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trust funds belonging to the Trust. In creating the account, Shirley did not intend for Robin to have survivorship rights to the remaining balance of $77,937.09, and the account most nearly conforms to an agency or convenience account. Robin converted the funds in the account for her own use by refusing to turn them over to the Trust. Accordingly, we affirm the decision of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DAMIEN D. WATKINS, APPELLANT.
825 N.W.2d 403

Filed November 30, 2012. No. S-11-1105.

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.** A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.
3. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.
4. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
5. **Postconviction: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.
6. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.
7. **Postconviction.** The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.
8. **Postconviction: Appeal and Error.** It is fundamental that a motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal.
9. ____: ____. An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the

basis relied upon for relief was not available at the time the movant filed the prior motion.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

Michael J. Wilson, of Schaefer Shapiro, L.L.P., for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

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

CASSEL, J.

INTRODUCTION

In a second postconviction proceeding, the appellant attempted to raise the issue of his competence to enter a guilty plea but he alleged no reason why the issue could not have been asserted in his direct appeal or his first postconviction proceeding. Because the need for finality in the judicial process demands application of a procedural bar rule, we affirm the district court's judgment.

BACKGROUND

In 2004, while represented by counsel, Damien D. Watkins pled guilty to second degree murder. The district court sentenced him to 40 years to life in prison.

Through appellate counsel different from trial counsel, Watkins filed a direct appeal. Watkins assigned only that the district court erred in denying his motion to withdraw his guilty plea without holding an evidentiary hearing. On November 16, 2005, in case No. S-05-271, this court sustained the State's motion for summary affirmance.

In 2006, Watkins filed a motion for postconviction relief. He alleged the denial of a fair trial and due process when the trial court accepted his guilty plea without first advising him of his right to the assistance of counsel at trial and receiving acknowledgment of that right. Watkins asserted that he was denied the effective assistance of trial counsel concerning an alleged breach of the plea agreement by the State. He also

claimed a denial of the effective assistance of appellate counsel by counsel's failure to raise the above issues on appeal. The district court appointed counsel different from trial and appellate counsel to represent Watkins. Following an evidentiary hearing, the court denied the motion. Upon Watkins' appeal assisted by yet another attorney, this court found no error and affirmed the district court's judgment.[1]

In 2011, Watkins filed a pro se second verified motion for postconviction relief and request for an evidentiary hearing. He again asserted that he was denied his constitutional rights to a fair trial, to due process of law, and to effective assistance of counsel. More specifically, Watkins alleged that his rights were violated when the trial court accepted his guilty plea without first advising him of his right to the assistance of counsel at trial and receiving an acknowledgment from Watkins, which Watkins claimed made his plea not knowingly, intelligently, voluntarily, understandingly, and freely made. Watkins alleged that he was denied the effective assistance of counsel when trial counsel (1) advised Watkins not to alert the court concerning Watkins' mental health history, (2) failed to move to suppress Watkins' confession, (3) failed to investigate the facts and merits of the case, and (4) failed to inform the court that Watkins was on a mind-altering medication. Watkins also alleged that appellate counsel failed to effectively communicate with him prior to filing the appeal and that counsel failed to raise all appealable issues. Watkins attached exhibits to his postconviction motion relating to his May 2003 admission to a mental health center.

The State moved to dismiss Watkins' motion without an evidentiary hearing, contending that Watkins was asserting arguments that could have been raised in the previous postconviction motion. The district court granted the State's motion and dismissed Watkins' motion for postconviction relief without an evidentiary hearing. The court reasoned that Watkins' "mental situation" had been known to him since he entered his plea in October 2004 and that the other issues raised in the motion had already been litigated.

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

Watkins timely appealed. The State filed a motion for summary affirmance, which we overruled.

ASSIGNMENT OF ERROR

Watkins assigns the following error: "Because Nebraska law states there is no 'procedural bar in postconviction proceedings of issues relating to competency to stand trial,' the district court erred when, based solely on its finding that the issues were procedurally barred, it dismissed . . . Watkins' competency issues without an evidentiary hearing."

STANDARD OF REVIEW

[1] 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]

[2-4] A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.[3] If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.[4] In appeals from postconviction proceedings, we review de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.[5]

[5,6] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.[6] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.[7]

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[2] *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011).

[3] *State v. Edwards, ante* p. 382, 821 N.W.2d 680 (2012).

[4] *Id.*

[5] *Id.*

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

[7] *Id.*

ANALYSIS

[7-9] The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.[8] Therefore, it is fundamental that a motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal.[9] Similarly, an appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion.[10]

Watkins had two previous opportunities to raise his competency-related claims: (1) his direct appeal and (2) his first motion for postconviction relief. His second motion for postconviction relief does not show on its face that the competency issues were unknown or unavailable to him at those earlier opportunities. Further, the motion does not attempt to state any reason why the competency issues were not raised in the prior proceedings. The record shows that no issue relating to competency was raised despite Watkins' having been represented by four different attorneys: his initial counsel at the time of his guilty plea, a second attorney on direct appeal, a third attorney during the first postconviction proceedings at the trial court level, and yet another attorney on the first postconviction appeal.

In the second postconviction proceeding, the district court concluded that the competency issues were procedurally barred because Watkins did not raise them in his first motion for postconviction relief. We agree.

Nearly 40 years ago, this court applied a procedural bar to a claim challenging competency to stand trial.[11] In *State v. Fincher*,[12] the defendant had originally filed a direct appeal challenging the excessiveness of his sentence, which was

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[8] *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009).

[9] *Id.*

[10] *Id.*

[11] See *State v. Fincher*, 191 Neb. 446, 216 N.W.2d 172 (1974).

[12] *Id.*

affirmed.[13] He subsequently lost on appeal from the denial of postconviction relief, where he alleged incompetence, ineffective assistance of counsel, error involving jury instructions, and a failure of proof.[14] The defendant then filed a petition for a writ of habeas corpus in federal court challenging the propriety of jury instructions on an insanity defense, the effectiveness of counsel, and the failure of the trial court to hold a hearing on the defendant's competency to stand trial. But the federal court dismissed the petition without prejudice because the defendant had not exhausted his state remedies as to the trial court's failure to hold a competency hearing. The defendant filed a second postconviction motion, which was summarily overruled. In affirming the district court's judgment on appeal, this court stated: "'There ought to be some final end to litigation in a criminal case. . . . There is no justification for allowing a prisoner to continue litigation endlessly by piecemeal [postconviction] attacks on his conviction and sentence.'"[15]

Watkins asserts that where issues relating to competency to stand trial are involved, Nebraska law does not allow a procedural bar in postconviction proceedings. He relies upon *State v. Johnson*.[16] In that case, the defendant did not file a direct appeal. In a postconviction motion, the defendant alleged that trial counsel was ineffective for failing to raise the issue of competency. The Nebraska Court of Appeals determined that the record failed to demonstrate that counsel was ineffective, but found that there was plain error due to the trial court's failure to hold a full hearing on the defendant's competency when the court was faced with reasonable doubt regarding competency. The *Johnson* court noted that *Fincher*[17] was procedurally distinguishable and stated, in dicta, "[T]he continued viability of the rule used to deny relief in *Fincher* has to be very much

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[13] See *State v. Fincher*, 188 Neb. 376, 196 N.W.2d 909 (1972).

[14] See *State v. Fincher*, 189 Neb. 746, 204 N.W.2d 927 (1973).

[15] *State v. Fincher, supra* note 11, 191 Neb. at 447, 216 N.W.2d at 173, quoting *State v. Reichel*, 187 Neb. 464, 191 N.W.2d 826 (1971).

[16] *State v. Johnson*, 4 Neb. App. 776, 551 N.W.2d 742 (1996).

[17] *State v. Fincher, supra* note 11.

in doubt at this point."[18] The *Johnson* court discussed two decisions from this court which suggested a procedural bar in postconviction proceedings when competency to stand trial was not raised on direct appeal: *State v. Painter*[19] and *State v. Rehbein*.[20] However, the *Johnson* court concluded that there should not be a procedural bar, stating:

> [D]espite the suggestions in *Painter* and *Rehbein*, we do not believe the law is that there is a procedural bar in postconviction proceedings of issues relating to competency to stand trial, and we decline to impose such a procedural bar for these issues in this postconviction proceeding. In reaching this conclusion, we bear in mind the sanctity of constitutional protections and the need to guard against constitutionally infirm convictions.[21]

