

SUPREME COURT OF MONTANA

Brasda v. State

2007 MT 95N (2007) · No. DA 06-0383 · Decided April 10, 2007

SUMMARY

The Montana Supreme Court affirmed the denial of Rayland Brasda’s petition for postconviction relief. The court held that counsel was not deficient in challenging the admission of a knife and, in any event, Brasda failed to establish prejudice under the Strickland ineffective-assistance standard.

CASE DETAILS

|                       |                                                                                                                                                                                                                           |
|-----------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Montana                                                                                                                                                                                                  |
| WRITING FOR THE COURT | Justice Jim Rice; Jim Rice; Karla M. Gray; W. William Leaphart; Patricia Cotter; James C. Nelson                                                                                                                          |
| JURISDICTION          | Montana                                                                                                                                                                                                                   |
| DECIDED               | April 10, 2007                                                                                                                                                                                                            |
| DOCKET                | DA 06-0383                                                                                                                                                                                                                |
| DISPOSITION           | affirmed                                                                                                                                                                                                                  |
| PROCEDURAL POSTURE    | Brasda appealed the Cascade County District Court's denial of his petition for postconviction relief based on ineffective assistance of counsel.                                                                          |
| STANDARD OF REVIEW    | The Court reviewed the denial of postconviction relief for clearly erroneous factual findings and incorrect conclusions of law. Ineffective-assistance claims, as mixed questions of law and fact, were reviewed de novo. |
| PRECEDENTIAL VALUE    | nonprecedential                                                                                                                                                                                                           |
| PARTIES               | Rayland Brasda v. State of Montana                                                                                                                                                                                        |

TOPICS

- post-conviction relief
- ineffective assistance
- criminal procedure
- standard of review
- appellate procedure

PRACTICE AREAS

- criminal law
- post-conviction relief
- ineffective assistance of counsel
- appellate procedure

## QUESTIONS PRESENTED

1. Whether trial counsel provided ineffective assistance by failing to properly object to the admission of the knife and by failing to request a jury instruction concerning alleged police manipulation of the knife.
2. Whether Brasda established prejudice under the second prong of the Strickland ineffective-assistance test.

## HOLDINGS

1. Brasda failed to establish that counsel's performance was deficient because counsel initially objected to the knife's admission, requiring the State to lay a testimonial foundation concerning whether the knife's condition had been altered.
2. Brasda failed to establish a reasonable probability that, absent counsel's alleged errors, the result of the proceeding would have been different; admission of the knife was not sufficiently prejudicial to undermine confidence in the verdict.

## KEY QUOTATIONS

*“Under the second prong of the Strickland test, a petitioner must establish that the ineffective assistance caused prejudice.”* (¶ 7)

*“The second prong requires the defendant to establish prejudice by demonstrating that there was a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.”* (¶ 9)

## FACTUAL BACKGROUND

Brasda was charged with and convicted of felony assault with a weapon. At trial, the State introduced a knife that Brasda claimed had been manipulated by police, and his counsel initially objected to its admission. In his postconviction petition, Brasda alleged that counsel was ineffective for failing to properly object to the knife, failing to request a related jury instruction, and other trial deficiencies; on appeal, he pursued only the knife-related claims.

## PROCEDURAL HISTORY

Brasda was convicted by a jury of felony assault with a weapon and his conviction was affirmed on direct appeal. He then sought postconviction relief, alleging ineffective assistance of counsel. The District Court denied the petition, and the Montana Supreme Court affirmed.

## DISPOSITION

affirmed

## CASES CITED

- State v. Brasda, 2003 MT 374, 319 Mont. 146, 82 P.3d 922
- Hendricks v. State, 2006 MT 22, ¶ 10, 331 Mont. 47, ¶ 10, 128 P.3d 1017, ¶ 10
- Thurston v. State, 2004 MT 142, ¶ 8, 321 Mont. 411, ¶ 8, 91 P.3d 1259, ¶ 8

- Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)
- State v. Boyer, 215 Mont. 143, 147, 695 P.2d 829, 831 (1985)
- State v. Rogers, 2001 MT 165, ¶ 14, 306 Mont. 130, ¶ 14, 32 P.3d 724, ¶ 14
- Davis v. State, 2004 MT 112, ¶ 20, 321 Mont. 118, ¶ 20, 88 P.3d 1285, ¶ 20
- State v. Harris, 2001 MT 231, ¶ 19, 306 Mont. 525, ¶ 19, 36 P.3d 372, ¶ 19

## OPINION

### PER CURIAM.

No. DA 06-0383 IN THE SUPREME COURT OF THE STATE OF MONTANA 2007 MT 95N  
 RAYLAND BRASDA, Petitioner and Appellant, v. STATE OF MONTANA, Respondent and  
 Respondent. APPEAL FROM: The District Court of the Eighth Judicial District, In and For the  
 County of Cascade, Cause No. ADC 01-118(b), Honorable Julie Macek, Presiding Judge  
 COUNSEL OF RECORD: For Appellant: Joseph P. Gilligan, Attorney at Law, Great Falls,  
 Montana For Respondent: Honorable Mike McGrath, Attorney General; John Paulson, Assistant  
 Attorney General, Helena, Montana Brant Light, County Attorney; Susan Weber, Deputy County  
 Attorney, Great Falls, Montana Submitted on Briefs: January 31, 2007 Decided: April 10, 2007  
 Filed: \_\_\_\_\_ Clerk Justice Jim Rice delivered the  
 Opinion of the Court. ¶1 Pursuant to Section I, Paragraph 3(d)(v), Montana Supreme Court 1996  
 Internal Operating Rules, as amended in 2003, the following memorandum decision shall not be  
 cited as precedent.

