STATE OF NEBRASKA, APPELLEE, V. JASON L. GOLKA, APPELLANT.

796 N.W.2d 198

Filed April 22, 2011. No. S-10-484.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required.
3. **Effectiveness of Counsel: Appeal and Error.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
4. **Postconviction: Effectiveness of Counsel: Pleas.** In a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
5. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
6. **Convictions: Effectiveness of Counsel: Pleas: Proof.** When a conviction is the result of a guilty plea or a plea of no contest, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the convicted defendant can show a reasonable probability that, but for the errors of counsel, he or she would have insisted on going to trial rather than pleading.
7. **Effectiveness of Counsel: Jury Trials: Waiver.** The decision to waive a jury trial is ultimately and solely the defendant's, and, therefore, the defendant must bear the responsibility for that decision. Counsel's advice to waive a jury trial can be the source of a valid claim of ineffective assistance only when (1) counsel interferes with his or her client's freedom to decide to waive a jury trial or (2) the appellant can point to specific advice of counsel so unreasonable as to vitiate the knowing and intelligent waiver of the right.

8. **Effectiveness of Counsel: Pleadings: Trial.** Where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.
9. **Jury Instructions: Homicide: Evidence.** No error occurs by not instructing the jury regarding second degree murder and manslaughter where there is no evidence that would give a fact finder a rational basis to find the defendant guilty of second degree murder or manslaughter and acquit him or her of first degree murder.
10. **Homicide: Intent.** A person commits murder in the first degree if he or she kills another person purposely and with deliberate and premeditated malice or in the commission of a felony or by administering poison.
11. ____: ____. A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.
12. ____: ____. The material elements of manslaughter are an unintentional killing while in the commission of an unlawful act or upon sudden quarrel.
13. **Self-Defense.** To successfully assert the claim of self-defense, one must have a reasonable and good faith belief in the necessity of using force. In addition, the force used in defense must be immediately necessary and must be justified under the circumstances.
14. **Effectiveness of Counsel: Appeal and Error.** Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal.
15. **Pleas.** To support a finding that a plea of guilty or nolo contendere has been voluntarily and intelligently made, the court must (1) inform the defendant concerning (a) the nature of the charge, (b) the right to assistance of counsel, (c) the right to confront witnesses against the defendant, (d) the right to a jury trial, and (e) the privilege against self-incrimination; and (2) examine the defendant to determine that he or she understands the foregoing. Additionally, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged.
16. **Constitutional Law.** Once a defendant is informed of his or her constitutional rights, there is no requirement that the court advise the defendant on each subsequent court appearance of those same rights.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

James R. Mowbray and Jeffery A. Pickens, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and INBODY, Chief Judge.

MILLER-LERMAN, J.

NATURE OF THE CASE

In this postconviction case, appellant, Jason L. Golka, was convicted in the district court for Sarpy County of two counts of first degree murder pursuant to a guilty plea. On the date of the offenses, Golka was 17 years old. Golka was sentenced to two consecutive terms of life imprisonment "without parole." Golka appealed the sentences and, on direct appeal, claimed that the provision that his sentences be "without parole" should be vacated pursuant to *State v. Conover*, 270 Neb. 446, 703 N.W.2d 898 (2005). This court issued a memorandum opinion and affirmed Golka's convictions on both counts of first degree murder; however, because we found the "without parole" feature to be error, we vacated the sentences of life imprisonment "without parole" and remanded the cause for resentencing. Golka was resentenced to two life terms to be served consecutively, from which he did not appeal.

After resentencing, Golka filed a motion for postconviction relief which gives rise to the instant appeal. In his motion, Golka alleged that he received ineffective assistance of trial counsel based on counsel's advising him to waive his right to a jury trial, failing to advise him of certain defenses, and advising him to enter into the plea agreement. Golka argues that he received ineffective assistance of appellate counsel because his counsel on appeal did not assign as error that the district court erred in accepting Golka's plea without advising him of the nature of the charges against him or his right to be presumed innocent. Finally, Golka alleged that sentences of life imprisonment constituted cruel and unusual punishment because of his age at the time of the crimes. The district court denied Golka's claims without an evidentiary hearing. Golka appeals, and we affirm.

