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STATE OF NEBRASKA, APPELLEE, V. MAJDAL K. ELIAS, APPELLANT.

___ N.W.3d ___

Filed October 23, 2026. No. S-25-395.

1. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
2. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Postconviction: Effectiveness of Counsel: Appeal and Error.** Where a defendant is represented both at trial and on appeal by the same lawyers, the defendant's first opportunity to assert the ineffective assistance of trial counsel is in a postconviction motion.
4. **Postconviction: Claim Preclusion: Appeal and Error.** The Nebraska Supreme Court applies principles analogous to claim preclusion on postconviction actions to bar relitigating any issues directly addressed or necessarily included in its decision on direct appeal of an inmate's convictions and sentences.
5. ____: ____: ____. A petitioner for postconviction relief cannot escape the preclusive effect of a decision on direct appeal merely by using different language to phrase an issue or define an alleged error.
6. **Constitutional Law: Criminal Law: Search and Seizure: Evidence.** Even where First Amendment activities are implicated, it has traditionally been under the Fourth Amendment umbrella of a "search" that a criminal defendant's reasonable expectation of privacy is protected by the exclusionary rule.
7. **Evidence: Statutes.** In keeping with the general principle that courts do not lightly impose a judicial exclusionary remedy, it is well established

that there is no exclusionary rule generally applicable to statutory violations.

8. **Search and Seizure: Police Officers and Sheriffs: Evidence: Telecommunications.** The good faith exception to the exclusionary rule, which exception applies to information obtained by an order of the court pursuant to the Electronic Communications Privacy Act of 1986 or its State counterparts, asks the objectively ascertainable question of whether a reasonably well-trained officer would have known that the search was illegal despite a magistrate's authorization, because police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield meaningful deterrence and culpable enough to be worth the price paid by the justice system.
9. **Effectiveness of Counsel.** Counsel is not ineffective for failing to make an objection that has no merit or by failing to raise novel legal theories or arguments.

Appeal from the District Court for Lancaster County: Lori A. Maret, Judge. Affirmed.

Carlos Alberto Monzon, of Monzon Guerra Law Firm, and Gerald L. Soucie for appellant.

Michael T. Hilgers, Attorney General, and Austin N. Relph for appellee.

Funke, C.J., Cassel, Stacy, Papik, Freudenberg, and Vaughn, JJ.

Freudenberg, J.

INTRODUCTION

We held, on direct appeal from the defendant's convictions, that cell phone "tower dump" distance data was admissible because it was not derived from a search under the Fourth Amendment and because law enforcement relied in good faith on the lower court's order under Neb. Rev. Stat. § 86-2,106 (Reissue 2024). Thus, the trial court did not err by overruling the defendant's Fourth Amendment objection to the admission of the data. With new counsel, the defendant filed a motion for postconviction relief, asserting on postconviction

that defense counsel was ineffective by failing to incorporate the First Amendment and alleged violations of § 86-2,106 into his Fourth Amendment objection at trial. The district court dismissed such claims without an evidentiary hearing, and the defendant appeals. We affirm.

BACKGROUND

Convictions and Direct Appeal

Majdal K. Elias was convicted of second degree murder, unlawful discharge of a firearm, and two counts of use of a weapon to commit a felony in relation to a drive-by shooting. His convictions were affirmed on appeal in *State v. Elias*.[1] Appellate counsel and trial counsel were the same.

Among the evidence at trial was Elias' cell phone location information showing, in conjunction with security footage, that he was in the vicinity of the shooting at the time of the crime. This information was derived from an order for a tower dump, issued under 18 U.S.C. § 2703(d) (2018) of the Electronic Communications Privacy Act of 1986[2] and the Nebraska equivalent, § 86-2,106, before Elias was identified as a suspect.

The tower dump included phone numbers for all cell phones that accessed towers near the requested address during the specified timeframe of 30 minutes. This order was issued shortly after the crime because cell phone carriers did not retain such information for more than approximately 10 days. After Elias was arrested, law enforcement found Elias' phone number within the tower dump information.

The trial court overruled defense counsel's Fourth Amendment objection to the admission of Elias' cell phone location information derived from the tower dump. We held on direct appeal that the trial court did not err in admitting

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[1] *State v. Elias*, 314 Neb. 494, 990 N.W.2d 905 (2023).

