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STATE OF NEBRASKA, APPELLEE, V. AARON D. MANNING, APPELLANT.

789 N.W.2d 54

Filed August 17, 2010. No. A-09-1174.

1. **Motions to Vacate: Proof: Appeal and Error.** An appellate court will reverse a decision on a motion to vacate or modify a judgment only if the litigant shows that the district court abused its discretion.
2. **Postconviction: Final Orders.** An order denying a defendant's request for an evidentiary hearing on postconviction relief is a final order.
3. **Pleadings: Time: Appeal and Error.** The 30-day appeal period is tolled only by a timely motion for new trial, a timely motion to alter or amend a judgment, or a timely motion to set aside the verdict. All of such motions must be filed within 10 days of the entry of judgment in order to toll the 30-day time in which to appeal.
4. **Courts: Jurisdiction.** In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgments at any time during the term at which they are rendered.
5. **Postconviction.** Postconviction relief is not part of a criminal proceeding and is considered civil in nature.
6. **Postconviction: Constitutional Law: Proof.** A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution.
7. **Postconviction: Statutes.** Postconviction relief statutes simply do not accord the opportunity to amend a pleading after the court determines that it is insufficient to necessitate an evidentiary hearing.
8. **Postconviction: Motions to Vacate: Appeal and Error.** In assessing whether the trial court abused its discretion in denying a motion to vacate, which sought to amend a postconviction motion after a final order had been entered dismissing the motion, it is not inappropriate to look at the nature of the proposed amendment.
9. **Postconviction: Sentences.** Neb. Rev. Stat. § 29-3001 (Reissue 2008) requires only that the postconviction motion be filed in the court where the sentence was imposed, not that it be heard by the sentencing judge.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Robert Wm. Chapin, Jr., for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

IRWIN, SIEVERS, and CARLSON, Judges.

SIEVERS, Judge.

INTRODUCTION

Aaron D. Manning pled no contest to two counts of attempted first degree murder and filed a direct appeal to this court, which we dismissed without opinion at Manning's request. See *State v. Manning*, 14 Neb. App. xliv (case No. A-05-1112, Dec. 19, 2005). He then filed a motion for postconviction relief. The district court for Buffalo County denied any relief without granting an evidentiary hearing. Manning did not file a timely motion to toll the running of the 30-day appeal time, but did file a "Motion to Vacate Judgment and Motion to Amend Motion for Postconviction Relief" (motion to vacate), which the district court denied. Manning then appealed to this court.

Because Manning's appeal is only from the district court's order denying his motion to vacate a final order denying postconviction relief, we cannot address any issues beyond the denial of the motion to vacate. Pursuant to our authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), we have ordered this case submitted for decision without oral argument.

FACTUAL AND PROCEDURAL BACKGROUND

As the result of events on October 31, 2004, Manning was charged with two counts of attempted first degree murder and two counts of use of a weapon to commit a felony. Manning pled no contest to the two attempted first degree murder charges in exchange for the State's agreement to dismiss the weapon use charges. According to the State's factual basis, on Halloween in 2004, Manning went to a house in Odessa, Nebraska, where the wife and daughter of his friend Jim Haga resided. Manning's friend was estranged from his wife and daughter at that time. Manning was costumed as a surgeon and attacked both the wife and daughter with a scalpel. Manning cut both victims' necks and throats and the daughter's face. Neither victim died, but a doctor would have testified that the cuts were within millimeters of hitting either their jugular veins or carotid arteries. Manning did not stop his attack until after the daughter stabbed him with a knife and the surgical mask

he was wearing came off, allowing the victims to identify him. The district court sentenced Manning to 40 to 50 years' imprisonment on each count and ordered that the sentences be served concurrently. Manning filed a direct appeal with this court which was docketed as our case No. A-05-1112. Manning then filed a motion requesting that we dismiss this appeal, and we granted that motion.

It was not until July 30, 2009, that Manning filed the motion for postconviction relief that resulted in this appeal. Among other things, Manning alleged that he was "denied his right to exculpatory evidence in possession of [the State] which would have aided [Manning]." Manning alleged that there was evidence that he was part of a conspiracy and showed that he "abandoned and refuse[d] to go through with the conspiratorial act."

