

No. A-25-656 & A-25-657

IN THE NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,

Appellee,

v.

EMANUEL CHAVEZ,

Appellant.

**APPEAL FROM THE DISTRICT COURT OF
LANCASTER COUNTY, NEBRASKA**

The Honorable Susan Strong, District Judge

BRIEF OF APPELLEE

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Statement of the Case

A. Nature of the Case

This is a consolidated appeal from the denial of postconviction relief without an evidentiary hearing.

B. Issues Before the District Court

The issue before the district court was whether it should grant an evidentiary hearing on the ineffective assistance of counsel claim raised in the postconviction motion.

C. How the Issues Were Decided in the District Court

The district court entered a written order denying postconviction relief without an evidentiary hearing. (A-25-656 & A-25-657, T16-21).

D. Scope of Review

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. *State v. Goynes*, 318 Neb. 413 (2025).

A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *State v. Ammons*, 314 Neb. 433 (2023). When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. *Id.* With regard to 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 (1984), an appellate court reviews such legal determinations independently of the lower court's conclusion. *Ammons*, *supra*.

Propositions of Law

I.

Postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations that render the judgment void or voidable. Those seeking relief under the postconviction statutes must file a verified motion in the court in which sentence was imposed stating the grounds relied upon.

State v. Ammons, 314 Neb. 433 (2023).

II.

The court determines whether and on what claims an evidentiary hearing is warranted based on the allegations in the motion. A prisoner is not entitled to an evidentiary hearing if a claim is supported by only conclusory statements of law or fact.

State v. Ammons, 314 Neb. 433 (2023).

III.

The allegations in a motion for postconviction relief must be sufficiently specific for the district court to make a preliminary determination as to whether an evidentiary hearing is justified.

State v. Cox, 314 Neb. 104 (2023).

IV.

An evidentiary hearing is not required on a motion for postconviction relief when (1) the motion does not contain factual allegations which, if proved, constitute an infringement of the movant's constitutional rights rendering the judgment void or voidable; (2) the motion alleges only conclusions of fact or law without supporting facts; or (3) the records and files affirmatively show that the defendant is entitled to no relief.

State v. Cox, 314 Neb. 104 (2023).

V.

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 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.

State v. Russell, 308 Neb. 499 (2021).

VI.

To show that counsel's performance was deficient, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. 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.

State v. Russell, 308 Neb. 499 (2021).

VII.

In order to obtain a new direct appeal as postconviction relief, the defendant must show, by a preponderance of the evidence, that the defendant was denied his or her right to appeal due to the negligence or incompetence of counsel, and through no fault of his or her own.

State v. Russell, 308 Neb. 499 (2021).

VIII.

It is fundamental to a claim of ineffective assistance of counsel based on failure to appeal or failure to properly perfect an appeal, that the defendant directed that such appeal be filed.

State v. Trotter, 259 Neb. 212 (2000).

IX.

After a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief.

State v. Hessler, 295 Neb. 70 (2016).

X.

The presumption of prejudice for failing to file an appeal after being so directed by the criminal defendant also applies to plea-based convictions.

State v. McCroy, 259 Neb. 709 (2000).

Statement of Facts

Convictions and Sentences

On June 8, 2022, in two separate dockets, Appellant Emanuel Chavez was charged with five felony offenses: two counts of possession of child pornography – age 19 and over, a Class IIA felony; two counts of first degree sexual assault, a Class II felony; and one count of enticement by electronic communication device, a Class IV felony. (A-25-656 & A-25-657, ST1-2). On March 2, 2023, Chavez entered no contest pleas to an amended charge of attempted possession of child pornography – age 19 and over (a Class IIIA felony), one of the first degree sexual assault charges, and the enticement by electronic communication device charge. (A-25-656, ST6-7, ST16-17; A-25-657, ST7-8, ST17-18). The two other original charges were dismissed. (A-25-656, ST6-7; A-25-657, ST7-8). The district court accepted a stipulation of the factual basis, found Chavez guilty, and ordered a presentence investigation report. (A-25-656, ST17; A-25-657, ST18).

On May 23, 2023, a sentencing hearing was held and the district court sentenced Chavez to consecutive prison sentences of 2 to 3 years for attempted possession of child pornography, 24 to 32 years for first degree sexual assault, and 1 to 2 years for enticement by electronic communication device. (A-25-656, ST9-10, ST17; A-25-657, ST10-11, ST18). No direct appeal was filed.