[2] 18 U.S.C. § 2701 et seq. (2024).

the data obtained via the court order seeking the tower dump, because such a limited investigation and intrusion were not a "search" protected against by the Fourth Amendment.[3] It instead fell into a category akin to conventional surveillance techniques of public movements, for which there is no reasonable societal expectation of privacy.[4] In so holding, we found that the tower dump at issue was distinguishable from the facts of the U.S. Supreme Court's decision in *Carpenter v. United States*,[5] wherein the Court held that a Fourth Amendment search was conducted when the government compelled disclosure of historical, time-stamped cell phone location information of the defendant and other identified suspects over a 127-day period and from 12,898 location points. Indeed, in *Carpenter*, the Court expressly said that its decision was "a narrow one" that did not address "real-time [cell site location information] or 'tower dumps'" or "call into question conventional surveillance techniques and tools, such as security cameras."[6]

We alternatively held that even if there was a search subject to the Fourth Amendment, the good faith exception applied to the order. We explained that the order contained the required modicum of evidence between the shooting at issue and the tower dump information to be searched and that the U.S. Supreme Court has not spoken on whether such a tower dump implicates the Fourth Amendment. Thus, law enforcement was "entirely reasonable in its reliance on the order," and the exclusionary rule did not apply.[7]

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[3] Compare *Carpenter v. United States*, 585 U.S. 296, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018), with *U.S. v. Pricop*, 775 F. Supp. 3d 1036 (D. Ariz. 2025), and *U.S. v. Williams*, 741 F. Supp. 3d 642 (E.D. Mich. 2024). See *Hudson v. State*, 312 A.3d 615 (Del. 2024).

[4] See *State v. Elias, supra* note 1.

[5] *Carpenter v. United States, supra* note 3.

[6] *Id.*, 585 U.S. at 316.

[7] *State v. Elias, supra* note 1, 314 Neb. at 508, 990 N.W.2d at 915.

Postconviction

With new counsel, Elias filed a motion for postconviction relief. The district court granted an evidentiary hearing on "Ground Two (C)" of the motion but denied postconviction relief without an evidentiary hearing on "Ground One," "Ground Two (A)," "Ground Two (B)," and "Ground Three."

Under Ground One, Elias alleged that the use of the tower dump distance data at trial was unconstitutional "'as applied'" in violation of the 1st, 4th, and 14th Amendments to the U.S. Constitution. On the First Amendment, Elias asserted that, as a matter of law, § 86-2,106 and 18 U.S.C. § 2703 recognize cell phone subscribers have a privacy expectation associated with their cell phone data, because such information cannot be accessed by a government entity without compliance with the specific statutory requirements. He also argued that these statutory protections are relevant to the Fourth Amendment analysis.

Elias then alleged how the relevant laws were not complied with. Elias asserted the cell tower distance data was not an "electronic communication," as set forth in § 86-2,106 and 18 U.S.C. § 2703, and was therefore outside the statutory parameters of what can be seized by a government entity. He further argued that law enforcement failed to provide notice to all cell phone subscribers as required by Neb. Rev. Stat. § 86-2,108 (Reissue 2024) and 18 U.S.C. § 2705. Finally, Elias alleged that law enforcement obtained cell tower distance information only for Verizon cell service subscribers, thereby "creating the false impression that the data was a reliable basis to determine [the] 'shooter's' cellphone's location" and singling out all Verizon subscribers without their notice or permission.

Under Ground Two (A), Elias alleged trial counsel was ineffective by failing to object to the cell tower information under an "'as applied'" challenge as described in Ground One.

Under Ground Two (B), Elias alleged trial counsel was ineffective by failing to object to each witness on the grounds

of Neb. Evid. R. 403 and 404, Neb. Rev. Stat. §§ 27-403 (Reissue 2016) and 27-404 (Cum. Supp. 2024).

In Ground Three, Elias alleged he "did not receive effective assistance of appellate counsel" because trial counsel, also being appellate counsel, could not have raised his own ineffectiveness at trial.

In denying an evidentiary hearing on Ground One, Ground Two (A), and Ground Two (B), the district court concluded that objecting to the cell tower information for the reasons alleged would have been futile. The court elaborated that the tower dump was "data" and, therefore, "[e]lectronic communication" under Neb. Rev. Stat. § 86-276 (Reissue 2024), as well as 18 U.S.C. § 2510(12) (2024).

