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CONCLUSION

Moser has established the existence of a reasonable probability that had he been adequately advised about the possibility of pursuing suppression of the evidence following the traffic stop of his vehicle, he would not have pled guilty, but would have insisted on filing a motion to suppress and going to trial. Having established prejudice from the ineffective assistance of trial counsel, we reverse the decision of the district court and remand the cause with directions to set aside Moser's conviction, to allow him to withdraw his plea, and for further proceedings.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. RODNEY E. SEEGER, APPELLANT.

822 N.W.2d 436

Filed October 23, 2012. No. A-11-804.

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.** 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.
3. **Postconviction: Constitutional Law: Proof.** A court must grant an evidentiary hearing on a postconviction motion when the motion contains factual allegations which, if proven, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.
4. **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 movant is entitled to no relief—no evidentiary hearing is required.
5. **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. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.

6. **Postconviction: Pleas: Effectiveness of Counsel.** In a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
7. **Effectiveness of Counsel: Pleas: Proof.** Within the plea context, in order to satisfy the prejudice requirement to establish an ineffective assistance of counsel claim, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial.
8. ____: ____: ____. Self-serving declarations that a defendant would have gone to trial will not be enough; a defendant must present objective evidence showing a reasonable probability that he or she would have insisted on going to trial.
9. **Effectiveness of Counsel: Pleas.** In a claim of ineffective assistance of counsel regarding the entry of a guilty plea, the likelihood of the defense's success should be considered with other factors such as the likely penalties the defendant would face if convicted at trial, the relative benefit of the plea bargain, and the strength of the State's case.

Appeal from the District Court for Sarpy County: MAX KELCH, Judge. Affirmed.

Gregory A. Pivovar for appellant.

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

INBODY, Chief Judge, and MOORE and RIEDMANN, Judges.

MOORE, Judge.

INTRODUCTION

Following his plea-based convictions in the district court for Sarpy County for two counts of incest, Rodney E. Seeger filed a pro se postconviction motion. The court granted an evidentiary hearing on the allegation that Seeger received ineffective assistance of trial counsel due to counsel's alleged failure to file a direct appeal after being requested to do so. The court denied Seeger's other postconviction claims without an evidentiary hearing. Because we find no error in the denial of the remaining postconviction claims without an evidentiary hearing, we affirm.

BACKGROUND

The State filed an information in the district court, charging Seeger with two counts of first degree sexual assault in

violation of Neb. Rev. Stat. § 28-319(1)(a) and (b) (Reissue 2008), both Class II felonies; two counts of incest in violation of Neb. Rev. Stat. § 28-703 (Reissue 2008), both Class III felonies; and two counts of child abuse in violation of Neb. Rev. Stat. § 28-707(4) (Reissue 2008), both Class IIIA felonies.

A plea hearing was held on April 19, 2010. Seeger agreed to enter guilty pleas to the two counts of incest. In exchange, the State agreed to dismiss the counts of first degree sexual assault and child abuse. The State also agreed to remain silent at sentencing and not seek a determination that these were aggravated offenses for purposes of the sex offender statutes. Seeger acknowledged the terms of the plea agreement. After the district court advised Seeger of his rights and explained the consequences of pleading guilty, Seeger entered his pleas.

The State provided a factual basis, which shows that the charges arose out of sexual contact by Seeger upon his daughters. When asked by the district court to comment upon the factual basis, Seeger's attorney replied, "Judge, my client did make a statement to police he did have contact in a sexual manner with these two girls, but he denies it was to the extent as described by the State. So this is a best interest plea." The court then recited what it believed a best interest plea to entail, and Seeger stated his agreement with and understanding of the court's recitation.

Seeger stated that he was entering his pleas freely and voluntarily and that no one threatened him or promised him anything other than the terms of the plea agreement to get him to enter his pleas. The district court then found that there was a factual basis to support Seeger's pleas and that the pleas were entered voluntarily, knowingly, and intelligently. After accepting Seeger's pleas, the court found him guilty of two counts of incest, dismissed the other counts of the information per the parties' plea agreement, and ordered a presentence investigation.

The district court entered an order on June 21, 2010, sentencing Seeger to consecutive terms of imprisonment for 15 to 20 years. No direct appeal was filed.

On July 5, 2011, Seeger filed a pro se motion for postconviction relief, alleging numerous claims of ineffective assistance of trial counsel, mostly concerning counsel's alleged failure to investigate the case in various ways and alleged failure to request independent testing of certain items of evidence. Seeger also alleged that his trial counsel failed to file a direct appeal after being requested to do so by Seeger.

On August 29, 2011, the district court entered an order ruling on Seeger's motion. The court granted an evidentiary hearing on the issue of whether Seeger's trial counsel failed to file a direct appeal after being requested to do so. As to Seeger's other claims, the court found that Seeger had not specifically set forth the additional evidence that might have been gathered through additional investigation or how that undetermined evidence would render a different result. Because Seeger had failed to allege more than just conclusions of fact or law, the court denied an evidentiary hearing on the balance of Seeger's claims and denied the balance of Seeger's claims for relief. Seeger subsequently perfected his appeal to this court.

