

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL
(Memorandum Web Opinion)**

STATE V. CHAVEZ

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STATE OF NEBRASKA, APPELLEE,

V.

EMANUEL CHAVEZ, APPELLANT.

Filed October 20, 2026. Nos. A-25-656, A-25-657.

Appeals from the District Court for Lancaster County: SUSAN I. STRONG, Judge. Affirmed.
Matthew Kosmicki, of Kosmicki Law, L.L.C., for appellant.
Michael T. Hilgers, Attorney General, and Erin E. Tangeman for appellee.

BISHOP, WELCH, and FREEMAN, Judges.

WELCH, Judge.

INTRODUCTION

Emanuel Chavez appeals from the Lancaster County District Court's order denying his motion for postconviction relief without an evidentiary hearing. Chavez generally argues that the district court erred in finding that the factual allegations contained in his motion were insufficient to entitle him to an evidentiary hearing on his claim of ineffective assistance of trial counsel. For the reasons stated herein, we affirm.

STATEMENT OF FACTS

Although not in the record on appeal, the parties do not dispute that Chavez pled no contest in two separate cases, CR22-404 and CR22-405, to attempted possession of child pornography by an individual 19 years of age or older, first degree sexual assault, and enticement by electronic communication device. Following the May 23, 2023, sentencing hearing, the district court sentenced Chavez to consecutive prison sentences of 2 to 3 years' imprisonment for attempted

possession of child pornography, 24 to 32 years' imprisonment for first degree sexual assault, and 1 to 2 years' imprisonment for enticement by electronic communication device. No direct appeal was filed following his convictions and sentences in either case.

On June 24, 2024, Chavez timely filed a motion for postconviction relief. In his motion, Chavez asserted that he was denied effective assistance of counsel when his trial counsel failed to perfect a direct appeal. Chavez alleged that his "ability to communicate directly with trial counsel while incarcerated was limited," so "he requested assistance from his mother . . . in communicating with trial counsel about filing an appeal." Chavez asserted that his mother contacted trial counsel's office via email and phone and received no response until the final day of his 30-day time limit to file an appeal. Chavez alleged that during a phone call between Chavez' mother and trial counsel, his mother expressed to counsel that Chavez wanted to file an appeal. Chavez alleged that trial counsel informed Chavez' mother that

[trial counsel] did not think it was "worth" filing an appeal, and that . . . Chavez should just do his time. When [Chavez' mother] pressed on and insisted that an appeal be filed, trial counsel falsely told her that if . . . 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 . . . Chavez. Shortly after the 30-day deadline passed, [Chavez' mother] did her own research and discovered that trial counsel had misrepresented the consequences of filing an appeal. Trial counsel's failure to file an appeal and misinformation about the consequences of doing so in effort to discourage . . . Chavez from exercising his absolute right to a direct appeal clearly constitutes ineffective assistance of counsel. . .

The State responded by filing a motion requesting that the court deny Chavez' motion for postconviction relief without an evidentiary hearing because the motion failed to allege that Chavez personally instructed his trial counsel to file a direct appeal and offered no authority to support the proposition that his mother could assert Chavez' right to appeal on his behalf.

The district court denied Chavez' motion without an evidentiary hearing, finding that Chavez could not establish prejudice for his claim because he failed to allege that he directed his trial counsel to file a direct appeal. The district court specifically held:

[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.

Chavez has now appealed from the district court's order denying his motion for postconviction relief without an evidentiary hearing.

ASSIGNMENT OF ERROR

Chavez' assignments of error can be summarized into a single assignment of error asserting that the district court erred in denying his motion for postconviction relief without an evidentiary hearing regarding his claim that his trial counsel was ineffective in failing to file a direct appeal on Chavez' behalf because his verified complaint, as pled, entitled him to an evidentiary hearing.

STANDARD OF REVIEW

In appeals from postconviction proceedings when a district court denies postconviction relief without conducting an evidentiary hearing, 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. Lessley*, 312 Neb. 316, 978 N.W.2d 620 (2022).