The court also found no merit to the argument that there was a notice requirement violated by law enforcement for subscribers whose data was included in the tower dump. The court explained that under §§ 86-2,106 and 86-276 and the similar provisions of federal law, 18 U.S.C. §§ 2703 and 2510(8), notice is required for only the "contents of any electronic communication"—under Neb. Rev. Stat. § 86-274 (Reissue 2024), "any information concerning the substance, purport, or meaning of such communication"—which the tower dump information was not.

With respect to the allegation that only Verizon produced data of the distance between its subscribers and the cell tower, the court said it "candidly does not follow Elias's reasoning" and noted it was undisputed that Elias was a Verizon subscriber. The court reasoned, "Whether other providers failed to produce distance data has no bearing on the reliability of Verizon's distance data."

The court also observed more broadly that Elias' claims were based on alleged violations of statutory laws that do not provide for suppression as a remedy. And, absent a constitutional violation, a court will normally suppress evidence obtained in violation of a rule or statute only if the governing

law provides that remedy.[8] The court implicitly found that Elias had not set forth a claim for a constitutional violation.

The court concluded that Ground Three, the layered claim, was improper, since postconviction was Elias' first opportunity to allege ineffective assistance. It found Ground One was procedurally barred.

Elias timely appealed, and the parties submitted briefs in support of their respective positions. After the submission of briefs, Elias filed a motion to remand this matter to the district court for the consideration of the recently released U.S. Supreme Court case *Chatrie v. United States*.[9] In the alternative, Elias sought permission to submit supplemental briefing regarding *Chatrie*. We granted the request for supplemental briefing and deferred Elias' request to remand this matter.

ASSIGNMENTS OF ERROR

Elias assigns two errors in his appeal from the court's order, which denied in part and granted in part an evidentiary hearing on his claims for postconviction relief.

First, Elias assigns that the district court erred in dismissing, without an evidentiary hearing, Ground One, that the tower dump distance data was not admissible, stating:

> The State obtained thousands of call and location data pursuant to Neb. Rev. Stat. § 86-2,106 *et seq.,* but then failed to comply with Neb. Rev. Stat. § 86-2,108(1)(e). No notice was given by first class mail to ANY of the persons whose cell phone data was seized, including . . . Elias, as required by Neb. Rev. Stat. § 86-2,108(1)(e) and in violation of 18 U.S.C. [§] 2703, 18 U.S.C. [§] 2705, and the facts as alleged require [an] evidentiary hearing for violation of . . . Elias' [rights under the] First, Fourth, and Fourteenth Amendments to the United States Constitution.

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[8] *State v. Knutson*, 288 Neb. 823, 852 N.W.2d 307 (2014).

[9] *Chatrie v. United States*, 609 U.S. 605, 146 S. Ct. 2193, 225 L. Ed. 2d 793 (2026).

Second, Elias assigns that the district court erred in dismissing Ground Two (A) and Ground Two (B) without an evidentiary hearing, elaborating:

> Trial counsel failed to object to the cell phone data evidence at trial as for the reasons set forth in [Ground One]. Appellate counsel failed to assign as error on direct appeal ineffective assistance of trial counsel under the Sixth and Fourteenth Amendments to the United States Constitution.

It appears here that Elias meant to assign as error the denial of the evidentiary hearing on Ground Three, rather than Ground Two (B).

STANDARD OF REVIEW

[1] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.[10]

[2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.[11]

ANALYSIS

[3] We agree with the district court that Ground One of the motion for postconviction relief, standing alone as an alleged trial error without a claim of ineffective assistance of counsel, was procedurally barred to the extent it was not raised and passed upon at trial and assigned and argued on direct appeal.[12] To the extent that Ground Three of the motion was properly assigned as error, we also agree that the claim of

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[10] *State v. Kellogg*, 321 Neb. 502, 35 N.W.3d 442 (2026).

[11] *State v. Stelly*, 308 Neb. 636, 955 N.W.2d 729 (2021).

[12] See *State v. Galindo*, 315 Neb. 1, 994 N.W.2d 562 (2023).

ineffective assistance of appellate counsel was not cognizable because trial counsel and appellate counsel were the same. Where a defendant is represented both at trial and on appeal by the same lawyers, the defendant's first opportunity to assert the ineffective assistance of trial counsel is in a postconviction motion.[13] Elias' assignment that the district court erred by denying Ground Two (A) warrants further discussion. For the foregoing reasons, we hold that the court did not err in dismissing this claim without an evidentiary hearing.

