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STATE OF NEBRASKA, APPELLEE, V. LERON L. OBLEY, APPELLANT.

798 N.W.2d 151

Filed May 17, 2011. No. A-10-657.

1. **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.
2. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
3. **Effectiveness of Counsel: Appeal and 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: 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.
5. **Constitutional Law: Criminal Law: Right to Counsel.** A defendant has the right under the federal and state Constitutions to be represented by an attorney in all critical stages of a criminal prosecution.
6. **Criminal Law: Words and Phrases.** Critical stages of a criminal prosecution are those stages at which the substantial rights of a defendant may be affected.
7. **Criminal Law: Right to Counsel: Words and Phrases.** A hearing on a motion to withdraw a guilty plea is a critical stage in the proceedings, carrying with it the right to counsel.
8. **Constitutional Law: Right to Counsel: Waiver.** A defendant may waive the constitutional right to counsel, so long as the waiver is made knowingly, voluntarily, and intelligently.
9. ____: ____: ____. A waiver of the Sixth Amendment right to counsel is valid only when it reflects an intentional relinquishment or abandonment of a known right or privilege; therefore, the key inquiry is whether one who waived the Sixth Amendment right was sufficiently aware of the right to have counsel and of the possible consequences of a decision to forgo the aid of counsel.
10. **Right to Counsel: Presumptions.** Prejudice is presumed where an accused is completely denied counsel at a critical stage of the proceedings.

Appeal from the District Court for Douglas County: W. RUSSELL BOWIE III, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Gregory A. Pivovar for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

SIEVERS and CASSEL, Judges, and HANNON, Judge, Retired.

CASSEL, Judge.

INTRODUCTION

Leron L. Obley appeals from the denial of his motion for postconviction relief. Although the district court properly denied an evidentiary hearing on most of Obley's claims, we conclude that the hearing on Obley's motion to withdraw his plea was a critical stage at which Obley had the right to counsel and that the record does not show Obley knowingly waived such right. Because Obley's postconviction motion asserted claims of ineffectiveness of both trial and appellate counsel concerning his lack of counsel at that hearing, the court erred in denying an evidentiary hearing on those claims. We therefore affirm in part, and in part reverse and remand for further proceedings.

BACKGROUND

The State charged Obley with first degree sexual assault and first degree false imprisonment. On August 19, 2008, pursuant to plea negotiations, Obley pled no contest to first degree sexual assault and the other charge was dismissed. He was represented by an assistant public defender. The next day, Obley signed a pro se motion to withdraw his no contest plea, which motion was filed on August 25. Obley alleged that on the morning of August 19, he told his attorney that he believed he should go to trial on the matter, that his attorney set a hearing for that same day "in an attempt to scare or threaten" Obley, and that Obley was upset and under duress at the time of his no contest plea. Obley further alleged that his plea was not knowingly or intelligently made.

At the beginning of the October 29, 2008, hearing on Obley's motion, the assistant public defender representing Obley stated that "Obley is requesting to proceed on this matter on his own without counsel." This attorney then asked for leave to

withdraw. Without ruling on the request to withdraw, the court first asked Obley if he had any evidence to present. The following colloquy occurred:

> [Obley]: Your Honor, the day on August 19, when [defense counsel] came to see me that morning, it was agreed we were going to trial. I never gave him any indication or said anything about pleading guilty or no contest to any sexual assault or any of the charges. So it was my understanding we wanted to go to a trial the next day, August 20. But against my wishes and my knowledge, I had a hearing later that day, so I didn't know — when I got here, I just assumed that the charges were being dropped, until he told me that they had a deal for me, and it was a good deal and I should deal. So at the time, I was really surprised. I didn't know what was going on. I was shocked. I didn't even me [sic] come here to plead no contest or make a deal, so I said that I wanted to go to trial the next day.
>
> THE COURT: Well, it says — are you comfortable going forward on your own, . . . Obley?
>
> [Obley]: For the motion?
>
> THE COURT: Right.
>
> [Obley]: Yes.