It shall be filed as a public document with the Clerk of the Supreme Court and shall be reported by  
 case title, Supreme Court cause number and result to the State Reporter Publishing Company and  
 West Group in the quarterly table of noncitable cases issued by this Court. ¶2 Rayland Brasda  
 (Brasda) appeals from the order of the Eighth Judicial District Court, Cascade County, denying his  
 petition for postconviction relief. ¶3 Brasda was charged by information with the offense of assault  
 with a weapon, a felony, in violation of § 45-5-213(1)(b), MCA (1999).

Brasda was convicted in a jury trial and subsequently sentenced. Brasda's conviction was affirmed  
 in State v. Brasda, 2003 MT 374, 319 Mont. 146, 82 P.3d 922, wherein one of the issues Brasda  
 raised concerned the knife he possessed on the night of the incident and whether the opening  
 mechanism of the knife had been manipulated by police prior to trial to allow for easier working  
 of the knife.

Brasda argued the manipulation had changed the condition of the knife and rendered it  
 inadmissible as evidence in the trial. We affirmed, noting that the court ultimately admitted the  
 knife without objection, and, therefore, Brasda had waived his right to claim error on appeal. ¶4  
 Brasda then filed a petition for postconviction relief alleging ineffective assistance by reason of his  
 counsel's (1) failure to properly object to the admission of the knife and submit a related jury

instruction; (2) failure to properly challenge jurors during voir dire; 2 and (3) failure to properly develop the theory of the case.

The District Court denied the petition. ¶5 On appeal, Brasda challenges the District Court's denial of his petition only in regard to his counsel's failure to object to the admission of the knife and in failing to submit an instruction directing the jury to evaluate the evidence in light of the manipulations made by police. Brasda argues he sustained his burden to establish deficient performance by his counsel and that he was unfairly prejudiced as a result, and therefore is entitled to a new trial. ¶6 "This Court reviews a district court's denial of postconviction relief to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct.

Claims of ineffective assistance of counsel are mixed questions of law and fact, which we review de novo." *Hendricks v. State*, 2006 MT 22, ¶ 10, 331 Mont. 47, ¶ 10, 128 P.3d 1017, ¶ 10 (citing *Thurston v. State*, 2004 MT 142, ¶ 8, 321 Mont. 411, ¶ 8, 91 P.3d 1259, ¶ 8). ¶7 We have adopted the two-prong test from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct.

2052 (1984), to measure whether the assistance of counsel was effective. *State v. Boyer*, 215 Mont. 143, 147, 695 P.2d 829, 831 (1985). Under the first part, the petitioner must show that counsel's performance was deficient. This Court applies a highly deferential standard to review the strategic decisions an attorney must make during the trial process.

Under the second prong of the *Strickland* test, a petitioner must establish that the ineffective assistance caused prejudice. *State v. Rogers*, 2001 MT 165, 3 ¶ 14, 306 Mont. 130, ¶ 14, 32 P.3d 724, ¶ 14. If either part of the *Strickland* test would be dispositive, we need only address that part of the test. ¶8 "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. "The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066. ¶9 We are not persuaded that Brasda's counsel's performance was deficient.

She initially objected to the introduction of the knife based upon the asserted alteration by police, thus requiring the State to lay a testimonial foundation indicating that the condition of the knife had not been altered from its condition at the time of the incident. Further, even if Brasda had demonstrated that his counsel's performance was deficient, "[t]he second prong requires the defendant to establish prejudice by demonstrating that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Davis v. State*, 2004 MT 112, ¶ 20, 321 Mont.

118, ¶ 20, 88 P.3d 1285, ¶ 20 (citing State v. Harris, 2001 MT 231, ¶ 19, 306 Mont. 525, ¶ 19, 36 P.3d 372, ¶ 19). Here, admission of the knife was not prejudicial to such an extent that it would undermine confidence in the verdict, given the ample testimony available from the victims, the officers, and other witnesses regarding Brasda's use of a knife. 4 ¶10 It is appropriate to decide this case pursuant to our Order of February 11, 2003, amending Section I.3 of our 1996 Internal Operating Rules and providing for memorandum opinions.

It is manifest on the face of the briefs and the record before us that the appeal is without merit because the findings of fact are supported by substantial evidence, the legal issues are clearly controlled by settled Montana law which the District Court correctly interpreted, and there was no err by the District Court. ¶11 We affirm. /S/ JIM RICE We concur: /S/ KARLA M. GRAY /S/ W. WILLIAM LEAPHART /S/ PATRICIA COTTER /S/ JAMES C. NELSON 5