of process under North Dakota law. A dissent would have remanded for an evidentiary hearing under *Roe v. Flores-Ortega* to determine whether Owens had instructed counsel to appeal.

CASE DETAILS

COURT	Supreme Court of North Dakota
WRITING FOR THE COURT	Dale V. Sandstrom; Gerald W. VandeWalle; William A. Neumann; Mary Muehlen Maring; Kapsner
JURISDICTION	North Dakota
DECIDED	January 30, 2001
DOCKET	Nos. 20000128, 20000129
DISPOSITION	affirmed
PROCEDURAL POSTURE	Owens appealed the district court's summary disposition dismissing his successive application for post-conviction relief, which alleged that appointed counsel failed to file a direct appeal as instructed.
STANDARD OF REVIEW	Summary disposition is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The applicant bears the burden of establishing a basis for post-conviction relief, while the State bears the burden of pleading and proving misuse of process.
PRECEDENTIAL VALUE	Published precedential opinion
PARTIES	Earl L. Owens v. State of North Dakota

TOPICS

- state post-conviction relief
- successive petitions
- ineffective assistance
- appellate procedure
- standard of review

PRACTICE AREAS

criminal law

post-conviction relief

appellate procedure

ineffective assistance of counsel

QUESTIONS PRESENTED

1. Whether Owens's successive post-conviction application was properly dismissed as a misuse of process because he inexcusably failed to raise his claim that counsel failed to file a requested direct appeal in an earlier post-conviction proceeding.
2. Whether *Roe v. Flores-Ortega* required an evidentiary hearing or reversal based on Owens's allegation that counsel failed to file a direct appeal as instructed.

HOLDINGS

1. Owens's claim that counsel failed to file a direct appeal was simply a variation of arguments raised or available in his prior post-conviction proceedings. His failure to raise the present formulation of the claim earlier was inexcusable and constituted misuse of the post-conviction process under N.D.C.C. § 29-32.1-12(2).
2. *Roe v. Flores-Ortega* did not require reversal because Owens's own prior filings showed that counsel had consulted with him and advised that there were no grounds for appeal, and the successive claim was barred by misuse of process. Under the circumstances, prejudice could not be presumed.

KEY QUOTATIONS

“We hold Owens' current argument, that counsel did not directly appeal his conviction, is simply a variation of his previous arguments. Failure to raise this argument in prior post-conviction proceedings is inexcusable and therefore constitutes a misuse of process.” (¶ 16)

“The order of the district court is affirmed.” (¶ 28)

FACTUAL BACKGROUND

Owens was convicted of theft by deception, attempted theft by deception, and giving false information to a law enforcement officer. After new counsel was appointed, Robert Martin represented Owens at sentencing and in prior post-conviction proceedings, but no direct appeal was filed. Owens previously pursued post-conviction relief and raised numerous issues, including allegations concerning the denial of an appeal. In his 2000 application, Owens more specifically asserted that he had instructed Martin to appeal and that Martin failed to do so.

PROCEDURAL HISTORY

Owens was convicted in 1996 and did not file a direct appeal. He pursued prior post-conviction proceedings, including a 1997 amended application raising issues concerning the denial of an appeal; the North Dakota Supreme Court affirmed the denial of that application in 1998. Owens filed another post-conviction application in March 2000, asserting that counsel had failed to file a direct appeal as he directed. The district court summarily denied relief, and the Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- State v. Skjonsby, 417 N.W.2d 818 (N.D. 1987)
- State v. Kunkel, 366 N.W.2d 799 (N.D. 1985)
- Hopfauf v. State, 1998 ND 30, 575 N.W.2d 646
- Mertz v. State, 535 N.W.2d 834 (N.D. 1995)
- Owens v. State, 1998 ND 106, 578 N.W.2d 542
- State v. Johnson, 1997 ND 235, 571 N.W.2d 372
- McMorrow v. State, 537 N.W.2d 365 (N.D. 1995)
- Woehlhoff v. State, 531 N.W.2d 566 (N.D. 1995)
- Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)
- Clark v. Johnson, 227 F.3d 273 (5th Cir. 2000)
- Kitchen v. United States, 227 F.3d 1014 (7th Cir. 2000)
- Schlup v. Delo, 513 U.S. 298, 318-19, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)
- DeCoteau v. State, 1998 ND 199, 586 N.W.2d 156
- Rodriquez v. United States, 395 U.S. 327, 329-30, 89 S. Ct. 1715, 23 L. Ed. 2d 340 (1969)
- Peguero v. United States, 526 U.S. 23, 28, 119 S. Ct. 961, 143 L. Ed. 2d 18 (1999)
- Strickland v. Washington, 466 U.S. 668, 693-94, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)
- United States v. Cronin, 466 U.S. 648, 659 n. 26, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)
- Smith v. Robbins, 528 U.S. 259, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000)
- Castellanos v. United States, 26 F.3d 717, 720 (7th Cir. 1994)
- Berlin v. State, 2000 ND 206, 619 N.W.2d 623
- Anderson v. A.P.I. Co. of Minnesota, 1997 ND 6, 559 N.W.2d 204
- Aaland v. Lake Region Grain Co-op., 511 N.W.2d 244 (N.D. 1994)
- Friedt v. Moseanko, 484 N.W.2d 861 (N.D. 1992)
- Midwest Cas. Ins. Co. v. Whitetail, 1999 ND 133, 596 N.W.2d 341
- Mattson v. Rachetto, 1999 SD 51, 591 N.W.2d 814
- Silvesan v. State, 1999 ND 62, 591 N.W.2d 131
- Murchison v. State, 1998 ND 96, 578 N.W.2d 514
- Clark v. State, 1999 ND 78, 593 N.W.2d 329