STATEMENT OF FACTS

On November 17, 2004, Golka was charged by information in the district court for Sarpy County with two counts of first degree murder and two counts of use of a firearm to commit a felony. On the date of the offenses, Golka was 17 years old. On November 19, Golka was arraigned in a group arraignment. At

the arraignment, Golka was advised, inter alia, that he had the right to a jury trial, the right to a speedy and public trial, the right to counsel, and the right to confront and cross-examine witnesses, and that he would be presumed innocent. The court advised Golka, "Your presumption of innocence continues throughout the proceeding unless and until the State meets its burden of proof, and the State's burden of proof is to prove you guilty beyond a reasonable doubt before you can lose your presumption of innocence and be found guilty." The body of the information was read to Golka. The reading included identification of the victims, the location of the crime, the level of the crime, and the nature of the penalties. Golka was asked if he understood the nature of the charges and the penalties, to which Golka stated, "Yes, sir."

On March 3, 2005, an evidentiary hearing to transfer to juvenile court was conducted and the motion to transfer was denied. Also on March 3, an evidentiary hearing on Golka's motion to suppress was conducted, and the motion was denied.

On July 5, 2005, the district court held a hearing at which Golka waived his right to a jury trial. The following exchange took place:

> THE COURT: Sir, do you understand that in each of these files, that you have an absolute right to a jury trial?
>
> [Golka]: Yes, Your Honor.
>
> THE COURT: Are you waiving that right at this time?
>
> [Golka]: Yes, Your Honor.
>
> THE COURT: Now, sir, was any threat made to you, promise given to you, or inducement given to you to get you to waive?
>
> [Golka]: No, Your Honor.
>
> THE COURT: You're doing so freely and voluntarily?
>
> [Golka]: Yes, Your Honor.
>
> THE COURT: Now, you've had discussions with your counsel about this; is that correct?
>
> [Golka]: Yes, Your Honor.
>
> THE COURT: Are you satisfied with that recommendation — or the advice you've gotten?
>
> [Golka]: Yes, Your Honor.

THE COURT: He's — you had ample opportunity to talk to him about these matters?

[Golka]: Yes, Your Honor.

THE COURT: The Court at this time [finds Golka's] waiver of jury trial to be freely, voluntarily, intelligently, [and] knowingly made. The Court accepts the waivers.

A second amended information was filed on July 8, 2005, with an additional count of conspiracy to commit first degree murder, a Class II felony. On July 13, pursuant to a plea agreement, Golka pled guilty to two counts of first degree murder. In exchange for his pleas, the State agreed to dismiss both counts of use of a firearm to commit a felony and the conspiracy count. In addition, in a second case, the State agreed to dismiss a count of use of a firearm to commit a felony, and to dismiss a third case in its entirety.

At the plea hearing, the State offered a factual basis for each count of first degree murder. The district court took judicial notice of the evidence adduced at the juvenile transfer and motion to suppress hearings and the orders issued on each of those motions. There was evidence that one victim died of a gunshot wound to the head and that the other victim died from multiple gunshot wounds to the torso and head.

At the plea hearing, the following exchange took place:

THE COURT: . . . Counts I and III are two counts of murder in the first degree. The possible penalty here — the maximum possible penalty, by reason of the fact that you were under 18 years of age at the time of the commission of the offense, is — the maximum penalty is confinement with the Department of Corrections of the State of Nebraska for the term of your natural life without the possibility of parole.

Now do you understand the maximum possible penalty here?

[Golka]: Yes, Your Honor.

THE COURT: Okay.

. . . .

THE COURT: On each count. Do you understand that?

[Golka]: Yes, Your Honor.

THE COURT: Do you also understand that if I saw fit, I could make those sentences run consecutive to each other?

[Golka]: Yes, Your Honor.

Before accepting the pleas, the court also advised Golka that he had the following rights: the right to counsel, the right to a jury trial, the right to call and confront witnesses, the privilege against self-incrimination, the right to a speedy and public trial where the State would have the burden of proving him guilty beyond a reasonable doubt, and the right to appeal. Golka stated that no promises had been made to induce his plea and that he was not subjected to any threats, promises, or other inducements. Golka stated that he understood his rights and that he was pleading freely and voluntarily. The district court accepted the pleas and adjudged Golka guilty of two counts of first degree murder.

Golka was sentenced on August 19, 2005, to two consecutive terms of life imprisonment without parole. Golka appealed the convictions and sentences and, on direct appeal, claimed that the provision that his sentences be "without parole" should be vacated pursuant to *State v. Conover*, 270 Neb. 446, 703 N.W.2d 898 (2005). This court filed a memorandum opinion on September 27, 2006, in which we affirmed Golka's convictions on both counts of first degree murder but vacated the sentences of "life imprisonment without parole" and remanded the cause for resentencing.