Approximately 3 years after *Johnson*,[22] this court again applied a procedural bar to a competency claim raised for the first time in a second motion for postconviction relief.[23] In *State v. Ryan*,[24] the defendant did not raise any issues regarding competency to stand trial on direct appeal or in his first motion for postconviction relief. The trial court determined that the competency claims were procedurally barred but that even if not barred, the defendant was not entitled to relief because he was clearly competent during his trial. This court agreed, stating that because the defendant failed to raise the competency issue on direct appeal or in his first postconviction proceeding, the claim was procedurally barred unless the defendant could show that the basis for relief was unavailable when the prior motions were filed. This court reasoned that the reports on the defendant's mental condition, which were prepared before his trial, were available to the defendant and his counsel at all times. We stated, "Allowing [the defendant]

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[18] *State v. Johnson, supra* note 16, 4 Neb. App. at 800, 551 N.W.2d at 758.

[19] *State v. Painter*, 229 Neb. 278, 426 N.W.2d 513 (1988).

[20] *State v. Rehbein*, 235 Neb. 536, 455 N.W.2d 821 (1990).

[21] *State v. Johnson, supra* note 16, 4 Neb. App. at 801, 551 N.W.2d at 758.

[22] *State v. Johnson, supra* note 16.

[23] See *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999).

[24] *Id.*

to first raise the issue of competency after more than 10 years of appellate litigation during which [the defendant] chose not to raise the issue would make a mockery of the finality of the judicial process."[25]

Watkins points out that *Ryan*[26] did not overrule *Johnson*.[27] He contends that the *Ryan* court did not hold that the procedural bar must be imposed on every defendant who fails to raise a constitutional issue at the first opportunity and then upon subsequently raising it, fails to show that it was previously unavailable. Thus, he contends that we should not apply the procedural bar rule. We disagree.

We reaffirm our holdings in *Fincher*[28] and *Ryan*.[29] As in those cases, the instant case involves a successive motion for postconviction relief. In contrast, the competency issue was raised in *Johnson*[30] in a first postconviction proceeding after no direct appeal had been taken. While the trial court's colloquy with the defendant in *Johnson* at the time of the plea raised an obvious issue of competence, the district court's colloquy with Watkins at the time of his guilty plea does not suggest any such problem. Watkins' admission to a mental health center predated his guilty plea, and he has not alleged that his mental health records were not available to his attorneys in any of the prior proceedings. Watkins essentially asks for a rule establishing that an issue related to competency to stand trial or to enter a plea is never procedurally barred. While we recognize the constitutional imperative of an accused's competence to enter a guilty plea,[31] we reject the argument that a procedural bar can never apply to an issue of competence. Because of the need for finality, we decline to establish such a rule.

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[25] *Id*. at 662, 601 N.W.2d at 493.

[26] *State v. Ryan, supra* note 23.

[27] *State v. Johnson, supra* note 16.

[28] *State v. Fincher, supra* note 11.

[29] *State v. Ryan, supra* note 23.

[30] *State v. Johnson, supra* note 16.

[31] See *Pate v. Robinson*, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966).

CONCLUSION

Because Watkins did not allege that the competency-related issues he raised in his second motion for postconviction relief were not available previously or could not have been raised either on direct appeal or in his first postconviction proceeding, the claims are procedurally barred. We affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RYAN L. POE, APPELLANT.

822 N.W.2d 831

Filed November 30, 2012. No. S-12-141.

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. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.
3. ____: ____. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.
4. ____: ____. 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.
5. **Postconviction: Constitutional Law: Judgments: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution, causing the judgment against the defendant to be void or voidable.
6. **Postconviction.** An evidentiary hearing is not required when a motion for postconviction relief alleges only conclusions of fact or law.
7. **Postconviction: Constitutional Law: Judgments: Proof.** If a defendant makes sufficient allegations of a constitutional violation which would render a judgment void or voidable, an evidentiary hearing on a motion for postconviction relief may be denied only when the records and files affirmatively show that the defendant is entitled to no relief.
8. **Constitutional Law: Trial: Due Process.** The Due Process Clause of the U.S. Constitution guarantees every defendant the right to a trial comporting with basic tenets of fundamental fairness.