ANALYSIS

Before addressing Chavez' specific argument, we briefly summarize the general legal principles governing the appellate court's analysis of appeals from the denial of postconviction claims without an evidentiary hearing.

In *State v. Lessley*, 312 Neb. at 326-27, 978 N.W.2d at 632-33, the Nebraska Supreme Court stated:

Postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his or her constitutional rights such that the judgment was void or voidable. Thus, in a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. The district 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 state or federal Constitution.

However, 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. 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.

When a district court denies postconviction relief without conducting an evidentiary hearing, an appellate court determines de novo whether the petitioner has alleged facts that would support the claim and, if so, whether the files and records affirmatively show that he or she is entitled to no relief.

Further, the defendant in a postconviction proceeding has the burden of alleging and proving that a claimed error is prejudicial. *State v. Galindo*, 315 Neb. 1, 994 N.W.2d 562 (2023).

Chavez generally argues that the district court erred in denying his motion for postconviction relief without an evidentiary hearing based on the court's erroneous determination that Chavez was required to allege that he personally instructed his trial counsel to file a direct appeal, rather than recognizing that a request through an intermediary acting on his behalf instructing his counsel to file an appeal was sufficient to warrant an evidentiary hearing on his claim of ineffective assistance of counsel.

In *State v. Trotter*, 259 Neb. 212, 217, 609 N.W.2d 33, 37-38 (2000), the Nebraska Supreme Court stated:

This court has previously held that where a defendant directs his or her counsel to file an appeal and the defendant is denied his or her right to an appeal because counsel fails to perfect an appeal, the proper vehicle for the defendant to seek relief is through the Nebraska Postconviction Act. *State v. Johnson*, 243 Neb. 758, 502 N.W.2d 477 (1993); *State v. Carter*, 236 Neb. 656, 463 N.W.2d 332 (1990); *State v. Halsey*, 195 Neb. 432, 238 N.W.2d 249 (1976). In *Halsey*, we stated that “[a] defendant must show, by a preponderance of the evidence, that he was denied his right to appeal due to the negligence or incompetence of counsel, and through no fault of his own.” 195 Neb. at 433-34, 238 N.W.2d at 250.

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*.

(Emphasis supplied.) Further, the court stated that “[a]fter 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. Trotter*, 259 Neb. at 222, 609 N.W.2d at 41.

Here, Chavez takes issue with the district court's interpretation of “being so directed by the criminal defendant” as requiring a defendant to allege that the defendant specifically and personally “directed” his trial counsel to file an appeal on his behalf. In his motion for postconviction relief, Chavez alleged that, due to his limited ability to communicate with his trial counsel after incarceration, he requested assistance from his mother in communicating with trial counsel about the filing of an appeal. Chavez asserted that his mother emailed trial counsel, requesting an appointment to discuss filing an appeal, and attempted to call Chavez' trial counsel after not receiving a response via email. Chavez alleged that on the final day to file an appeal, Chavez' trial counsel returned his mother's call and his mother informed trial counsel that Chavez wanted to file an appeal. Despite that, Chavez asserted that his trial counsel made it clear that he would not file an appeal on Chavez' behalf. Chavez contends on appeal that the allegations in his petition were sufficient to warrant an evidentiary hearing on his claim.

We cannot locate any cases in which Nebraska appellate courts have directly decided whether a defendant directing his counsel to file an appeal through a surrogate is sufficient to constitute a direction by the defendant to his or her counsel to file an appeal; however, the matter was indirectly addressed in *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012). In *Dunkin*, the district court granted the defendant an evidentiary hearing on the basis of the defendant's claim that he and/or his mother contacted his counsel regarding the possible success of an appeal. In

finding that the district court did not clearly err in finding the evidence was insufficient to constitute a directive by Dunkin to his counsel to file a direct appeal, the Nebraska Supreme Court held:

After reviewing the evidence received at the postconviction hearing, the district court concluded that he did not. As noted above, [the defendant's mother] contacted counsel to discuss the possible success of an appeal, but the record does not indicate that she specifically requested counsel to pursue an appeal. And there is no evidence that [the defendant] attempted to contact counsel by letter or telephone to make such a request himself. It is uncontested that [the defendant] and counsel had no contact following the sentencing proceedings. Based upon our review of the record, we conclude that these findings are not clearly erroneous.