The resentencing hearing occurred on December 1, 2006. The following exchange took place at the resentencing:

THE COURT: . . .

. . . .

Matter comes on for resentencing after remand from the Nebraska Supreme Court. . . .

. . . .

THE COURT: . . .

The Court has considered a presentence report or an evaluation that was contained in the bill of exceptions. . . .

. . . [H]as the state had an opportunity to review this?

[Prosecutor]: We have.

[Defense counsel]: I have.

THE COURT: [addressing defense counsel] [I]s there any legal reason why sentence may not be pronounced?

[Defense counsel]: No.

THE COURT: State wish to be heard?

[Prosecutor]: Your Honor, the only reason we are here, obviously, is because this comes back on remand because the court has determined that the statute under which [Golka] was initially sentenced was unconstitutional.

There has been no change in circumstance that would warrant a change in the status of the — of [Golka's] sentence; that being two consecutive life sentences. And with that, I would ask you to consider the state's previous arguments that were offered to the Court on August 19, 2005, at his original sentencing.

. . . .

[Defense counsel]: . . . We're here today to formally sentence . . . Golka pursuant to the mandate of the supreme court.

I've had an opportunity to review the presentence investigation. . . . Golka is obviously aware we're not here asking for probation. With that, we know that we are going to get two consecutive life sentences.

The — and I've talked to [Golka] for a little bit and I think he realizes that there is an opportunity, albeit slim and way down the road, for him to have his sentences commuted, and he — he is in the situation of having to be an ideal prisoner for a long time if he wants the opportunity to have his sentence commuted. It's not going to be in my lifetime, but I think he realizes that if he abides by the rules and regulations, there is a chance for him to better himself.

. . . .

THE COURT: Okay. Mr. Golka, is there anything you wish to tell me?

[Golka]: No.

THE COURT: Mr. Golka, it will be the judgment of the Court on resentencing that on each count you be sentenced to serve a term of your natural life; that you are

> — and these sentences to be served . . . consecutively with each other, . . . and it will be deemed that these sentences commenced August 19th, 2005. So the resentence is not from today.
>
> With that, he's remanded to the custody of the sheriff for transportation back to the Department of Corrections.

No appeal was taken from the resentencing. Golka was represented by the same counsel at trial, on direct appeal, and at the resentencing.

On November 8, 2007, Golka filed a pro se motion for postconviction relief and filed an amended motion on November 26, 2008, through counsel. In his amended petition, Golka claimed that he received ineffective assistance of trial and appellate counsel.

With respect to trial counsel, Golka alleged that trial counsel was ineffective when he advised Golka to waive his right to a jury trial, failed to advise him of the existence of alternate crimes and defenses that he could have asserted, and advised him to accept the plea agreement.

With respect to the plea, Golka claimed that his trial counsel was ineffective when he advised Golka to plead guilty. Golka specifically alleged that his counsel advised him that if he pled guilty to the two counts of first degree murder, "his two life sentences would be commuted to sentences of terms of years after 20 to 25 years, and he would be paroled." Golka alleged that he pled guilty based on this advice and, "[b]ut for [counsel's] advice, . . . would have exercised his right to a trial rather than entering his guilty pleas pursuant to the plea agreement."

In his motion for postconviction relief, Golka alleged that he received ineffective assistance of appellate counsel when his appellate counsel failed to assign as error that the district court had erred when it accepted his guilty plea without advising Golka of the nature of the charges against him and his right to be presumed innocent.

Finally, Golka raised a claim of cruel and unusual punishment with respect to sentencing. The district court denied Golka's claims without an evidentiary hearing in an order filed April 20, 2010. Golka appealed.

ASSIGNMENTS OF ERROR

Golka claims that the district court erred when it denied him postconviction relief without conducting an evidentiary hearing on the claims of (1) ineffective assistance of trial counsel, (2) ineffective assistance of appellate counsel, and (3) constitutionality of sentencing juveniles.

STANDARDS OF REVIEW

[1,2] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010). An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. *Id*. However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required. *Id*.

[3] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *State v. McKinney*, 279 Neb. 297, 777 N.W.2d 555 (2010).

ANALYSIS

The overriding issue presented in this appeal is whether the district court erred when it denied postconviction relief without conducting an evidentiary hearing. An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. *State v. McGhee*, 280 Neb. 558, 787

N.W.2d 700 (2010). However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required. *Id*.

Ineffective Assistance of Counsel.