Elias' incorporations of the First Amendment and an alleged violation of § 86-2,108(1)(e) are new postconviction additions to his challenges to the admissibility of the tower dump distance data, but the underlying premise for Elias' ineffective assistance claim is that the admission of the tower dump data was reversible error, and we held on direct appeal that it was not. Elias cannot use his motion for postconviction relief to collaterally attack our holdings that the tower dump data was not the fruit of a "search" and that, regardless, the data was obtained by law enforcement in good faith.

[4,5] We apply principles analogous to claim preclusion on postconviction actions to bar relitigating any issues directly addressed or necessarily included in our decision on direct appeal of the inmate's convictions and sentences.[14] A petitioner for postconviction relief cannot escape the preclusive effect of a decision on direct appeal merely by using different language to phrase an issue or define an alleged error.[15]

[6] The statutory and First Amendment arguments Elias is making on postconviction are but different ways of framing the Fourth Amendment challenge asserting a reasonable expectation of privacy in the tower dump distance data. Elias does not present the First Amendment as a challenge wholly independent of the Fourth Amendment. This is likely because,

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[13] *State v. Williams*, 295 Neb. 575, 889 N.W.2d 99 (2017).

[14] *State v. German*, 321 Neb. 652, 36 N.W.3d 458 (2026).

[15] See *id*.

even where First Amendment activities are implicated, it has traditionally been under the Fourth Amendment umbrella of a "search" that a criminal defendant's reasonable expectation of privacy is protected by the exclusionary rule.[16] While some legal scholars have suggested that the First Amendment's protection of freedom of association provides an independent avenue to challenge data surveilling public movements,[17] neither the U.S. Supreme Court nor this court has so held.

[7] Similarly, Elias does not make a standalone statutory challenge to the admissibility of the tower dump distance data. Instead, he asserts that the confines of the statute inform society's expectation of privacy. Yet Elias does not argue that the Legislature has mandated exclusion of evidence obtained in violation of § 86-2,108(1)(e). In keeping with the general principle that courts do not lightly impose a judicial exclusionary remedy,[18] it is well established that there is no exclusionary rule generally applicable to statutory violations.[19] Indeed, in *State v. Knutson*,[20] we explicitly held that the Legislature has provided no remedy for a violation of § 86-2,106. We also held that § 86-2,106 does not create an expectation of privacy under the Fourth Amendment.

In sum, these alleged statutory and First Amendment violations raised on postconviction are simply nuanced additions

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[16] See, e.g., *Maryland v. Macon*, 472 U.S. 463, 105 S. Ct. 2778, 86 L. Ed. 2d 370 (1985); *Zurcher v. Standford Daily*, 436 U.S. 547, 98 S. Ct. 1970, 56 L. Ed. 2d 525 (1978).

[17] See, e.g., Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. Rev. 741 (2008); Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. Rev. 112 (2007).

[18] See *State v. Knutson, supra* note 8.

[19] See, *U.S. v. Abdi*, 463 F.3d 547 (6th Cir. 2006); *State v. Knutson, supra* note 8; *People v. Robinson*, 47 Cal. 4th 1104, 224 P.3d 55, 104 Cal. Rptr. 3d 727 (2010).

[20] *State v. Knutson, supra* note 8. See, also, e.g., *Upshur v. State*, 208 Md. App. 383, 56 A.3d 620 (2012).

to arguments, decided on direct appeal, that Elias lacked a reasonable expectation of privacy in the tower dump distance data. Elias cannot collaterally attack those decisions through his postconviction motion.

[8] Moreover, Elias fails to explain how an alleged First Amendment privacy right or statutory violation negates our holding that the data was admissible under the good faith exception to the exclusionary rule. The good faith exception to the exclusionary rule, which exception applies to information obtained by an order of the court pursuant to the Electronic Communications Privacy Act of 1986 or its State counterparts,[21] asks the objectively ascertainable question of whether a reasonably well-trained officer would have known that the search was illegal despite a magistrate's authorization.[22] This is because "'[p]olice practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield "meaningfu[l]" deterrence, and culpable enough to be "worth the price paid by the justice system."'"[23] We held on direct appeal that because the affidavit in support of the court's order showed a connection between the criminal activity and the place to be searched, and the U.S. Supreme Court has not spoken on the facts presented in Elias' case, law enforcement reasonably would not have known the search was illegal. Elias is bound by this holding.