Postconviction Proceedings

On June 24, 2024, Chavez filed a motion for postconviction relief in each case, requesting a new direct appeal based upon an allegation that his trial counsel was ineffective for failing to file a direct appeal. (A-25-656 & A-25-657, T1-4). Chavez's motion contained the following factual allegations:

Mr. Chavez was sentenced on May 23, 2023 and the deadline for filing a direct appeal was on June 22, 2023. Immediately after his sentencing hearing, Mr. Chavez was taken into custody and transported to the Reception and Treatment Center in Lincoln, Nebraska to begin serving his sentence. Mr. Chavez's ability to communicate directly with trial counsel while incarcerated was limited, he requested assistance from his mother, Mona Castro, in communicating with trial counsel about filing an appeal.

On June 7, 2023, well within the 30 days to perfect an appeal, Ms. Castro emailed trial counsel's office requesting an appointment to discuss filing an appeal for Mr. Chavez. Ms. Castro never received a response to her email. Ms. Castro called trial counsel on June 12, 2023, to follow up on her email. Trial counsel was unavailable and failed to return her call. Finally, at zero hour, on June 22, 2023, trial counsel took a call from Ms. Castro. During this call, she expressed to trial counsel that Mr. Chavez wanted to file an appeal. Trial counsel told Ms. Castro that he did not think it was "worth" filing an appeal, and that Mr. Chavez should just do his time. When Ms. Castro pressed on

and insisted that an appeal be filed, trial counsel falsely told her that if Mr. Chavez filed an appeal, it would result in more charges being brought against him and he would end up doing more prison time. Trial counsel made it clear that he would not be filing an appeal for Mr. Chavez. Shortly after the 30-day deadline passed, Ms. Castro did her own research and discovered that trial counsel had misrepresented the consequences of filing an appeal.

(A-25-656 & A-25-657, T3-4). Chavez asserted that prejudice was presumed when counsel did not file an appeal as directed. (*Id.*).

On July 31, 2025, the district court entered a written order in each case denying postconviction relief without an evidentiary hearing. (A-25-656 & A-25-657, T16-21). The court provided the following analysis:

[Chavez] relies on case law which can be factually distinguished. In *State v. Trotter*, [259 Neb. 212, 222 (2000)], the Supreme Court held that “after a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief.” As a general rule, “the right to appeal in criminal cases can be exercised only by a party to whom it is given and that generally, only a person aggrieved or injured by a judgment may take an appeal from it.” *State v. Thalken*, [299 Neb. 857, 870-71 (2018)]. Thus, counsel’s failure to perfect an appeal is presumed deficient representation only when a defendant has requested it. As explained by the U.S. Supreme Court:

We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. ... This is so because a defendant who instructs counsel to

initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes.

Roe v. Flores-Ortega, [528 U.S. 470, 477 (2000)] (citations omitted).

In this case, [Chavez] does not allege that he requested his counsel file a direct appeal. [Chavez] does not allege that he himself spoke, wrote, emailed, or phoned trial counsel and directed him to file an appeal. [Chavez] alleges that he was "limited" in his ability to communicate with his counsel because of his incarceration but does not allege that he was barred or prevented from doing so. In fact, [Chavez] does not allege whether he ever discussed filing an appeal with his counsel. He alleges only that his mother emailed and phoned his counsel and requested that trial counsel file an appeal. He does not allege that he directed his mother to take these actions. [Chavez] offers no authority for his proposition that another person can assert a defendant's right to appeal on their behalf. Failure to limit the right to an appeal to the aggrieved party could result in an appeal in almost every case, even when there are no grounds for appeal.

For instance, in this case [Chavez] pled no contest to the charges against him and was sentenced within the statutory range for the charges. Generally, a voluntary guilty plea or plea of no contest waives all defenses to a criminal charge. *State v. Anderson*, [305 Neb. 978, 985 (2020)]. And an appellate court must uphold sentences within statutory limits unless the sentence was an abuse of judicial discretion. *State v. Thurman*, [273 Neb. 518, 530 (2007)]. According to [Chavez's] motion, trial counsel informed [Chavez's] mother that in his opinion it was not worth filing an appeal.

[Chavez] fails to allege that he directed his trial counsel to file an appeal. Therefore, he cannot establish prejudice and his claims fail under *Strickland*....

(A-25-657, T18-20) (emphasis omitted).

Argument

I. Assignments of Error 1 & 2

Chavez’s first two assignments of error on appeal, consolidated and restated, are that the district court erred in denying him postconviction relief without an evidentiary hearing. (Brief of Appellant, pp. 5-6, 10-16).