[4-6] We note that Golka was represented by the same lawyer at the time of his plea, on direct appeal, and at the resentencing, and, accordingly, this postconviction proceeding is his first opportunity to assert claims of ineffective assistance of counsel. See *State v. McKinney, supra*. In a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *State v. Vo, supra*. In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington, supra*, to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case. *State v. Vo, supra*. The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *Id*. When a conviction is the result of a guilty plea or a plea of no contest, the prejudice requirement is satisfied if the convicted defendant can show a reasonable probability that, but for the errors of counsel, he or she would have insisted on going to trial rather than pleading. See *id*.

Ineffective Assistance of Trial Counsel: Waiver of Jury.

Golka alleged that his trial counsel was ineffective when counsel advised him to waive a jury trial. Golka alleges that trial counsel advised him that it was better to have a judge decide his case, because a judge is a professional and confusion would result if 12 people were required to decide his guilt or innocence. Golka also alleges that trial counsel failed to advise him that the jury verdict must be unanimous. Golka alleged that but for trial counsel's advice, he would have exercised his right to a jury trial. Golka claims that he was denied his right to a jury trial guaranteed by the 6th and 14th Amendments to the

U.S. Constitution and article I, §§ 6 and 11, of the Nebraska Constitution. We find no merit to this argument.

[7] The focus of this allegation of ineffectiveness is Golka's assertion that trial counsel's advice was so "patently unreasonable," brief for appellant at 13, as to vitiate the knowing and intelligent waiver of his right to a jury trial. In this regard, we have stated:

> The decision to waive a jury trial is ultimately and solely the defendant's, and, therefore, the defendant must bear the responsibility for that decision. . . . Counsel's advice to waive a jury trial can be the source of a valid claim of ineffective assistance only when (1) counsel interferes with his or her client's freedom to decide to waive a jury trial or (2) the appellant can point to specific advice of counsel so unreasonable as to vitiate the knowing and intelligent waiver of the right.

State v. Dean, 264 Neb. 42, 48-49, 645 N.W.2d 528, 534 (2002) (citation omitted). See, also, *State v. Seberger*, 279 Neb. 576, 779 N.W.2d 362 (2010).

There is nothing in the postconviction motion or record which suggests that trial counsel interfered with Golka's freedom to decide to waive a jury trial, and the colloquy in court at the jury trial waiver hearing is to the contrary. The alleged statements of trial counsel regarding the relative merits of trying a case to the court as opposed to a jury were commonplace considerations and did not constitute unreasonable advice so as to vitiate the knowing and intelligent waiver of the right to a jury trial.

The decision to waive the jury was Golka's. Trial counsel's alleged advice was not unreasonable. The allegations in the postconviction motion and the record affirmatively show that Golka was not entitled to relief on this issue, and the district court did not err when it denied this claim without an evidentiary hearing.

Ineffective Assistance of Trial Counsel: Alternate Crimes and Available Defenses.

Golka alleged that his trial counsel was ineffective because he failed to advise Golka of alternate crimes to which he would

have been subject and defenses he could have asserted. Golka claims that further advice, and inferentially no plea, would have led Golka to proceed to trial wherein he would have been convicted of second degree murder or manslaughter rather than first degree murder or acquitted based on diminished capacity or self-defense. For purposes of analysis, we assume without deciding that trial counsel failed to advise Golka regarding these matters. We conclude that no prejudice resulted, and this claim is without merit.

[8] The U.S. Supreme Court has stated: "[W]here the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). See, similarly, *Gumangan v. U.S.*, 254 F.3d 701 (8th Cir. 2001) (stating that counsel was not ineffective for failing to advise of certain defenses, because they would not have been likely to succeed had defendant gone to trial).

Notwithstanding the fact that Golka's convictions are plea based, the record in this postconviction case is extensive. It includes the juvenile transfer hearing, the motion to suppress, and the factual bases at the plea hearing. The strength of the State's case is obvious, and Golka received benefit from the plea bargain. The allegation that Golka would have gone to trial if he had been advised of the alternate crimes and defenses is perfunctory. Given the allegations and the record, the authenticity of the allegation that Golka would have gone to trial is negated by its lack of merit. Given the lack of merit, no "rational defendant [would have] insist[ed] on going to trial" on these bases. *Roe v. Flores-Ortega*, 528 U.S. 470, 486, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

[9] In order to evaluate Golka's claim regarding the existence of the alternate crimes and the availability of the defenses he now urges, we need to analyze whether the facts produce a rational basis to acquit Golka of first degree murders and instead convict him of second degree murders or manslaughters and whether the defenses likely would have succeeded at trial. We have indicated that no error occurs by not instructing the

jury regarding second degree murder and manslaughter where there is no evidence that would give a fact finder a rational basis to find the defendant guilty of second degree murder or manslaughter and acquit him or her of first degree murder. See *State v. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009). The same reasoning applies here. Accordingly, we must review the circumstances surrounding these two murders as reflected in the record.

On October 23, 2004, in the early morning hours, Golka was hit over the head and knocked unconscious at the residence of Jay Ellis. Chunks of Golka's hair were shaved off, his hat and head were spray painted, and he was burned with a cigarette. After he regained consciousness, he went home. Golka then spent the day with his girlfriend, who took him to get his hair cut, and he slept. He went back to the Ellis residence that night and confronted Ellis with a .22-caliber rifle regarding who had assaulted him. Ellis acted as if nothing had happened, but became upset after seeing Golka had a weapon. Golka left.

Golka admitted that he planned the murder on Sunday, October 24, 2004. He planned to use his stepfather's 12 gauge shotgun and a .22-caliber rifle to kill Ellis and anyone else in the residence. He directed a 15-year-old individual, who had accompanied him, to walk to the front door to determine who was in the residence. The individual informed Golka that Ellis and Roscoe Jordan were the only ones in the residence. Golka retrieved the .22-caliber rifle from his vehicle and walked into the backyard. He knocked over a plant to cause a loud noise so that Jordan, whom Golka could see through the kitchen window, would come outside.

Once Jordan appeared, Golka stood up and fired seven rounds into Jordan's upper body and head. The first shots were heard at a little after midnight on October 25, 2004. It appeared to Golka that Jordan was trying to get back up, so he fired three more shots toward his head. Jordan did not move.

Golka then went back to the vehicle to retrieve the 12 gauge shotgun and returned to the residence. Once inside, Golka could see Ellis lying on the couch and fired one round into Ellis' head. He then exited the home and fired another round pointblank into Jordan's head.

Golka and the 15-year-old individual discussed "keep[ing] this a secret," and after dropping the individual off, Golka disposed of the .22-caliber rifle in a drainage ditch or sewer area to conceal it. He called his mother, told her what he had done, and told her that he was hearing voices in his head. Before being taken into custody, Golka parked his vehicle in the Sarpy County sheriff's office parking lot. Golka stated that he took four or five Valium pills and contemplated suicide.

Golka was described as very cooperative with law enforcement after being taken into custody. He was transported to a hospital, where he tested positive for marijuana and negative for Valium. The CAT scan of his head was negative for injuries. Golka did not indicate that he was under the influence of marijuana or any other substances other then Valium, nor did he exhibit any signs of being under the influence.

Given these facts, and the absence of allegations that put the facts in doubt, Golka's convictions of first degree murder are supported by the facts and provide no rational basis for acquittal. His alternate theories were not warranted by the evidence, and his various defense theories lack merit. Therefore, Golka suffered no prejudice and it was not ineffective of trial counsel not to have advised Golka about these matters.

[10,11] Neb. Rev. Stat. § 28-303 (Reissue 2008) provides that a person commits murder in the first degree if he or she kills another person purposely and with deliberate and premeditated malice or in the commission of a felony or by administering poison. The facts show Golka killed the victims purposely, deliberately, and with premeditation. In contrast, the crime of second degree murder, found at Neb. Rev. Stat. § 28-304 (Reissue 2008), provides that "[a] person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." See *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006). The facts show Golka killed the victims with premeditation; there is no rational basis to believe that Golka would have been acquitted of first degree murder and convicted of second degree murder.

[12] With respect to manslaughter, the material elements are an unintentional killing while in the commission of an unlawful act, *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009),

or upon sudden quarrel, *State v. Sepulveda*, 278 Neb. 972, 775 N.W.2d 40 (2009). See Neb. Rev. Stat. § 28-305 (Reissue 2008). The facts show the killings were intentional and not upon sudden quarrel; therefore, there is no rational basis to believe that Golka would have been acquitted of first degree murder and convicted of manslaughter.

With respect to diminished capacity, we have indicated that this defense may be available where a defendant lacked the capacity to intend the voluntary and probable consequences of his or her act. See *State v. Urbano*, 256 Neb. 194, 589 N.W.2d 144 (1999). See, also, *State v. Canbaz*, 270 Neb. 559, 705 N.W.2d 221 (2005). The facts show that Golka tested negative for Valium and that a CAT scan was negative. The facts show that 1½ days after the events of October 23, 2004, Golka deliberately set out to go to Ellis' house in revenge. After the killings, he hid at least one weapon and he was articulate with the authorities. It is not likely that diminished capacity would have succeeded at trial.

