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he may not have been able to provide the legal definition of the terms "life estate" or "remainder."

Upon our de novo review, we conclude there is sufficient evidence in the record to establish that Lester understood that by signing the April 21, 2005, deed, he was giving his farm away upon his death, and that he wanted to give the farm to Cheri. In addition, there was ample testimony to demonstrate that Lester understands what it means to give something away. The fact that he executed a more "complicated" deed in order to retain possession of the farm until his death does not, by itself, demonstrate that he lacked the mental capacity to appreciate what he was doing when he signed the deed.

In light of the district court's factual findings, we conclude that the district court erred in finding that Lester lacked the mental capacity to execute the April 21, 2005, deed and, as a result, erred in setting aside that deed.

VI. CONCLUSION

Upon our de novo review of the record, we conclude that although there was conflicting evidence presented concerning Lester's capacity to execute the April 21, 2005, deed, the district court found that Lester was capable of understanding "the concept of giving property away" and the effect of a simple deed of conveyance. Such a finding is sufficient to establish that Lester had the capacity to execute the deed. As such, we reverse the district court's order setting aside the deed.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V.
PAUL W. MICK, APPELLANT.
808 N.W.2d 663

Filed February 14, 2012. Nos. A-11-235, A-11-236.

1. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.

2. ____: ____. If it is more appropriate to dispose of an ineffectiveness claim because of the lack of sufficient prejudice, that course should be followed.
3. **Effectiveness of Counsel: Records: Appeal and Error.** Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question.
4. **Sentences.** In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.
5. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
6. ____. In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
7. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.
8. **Criminal Law: Restitution: Damages.** Neb. Rev. Stat. § 29-2280 et seq. (Reissue 2008) vests trial courts with the authority to order restitution for actual damages sustained by the victim of a crime for which the defendant is convicted.
9. ____: ____: ____. Pursuant to Neb. Rev. Stat. § 29-2281 (Reissue 2008), before restitution can be properly ordered, the trial court must consider: (1) whether restitution should be ordered, (2) the amount of actual damages sustained by the victim of a crime, and (3) the amount of restitution a criminal defendant is capable of paying.
10. **Criminal Law: Restitution: Damages: Proof.** The language of Neb. Rev. Stat. § 29-2281 (Reissue 2008) and the case law require appropriate sworn documentation to support both the actual damages sustained by the victim and the defendant's ability to pay restitution.
11. **Restitution: Appeal and Error.** On appeal, an appellate court does not endeavor to reform the trial court's order. Rather, the appellate court reviews the record made in the trial court for compliance with the statutory factors which control restitution orders.

Appeals from the District Court for Gage County: PAUL W. KORSLUND, Judge. Affirmed in part, sentence of restitution vacated, and cause remanded with directions.

Franklin E. Miner for appellant.

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

INBODY, Chief Judge, and SIEVERS and PIRTLE, Judges.

INBODY, Chief Judge.

INTRODUCTION

Paul W. Mick appeals his plea-based convictions and sentences in Gage County District Court in two separate criminal cases, which have been consolidated for review on appeal. Pursuant to Neb. Ct. R. App. P. § 2-111(E)(5)(a) (rev. 2008), this case was submitted without oral argument.

STATEMENT OF FACTS

In the first case, on October 1, 2010, at approximately 1:30 a.m., Beatrice police officers were dispatched to a business in response to a report of a broken-out garage door. Upon arrival at the scene, officers observed a shattered overhead door and a license plate in the driveway near the door. A restored 1968 Ford Fairlane 500 was determined to be missing from the business. An hour later, a deputy with the Gage County sheriff's office observed the vehicle and attempted to initiate a traffic stop of the vehicle, but was unsuccessful, and a pursuit of the vehicle ensued. Beatrice police officers deployed mechanical tire deflators, which the vehicle ran over and continued. When the vehicle came to a stop shortly thereafter, the driver exited the vehicle and took off running on foot. The deputy chased and eventually stopped the driver, later identified as Mick. Officers observed alcohol containers in the vehicle, and during an interview with the deputy, Mick admitted to driving under the influence.

In the second case, the Beatrice Police Department was dispatched to a convenience store regarding possible fraud involving Mick's attempt to cash a check for $635 on another individual's checking account, which check was later discovered missing. The individual believed that Mick was the only individual who had access to her checkbook. During an interview with police, Mick admitted that he stole the check, filled it out for $635, and attempted to cash it at the convenience store.

