

SUPREME COURT OF COLORADO

Downey v. People

25 P.3d 1200 (Colo. 2001) · No. No. 99SC664 · Decided June 25, 2001

SUMMARY

The Colorado Supreme Court considered whether a defendant proceeding pro se could assert ineffective assistance of counsel against appointed advisory appellate counsel. The court held that such a claim is generally unavailable when counsel acts only in an advisory capacity, but may be available if advisory counsel assumes a broader role and exercises control appropriate for legal representation. Deferring to the trial court’s finding that counsel acted solely as advisory counsel, the court affirmed the judgment of the court of appeals.

CASE DETAILS

COURT	Supreme Court of Colorado
WRITING FOR THE COURT	Justice Martinez; Justice Coats; Justice Kourlis
JURISDICTION	Colorado
DECIDED	June 25, 2001
DOCKET	No. 99SC664
DISPOSITION	affirmed
PROCEDURAL POSTURE	Petition for certiorari review of the Colorado Court of Appeals' affirmance of the denial of Downey's Crim. P. 35(c) motion alleging ineffective assistance of advisory appellate counsel.
STANDARD OF REVIEW	The reviewing court defers to the trial court's factual findings and will not overturn them unless they are unsupported by the appellate record. The legal consequence of those findings is reviewed as a matter of law.
PRECEDENTIAL VALUE	Published, precedential opinion of the Supreme Court of Colorado, decided en banc.
PARTIES	Gregory Downey v. The People of the State of Colorado

TOPICS

- ineffective assistance
- right to counsel
- criminal procedure
- post-conviction relief
- appellate procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether a defendant who elects self-representation may assert an ineffective-assistance claim against advisory appellate counsel.
2. Whether advisory counsel becomes subject to an ineffective-assistance claim when counsel assumes a broader role and exercises a degree of control appropriate for traditional legal representation.
3. Whether Downey's advisory appellate counsel exceeded the limited advisory role in this case.

HOLDINGS

1. A defendant who knowingly and voluntarily waives the right to counsel and proceeds pro se ordinarily may not maintain a constitutional ineffective-assistance claim against advisory counsel because the defendant has no constitutional right to advisory counsel.
2. A defendant may assert ineffective assistance against advisory counsel if advisory counsel exceeds the advisory role and assumes a broader role involving a degree of control appropriate for traditional legal representation; the claim is limited to the duties assigned to or assumed by counsel.
3. Downey could not maintain an ineffective-assistance claim because the trial court's supported factual finding established that his appellate attorney acted solely as advisory counsel.

KEY QUOTATIONS

"Once advisory counsel exceeds his role as advisory counsel and exercises a degree of control appropriate for legal representation, a defendant may assert an ineffective assistance of counsel claim "within the limited scope of the duties assigned to or assumed by counsel."" (25 P.3d at 1205)

"Under these circumstances, Downey could not maintain a claim for ineffective assistance of counsel against his advisory appellate counsel." (25 P.3d at 1206)

FACTUAL BACKGROUND

Downey elected to represent himself on appeal after dissatisfaction with his trial counsel, and the trial court appointed a privately retained attorney as advisory appellate counsel. The attorney drafted appellate briefs, but Downey participated in selecting the issues, retained veto power over the issues raised, and signed the briefs. Downey insisted that his ineffective-assistance-of-trial-counsel claim be raised on direct appeal rather than in post-conviction proceedings. After an evidentiary hearing, the trial court credited counsel's testimony and found that counsel acted solely in an advisory capacity.

PROCEDURAL HISTORY

Downey was convicted of possession of contraband, attempted escape, conspiracy to commit escape, and five habitual-criminal counts. He elected to proceed pro se on appeal, while the trial court appointed his privately retained attorney as advisory counsel. After a partially successful direct appeal, Downey filed a Crim. P. 35(c) motion alleging that advisory appellate counsel was ineffective for raising trial-counsel ineffectiveness on direct

appeal rather than in post-conviction proceedings. The trial court denied the motion, the court of appeals affirmed, and the Colorado Supreme Court granted certiorari and affirmed.

DISPOSITION

affirmed

CASES CITED

- McKaskle v. Wiggins, 465 U.S. 168 (1984)
- Faretta v. California, 422 U.S. 806 (1975)
- People v. Romero, 694 P.2d 1256 (Colo. 1985)
- People v. Lucero, 200 Colo. 335, 615 P.2d 660 (1980)
- Armstrong v. People, 701 P.2d 17 (Colo. 1985)
- Reliford v. People, 195 Colo. 549, 579 P.2d 1145 (1978)
- People v. Doane, 200 Cal. App. 3d 852, 246 Cal. Rptr. 366 (1988)
- People v. Bloom, 48 Cal. 3d 1194, 259 Cal. Rptr. 669, 774 P.2d 698 (1989)
- Rodriguez v. State, 763 S.W.2d 893 (Tex. Ct. App. 1988)
- United States v. Causey, 835 F.2d 1289 (9th Cir. 1987)
- State v. Bettney, 529 A.2d 1356 (Me. 1987)
- Estelle v. State, 558 So. 2d 843 (Miss. 1990)
- M.S. Ali v. United States, 581 A.2d 368 (D.C. 1990)
- Hance v. Kemp, 258 Ga. 649, 373 S.E.2d 184 (1988)
- People v. Naranjo, 840 P.2d 319 (Colo. 1992)
- People v. Cole, 775 P.2d 551 (Colo. 1989)
- People v. Blehm, 983 P.2d 779 (Colo. 1999)
- State v. Oliphant, 47 Conn. App. 271, 702 A.2d 1206 (1997)
- State v. Randall, 530 S.W.2d 407 (Mo. Ct. App. 1975)