State v. Dunkin, 283 Neb. at 49-50, 807 N.W.2d at 759.

Although the Nebraska Supreme Court did not explicitly state that a directive by Dunkin to his mother to instruct his counsel to file an appeal would have been sufficient, we find the Supreme Court's analysis instructive. If the Court believed that Dunkin's lack of direct instruction to his counsel was a sufficient basis to deny his claim, the Supreme Court could have said so. But instead, the Court found the evidence was insufficient to find that either Dunkin or his mother made the communication. That analysis at least implies that a directive from Dunkin's mother to Dunkin's counsel, made at Dunkin's request, might be sufficient to constitute a directive by Dunkin.

But whether a defendant can direct a third party to direct counsel to file a direct appeal on the defendant's behalf and whether counsel is ineffective in failing to so file that appeal is a matter we need not decide. In this instance, Chavez' postconviction motion did not plead that he directed his mother to instruct his counsel to file an appeal on Chavez' behalf. Instead, Chavez generally averred that he had "limited" ability to communicate directly with trial counsel while incarcerated. He does not explain why or how his ability to communicate with counsel was "limited," thus providing no justification for why he would need a third party to communicate with counsel on his behalf. Further, he only alleged that he "requested assistance from his mother . . . *in communicating* with trial counsel *about filing an appeal*." (Emphasis added.) Chavez did not allege that he asked his mother to communicate with his trial counsel to specifically direct him to file an appeal. Rather, he claims that he asked his mother to communicate with his trial counsel "about filing an appeal," which could mean a request for general information about filing an appeal, such as timeframe and likelihood of success. As such, Chavez' postconviction motion did not allege that he specifically told his mother to direct trial counsel to file an appeal; Chavez' allegation that his mother told counsel to file an appeal is not sufficient when there is no assertion that the instruction came from him.

As we noted before, an evidentiary hearing is not required on a motion for postconviction relief when, among other things, 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. See *State v. Lessley*, 312 Neb. 316, 978 N.W.2d 620 (2022). In Chavez' verified motion for postconviction relief, he does not aver that he directed his counsel to file an appeal. If he did, and if his counsel allegedly failed to comply with that directive, he would be entitled to an

evidentiary hearing because, if he could establish those facts, his counsel would be deemed ineffective as prejudice with that failure is presumed. See *State v. Russell*, 308 Neb. 499, 954 N.W.2d 920 (2021) (after trial, conviction, and sentencing, if counsel deficiently fails to file or perfect appeal after being so directed by criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling defendant to postconviction relief). Nor did Chavez aver that he instructed his mother to direct his counsel to file an appeal. Instead, he alleges he “requested assistance from his mother . . . *in communicating with trial counsel about filing an appeal*” due to his own “limited” access to counsel. (Emphasis added.) This allegation is not the equivalent of the defendant directly instructing counsel to file an appeal on his behalf and does not carry with it a presumption of prejudice under our caselaw. To the contrary, under these circumstances, Chavez was obligated to allege and prove that the claimed error was an infringement of his constitutional rights and was prejudicial to him. We hold that that allegations in Chavez’ postconviction motion, as pled by Chavez, failed to establish that his counsel’s failure to file an appeal constituted an infringement of his constitutional rights, nor did his allegations establish how he was prejudiced by his counsel’s actions or inactions. Under these circumstances, Chavez was not entitled to an evidentiary hearing, and the district court did not err in failing to order one.

CONCLUSION

For the reasons stated herein, we affirm the district court’s denial of Chavez’ motion for postconviction relief without an evidentiary hearing.

AFFIRMED.