As a result of these incidents, Mick was charged with eight counts in the first criminal case and one count in the second case. Those counts included the following: burglary, theft by receiving stolen property, operating a motor vehicle to avoid

arrest, willful reckless driving, obstructing a peace officer, driving under the influence, refusal to submit to a preliminary breath test, refusal to submit to a chemical test, and second degree forgery (more than $300 but less than $1,000).

Pursuant to a plea agreement with the State, Mick pled no contest to burglary, operating a motor vehicle to avoid arrest, driving under the influence, and second degree forgery. The State moved to dismiss the remaining charges, Mick agreed to a civil judgment of restitution in the amount of $12,469.74, and the parties agreed that they would jointly recommend a sentence of 14 to 15 years' imprisonment for the burglary charge. The district court accepted Mick's pleas, and Mick then moved to waive the presentence investigation, which motion was overruled. At sentencing, Mick was sentenced to 14 to 15 years' imprisonment with 146 days' credit for time served for the burglary conviction; 20 to 60 months' imprisonment for the operating a motor vehicle to avoid arrest conviction; 60 days' confinement, a $400 fine, and a 6-month license revocation for the driving under the influence conviction; and 20 to 60 months' imprisonment for the second degree forgery conviction. The district court ordered the sentences to run consecutively, and Mick was ordered to pay a civil judgment of $12,469.74 as restitution pursuant to the parties' plea agreement. Mick has timely appealed to this court.

ASSIGNMENTS OF ERROR

Mick assigns that he received ineffective assistance of trial counsel and that the district court abused its discretion by imposing excessive sentences.

ANALYSIS

Ineffective Assistance of Counsel.

Mick contends that he received ineffective assistance of counsel because trial counsel did not properly research his right to waive the presentence investigation report and did not object to the short amount of time given to complete the presentence investigation report.

[1-3] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct.

2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010). If it is more appropriate to dispose of an ineffectiveness claim because of the lack of sufficient prejudice, that course should be followed. *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004). Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. *Id.*

The record indicates that at trial, Mick's counsel made the following request to waive the presentence investigation:

> Mick has asked me to request that he be allowed to waive the presentence investigation. I was not aware of the ability to do so in a felony matter. However, . . . Mick did have a printout. It's part of a case. It's not the entire case, but it does appear that [§] 29-2261(1) may allow that to be done in a felony proceeding. And again, he provided this to me this morning so I didn't have a chance to look it up. But he would like to go forward with sentencing and waive the right to a presentence.

The court indicated that it was aware the presentence investigation could be waived, but that it was not typically done, and overruled the motion, ordering the presentence investigation to proceed. Specifically, the district court determined, "I agree that the presentence investigation can be waived under certain circumstances, but it's not something that is typically done. I would prefer to have a presentence investigation before proceeding . . . ."

Neb. Rev. Stat. § 29-2261(1) (Reissue 2008) requires that a presentence investigation be completed in felony matters. However, the Nebraska Supreme Court has construed this statute as a mandate imposed for the benefit of the defendant and gives the defendant a statutory right to a presentence investigation. See *State v. Tolbert*, 223 Neb. 794, 394 N.W.2d 288 (1986). However, the court further found that the right to have a presentence investigation completed prior to sentencing may be waived. *Id.*

While Mick's counsel may have indicated to the trial court that she was unfamiliar with the ability to waive the presentence investigation in a felony matter, she maintained to the district court, as requested by Mick, Mick's request to waive the presentence investigation. The district court considered Mick's request to waive the presentence investigation and denied his request. There is nothing in the record to indicate that counsel's failure to research waiver of a presentence investigation in a felony matter prejudiced him in any way.

Mick further argues that counsel failed to object to the short amount of time given to complete the presentence investigation. Mick was adjudged guilty on February 2, 2011, and was sentenced on February 23. Specifically, Mick argues that his statement is missing from the report as a result of the short turnaround between his plea and his sentencing. The presentence investigation does not include a statement by Mick, but indicates that Mick's counsel was to provide his statement to the probation office and had not done so. However, the record indicates that while there is no defendant's statement contained in the presentence investigation report, at sentencing, Mick was given the opportunity to give a statement and declined. Thus, any possibility of prejudice was cured when Mick was given an opportunity to give a statement in court at the time of his sentencing. Accordingly, we need not determine whether counsel was ineffective in failing to provide her client's statement for the presentence investigation. See *State v. Williams*, 259 Neb. 234, 609 N.W.2d 313 (2000) (if it is easier to dispose of ineffectiveness claim on ground of lack of sufficient prejudice, that course should be followed). This assignment of error is without merit.

Excessive Sentences—Imprisonment.

Mick argues that the district court abused its discretion by imposing excessive sentences.