ASSIGNMENTS OF ERROR

Seeger asserts, restated, that the district court erred in (1) ruling that he should not be granted an evidentiary hearing on his postconviction claims of ineffective assistance of counsel other than the failure to file a direct appeal and (2) failing to defer ruling on the remaining issues of ineffective assistance of counsel until after the evidentiary hearing and determination of whether Seeger is entitled to a new direct appeal.

STANDARD OF REVIEW

[1,2] 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. *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011). A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012). 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. *State v. Lee, supra*. An appellate court reviews factual findings for clear error. *Id*.

ANALYSIS

Seeger asserts that the district court erred in denying him an evidentiary hearing on the balance of his postconviction claims. Seeger also asserts that the court erred in deciding the balance of his postconviction claims rather than waiting for the outcome of the evidentiary hearing on the failure to file a direct appeal. Seeger argues that if he is granted a new direct appeal, it would then be appropriate to bring the ineffective assistance of trial counsel claims at that time. Seeger further argues that the district court should have simply taken the balance of the postconviction claims under advisement until after the matter of the direct appeal is decided. We will address Seeger's second argument first.

The Nebraska Supreme Court has addressed a somewhat similar issue but in a different factual situation. In *State v. Shelly*, 279 Neb. 728, 782 N.W.2d 12 (2010), Tyrus Shelly filed a postconviction motion alleging trial counsel's failure to file a direct appeal from his conviction for second degree murder, attempted second degree murder, and use of a firearm to commit a felony. The district court denied an evidentiary hearing, and on appeal, the Supreme Court vacated the order and remanded the cause to the district court with directions to conduct an evidentiary hearing on the issue of whether trial counsel failed to perfect a direct appeal. After the mandate was issued, Shelly filed another postconviction motion, alleging several claims for relief, including the denial of effective assistance of trial counsel. The district court "'overruled'" the motion, 279 Neb. at 731, 782 N.W.2d at 14, finding that because of the previous mandate, the court did not have authority to consider the additional issues in the new motion. The court also found that the new motion was procedurally barred as a successive motion.

On appeal from this decision, the Supreme Court agreed with the district court to the extent that it could not consider Shelly's second postconviction motion as part of the remand regarding the first postconviction motion as it was beyond

the terms of the mandate. However, the Supreme Court found error with the district court's overruling of the second motion and the finding that it was procedurally barred. The Supreme Court concluded that such a decision was a ruling on the merits and was outside the scope of the mandate. The Supreme Court also stated that it was premature for Shelly to file the second motion, noting that the evidentiary hearing on the first motion had not yet been held, and that "it is conceivable that following the evidentiary hearing in the first postconviction motion, the district court could grant relief in the form of a new direct appeal and that such appeal could encompass the claims Shelly set forth in the second postconviction motion." 279 Neb. at 733, 782 N.W.2d at 15.

The significant difference between *State v. Shelly, supra*, and the case at hand is that Seeger combined all of his claims of ineffective assistance of counsel in this postconviction action. Seeger has not provided any authority for the proposition that the district court was required to postpone ruling on the balance of his postconviction claims until after the evidentiary hearing on his entitlement to a new direct appeal is held. Our independent research has also not revealed any such authority. We conclude that the district court did not err in deciding the merits of the balance of the postconviction claims presented in Seeger's motion.

Although we find no error in the district court's determination of all of the postconviction claims, we note that judicial economy may have been served by deferring ruling on the balance of the postconviction claims. Under the procedure utilized by the district court in this case, Seeger was required to appeal from the denial of an evidentiary hearing on his remaining claims, as opposed to waiting until the outcome of the evidentiary hearing on whether he should be granted a new direct appeal. See *State v. Timmens*, 282 Neb. 787, 805 N.W.2d 704 (2011) (grant of evidentiary hearing on some issues and denial of hearing on others is final order as to claims denied without hearing). A better procedure would be to defer ruling on the balance of the postconviction claims until after the evidentiary hearing on the entitlement to a new direct appeal has been held. If a new direct appeal is granted, the remaining

postconviction claims could be dismissed as premature and thereafter raised in the direct appeal. If a new direct appeal is not granted, then the court could issue a final order addressing all of the claims and the appellant would be required to file only one appeal.

