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negligence. We also determine that Sadler's additional insured endorsement, which provided coverage for liability arising out of Sadler's operations, was broad enough to include coverage for Alliance's negligence even if Sadler was not negligent. We reverse the judgment and remand the cause for further proceedings on the application of the "sole negligence" exclusion in the endorsement.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

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## STATE OF NEBRASKA, APPELLEE, V. DONALD M. LEE, APPELLANT.

807 N.W.2d 96

Filed October 28, 2011. No. S-10-1098.

1. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations that, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.
2. ____: ____: ____. When a movant for postconviction relief makes an allegation of an infringement of constitutional rights, a court may deny an evidentiary hearing only when the records and files affirmatively show that the defendant is entitled to no relief.
3. **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.
4. **Effectiveness of Counsel: Appeal and Error.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. Determinations regarding whether counsel was deficient and whether this deficiency prejudiced the defendant are questions of law that an appellate court reviews independently of the lower court's decision. An appellate court reviews factual findings for clear error.
5. **Pleas: Waiver.** A voluntary guilty or no contest plea generally waives all defenses to the charge.
6. **Postconviction: Pleas: Effectiveness of Counsel.** In a postconviction proceeding brought by a defendant convicted on a plea of guilty or no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
7. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When lawyers employed by the same office represent a defendant both at trial and on direct

appeal, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.

8. **Postconviction: Effectiveness of Counsel: Proof.** To establish a right to postconviction relief on a claim of ineffective assistance of counsel, the petitioner has the burden to meet the test put forward in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); that is, the petitioner must show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defendant.
9. **Criminal Law: Effectiveness of Counsel.** A lawyer's performance is deficient if his or her performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.
10. **Effectiveness of Counsel: Proof.** To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
11. **Postconviction: Appeal and Error.** A defendant cannot use a postconviction proceeding to secure review of issues that were known to the defendant and that were or could have been litigated on direct appeal.
12. **Pleas: Waiver.** 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. A voluntary and intelligent waiver of the above rights must affirmatively appear from the face of the record.
13. **Right to Counsel.** An express advisement of the right to counsel is not necessary when the defendant is represented by counsel.
14. **Postconviction: Effectiveness of Counsel: Speedy Trial.** In a postconviction proceeding, when a defendant alleges that trial counsel failed to properly assert his or her speedy trial rights, the court must consider the merits of the defendant's speedy trial rights under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
15. **Effectiveness of Counsel.** Only if a motion would have resulted in the defendant's absolute discharge, thus barring a later trial and conviction, could the failure to move for discharge be deemed ineffective assistance.
16. ____. Defense counsel is not ineffective for failing to raise a meritless argument.
17. **Speedy Trial.** Nebraska's speedy trial statutes require that those who are charged with crimes be brought to trial within 6 months, as calculated by the applicable statute.
18. ____. To calculate the deadline for trial under the speedy trial statutes, a court must exclude the day the State filed the information, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 2008).
19. ____. If the State does not bring the defendant to trial within the permissible time, the court must order an absolute discharge from the offense charged.

20. **Speedy Trial: Indictments and Informations.** For a felony, the speedy trial clock begins to run on the date that the indictment is returned or the information is filed, not on the date on which the complaint is filed.
21. **Postconviction: Proof.** Under the postconviction statutes, a court is not obligated to hold an evidentiary hearing if the files and records of the case affirmatively show that the prisoner is entitled to no relief.
22. **Postconviction.** The district court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether the defendant has raised any substantial issues, before granting a full evidentiary hearing.
23. **Postconviction: Appeal and Error.** An appellate court examines the procedures used by the district court to determine whether to grant an evidentiary hearing for abuse of discretion, which exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Donald M. Lee, pro se.

Jon Bruning, Attorney General, and George R. Love for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

In 2009, under a plea bargain, Donald M. Lee pleaded nolo contendere to one count of second degree murder. The court sentenced Lee to a term of 70 years to life in prison. Lee now moves for postconviction relief. He claims violations of his right to speedy trial, his right to due process, and his right to effective assistance of counsel. The district court denied relief without granting an evidentiary hearing. We affirm in part, and in part reverse and remand for further proceedings.

## BACKGROUND

In July 2008, the State originally filed a complaint in county court, charging Lee with first degree murder. On July 21, the court arraigned him. On November 3, after Lee waived a

preliminary hearing, the State filed the information in district court, charging Lee with first degree murder.

On May 19, 2009, under a plea bargain, the State filed an amended information reducing the charge to second degree murder and Lee pleaded nolo contendere. Lee attended the plea hearing with his attorney. After a colloquy in which the court advised Lee of certain rights, the State provided a factual basis for the plea. Briefly stated, an autopsy revealed that a young girl died of manual strangulation and had also suffered injuries such as a fractured skull, a lacerated intestine, and multiple abrasions and contusions. Lee was the only adult with the girl when the incident occurred. Lee's explanation for the injuries was inconsistent with the pathologist's report.

The court sentenced Lee to a term of 70 years to life in prison. Lee appealed in case No. S-09-779, asserting only a claim of an excessive sentence. On December 10, 2009, we summarily affirmed.

## Postconviction Claims

Lee's first postconviction claim is that the State violated his right to a speedy trial. He alleged that the State filed the information on July 18, 2008, but that he did not enter his plea until May 19, 2009. Further, while Lee acknowledges the court conducted at least two hearings regarding his case, he alleged that he requested no continuance and never waived his speedy trial rights. And he claims that nobody ever explained his right to a speedy trial to him.

Lee's next claim is that the court failed to advise him of the consequences of his plea. He alleged that the court did not explain the rights that he would waive by entering a plea of no contest. He also claimed that the court failed to question him regarding his age; education; whether he was intoxicated; whether he was acting under any threats, promises, or inducements; and whether he was mentally competent. Finally, he alleged that the court failed to ask him whether he agreed with the State's factual basis for the plea.

Lee's final two claims relate to the effectiveness of his trial and appellate counsel. He claims that both were ineffective for

failing to raise the speedy trial issue and the voluntariness of his plea.

### The District Court's Order Denying an Evidentiary Hearing

The court denied Lee relief without an evidentiary hearing. The court's analysis of the speedy trial issue appears limited to the statutory speedy trial provision. Lee's motion does not appear to have raised a constitutional speedy trial claim.[1] The court found that the State filed the information on November 3, 2008, and that Lee entered his plea on May 19, 2009, which meant that if no time was excluded, Lee's right was violated. But the court found that a pair of continuances—one relating to a hearing on a motion to suppress and the other a continuance of the trial itself—tolled the time in which to bring Lee to trial. But the record in this appeal fails to show who filed these continuances, when they were granted, or the length of the continuances. Nevertheless, the court found that the State had not violated Lee's right to a speedy trial, so neither trial nor appellate counsel was ineffective in failing to raise it.

The court also rejected Lee's claim that the court did not advise him of the consequences of his plea. The court found that the bill of exceptions clearly showed that the court had advised Lee of his rights and that Lee had knowingly and voluntarily waived those rights. As with Lee's speedy trial claim, the court concluded that because the underlying error was meritless, it was not ineffective assistance of counsel to not raise it.

## ASSIGNMENTS OF ERROR

Lee assigns that the district court erred as follows:

(1) in denying his motion for postconviction relief without an evidentiary hearing; and

(2) in refusing to appoint counsel for the postconviction motion.

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[1] See, *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); *State v. Sims*, 272 Neb. 811, 725 N.W.2d 175 (2006).

## STANDARD OF REVIEW

[1-3] An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations that, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.[2] When a movant makes such an allegation, a court may deny an evidentiary hearing only when the records and files affirmatively show that the defendant is entitled to no relief.[3] 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.[4]

[4] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[5] Determinations regarding whether counsel was deficient and whether this deficiency prejudiced the defendant are questions of law that we review independently of the lower court's decision.[6] We review factual findings for clear error.[7]

## ANALYSIS

Lee's brief is sketchy at best. He appears to claim that he is entitled to relief for the following reasons: (1) He entered his plea involuntarily and unintelligently; (2) the State violated his statutory right to a speedy trial; and (3) his trial and appellate counsel (who were from the same office) were ineffective for failing to raise the above issues.

[5,6] We begin with a few general principles. First, a voluntary guilty or no contest plea generally waives all defenses to the charge.[8] But in a postconviction proceeding brought by a defendant convicted on a plea of guilty or no contest, a court

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[2] See *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007).

[3] See *id.*

[4] *Id.*

[5] *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011).

[6] *Id.*

[7] *Id.*

[8] See, *id.*; *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010).

will consider an allegation that the plea was the result of ineffective assistance of counsel.[9]

[7] When lawyers employed by the same office represent a defendant both at trial and on direct appeal, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief.[10] So, this is Lee's first opportunity to assert his ineffective assistance of counsel claims.

[8-10] To establish a right to postconviction relief on a claim of ineffective assistance of counsel, the petitioner has the burden to meet the test put forward in *Strickland v. Washington*[11]; that is, the petitioner must show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defendant.[12] A lawyer's performance is deficient if his or her performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area.[13] To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[14]

### The Voluntariness of Lee's Plea

[11] Lee first argues that his plea did not comport with due process because the trial court did not ensure that his plea was voluntary. But Lee either knew or should have known of this error when he prosecuted his direct appeal. Because he did not raise it, he has waived consideration of it now. A defendant cannot use a postconviction proceeding to secure review of issues that were known to the defendant and that were or could have been litigated on direct appeal.[15]

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[9] *Yos-Chiguil, supra* note 5; *Vo, supra* note 8.

[10] See, *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004); *State v. Jones*, 264 Neb. 671, 650 N.W.2d 798 (2002).

[11] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[12] See *Yos-Chiguil, supra* note 5.

[13] See *McLeod, supra* note 2.

[14] *State v. Gibilisco*, 279 Neb. 308, 778 N.W.2d 106 (2010).

[15] See *Vo, supra* note 8.

But Lee may still assert an ineffective assistance of counsel claim based on those facts. Lee claims that his counsel was ineffective for not reminding the court of its obligations to ensure the voluntariness of his plea and for not raising the issue on appeal.

[12] 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."[16]

A voluntary and intelligent waiver of the above rights must affirmatively appear from the face of the record.[17]

At the plea hearing, where Lee was represented by counsel, the following exchange occurred:

> THE COURT: Okay. Mr. Lee, the Amended Information alleges that on or about July 19, 2008 here in Lincoln County you intentionally [but] without premeditation killed [the victim]. It's a Class I(B) felony which is punishable by life imprisonment as a maximum or twenty years in prison as a minimum. Do you understand that?
>
> MR. LEE: Yes.
>
> THE COURT: If you enter a plea of no contest to this charge, you're giving up your right to have a speedy and a public trial by jury, and at that trial you'd have the right

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[16] *State v. Golka*, 281 Neb. 360, 378, 796 N.W.2d 198, 213 (2011), quoting *State v. Hays*, 253 Neb. 467, 570 N.W.2d 823 (1997). See, also, *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986).

[17] *Golka, supra* note 16.

to see and hear all the witnesses that would come and testify and have [counsel] cross-examine those witnesses on your behalf. You'd also have the right to put on your own evidence, which includes the right to ask the Court to issue subpoenas to anyone you'd like to have testify for you and the Court would issue those subpoenas and make them come and testify on your behalf.

You cannot be called as a witness against yourself nor can you be made to testify against yourself. If you chose not to testify it can't be used against you in any way or even be mentioned in front of a jury; however, if you decided you wanted to testify and took the stand, you would waive your Fifth Amendment right and the County Attorney could ask you any questions she wished about your testimony or about the charges and you would have to answer.

You are presumed to be innocent of this charge and that presumption goes with you throughout the trial until the State has proven your guilt beyond a reasonable doubt so that all twelve members of the jury believed you were guilty. If all twelve could not agree, you could not be found guilty at that trial. Do you understand those rights?

MR. LEE: Yes.

THE COURT: You also understand by entering a plea of no contest you're waiving any other motions you may file and plus any appeal of the Court's prior ruling on the motion to suppress that you had filed?

MR. LEE: Yes.

THE COURT: If you enter a plea of no contest, as I said, you're waiving those rights, and if the State supplies a sufficient factual basis for the Court to accept the plea, you'd be found guilty the same as if you'd been tried and convicted by a jury.

MR. LEE: Yes.

THE COURT: Do you understand that?

MR. LEE: Yes.

After this colloquy, the State provided a factual basis for the crime.

Thus, to summarize the proceedings, the court informed Lee that the State had charged him with a Class IB felony and that the State had alleged that he had killed the victim intentionally but without premeditation. The court informed Lee that the possible sentence ranged from 20 years to life in prison. The court also informed Lee that by pleading guilty, Lee was waiving his right to a jury trial, the right to cross-examine witnesses, and his right not to testify. Finally, the State provided a factual basis for the plea. Lee stated several times that he understood the rights he was waiving and the nature of the charge. And the court found that the plea was "knowingly, voluntarily and intelligently entered."

[13] It is true that the court did not explicitly advise Lee that he was entitled to the assistance of counsel, but in considering a similar advisement, we held that an express advisement of the right to counsel is not necessary when the defendant is represented by counsel.[18] Counsel represented Lee at all times—from the arraignment through his plea—so an express warning was unnecessary.

Thus, the court gave Lee all the required advisements. And so, counsel was not ineffective in failing to ask the court to do so.

### Was Counsel Ineffective for Failing to Assert Lee's Speedy Trial Rights?

Lee next argues that the State violated his right to a speedy trial. From his motion for postconviction relief and the court's order, it appears that Lee is asserting that the State violated his statutory speedy trial rights. He did not claim and does not argue on appeal that the State violated his constitutional right to a speedy trial,[19] and we will not address it. Further, the Nebraska Postconviction Act provides relief only if there was a "'denial or infringement'" of constitutional rights.[20] The 6-month statutory speedy trial right found at Neb. Rev. Stat.

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[18] See *State v. Watkins*, 277 Neb. 428, 762 N.W.2d 589 (2009).

[19] See, U.S. Const. amends. VI and XIV; Neb. Const. art. I, § 11. See, also, *Barker, supra* note 1; *Sims, supra* note 1.

[20] *Yos-Chiguil, supra* note 5, 281 Neb. at 626, 798 N.W.2d at 840.

§ 29-1207 (Reissue 2008) is separate from the *constitutional* speedy trial right.[21] So even if it were not waived by a plea of guilty,[22] a claim of a statutory speedy trial violation, in and of itself, would not be cognizable in a postconviction proceeding because it is not a constitutional right. Nevertheless, it can be considered through the prism of an ineffective assistance of counsel claim.

[14-16] In a postconviction proceeding, when a defendant alleges that trial counsel failed to properly assert his or her speedy trial rights, the court must consider the merits of the defendant's speedy trial rights under *Strickland*.[23] Again, under *Strickland*, one claiming ineffective assistance of counsel must show a reasonable probability that but for the deficient performance, the result of the proceedings would have been different.[24] Only if a motion would have resulted in the defendant's absolute discharge, thus barring a later trial and conviction, could the failure to move for discharge be deemed ineffective assistance.[25] Defense counsel is not ineffective for failing to raise a meritless argument.[26]

[17-20] Nebraska's speedy trial statutes require that those who are charged with crimes be brought to trial within 6 months, as calculated by the applicable statute.[27] To calculate the deadline for trial under the speedy trial statutes, a court must exclude the day the State filed the information, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4).[28] If the State does not bring the defendant to trial within the permissible time, the court must order an

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[21] See, e.g., *State v. Kula*, 254 Neb. 962, 579 N.W.2d 541 (1998).

[22] See Neb. Rev. Stat. § 29-1209 (Reissue 2008).

[23] See, *Sims, supra* note 1; *State v. Rieger*, 270 Neb. 904, 708 N.W.2d 630 (2006).

[24] *Gibilisco, supra* note 14.

[25] See, *Sims, supra* note 1; *State v. Meers*, 267 Neb. 27, 671 N.W.2d 234 (2003).

[26] See *Vo, supra* note 8.

[27] See § 29-1207.

[28] See *State v. Tamayo*, 280 Neb. 836, 791 N.W.2d 152 (2010).

absolute discharge from the offense charged.[29] For a felony, the speedy trial clock begins to run on the date that the indictment is returned or the information is filed, not on the date on which the complaint is filed.[30]

Section 29-1207(4) sets out the excludable time periods for speedy trial purposes.[31] As relevant here, these include delays resulting from pretrial motions of the defendant, such as a motion to suppress evidence[32] or for continuances requested by or consented to by the defendant or his counsel.[33]

Lee claims that the speedy trial clock began to run July 18, 2008, the day the State filed the complaint. On this point, Lee is mistaken. While the record shows that the State filed the complaint on July 18, this is not the operative date. As we noted in *State v. Williams*,[34] for a felony, the clock begins to run when the State files the information. This occurred on November 3, 2008. To determine the date, excluding any tolling, by which the State had to commence trying Lee, we exclude the date the State filed the information, count forward 6 months, and then back up 1 day. Applying this methodology, the State had to commence trying Lee by, at the latest, May 3. Lee did not enter his plea until May 19. So unless excludable periods extended the deadline, it would appear that counsel should have moved for discharge on speedy trial grounds.

But the postconviction court found that there were two continuances that tolled the speedy trial clock. It found that the trial court continued a motion to suppress hearing and the trial, which together added an additional 60 days to the time in which the State could try Lee. The records, however, do not show when the court granted the continuances or for how long the matters were continued. And Lee alleges in his motion that he never moved for any continuances.