[4-6] In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *State v. Nelson*, 276 Neb. 997, 759 N.W.2d 260 (2009). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's

demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.* In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Davis*, 277 Neb. 161, 762 N.W.2d 287 (2009).

[7] A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

The presentence investigation report indicated that Mick was 36 years old, had a ninth-grade education, and had a lengthy criminal history, beginning in 1989, when Mick was a juvenile. Many of his convictions are for incidents similar to the present case and involve numerous prison sentences.

We have carefully reviewed the record and the sentences imposed for each of Mick's convictions. All of the sentences are within the statutory limits. Furthermore, at the sentencing hearing, in addition to other factors, the district court specifically indicated that it had taken into consideration the plea agreement and that Mick had saved the State the time and expense of the trial. Therefore, we cannot say that the district court abused its discretion by imposing sentences within the statutory limits.

Excessive Sentences—Restitution.

Mick also argues that the district court abused its discretion at sentencing by ordering restitution, based upon grounds that the district court did not take into consideration his ability to pay.

[8] Neb. Rev. Stat. § 29-2280 et seq. (Reissue 2008) vest trial courts with the authority to order restitution for actual damages sustained by the victim of a crime for which the defendant is convicted. *State v. Holecek*, 260 Neb. 976, 621 N.W.2d 100 (2000). In imposing restitution, § 29-2281 provides, in part, the following parameters:

> To determine the amount of restitution, the court may hold a hearing at the time of sentencing. The amount of restitution shall be based on the actual damages sustained by the victim and shall be supported by evidence which shall become a part of the court record. The court shall consider the defendant's earning ability, employment status, financial resources, and family or other legal obligations and shall balance such considerations against the obligation to the victim.

[9,10] Pursuant to § 29-2281, before restitution can be properly ordered, the trial court must consider: (1) whether restitution should be ordered, (2) the amount of actual damages sustained by the victim of a crime, and (3) the amount of restitution a criminal defendant is capable of paying. *State v. Wells*, 257 Neb. 332, 598 N.W.2d 30 (1999). The language of § 29-2281 and the case law require appropriate sworn documentation to support both the actual damages sustained by the victim and the defendant's ability to pay restitution. *State v. Wells, supra*.

The record indicates that, as part of the plea agreement, Mick agreed to $12,469.74 of restitution as part of a civil judgment. At the plea hearing, Mick indicated to the district court that he understood the terms of the plea agreement and had not been threatened or promised anything to enter into the agreement. The district court found that Mick understood his rights; was acting freely and voluntarily; understood the nature of the charges, the possible penalties, and the effect of the pleas; and had entered his pleas voluntarily, knowingly, and intelligently. At the sentencing hearing, Mick's counsel specifically stated that Mick "would also ask the Court to enter a civil judgment in the amount of $12,469.74."

However, the record is devoid of any evidence of the trial court's meaningful consideration of Mick's ability to pay the restitution ordered. We are mindful that, pursuant to the plea agreement, Mick agreed to pay restitution to the victim in this case. Nonetheless, despite the plea agreement, the court must still give meaningful consideration to Mick's ability to

pay restitution, and the record does not establish that the court did so.

[11] On appeal, we do not endeavor to reform the trial court's order. Rather, we review the record made in the trial court for compliance with the statutory factors which control restitution orders. *State v. Wells, supra*. Having reviewed the record in this case, we find that the record does not indicate that the trial court meaningfully considered the factors mandated by § 29-2281 with respect to Mick's ability to pay $12,469.74 in restitution. Therefore, the district court erred in the restitution order, and as such, we vacate the trial court's order regarding restitution and remand this matter to the trial court for such proceedings as are consistent with this opinion and the statutory factors set forth in § 29-2281.

CONCLUSION

In conclusion, we find no merit to Mick's claims that his trial counsel was ineffective or that the district court abused its discretion by imposing sentences which are within the statutory ranges; thus, we affirm that portion of the district court's order imposing said sentences. The portion of the sentences regarding restitution is vacated, and the cause is remanded for proceedings consistent with this opinion.

AFFIRMED IN PART, SENTENCE OF RESTITUTION VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

JAMES SPENCER COLLINS, APPELLEE, V. LEE MARIE COLLINS, APPELLANT, AND STATE OF NEBRASKA ON BEHALF OF MATTHEW COLLINS AND CODY COLLINS, INTERVENOR-APPELLEE.

808 N.W.2d 905

Filed February 14, 2012. No. A-11-251.

1. **Modification of Decree: Child Support: Appeal and Error.** An appellate court reviews proceedings for modification of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion.