

# State v. Ely

**Case Number**

S-19-0850

**Case Audio**

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**Call Date**

April 28, 2020

**Case Time**

9:00 AM

**Court Number**

Douglas

**Case Location**

Lincoln

**Court Type**

District Court

**Case Summary**

S-19-0850 State of Nebraska v. Nicholas J. Ely

Douglas County District Court, Judge J. Michael Coffey

Attorneys: Stacy M. Foust (Office of the Attorney General, for Appellee); Brian Munnelly (Attorney for Appellant)

Criminal: Postconviction relief

Proceedings Below: The Supreme Court previously reversed and remanded with direction to the district court to hold an evidentiary hearing on Appellant's claims that 1) his trial counsel was ineffective in failing to advise him of his right to testify; and 2) his appellate counsel was ineffective in failing to argue that the district court erred in denying him the right to proceed *pro se*. The district court then determined that Appellant was aware of his right to testify and it was his decision not to take the stand. It found that the advice of his counsel was reasonable considering the facts of the case and the Appellant's criminal history. The court concluded that, if appellate counsel had raised on direct appeal the issue of Appellant's right to proceed *pro se*, it would not have been successful. Because the claim would not have been successful, the court found that appellate counsel was not ineffective for failing to raise it on direct appeal. The court further stated that Appellant's failure to raise the issue of representing himself after the court overrule his motion to dismiss could be a waiver of the issue.

Issues on Appeal: Whether the trial court erred in denying Appellant's verified motion for postconviction relief on the grounds that 1) his trial counsel was ineffective in failing to advise him of his right to testify; and 2) his appellate counsel was ineffective in failing to argue that the trial court erred in denying him the right to proceed *pro se*.

**Schedule Code**

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