The court inquired further as to why Obley entered his no contest plea, and Obley offered his explanations. The prosecutor stated that Obley had not met his burden to show that he was not properly informed of his rights, that the court erred in accepting his waiver of those rights, that he was not competent to stand trial, or that there was not a factual basis. The court then stated to Obley that "you have done this without assistance of counsel. And you haven't presented any evidence to show that your plea was not made freely, knowingly, voluntarily and intelligently, and that you were incompetent to enter the plea, or the factual basis was insufficient." The court overruled Obley's motion to withdraw his plea and proceeded to sentencing. The assistant public defender was not discharged by the court, and he represented Obley during sentencing. Obley was sentenced to 15 to 20 years' imprisonment.

On direct appeal, represented by the public defender's office, Obley asserted only that his sentence was excessive. On March 13, 2009, we summarily affirmed the sentence in case No. A-08-1233.

Obley subsequently filed a pro se motion for postconviction relief and motion for appointment of counsel. Obley's motion for postconviction relief alleged that (1) the district court engaged in judicial misconduct because at the time of the hearing on his motion to withdraw his plea, the district court failed to inquire if Obley was waiving his right to counsel; (2) his trial counsel was ineffective in failing to investigate and interview the State's witnesses and in "induc[ing]" Obley to plead no contest; (3) his appellate counsel was ineffective in failing to pursue Obley's claims regarding the hearing on Obley's motion to withdraw his plea; (4) the district court did not obtain jurisdiction because the information was invalid; and (5) his no contest plea was not intelligently and understandingly made. The district court denied the motion without an evidentiary hearing. The court found that Obley's judicial misconduct claim was procedurally barred. It determined that Obley's claim that he received ineffective assistance of counsel during the hearing on his motion to withdraw his plea was without merit because Obley elected to represent himself. It found that Obley's claim that counsel was ineffective in coercing him to enter his plea was without merit because the court found the plea to be entered freely, knowingly, voluntarily, and intelligently. The court found Obley's claim that counsel failed to investigate to be without merit because Obley entered a plea of no contest in which he declined to contest the facts upon which the charge was based. As to Obley's claim of ineffective assistance of appellate counsel for failing to raise the other claims on direct appeal, the district court stated that "[t]here is no evidence contained in the bill of exceptions which would form a basis from which appellate counsel would raise these arguments." Finally, the court found Obley's jurisdictional claim to be meritless.

Obley timely filed a motion to reconsider. While that motion was pending, Obley filed a notice of appeal, docketed as our case No. A-09-904. In due course, on March 24, 2010, we

dismissed the appeal for lack of jurisdiction, determining that the pending motion for rehearing constituted a motion to alter or amend the judgment and terminated the running of the time for appeal.

Thereafter, the district court overruled the motion to reconsider and Obley, through appellate counsel, timely filed a new notice of appeal, which was docketed as the instant case.

ASSIGNMENTS OF ERROR

Obley assigns that the district court erred in (1) denying an evidentiary hearing, (2) denying his motion for postconviction relief, and (3) finding Obley's plea was knowingly and voluntarily entered.

STANDARD OF REVIEW

[1] 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. *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010).

[2,3] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *Id.* 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. McGhee, supra*.

ANALYSIS

Obley's brief argues his three assignments of error collectively: Because Obley alleged facts in his motion for postconviction relief which would constitute a denial of his constitutional rights, the district court erred in denying his motion without an evidentiary hearing. Although Obley's assignments

of error are broad enough to encompass the district court's denial of all the claims raised in his motion for postconviction relief, we limit our review to those claims that were raised in his motion and also argued in his brief. See *State v. McGhee, supra* (alleged error must be both specifically assigned and specifically argued in brief of party asserting error to be considered by appellate court). See, also, *State v. Gunther*, 278 Neb. 173, 768 N.W.2d 453 (2009). Thus, we do not address the allegations of the motion regarding judicial misconduct, the purported invalidity of the information, and Obley's understanding of the no contest plea.

Obley's arguments in his brief are limited to his claims for relief that trial counsel provided ineffective assistance of counsel by inducing him to enter a plea, by failing to investigate, and by failing to adequately represent him at the hearing on the motion to withdraw his plea. He also argues that appellate counsel was ineffective in not discussing the appeal with Obley resulting in the withdrawal of plea issue not being raised on direct appeal. Because Obley was represented by the public defender's office at the trial level and on direct appeal, this postconviction proceeding is his first opportunity to raise claims of ineffective assistance of counsel. See *State v. McGhee, supra*.

[4] 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*, 279 Neb. 964, 783 N.W.2d 416 (2010). The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *Id.* Because Obley's conviction was the result of a plea, the prejudice requirement is satisfied if he can show a reasonable probability that, but for the errors of counsel, he would have insisted on going to trial rather than pleading. See *id.*

Most of Obley's arguments relate to his postconviction claims that trial counsel was ineffective in failing to defend and protect Obley's interests during the hearing on his motion

to withdraw his no contest plea and that appellate counsel was ineffective in failing to pursue any claims regarding the hearing on Obley's motion to withdraw his plea.

We consider Obley's lack of representation at the time of the hearing on his motion to withdraw his plea. Without the assistance of counsel, Obley filed the motion to withdraw his no contest plea. At the start of the hearing on Obley's motion, the public defender stated that Obley was requesting to proceed on the matter "on his own without counsel" and the public defender asked for leave to withdraw. After Obley explained that he had not wanted to plead no contest but wanted to go to trial, the court asked Obley if he was "comfortable going forward on [his] own." Obley answered that he was.

[5,6] A defendant has the right under the federal and state Constitutions to be represented by an attorney in all critical stages of a criminal prosecution. See *State v. Miner*, 273 Neb. 837, 733 N.W.2d 891 (2007). Critical stages of a criminal prosecution are those stages at which the substantial rights of a defendant may be affected. *State v. Gray*, 8 Neb. App. 973, 606 N.W.2d 478 (2000), *overruled on other grounds, State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001).

Our review of Nebraska case law has not uncovered any cases explicitly deciding whether a hearing on a motion to withdraw a plea is a "critical stage" of a criminal proceeding.

[7] Other jurisdictions have considered the issue and held that a hearing on a motion to withdraw a guilty plea is a critical stage in the proceedings, carrying with it the right to counsel. See, e.g., *U.S. v. Sanchez-Barreto*, 93 F.3d 17 (1st Cir. 1996); *U.S. v. Garrett*, 90 F.3d 210 (7th Cir. 1996); *United States v. White*, 659 F.2d 231 (D.C. Cir. 1981); *United States v. Crowley*, 529 F.2d 1066 (3d Cir. 1976); *Ducker v. State*, 986 So. 2d 1224 (Ala. Crim. App. 2007); *Fortson v. State*, 272 Ga. 457, 532 S.E.2d 102 (2000); *State v. Harell*, 80 Wash. App. 802, 911 P.2d 1034 (1996); *Browning v. Com.*, 19 Va. App. 295, 452 S.E.2d 360 (1994); *Randall v. State*, 861 P.2d 314 (Okla. Crim. App. 1993); *Martin v. State*, 588 N.E.2d 1291 (Ind. App. 1992); *Beals v. State*, 106 Nev. 729, 802 P.2d 2 (1990); *Lewis v. United States*, 446 A.2d 837 (D.C. App.

1982); *People v. Holmes*, 12 Ill. App. 3d 1, 297 N.E.2d 204 (1973). Cf. *State v. Hartshorn*, 149 Idaho 454, 235 P.3d 404 (2010) (postjudgment hearing on motion to withdraw guilty pleas was not critical stage of proceedings at which right to counsel attached).

[8] The same constitutional right to counsel also guarantees the right of a defendant to represent himself or herself. See *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001). A defendant may waive the constitutional right to counsel, so long as the waiver is made knowingly, voluntarily, and intelligently. *State v. Figeroa*, 278 Neb. 98, 767 N.W.2d 775 (2009). Formal warnings do not have to be given by the trial court to establish a knowing, voluntary, and intelligent waiver of the right to counsel. *Id.*

[9] However, in the case before us, the district court did not resolve the uncertainty. The court did not ask Obley whether he intended to waive his right to counsel or whether he wanted the assistance of appointed counsel. Rather, the court merely asked Obley if he was comfortable proceeding on his own without giving Obley any options. The court in *Fortson v. State, supra*, considered a similar situation in which the defendant filed a pro se motion to withdraw his plea and appeared pro se at the hearing on the motion. The *Fortson* court determined that the trial court was obligated to inform the defendant of his right to counsel or to obtain a constitutionally valid waiver of counsel and that the absence of counsel was prejudicial. It therefore reversed, and remanded the cause for another hearing on the defendant's motion to withdraw his plea. Similarly, the district court in this case should have advised Obley that he had a right to counsel. Because Obley was not advised of a right to counsel, we question how he could have effectively waived that right. A waiver of the Sixth Amendment right to counsel is valid only when it reflects an intentional relinquishment or abandonment of a known right or privilege; therefore, the key inquiry is whether one who waived the Sixth Amendment right was sufficiently aware of the right to have counsel and of the possible consequences of a decision to forgo the aid of counsel. *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997).