[13] With respect to self-defense, Neb. Rev. Stat. § 28-1409 (Reissue 2008) provides:

> (1) . . . [T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
>
> . . . .
>
> (4) The use of deadly force shall not be justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat[.]

To successfully assert the claim of self-defense, one must have a reasonable and good faith belief in the necessity of using force. In addition, the force used in defense must be immediately necessary and must be justified under the circumstances. *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006). Where there is no present threat, a claim of self-defense is not viable. See *State v. Eagle Thunder*, 201 Neb. 206, 266 N.W.2d 755 (1978).

The facts of the case and Golka's statements to the authorities show that self-defense was not a viable defense, because, inter alia, the unlawful force of the previous encounter had passed and Golka's use of force was not immediately necessary. It is not likely that self-defense would have succeeded at trial.

The facts show the existence of two first degree murders, and there is no rational basis to believe that Golka would have been acquitted of first degree murders and instead convicted of second degree murders or manslaughters. The alternate theories would not have been warranted by the evidence. Further, the defenses Golka claims were not communicated to him by trial counsel would have been unavailing. The allegations in the postconviction motion are not to the contrary. A rational defendant would not have insisted on going to trial. *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). Therefore, Golka was not prejudiced by trial counsel's alleged failure to advise him on these matters or by the entry of his pleas. The district court did not err when it denied this claim without an evidentiary hearing.

Ineffective Assistance of Trial Counsel: Improper Plea Advice.

Golka claims that he received ineffective assistance of trial counsel based on sentencing-related advice that his counsel gave him with respect to entering into a plea agreement with the State. The substance of this claim is that trial counsel allegedly assured Golka that if he accepted the plea agreement, he would be paroled, whereas, in fact, there is no basis in law or experience to expect to be paroled, and that if he had been accurately advised, he would have insisted on going to trial. Golka specifically alleges that trial counsel advised him that if he "accepted the plea agreement, his two life sentences would be commuted to sentences of terms of years after 20 to 25 years, and he would be paroled" and that "[b]ut for [trial counsel's] advice, . . . Golka would have exercised his right to a trial rather than entering his guilty pleas pursuant to the plea agreement."

In its order, the district court generally determined that even if Golka had been better apprised of the law regarding his

parole eligibility and the unlikelihood of parole, Golka could not establish that he would have insisted upon going to trial. The district court determined that Golka gained significant benefit from the plea agreement, and the court therefore found no merit to his claim regarding the alleged impropriety of pleading guilty and, thus, denied an evidentiary hearing on this issue. In the context of this postconviction action, the question presented on appeal is whether the records and files in the case affirmatively show that Golka is entitled to no relief on this issue and thus not entitled to an evidentiary hearing, as the district court determined. See *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010).

The statements Golka now attributes to his counsel of promises of parole are inconsistent with his representations to the court at the plea hearing and are contradicted by the record at the resentencing. As reflected in the record of the plea hearing, Golka specifically denied that any promises had been made to induce his plea and he indicated that he was not subjected to any threats, promises, or other inducements. He also expressed his understanding that life imprisonment was the maximum possible penalty which the court could impose.

In connection with trial counsel's advice, we refer in particular to the record at the resentencing in which counsel represented to the court a summary of his advice to Golka as follows:

> [Defense counsel:] I've had an opportunity to review the presentence investigation. . . . Golka is obviously aware we're not here asking for probation. With that, we know that we are going to get two consecutive life sentences.
>
> The — and I've talked to [Golka] for a little bit and I think he realizes that there is an opportunity, albeit slim and way down the road, for him to have his sentences commuted, and he — he is in the situation of having to be an ideal prisoner for a long time if he wants the opportunity to have his sentence commuted. It's not going to be in my lifetime, but I think he realizes that if he abides by the rules and regulations, there is a chance for him to better himself.

. . . .

THE COURT: Okay. Mr. Golka, is there anything you wish to tell me?

[Golka]: No.

These statements by counsel made before the court were not a promise of parole. These statements indicate that Golka has the opportunity for parole "albeit slim and way down the road." When invited by the court, Golka did not take issue with counsel's narrative regarding the advice he had rendered to Golka or otherwise express that counsel's advice had been to the contrary. There was no indication by Golka that he wished to withdraw his plea and insist on going to trial, an option available to him between conviction and sentencing. See *State v. Williams*, 276 Neb. 716, 757 N.W.2d 187 (2008).

Golka claims that he pled guilty based on counsel's promise of parole and that but for that advice, he would have insisted on going to trial. The record is sufficient to evaluate Golka's claim. The records and files contradict this claim and affirmatively show that he is not entitled to relief, and thus no evidentiary hearing is required on this issue. Although our reasoning differs from that of the district court, the district court did not err when it denied this claim without an evidentiary hearing.

Ineffective Assistance of Appellate Counsel: Failure to Assign Errors on Appeal.

Golka alleges that he received ineffective assistance of appellate counsel because his appellate counsel did not assign as error the district court's acceptance of his pleas without properly advising him of the nature of the charges against him, his understanding thereof, and his right to be presumed innocent at trial. Because we conclude that the records and files in the case affirmatively show that Golka is entitled to no relief on his claims that he received ineffective assistance of appellate counsel, we affirm the decision of the district court which denied these claims without an evidentiary hearing.

As noted above, in order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104

S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case. *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009).

[14] When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel failed to bring a claim on appeal that actually prejudiced the defendant. *State v. Jim*, 278 Neb. 238, 768 N.W.2d 464 (2009). In doing so, courts begin by assessing the strength of the claim appellate counsel purportedly failed to raise. *Id*. Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal. *Id*.

[15] Golka's appellate ineffectiveness claim under consideration is grounded in Golka's assertion that his plea was not voluntarily or intelligently entered due to purported failures of the court to advise him of the nature of the charges against him, his understanding thereof, and the presumption of innocence. To assess the strength of Golka's claim, we must begin by reviewing what the district court is required to advise a defendant when accepting a plea. We generally refer to *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), to ascertain these requirements. To support a finding that a plea of guilty or nolo contendere has been voluntarily and intelligently made,

> 1. The court must
>
> a. inform the defendant concerning (1) the nature of the charge; (2) the right to assistance of counsel; (3) the right to confront witnesses against the defendant; (4) the right to a jury trial; and (5) the privilege against self-incrimination; and
>
> b. examine the defendant to determine that he or she understands the foregoing.
>
> 2. Additionally, the record must establish that
>
> a. there is a factual basis for the plea; and
>
> b. the defendant knew the range of penalties for the crime with which he or she is charged.

State v. Hays, 253 Neb. 467, 471-72, 570 N.W.2d 823, 827 (1997), quoting *State v. Irish, supra*. Accord, *State v. LeGrand*,

249 Neb. 1, 541 N.W.2d 380 (1995), *overruled on other grounds, State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999); *State v. Walker*, 235 Neb. 85, 453 N.W.2d 482 (1990). A voluntary and intelligent waiver of the above rights must affirmatively appear from the face of the record. *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981).

[16] With respect to the nature of the charges, we have reversed, and remanded a cause for further proceedings, where the court failed to inform a defendant of the nature of the charges and failed to examine the defendant to determine that he understood the nature of the charges at the time of entering into the plea. *State v. Ponec*, 236 Neb. 710, 463 N.W.2d 793 (1990). With respect to the presumption of innocence, we have not required the trial court to inform the defendant of the "presumption of innocence" per se, although the advisements under *Irish*, taken together, reflect the presumption. For completeness, we note that elsewhere, it has been held that the failure to advise the defendant of the presumption of innocence does not require setting aside the guilty plea. See, e.g., *People v. Saffold*, 465 Mich. 268, 631 N.W.2d 320 (2001). Finally, it is important to note that once a defendant is informed of his or her constitutional rights, there is no requirement that the court advise the defendant on each subsequent court appearance of those same rights. See *State v. LeGrand, supra.* See, also, *State v. Wiley*, 225 Neb. 55, 402 N.W.2d 311 (1987).

In this case, as we understand it, both the State and the district court refer to the following exchange at the plea hearing to support the proposition that Golka was adequately advised regarding the nature of the charges and questioned as to his understanding of the charges against him:

> THE COURT: . . . Counts I and III are two counts of murder in the first degree. The possible penalty here — the maximum possible penalty, by reason of the fact that you were under 18 years of age at the time of the commission of the offense, is — the maximum penalty is confinement with the Department of Corrections of the State of Nebraska for the term of your natural life without the possibility of parole.

> Now do you understand the maximum possible penalty here?
>
> [Golka]: Yes, Your Honor.
>
> THE COURT: Okay.
>
> . . . .
>
> THE COURT: On each count. Do you understand that?
>
> [Golka]: Yes, Your Honor.
>
> THE COURT: Do you also understand that if I saw fit, I could make those sentence run consecutive to each other?
>
> [Golka]: Yes, Your Honor.

We note the greater particularity at the arraignment on November 19, 2004, quoted earlier in this opinion, where the court advised Golka that counts I and III charged him with one count each of first degree murder and that the first degree murders were Class IA felonies. The court read the charging documents to Golka. The court specifically inquired if Golka understood the nature of the charges and the penalties, and Golka responded, "Yes, sir."

We have held that in a case where the defendant is represented by counsel and the court advised the defendant of the offense with which he was charged, the defendant has been adequately advised as to the nature of the offense. See *State v. Clark*, 217 Neb. 417, 350 N.W.2d 521 (1984). The statement by the trial court at the plea hearing as to the nature of the charges was meager, but the statements by the trial court at the arraignment were ample. Although at no point in the exchange at the plea hearing did the court confirm that Golka understood the nature of the charges, the record does show that this inquiry was met at the arraignment. We believe that generally, where the defendant is properly advised of his rights during the proceedings, the plea is a voluntary and intelligent choice. See *State v. Wiley, supra.* Taking the arraignment and the plea hearing together, the record shows that Golka was properly advised of the nature of the charges and his understanding thereof.

With respect to the presumption of innocence, at the arraignment, Golka was advised that he was presumed to be innocent

and that this "presumption of innocence continues throughout the proceeding unless and until the State meets its burden of proof." This advisement goes beyond what is required in *Irish*.

Because Golka received the proper necessary advisements, appellate counsel did not fail to raise issues related thereto on appeal. The records and files in this case affirmatively show that there is no merit to Golka's claims of ineffective assistance of appellate counsel. The district court did not err when it denied relief on these issues without an evidentiary hearing.

Life Sentence for Juvenile Who Committed Homicide.

In his postconviction motion, Golka raised an issue with respect to his sentences. The allegation in his postconviction motion reads in its entirety as follows:

> 41. Mr. Golka's date of birth is November 9, 1986. The date of offense of the crimes for which he was convicted was October 24, 2004. Thus, he was 17 years old at the time the crimes were committed.
>
> 42. Sentencing children who were less than 18 years old at the time of the commission of theirs [sic] crimes constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and art. I, § 9 of the Nebraska Constitution.

Evidently, before the district court, Golka explained the import of the sentencing issue alluded to in his postconviction motion. In its order denying relief, the district court noted that Golka cited "no authority which would support this [sentencing] claim [and that] to the contrary, [the court] has located several cases in which courts of other jurisdictions have found the punishment of life in prison [for juveniles] was not cruel and unusual."

We are aware that subsequent to the filing of Golka's amended motion for postconviction relief and the court's order denying the motion, the U.S. Supreme Court issued its opinion in *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). In that opinion, the Court considered the

sentencing of a juvenile nonhomicide offender and held that the Eighth Amendment to the U.S. Constitution prohibited the imposition of a life sentence without parole for the juvenile offender who did not commit homicide.

Since *Graham* and referring thereto, courts have upheld sentences of life without parole for juveniles who have committed homicides. *Jackson v. Norris*, 2011 Ark. 49, 578 S.W.3d 103 (2011); *State v. Andrews*, 329 S.W.3d 369 (Mo. 2010). The majority opinion in *Andrews* states that "the Court recognized [in *Graham*] that a line existed 'between homicide and other serious violent offenses against the individual.' . . ." 329 S.W.3d at 377. *Andrews* further states that "[b]y illustrating the differences between all other juvenile criminals and murderers, the Court implies that it remains perfectly legitimate for a juvenile to receive a sentence of life without parole for committing murder." *Id.* We agree with the reasoning of these cases.

Referring to his postconviction motion quoted above, we believe that Golka's allegations are conclusory and that he has alleged no facts in his postconviction motion upon which we could conclude that his life sentences for first degree murders constitute cruel and unusual punishment under the federal or state constitution. It is axiomatic that if a motion for postconviction relief alleges only conclusions of fact or law, no evidentiary hearing is required. *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010). An evidentiary hearing was not warranted on this issue, and the district court did not err when it so ruled.

CONCLUSION

The district court did not err when it denied Golka's motion for postconviction relief without an evidentiary hearing.

AFFIRMED.

WRIGHT, J., not participating.