[3,4] We now turn to the question of whether the district court erred in denying Seeger an evidentiary hearing on the balance of his claims of ineffective assistance of counsel. A court must grant an evidentiary hearing on a postconviction motion when the motion contains factual allegations which, if proven, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. *State v. Seberger*, 284 Neb. 40, 815 N.W.2d 910 (2012). If a postconviction motion alleges only conclusions of fact or law—or if the records and files in the case affirmatively show that the movant is entitled to no relief—no evidentiary hearing is required. *Id.*

[5] 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. *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012). The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *Id.*

[6,7] In a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *State v. Dunkin, supra*. Within the plea context, in order to satisfy the prejudice requirement to establish an ineffective assistance of counsel claim, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial. *Id.*

[8] In his postconviction motion, Seeger alleged his trial counsel was ineffective for failing to investigate the facts of the case, consult with Seeger on strategy decisions for critical

aspects of the case, interview the victims, use an investigator, request independent forensic testing of physical evidence, find evidence to rebut the State's forensic evidence, request independent testing of the sexual assault kits, request independent DNA testing, raise the issue of whether the victims were competent to testify, obtain sexual assault examination reports, and obtain reports of the examination of a laptop computer and some memory cards. But, Seeger's postconviction motion did not allege any facts showing what additional evidence would have been gathered, how a different result would have been obtained, or why there was a reasonable probability that Seeger would have insisted on going to trial rather than accept a plea agreement that dismissed four felonies. Self-serving declarations that a defendant would have gone to trial will not be enough; a defendant must present objective evidence showing a reasonable probability that he or she would have insisted on going to trial. *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011). The district court did not err in failing to grant an evidentiary hearing on these issues.

In addition to the investigative failures Seeger alleged in his postconviction motion, he also alleged that his trial counsel was ineffective for not investigating his mental status or requesting a fitness hearing prior to Seeger's entry of his guilty pleas. Seeger did not allege that he was mentally unfit or incompetent to enter his guilty pleas or enter into the plea agreement. Additionally, the record from the plea hearing reflects Seeger's acknowledgment that he had had adequate time to discuss the case completely with his attorney, had discussed the facts of the case and any possible defenses with his attorney, was satisfied with the services of his attorney, was not under the influence of any type of drug or alcoholic beverage, and understood the district court's numerous advisories and inquiries. Seeger's statements were all responsive to and appropriate to the district court's advisories and inquiries.

Seeger's coherent answers during the plea hearing and his affirmative denial of being under the influence of any drugs affirmatively refute his claim of mental unfitness. As previously stated, if a postconviction motion alleges only conclusions of fact or law—or if the records and files in the case

affirmatively show that the movant is entitled to no relief—no evidentiary hearing is required. *State v. Seberger*, 284 Neb. 40, 815 N.W.2d 910 (2012).

> If the dialogue which is required between the court and the defendant whereat, as here, the court receives an affirmative answer as to whether the defendant understands the specified and full panoply of constitutional rights . . . is to be impugned by a mere recantation made after the doors of the prison clang shut, we are wasting our time and that of the trial judges, making a mockery out of the arraignment process.

State v. Scholl, 227 Neb. 572, 580, 419 N.W.2d 137, 142 (1988).

[9] In a claim of ineffective assistance of counsel regarding the entry of a guilty plea, the likelihood of the defense's success should be considered with other factors such as the likely penalties the defendant would face if convicted at trial, the relative benefit of the plea bargain, and the strength of the State's case. *State v. Yos-Chiguil, supra*. Seeger's postconviction claims are in the context of a plea agreement by which he procured the dismissal of two Class II felonies and two Class IIIA felonies, which carried the risk of aggregate penalties of an additional 110 years in prison. The record affirmatively shows that Seeger admitted to police, upon waiving his *Miranda* rights, that he had sexual contact with his daughters. Seeger's postconviction claims do not include any claim of ineffective assistance for failure to file a suppression motion. Seeger has not alleged sufficient facts to show any reasonable probability that he would have insisted on going to trial when he was exposed to significant additional penalties from the other crimes with which he was charged and avoided by taking the plea agreement.

The district court did not err by denying Seeger an evidentiary hearing on the balance of his ineffective assistance of counsel claims.

CONCLUSION

The district court did not err in denying Seeger an evidentiary hearing on his claims of ineffective assistance of counsel,

other than the alleged failure to file a direct appeal. We also find no error in the district court's dismissal of these remaining claims of ineffective assistance of counsel.

AFFIRMED.

TRACEY L. CURTIS, PERSONAL REPRESENTATIVE OF THE ESTATE OF PRESTON M. CURTIS, DECEASED, APPELLANT, V. STATES FAMILY PRACTICE, LLC, ET AL., APPELLEES.

823 N.W.2d 224

Filed October 30, 2012. No. A-11-637.

1. **Motions for New Trial: Appeal and Error.** A motion for a new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
2. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives the litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.
3. **Appeal and Error.** Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.
4. **Jury Instructions: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.
5. **Appeal and Error.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
6. **Actions: Negligence: Liability: Parties: Words and Phrases.** The term "defendant" in Neb. Rev. Stat. § 25-21,185.10 (Reissue 2008), which governs joint and several liability and allocation of liability involving more than one defendant, also includes a third-party defendant brought into the action.
7. **Wrongful Death: Words and Phrases.** In the context of the wrongful death statutes, "next of kin" is defined as those persons nearest in degree of blood surviving the decedent, who ordinarily are those persons who take the personal estate of the deceased under the statutes of distribution.
8. **Trial: Expert Witnesses.** *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), require the trial court to act as a gatekeeper to ensure that expert testimony is scientifically valid and can be properly applied to the facts in issue and is therefore helpful to the trier of fact.