

SUPREME COURT OF NEBRASKA

State v. Allen

301 Neb. 560 (2018) · No. No. S-17-771 · Decided November 16, 2018

SUMMARY

The Nebraska Supreme Court affirmed the denial, without an evidentiary hearing, of Kevin Allen's motion for postconviction relief. The court held that claims concerning alleged trial errors were procedurally barred because they were or could have been raised on direct appeal, and that Allen's ineffective-assistance claims failed to allege prejudice or deficient performance. The court also concluded that proposed polygraph evidence was inadmissible and that the motion did not establish entitlement to a hearing based on newly discovered evidence.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Funke, J.; Heavican, C.J.; Miller-Lerman, J.; Cassel, J.; Stacy, J.; Papik, J.
JURISDICTION	Nebraska
DECIDED	November 16, 2018
DOCKET	No. S-17-771
DISPOSITION	affirmed
PROCEDURAL POSTURE	Kevin Allen appealed the Douglas County District Court's denial of his amended motion for postconviction relief without an evidentiary hearing.
STANDARD OF REVIEW	The appellate court reviews de novo a determination that a postconviction defendant failed to allege sufficient facts to demonstrate a constitutional violation or that the record and files affirmatively show that the defendant is entitled to no relief.
PRECEDENTIAL VALUE	Published precedential opinion of the Supreme Court of Nebraska
PARTIES	Kevin Allen v. State of Nebraska

TOPICS

state post-conviction relief

post-conviction relief

ineffective assistance

criminal procedure

evidence

PRACTICE AREAS

State postconviction relief

Criminal procedure

Ineffective assistance of counsel

Evidence

Appellate procedure

QUESTIONS PRESENTED

1. Whether Allen could use postconviction proceedings to relitigate alleged trial errors that were raised or could have been raised on direct appeal.
2. Whether Allen alleged sufficient facts to warrant postconviction relief or an evidentiary hearing on ineffective assistance of trial counsel.
3. Whether Allen sufficiently argued or established ineffective assistance of appellate counsel.
4. Whether generalized allegations concerning possible forensic-evidence problems and newly discovered evidence required an evidentiary hearing.

HOLDINGS

1. A motion for postconviction relief cannot be used to secure review of issues that were or could have been litigated on direct appeal, and plain error cannot be asserted in a postconviction proceeding to raise claims of trial-court error.
2. Allen was not entitled to postconviction relief or an evidentiary hearing because he failed to allege facts demonstrating deficient performance and a reasonable probability of prejudice.
3. The court declined to address Allen's ineffective-assistance-of-appellate-counsel assignment because he failed to specifically argue it in his appellate brief.
4. An evidentiary hearing is not required when a postconviction motion alleges only conclusions of fact or law without supporting facts.
5. The proper course is to overrule the motion for postconviction relief without an evidentiary hearing, rather than characterize the disposition as dismissal for failure to state a civil pleading claim.

KEY QUOTATIONS

“A more precise formulation is that in the absence of alleged facts that would render the judgment void or voidable, the proper course is to overrule the motion for postconviction relief without an evidentiary hearing.” (571)

“We have consistently held that the results of polygraph examinations are not admissible into evidence in this state.” (574-575)

FACTUAL BACKGROUND

Allen was convicted of murdering Omaha police officer James B. Wilson, Jr., and using a firearm to commit a felony after witnesses identified Allen as the gunman who exited a Chevrolet van and shot Wilson during a traffic stop. The murder weapon was not recovered, but the State presented eyewitness testimony, testimony from a cooperating participant, photographs, and fingerprint evidence linking Allen to the van. In postconviction

proceedings, Allen alleged ineffective assistance, trial errors, and newly discovered evidence based principally on alleged witness testimony, polygraph evidence, and generalized concerns about forensic evidence.

PROCEDURAL HISTORY

Allen was convicted by a jury of first degree murder and use of a firearm to commit a felony and received consecutive sentences of life imprisonment and 18 to 20 years' imprisonment. The Nebraska Supreme Court affirmed his convictions on direct appeal. After the district court appointed counsel, Allen filed an amended postconviction motion asserting fair-trial violations, ineffective assistance of trial and appellate counsel, prosecutorial misconduct, and newly discovered evidence. The district court dismissed the motion without an evidentiary hearing, and the Nebraska Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- State v. Allen, 252 Neb. 187, 560 N.W.2d 829 (1997)
- State v. Foster, 300 Neb. 883, 916 N.W.2d 562 (2018)
- State v. Newman, 300 Neb. 770, 916 N.W.2d 393 (2018)
- State v. Haynes, 299 Neb. 249, 908 N.W.2d 40 (2018)
- State v. Ryan, 287 Neb. 938, 845 N.W.2d 287 (2014)
- State v. Robertson, 294 Neb. 29, 881 N.W.2d 864 (2016)
- State v. Ross, 296 Neb. 923, 899 N.W.2d 209 (2017)
- State v. Sepulveda, 278 Neb. 972, 775 N.W.2d 40 (2009)
- Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)
- State v. Castaneda, 287 Neb. 289, 842 N.W.2d 740 (2014)
- United States v. Scheffer, 523 U.S. 303, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998)
- State v. Walker, 242 Neb. 99, 493 N.W.2d 329 (1992)
- State v. Steinmark, 195 Neb. 545, 239 N.W.2d 495 (1976)
- Boeche v. State, 151 Neb. 368, 37 N.W.2d 593 (1949)
- Parker v. State, 164 Neb. 614, 83 N.W.2d 347 (1957)
- State v. Temple, 192 Neb. 442, 222 N.W.2d 356 (1974)
- State v. Anderson and Hochstein, 207 Neb. 51, 296 N.W.2d 440 (1980)
- State v. Beach, 215 Neb. 213, 337 N.W.2d 772 (1983)
- State v. Riley, 281 Neb. 394, 796 N.W.2d 371 (2011)
- State v. Stricklin, 300 Neb. 794, 916 N.W.2d 413 (2018)
- State v. Cook, 290 Neb. 381, 860 N.W.2d 408 (2015)
- State v. Myers, 258 Neb. 300, 603 N.W.2d 378 (1999)

- State v. Lotter, ante p. 125, 917 N.W.2d 850 (2018)

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