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[29] *Id.* See, also, Neb. Rev. Stat. § 29-1208 (Reissue 2008).

[30] See *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009).

[31] See *id.*

[32] § 29-1207(4)(a).

[33] § 29-1207(4)(b).

[34] *Williams, supra* note 30.

[21-23] Under the postconviction statutes, a court is not obligated to hold an evidentiary hearing if the files and records of the case affirmatively show that the prisoner is entitled to no relief.[35] And the district court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether the defendant has raised any substantial issues, before granting a full evidentiary hearing.[36] We examine these procedures for abuse of discretion, which exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.[37]

In determining whether to hold an evidentiary hearing, we have previously allowed a court to hold a records hearing to receive into evidence the relevant files and records that the court may need to review in considering whether to grant or deny an evidentiary hearing.[38] If a court does not receive into evidence the relevant files and records at a records hearing, the court should certify and include in the transcript the files and records of the earlier proceedings it considered in denying relief.[39]

Here, the district court denied an evidentiary hearing because it had found that Lee had asked for continuances, which tolled the time in which the State had to commence the trial. Because of this tolling, the court concluded that the State had not violated Lee's right to a speedy trial. But the files and records of the case do not show when the court granted these continuances or for how long the matters were continued. In other words, the files and records of the case do not show that Lee actually moved for continuances and thus do not show that the State did not violate his speedy trial right. Simply put, the records do not affirmatively show that Lee is not entitled to

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[35] *State v. Glover*, 276 Neb. 622, 756 N.W.2d 157 (2008).

[36] See *McLeod, supra* note 2.

[37] *Id.*

[38] See, also, *Glover, supra* note 35.

[39] See, *id.*; *State v. Fugate*, 180 Neb. 701, 144 N.W.2d 412 (1966).

relief. Under the rule articulated in *State v. Glover*,[40] the court should have certified and included in the transcript any files or records, which would have included any documents related to the supposed continuances, that it considered in denying Lee an evidentiary hearing.

The reason for this rule should be obvious. When the court denies an evidentiary hearing based upon documents it does not certify and include in the transcript, it effectively denies the movant a meaningful appeal. We are left with only the option of taking the district court's word for the matter. This we refuse to do.

The State's contention—that Lee had the burden of producing a record including all materials relevant to the issue—is contrary to the petitioner's burden in postconviction cases, and we reject it. We have repeatedly stated that the petitioner must only allege facts that, if proved, show that the petitioner's constitutional rights were violated. The petitioner is obviously not required to disprove his or her own allegations or to make the State's case for it. If the records and files are sufficient to refute the petitioner's claim, the statutes allow the postconviction court to notice those facts, or the State can offer them as evidence in a records hearing. But because the statutes permit judicial notice of records and files, we require a court to include those files and records that illustrate why it denied an evidentiary hearing.

Because the court failed to certify and include in the record the documents that it considered in denying an evidentiary hearing, the record does not affirmatively show that Lee is not entitled to relief. We remand for further proceedings.

## CONCLUSION

We conclude that Lee's claim regarding the voluntariness of his plea and the related ineffective assistance of counsel claim are meritless. The records before us, however, do not affirmatively show that Lee's ineffective assistance of counsel claim regarding his speedy trial rights is without merit. Accordingly,

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[40] *Glover, supra* note 35.

we affirm in part, and in part reverse and remand for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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DARLENE HOWSDEN, APPELLANT, V. ROPER'S REAL ESTATE COMPANY, A NEBRASKA CORPORATION, APPELLEE.

805 N.W.2d 640

Filed October 28, 2011. No. S-11-174.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Workers' Compensation.** If an injury arises out of and in the course of employment, the Nebraska Workers' Compensation Act is the injured employee's exclusive remedy against his or her employer.
3. **Corporations: Fraud.** A court will disregard a corporation's identity, or pierce the corporate veil, only where the corporation has been used to commit fraud, violate a legal duty, or perpetrate a dishonest or unjust act in contravention of the rights of another.
4. **Corporations: Courts: Equity.** A court exercises its equitable power when it disregards the corporate form.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded for further proceedings.

Jefferson Downing and Joel Bacon, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellant.

James A. Snowden and Joseph M. Aldridge, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

The plaintiff in this case was injured on premises that were leased to her employer by a legally distinct entity that is owned