[9] Counsel is not ineffective for failing to make an objection that has no merit[24] or by failing to raise novel legal

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[21] See *State v. Elias, supra* note 1. See, also, *U.S. v. Goldstein*, 914 F.3d 200 (3rd Cir. 2019); *U.S. v. Taylor*, 54 F.4th 795 (4th Cir. 2022); *U.S. v. Curtis*, 901 F.3d 846 (7th Cir. 2018); *U.S. v. Korte*, 918 F.3d 750 (9th Cir. 2019).

[22] See *State v. Elias, supra* note 1.

[23] *State v. Falcon*, 319 Neb. 911, 923, 25 N.W.3d 462, 475 (2025), quoting *Davis v. United States*, 564 U.S. 229, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011).

[24] *State v. Corral*, 318 Neb. 940, 20 N.W.3d 372 (2025).

theories or arguments.[25] Thus, defense counsel could not have been ineffective by failing to raise arguments necessarily determined by our holding on direct appeal that the tower dump distance data was admissible because there was no reasonable expectation of privacy and, alternatively, because the good faith exception to the exclusionary rule applied. Even if our alternative holdings on direct appeal did not encompass the statutory or First Amendment arguments presented on postconviction, those arguments are too novel to support a postconviction claim that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law by counsel's failing to raise them at trial.[26] Either way, as a matter of law, Elias failed to allege facts warranting an evidentiary hearing.

For the sake of completeness, we address the U.S. Supreme Court's release of its decision in *Chatrie* during the pendency of this appeal. [27] Elias suggests that *Chatrie* provides reason to reverse the decision and remand the cause for an evidentiary hearing on his motion for postconviction relief. We disagree.

In *Chatrie*, the Court held that "the police's accessing of Google's Location History data" of Google's users of cell phones, even for a limited time within the vicinity of a crime, is a search.[28] The court explained that such data is drawn from an "array of sources"[29]; is "'the most sweeping, granular, and comprehensive tool' existing today for collecting and storing location data"[30]; and is effectively a "personal journal of a user's movements" that the user "reasonably views as his

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[25] See, *State v. Sanders*, 289 Neb. 335, 855 N.W.2d 350 (2014). See, also, e.g., *Engle v. Isaac*, 456 U.S. 107, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982).

[26] See, e.g., *State v. Haas*, 317 Neb. 919, 12 N.W.3d 787 (2024).

[27] See *Chatrie v. United States, supra* note 9.

[28] *Id*., 609 U.S. at 625.

[29] *Id*., 609 U.S. at 612.

[30] *Id*., 609 U.S. at 613.

[or her] own" and does not voluntarily share in a meaningful sense.[31] The Court further said that there is no "grace period"[32] for a warrantless search of this "virtual panopticon with which to scrutinize . . . citizens' activities" and that a search does not become legal depending upon what it finds.[33] The Court expressly did not decide whether the warrant at issue was supported by probable cause or whether, as the lower court found, the good faith exception to the exclusionary rule applied.

Nothing in *Chatrie* suggested its holding was retroactive. Neither do we understand *Chatrie* to have recognized a """'watershed rule[] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."""[34] The Court's decision in *Chatrie* does not alter the principles of claim preclusion we have already discussed. Nor does this new precedent call into question the effectiveness of Elias' trial counsel or our holding on direct appeal that the good faith exception to the exclusionary rule applied to the tower dump distance data in the present case.

CONCLUSION

For the foregoing reasons, we affirm the district court's decision to dismiss without an evidentiary hearing Elias' postconviction claims stated as Ground One, Ground Two (A), and Ground Two (B). In doing so, we also by implication deny Elias' request to remand this matter to the district court for further proceedings.

Affirmed.

Bergevin, J., not participating.

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[31] *Id.*, 609 U.S. at 627.

[32] *Id.*, 609 U.S. at 628.

[33] *Id.*, 609 U.S. at 630.

[34] *State v. Glass*, 298 Neb. 598, 609, 905 N.W.2d 265, 275 (2018).