Legal Framework

Postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations that render the judgment void or voidable. *State v. Ammons*, 314 Neb. 433 (2023). Those seeking relief under the postconviction statutes must file a verified motion in the court in which sentence was imposed “stating the grounds relied upon.” *Ammons, supra*, quoting Neb. Rev. Stat. § 29-3001(1) (Reissue 2016). The court determines whether and on what claims an evidentiary hearing is warranted based on the allegations in the motion. *Id.* A prisoner is not entitled to an evidentiary hearing if a claim is supported by only conclusory statements of law or fact. *Id.*

The allegations in a motion for postconviction relief must be sufficiently specific for the district court to make a preliminary determination as to whether an evidentiary hearing is justified. *State v. Cox*, 314 Neb. 104 (2023). An evidentiary hearing is not required on a motion for postconviction relief when (1) the motion does not contain factual allegations which, if proved, constitute an infringement of the movant’s constitutional rights rendering the judgment void or voidable; (2) the motion alleges only conclusions of fact or law without supporting facts; or (3) the records and files affirmatively show that the defendant is entitled to no relief. *Id.*

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 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. *State v. Russell*, 308 Neb. 499 (2021). Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *Id.* To show that counsel's performance was deficient, a defendant must show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. *Id.* 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. *Id.*

In order to obtain a new direct appeal as postconviction relief, the defendant must show, by a preponderance of the evidence, that the defendant was denied his or her right to appeal due to the negligence or incompetence of counsel, and through no fault of his or her own. *Id.* It is fundamental to a claim of ineffective assistance of counsel based on failure to appeal or failure to properly perfect an appeal, that the defendant directed that such appeal be filed. *State v. Trotter*, 259 Neb. 212 (2000).

After a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief. *State v. Hessler*, 295 Neb. 70 (2016). This is also true for plea-based convictions. *State v. McCroy*, 259 Neb. 709 (2000).

Argument

In his postconviction motion, Chavez alleged that prejudice was presumed under *Trotter* because his counsel failed to file a direct appeal when directed to do so. Chavez's allegations, however, do not

support his claim, and as a result, the district court properly denied postconviction relief without an evidentiary hearing.

The State does not dispute that the district court would have been required to hold an evidentiary hearing on Chavez's claim had he alleged that he directly told his trial counsel to file a direct appeal. Chavez's motion, however, does not make that allegation. Chavez's motion also failed to make any allegations establishing attempts he made to personally contact his attorney to direct him to file an appeal. He asserted in his motion that "his ability to communicate directly with trial counsel while incarcerated was limited." (T3). This allegation was conclusory and Chavez provided no further details in his motion about these limitations. He attempts to remedy this by making more specific allegations in his brief on appeal, but this is not sufficient as the allegations were not contained in his motion. See, e.g., *State v. Haynes*, 299 Neb. 249, 267 (2018) (refusing to entertain factual allegations made on appeal). Because Chavez did not specifically allege that he directly informed his counsel to file a direct appeal or explain how he was prevented from doing so, his allegations did not warrant an evidentiary hearing on those grounds.

Chavez argues on appeal that his postconviction motion established that he obtained his mother's assistance in directing his trial counsel to file an appeal, but the allegations in his motion fall short of specifically alleging that as well. Chavez's motion provides only a vague allegation that "he requested assistance from his mother, Mona Castro, in communicating with trial counsel about filing an appeal." (T3). Chavez did not specifically state that he told his mother to inform his counsel to file an appeal. Because no further allegations were provided, Chavez's statement can simply be read to mean that he wanted his mother to have a conversation with counsel about whether he should file an appeal. Nowhere in his motion does Chavez state that he told his mother to tell his trial counsel to file a direct appeal. Chavez's motion did not contain sufficient allegations for a

presumption of prejudice, which was the basis of his postconviction claims.

The State submits that the district court did not err in denying postconviction relief without an evidentiary hearing, and thus, Chavez's first two assignments of error are without merit. If this Court were to disagree and find the allegations to be sufficient, the proper remedy would be to remand for an evidentiary hearing.

II. Assignment of Error 3

Chavez's third assignment of error is that the district court violated his right to due process by resolving factual disputes on the written record without an evidentiary hearing. (Brief of Appellant, pp. 6, 16-18). It is clear from the district court's order that the court based its decision on the allegations contained in the postconviction motion, and it did not make a credibility determination as Chavez asserts in his brief on appeal. The court found that the allegations set forth in the motion did not warrant a hearing because they did not establish a constitutional violation. Therefore, this claim is without merit.

Conclusion

For the reasons noted above, the appellee respectfully requests that this Court affirm the judgment of the district court.

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Certificate of Compliance

I hereby certify that this brief complies with the word count and typeface requirements of Neb. Ct. R. App. P. § 2-103. This brief contains 3,313 words, excluding this certificate. This brief was created using Word Microsoft 365.

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Certificate of Service

I hereby certify that on Monday, February 23, 2026 I provided a true and correct copy of this *Brief of Appellee* to the following:

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