In an order dated September 11, 2009, the district court determined that Manning was not entitled to an evidentiary hearing and denied his motion for postconviction relief in its entirety. Specifically, the court denied Manning's request for postconviction relief as to the alleged exculpatory evidence because his motion "fails to set forth any factual basis and fails to describe the nature and content of the purported exculpatory evidence."

On October 5, 2009, Manning filed the motion to vacate that we referenced previously in our introduction. In the motion to vacate, Manning requested relief pursuant to Neb. Rev. Stat. § 25-2001(1) (Reissue 2008). Manning alleged certain facts known to the State, which Manning asserted were previously unknown to him. Manning believed these facts would have been helpful to him in the original criminal case. The facts were as follows: Haga was accused of "sexually molesting" his daughter and set to be tried in late 2004. A friend of Haga's wife received a threatening letter in 2005 advising her that she "made a huge f-ing mistake running to the police to report our friend," that "all involved will take the punishment," and that she should "watch out." In addition, this same friend of Haga's wife received a visit from two costumed men on October 31, 2004, at about the same time as Manning was committing the crime. The men asked who

was home and left after they learned that Haga's daughter was not there.

On October 28, 2009, the court denied Manning's motion to vacate filed on October 5. Manning filed the instant appeal on November 30.

ASSIGNMENTS OF ERROR

Manning assigns, as restated, that the district court erred in (1) denying his motion to vacate the judgment and denying postconviction relief, (2) not allowing him to amend his motion for postconviction relief, and (3) not permitting the sentencing judge to rule on his motions.

STANDARD OF REVIEW

[1] An appellate court will reverse a decision on a motion to vacate or modify a judgment only if the litigant shows that the district court abused its discretion. *Eihusen v. Eihusen*, 272 Neb. 462, 723 N.W.2d 60 (2006).

ANALYSIS

Jurisdiction.

The State asserts that our jurisdiction in the instant appeal is limited. We agree. Because Manning did not file a notice of appeal within 30 days of the September 11, 2009, order dismissing his postconviction motion, and because he did not file any timely motions to toll the appeal period, our appellate jurisdiction is limited to review of the district court's October 28 order denying Manning's motion to vacate.

[2,3] Pursuant to Neb. Rev. Stat. § 25-1912 (Reissue 2008), a party must file an appeal within 30 days of the entry of a judgment, decree, or final order. An order denying a defendant's request for an evidentiary hearing on postconviction relief is a final order. See *State v. Poindexter*, 277 Neb. 936, 766 N.W.2d 391 (2009). The 30-day appeal period is tolled only by a timely motion for new trial, a timely motion to alter or amend a judgment, or a timely motion to set aside the verdict. See § 25-1912(3). All of such motions must be filed within 10 days of the entry of judgment in order to toll the 30-day time in which to appeal. See Neb. Rev. Stat. §§ 25-1144.01, 25-1315.02, and 25-1329 (Reissue 2008).

Manning's motion to vacate the judgment, which also asked for leave to amend his motion for postconviction relief, was filed on October 5, 2009, obviously well outside the 10-day timeframe for a tolling motion. Therefore, this appeal is simply an appeal from the October 28 order denying the motion to vacate. Thus, we can only consider the arguments related to the October 28 order.

Motion to Vacate.

Manning asserts that the district court erred in denying his October 5, 2009, motion to vacate the district court's September 11 judgment. Specifically, Manning asserts that he is entitled to relief pursuant to § 25-2001. However, § 25-2001 does not apply to the instant case. Section 25-2001 pertains to the power of a district court to modify its judgments after the end of a term, but within 6 months of the entry of the judgment. The applicable district court rules specify that the term of the district court is the calendar year. See Rules of Dist. Ct. of Ninth Jud. Dist. 9-1 (rev. 1995). Because Manning's motion to vacate was filed in the same calendar year, § 25-2001 does not apply.

[4,5] Admittedly, a district court has broad inherent powers to vacate or modify its own judgment during term. In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgments at any time during the term at which they are rendered. *Destiny 98 TD v. Miodowski*, 269 Neb. 427, 693 N.W.2d 278 (2005). Postconviction relief is not part of a criminal proceeding and is considered civil in nature. *State v. Pratt*, 273 Neb. 817, 733 N.W.2d 868 (2007). The district court's ability to modify a judgment during term is virtually unlimited. See *Eicher v. Mid America Fin. Invest. Corp.*, 275 Neb. 462, 748 N.W.2d 1 (2008).

Nonetheless, we find that the district court did not abuse its discretion in denying Manning's motion. Manning argues that the district court erred in denying his motion to vacate as to the issue of the exculpatory evidence which he asserts the State failed to provide to him prior to his plea. According to Manning's postconviction counsel, Manning's motion to vacate set forth, with more particularity, the nature of the problem

which Manning sought to plead in his postconviction motion. We quote counsel's comments to the court during the hearing on Manning's motion to vacate:

> Obviously from the initial pleading that was made, obviously the Court may have had some problem understanding what we were talking about in terms of where we thought there may be a problem in this case, and so as part of my motion [we have] detailed some of the — with a little bit more particulars, specifically what our problem is. Specifically, the fact that a letter was received by a friend of [Haga's wife]. And that on the same night [Haga's wife] was attacked by . . . Manning, that in fact there are people on the doorstep of [Haga's wife's friend], and shortly thereafter she received the letter which is attached as Exhibit A to my motion to vacate.

Counsel's quoted statement reveals that through the October 5, 2009, motion to vacate, Manning sought to allege with more particularity already known facts underlying Manning's request for postconviction relief.

[6] The district court initially denied this portion of Manning's postconviction motion because it did not include a factual basis. It is well known that the failure to include a factual basis is fatal to a claim for postconviction relief. A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution. *State v. Thomas*, 278 Neb. 248, 769 N.W.2d 357 (2009). Manning's original postconviction motion did not describe the nature of the allegedly exculpatory evidence the State supposedly withheld from Manning before he entered his plea. Accordingly, the problem which Manning sought to remedy was his own failure to draft an adequate postconviction motion. Given that postconviction counsel's quoted statement shows that Manning was aware of the allegedly withheld evidence at the time of filing the postconviction motion, we cannot conclude that the district court abused its discretion in denying Manning's motion to vacate—which was, in effect, a late-filed motion to amend to alleged facts known at the time of the pleading.

Amendment of Pleadings.

Manning also argues it is inequitable that he did not receive the opportunity to submit an amended postconviction motion once the court determined the pleading was insufficient, as is permitted in other civil cases. We suspect that Manning has in mind the former rule, now supplanted by notice pleading in civil cases: Upon the sustaining of a demurrer, a litigant must be given an opportunity to amend unless there is no reasonable possibility the defect can be cured to state a cause of action. See *Kubik v. Kubik*, 268 Neb. 337, 683 N.W.2d 330 (2004). Thus, this argument is based on a proposition rendered inapplicable by the adoption of notice pleading in Nebraska in all civil actions after January 1, 2003. See *id.* That said, postconviction relief under Neb. Rev. Stat. § 29-3001 (Reissue 2008) is a very narrow category of relief. *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009). And, such actions have their own pleading requirements.

[7,8] Section 29-3001 specifically provides that "[u]nless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon . . . ." Conversely, where no such showing is made, the request for a hearing is denied. See *State v. Thomas, supra*. Postconviction relief statutes simply do not accord the opportunity to amend a pleading after the court determines that it is insufficient to necessitate an evidentiary hearing. Manning has cited no legal authority which requires us to conclude otherwise. Finally, in assessing whether the trial court abused its discretion in denying the motion to vacate, which sought to amend the postconviction motion after a final order had been entered dismissing the motion, it is not inappropriate to look at the nature of the proposed amendment. Having done that, we fail to understand, and Manning does not explain, how the allegedly withheld information is in any way exculpatory, and would have made any difference on the fundamental question of whether he attempted to murder a mother and her daughter—as he admitted he did via his plea. For several reasons, there was no abuse of discretion in denying the motion to vacate.

Assignment of Sentencing Judge to Postconviction Proceedings.

[9] Manning asserts that § 29-3001 requires that the postconviction proceeding be heard by the judge that sentenced him. However, we conclude that this is not the case. Section 29-3001 provides that a prisoner "may file a verified [postconviction] motion at any time in the court which imposed such sentence." The plain language of § 29-3001 requires only that the postconviction motion be filed in the court where the sentence was imposed—not that it be heard by the sentencing judge. Therefore, this assignment of error is also without merit.

CONCLUSION

We conclude that the district court did not abuse its discretion in overruling Manning's motion to vacate the district court's final order denying postconviction relief. His other assigned errors lack merit.

AFFIRMED.