[10] We agree with the jurisdictions cited above that the hearing on Obley's motion to withdraw his plea was a critical stage of the proceeding at which the right to counsel attached. The lack of representation by counsel at this hearing is the linchpin of Obley's appeal. Prejudice is presumed where the accused is completely denied counsel at a critical stage of the proceedings. *State v. Davlin*, 265 Neb. 386, 658 N.W.2d 1 (2003). Because Obley's counsel asked to withdraw at the beginning of the hearing, Obley proceeded to represent himself at the hearing, and the record does not clearly show a knowing waiver of the right to counsel. We conclude that the district court erred in not granting an evidentiary hearing on this issue, which was couched in terms of Obley's claims of ineffective assistance of trial and appellate counsel. Accordingly, we reverse, and remand for further proceedings on those claims.

Obley also alleged in his motion for postconviction relief that his trial counsel was ineffective in failing to investigate and interview the State's witnesses. Obley alleges that counsel failed to interview specific witnesses who were endorsed on the information and who were involved in treating the victim, but Obley does not indicate what information these witnesses would have provided. Recently, in *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010), the Nebraska Supreme Court reiterated that in assessing postconviction claims that trial counsel was ineffective in failing to call a particular witness, it had upheld dismissal without an evidentiary hearing where the motion did not include specific allegations regarding the testimony which the witness would have given if called. Because Obley's motion lacked specific allegations regarding the nature of these individuals' testimonies, the district court did not err in denying an evidentiary hearing on this claim.

Obley claims that trial counsel was ineffective in failing to "investigate and gather" the sexual assault examination report "to determine if the victim was actually sexually assaulted and whether there was exculpatory evidence on the report" because a hospital laboratory result summary indicated the absence of "spermatozoom" and had no mention of redness, swelling, or irritation around the victim's vagina. Obley

implies that the sexual assault examination report would similarly show the absence of sperm and no evidence of trauma to the victim's vaginal area. According to the factual basis provided by the State, the evidence would show that Obley subjected the victim to penile-vaginal penetration without the victim's consent.

Because the district court's ruling on this claim relied upon Obley's plea and we have already determined that he is entitled to an evidentiary hearing regarding his claims of ineffective assistance of counsel as to the alleged denial of counsel at the hearing to withdraw the plea, the course of proceedings on this claim may turn upon the outcome of the evidentiary hearing. The district court found this claim to be without merit because Obley "entered a plea of 'no contest' to the charge of first degree sexual assault in which he declined to contest the facts upon which the charge was based." If the evidentiary hearing shows that Obley was not aware of his right to counsel at the hearing to withdraw his plea, he would be entitled to a hearing on the motion with the assistance of counsel. If he then prevailed at such a hearing, the plea would be withdrawn and this claim of ineffective assistance of counsel regarding the sexual assault report would become moot.

On the other hand, if the evidentiary hearing were to show that Obley was aware of his right to counsel at the hearing to withdraw his plea and that he voluntarily waived the right by going forward "on [his] own," then on the claim regarding the sexual assault report he would have the usual burden of showing both that counsel's performance was deficient and that he was prejudiced—that is, that but for the ineffective assistance of counsel he would have insisted on going to trial. The court erred in denying an evidentiary hearing on this issue.

CONCLUSION

Because we conclude that the district court erred in denying an evidentiary hearing on Obley's claims of ineffective assistance of counsel relating to the hearing on his motion to withdraw his plea, we reverse, and remand for an evidentiary hearing on those claims. We further reverse, and remand for an evidentiary hearing on Obley's claim of ineffective

assistance of counsel regarding counsel's alleged failure to obtain the sexual assault examination report. We affirm the denial of postconviction relief on all other claims.

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