

SUPREME COURT OF NEBRASKA

State v. Assad

304 Neb. 979 (2020) · No. No. S-17-1193 · Decided February 7, 2020

SUMMARY

The Nebraska Supreme Court held that Jason Assad was required to demonstrate both deficient performance and actual prejudice to prevail on his ineffective-assistance-of-appellate-counsel claim. Although appellate counsel raised only issues that were not preserved for review and the direct appeal was summarily affirmed, the court concluded that these circumstances did not warrant a presumption of prejudice or a new direct appeal. The court affirmed the Nebraska Court of Appeals’ judgment denying postconviction relief.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Papik, J.; Heavican, C.J.; Miller-Lerman, J.; Cassel, J.; Stacy, J.; Funke, J.
JURISDICTION	Nebraska
DECIDED	February 7, 2020
DOCKET	No. S-17-1193
DISPOSITION	affirmed
PROCEDURAL POSTURE	Petition for further review of the Nebraska Court of Appeals' affirmance of the district court's denial of Jason Assad's motion for postconviction relief without an evidentiary hearing.
STANDARD OF REVIEW	The appellate court reviews de novo the determination that a 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
PARTIES	Jason Assad v. State of Nebraska

TOPICS

- post-conviction relief
- ineffective assistance
- appellate procedure
- standard of review
- preservation of error

PRACTICE AREAS

criminal procedure

post-conviction relief

ineffective assistance of counsel

appellate procedure

QUESTIONS PRESENTED

1. Whether prejudice should be presumed under Strickland when appellate counsel raises only issues that were not preserved for appellate review, rather than asserting that trial counsel was ineffective for failing to preserve those issues.
2. Whether Assad was entitled to postconviction relief or an evidentiary hearing despite failing to allege or demonstrate a reasonable probability that the result of his direct appeal would have been different.

HOLDINGS

1. Prejudice is not presumed when appellate counsel files a brief and pursues an appeal but raises only issues that were not preserved for appellate review. Such a claim is treated as an allegation that counsel raised some issues rather than others and is governed by the ordinary Strickland requirement of proving prejudice.
2. Assad was required to show both deficient performance and actual prejudice under Strickland, and because he made no attempt to demonstrate prejudice, his postconviction claim was properly denied without an evidentiary hearing.
3. Nebraska appellate courts review de novo whether a postconviction defendant failed to allege sufficient facts showing a constitutional violation or whether the files and record affirmatively show that the defendant is entitled to no relief.

KEY QUOTATIONS

“In Smith v. Robbins, 528 U.S. 259, 286, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000), another case in which a party alleging ineffective assistance of appellate counsel argued for a presumption of prejudice, the U.S. Supreme Court drew a distinction between a “denial of counsel altogether on appeal” and “mere ineffective assistance of counsel on appeal.”” (at 988)

“Instead, just as in most other cases in which a defendant alleges ineffective assistance, Assad would be entitled to relief under Strickland if he could prove that his appellate counsel’s performance was deficient and that he suffered prejudice as a result of that deficient performance.” (at 994)

FACTUAL BACKGROUND

Police investigating a reported scream at a motel where Assad and his wife lived obtained search warrants and found Assad's wife injured, apparent narcotics evidence, weapons, and surveillance videos. Assad was charged with several offenses, including weapon-possession, false-imprisonment, and terroristic-threat offenses, and was convicted and sentenced as a habitual criminal. Although trial counsel filed suppression motions, counsel did not renew the objections when the State introduced the challenged evidence at trial, preventing preservation of the suppression issues for direct appeal.

PROCEDURAL HISTORY

Assad was convicted of several offenses and sentenced as a habitual criminal to an aggregate term of 35 to 60 years' imprisonment. On direct appeal, appellate counsel challenged the denial of suppression motions, but the Nebraska Court of Appeals summarily affirmed because trial counsel had not renewed the suppression objections at trial; the appellate court denied attempts to add ineffective-assistance claims, and the Nebraska Supreme Court denied further review. Assad then sought postconviction relief, alleging ineffective assistance of appellate counsel for failing to assert that trial counsel was ineffective in failing to preserve suppression issues. The district court denied relief without an evidentiary hearing, and the Court of Appeals affirmed. The Nebraska Supreme Court granted further review and affirmed.

DISPOSITION

affirmed

CASES CITED

- United States v. Leon, 468 U.S. 897 (1984)
- State v. Podrazo, 21 Neb. Ct. App. 489, 840 N.W.2d 898 (2013)
- State v. Martinez, 302 Neb. 526, 924 N.W.2d 295 (2019)
- Strickland v. Washington, 466 U.S. 668 (1984)
- State v. Avina-Murillo, 301 Neb. 185, 917 N.W.2d 865 (2018)
- United States v. Cronin, 466 U.S. 648 (1984)
- Bell v. Cone, 535 U.S. 685 (2002)
- Florida v. Nixon, 543 U.S. 175 (2004)
- Penson v. Ohio, 488 U.S. 75 (1988)
- Roe v. Flores-Ortega, 528 U.S. 470 (2000)
- Garza v. Idaho, 139 S. Ct. 738 (2019)
- State v. Trotter, 259 Neb. 212, 609 N.W.2d 33 (2000)
- Smith v. Robbins, 528 U.S. 259 (2000)
- Gray v. Greer, 800 F.2d 644 (7th Cir. 1986)
- Hardaway v. Robinson, 655 F.3d 445 (6th Cir. 2011)
- People v. Moore, 133 Ill. 2d 331, 549 N.E.2d 1257, 140 Ill. Dec. 385 (1990)
- Hendricks v. Lock, 238 F.3d 985 (8th Cir. 2001)
- State v. Sundquist, 301 Neb. 1006, 921 N.W.2d 131 (2019)
- Commonwealth v. Rosado, 637 Pa. 424, 150 A.3d 425 (2016)