

SUPREME COURT OF NEBRASKA

State v. Nesbitt

650 N.W.2d 766, 264 Neb. 612 (2002) · No. No. S-00-751 · Decided September 13, 2002

SUMMARY

The Supreme Court of Nebraska reviewed Thomas Edward Nesbitt’s appeal from the denial of his motion for postconviction relief without an evidentiary hearing. The court addressed claims concerning the charging documents, preliminary hearing, arraignment, depositions, witness sequestration, the felony-murder statute, and jury procedures, applying procedural-bar and ineffective-assistance principles. The court concluded that the asserted claims did not warrant postconviction relief or an evidentiary hearing.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Stephan, J.; Hendry, C.J.; Wright, J.; Connolly, J.; Gerrard, J.; McCormack, J.; Miller-Lerman, J.
JURISDICTION	Nebraska
DECIDED	September 13, 2002
DOCKET	No. S-00-751
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Nesbitt appealed from the Douglas County District Court's denial of his motion for postconviction relief without an evidentiary hearing.
STANDARD OF REVIEW	Whether a postconviction claim is procedurally barred is a question of law reviewed independently. An evidentiary hearing is required when a motion alleges facts that, if proved, would establish a constitutional infringement, unless the allegations are only conclusions or the files and records affirmatively show that the movant is entitled to no relief.
PRECEDENTIAL VALUE	Published Nebraska Supreme Court opinion; precedential.
PARTIES	Thomas Edward Nesbitt v. State of Nebraska

TOPICS

- state post-conviction relief
- ineffective assistance
- fifth amendment
- due process
- criminal procedure

PRACTICE AREAS

criminal procedure

post-conviction relief

constitutional law

ineffective assistance of counsel

evidence

QUESTIONS PRESENTED

1. Whether the district court properly denied postconviction relief without an evidentiary hearing on Nesbitt's numerous claims.
2. Whether claims of trial or appellate error that were raised or could have been raised on direct appeal were procedurally barred in the postconviction proceeding.
3. Whether Nesbitt adequately pleaded ineffective assistance of counsel under *Strickland v. Washington*.
4. Whether counsel's failure to assert Doyle objections to prosecutorial questions and argument concerning Nesbitt's silence after Miranda warnings warranted an evidentiary hearing.
5. Whether dismissal of the felony-murder theory at the close of the State's evidence acquitted Nesbitt of premeditated first degree murder or triggered double-jeopardy or collateral-estoppel protections.
6. Whether the district court abused its discretion by denying amendment of the postconviction pleading.
7. Whether the issue of appointment of postconviction counsel was moot because Nesbitt was represented by counsel on appeal.

HOLDINGS

1. A postconviction movant is entitled to an evidentiary hearing when the motion alleges specific facts that, if proved, would establish a constitutional violation, unless the allegations are merely conclusory or the files and records affirmatively show that the movant is entitled to no relief.
2. A motion for postconviction relief cannot be used to obtain review of issues that were or could have been litigated on direct appeal, regardless of how those issues are phrased or rephrased.
3. To establish ineffective assistance of counsel, a defendant must show deficient performance and actual prejudice under *Strickland*; a claim may be denied on the prejudice prong when appropriate.
4. Dismissal of the felony-murder theory at the close of the State's evidence did not acquit Nesbitt of premeditated first degree murder and did not bar the premeditation theory under double-jeopardy or collateral-estoppel principles.
5. A defendant is entitled to an evidentiary hearing on an ineffective-assistance claim when the prosecutor's questions and argument could reasonably be understood as referring to the defendant's post-Miranda silence, counsel did not object, and the record does not affirmatively establish that the failure to object was a conscious trial strategy.
6. The decision whether to permit amendment of a postconviction pleading rests in the district court's discretion, and the district court did not abuse that discretion on this record.

KEY QUOTATIONS

*"We cannot allow prosecutors to sidestep the Doyle protections by skirting the edge of the law with vague and imprecise references to a defendant's silence." (*790)*

*“We therefore reverse the order of the district court to the extent that it denied Nesbitt an evidentiary hearing on this issue because the files and records before us do not affirmatively establish that Nesbitt is not entitled to postconviction relief.” (*798)*

FACTUAL BACKGROUND

Nesbitt was convicted of the 1975 murder of Mary Kay Harmer after a 1986 jury trial and received a life sentence. The State presented evidence of a prior uncharged sexual assault involving Michele McKeever, and Nesbitt testified at trial that Harmer died from a drug overdose rather than homicide. During cross-examination and closing argument, the prosecutor referred to the fact that Nesbitt had not previously told law-enforcement authorities the exculpatory account he gave at trial, although some of his police contacts occurred before Miranda warnings and others occurred after warnings. Nesbitt's postconviction motion asserted numerous claims, including ineffective assistance of counsel for failing to object to those references.

PROCEDURAL HISTORY

Nesbitt was convicted of first degree murder after a 1986 jury trial, and the conviction and sentence were affirmed on direct appeal. After extensive postconviction filings and procedural delays, the district court denied his postconviction motion without an evidentiary hearing and later denied his motion for new trial. The Nebraska Supreme Court affirmed the denial of all claims except the ineffective-assistance claim based on counsel's failure to object to prosecutorial references to Nesbitt's post-Miranda silence, for which it remanded for an evidentiary hearing.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The case was remanded for further proceedings and an evidentiary hearing on Nesbitt's claim that trial counsel was ineffective for failing to assert Doyle objections to prosecutorial questions and argument that could be construed as referring to Nesbitt's post-Miranda silence. All other grounds for postconviction relief were affirmed as denied.

CASES CITED

- State v. Nesbitt, 226 Neb. 32, 409 N.W.2d 314 (1987)
- State v. Gamez-Lira, 264 Neb. 96, 645 N.W.2d 562 (2002)
- State v. Al-Zubaidy, 263 Neb. 595, 641 N.W.2d 362 (2002)
- State v. Bishop, 263 Neb. 266, 639 N.W.2d 409 (2002)
- State v. Rossbach, 264 Neb. 563, 650 N.W.2d 242 (2002)
- State v. Hill, 255 Neb. 173, 583 N.W.2d 20 (1998)
- Strickland v. Washington, 466 U.S. 668 (1984)
- Jones v. Barnes, 463 U.S. 745 (1983)

- State v. White, 239 Neb. 554, 477 N.W.2d 24 (1991)
- State v. Ryan, 233 Neb. 74, 444 N.W.2d 610 (1989)
- State v. Bjorklund, 258 Neb. 432, 604 N.W.2d 169 (2000)
- State v. Palmer, 257 Neb. 702, 600 N.W.2d 756 (1999)
- State v. Peery, 223 Neb. 556, 391 N.W.2d 566 (1986)
- State v. Rust, 223 Neb. 150, 388 N.W.2d 483 (1986)
- State v. Lofquest, 227 Neb. 567, 418 N.W.2d 595 (1988)
- State v. Myers, 244 Neb. 905, 510 N.W.2d 58 (1994)
- State v. Harms, 263 Neb. 814, 643 N.W.2d 359 (2002)
- State v. Jacob, 253 Neb. 950, 574 N.W.2d 117 (1998)
- Nesbitt v. Hopkins, 86 F.3d 118 (8th Cir. 1996)
- Victor v. Nebraska, 511 U.S. 1 (1994)

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