IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL
(Memorandum Web Opinion)

STATE V. JONES

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STATE OF NEBRASKA, APPELLEE,

V.

TERRELL L. JONES, APPELLANT.

Filed November 3, 2026. No. A-26-115.

Appeal from the District Court for Lancaster County: MATTHEW O. MELLOR, Judge. Affirmed.

Kyle J. Flentje, of Flentje Law, L.L.C., for appellant.

Michael T. Hilgers, Attorney General, and Teryn Blessin for appellee.

PIRTLE, WELCH, and PICCOLO, Judges.

WELCH, Judge.

INTRODUCTION

Terrell L. Jones appeals his plea-based convictions of obstructing a peace officer and third offense driving under the influence (DUI). He contends that the Lancaster County District Court erred in affirming the county court's acceptance of his plea, despite an insufficient factual basis to establish that he was driving under the influence of alcohol; that requiring his sentences to be served consecutively was an abuse of discretion; and that his trial counsel was ineffective for advising him to plead to DUI when the factual basis was insufficient to support his plea. For the reasons set forth herein, we affirm.

STATEMENT OF FACTS

The State charged Jones in Lancaster County Court with first offense resisting arrest, obstructing a peace officer, an interlock violation, third offense DUI, first offense driving during

revocation or impoundment, and careless driving. After Jones failed to appear at a December 2024 docket call, the State amended the complaint to add an additional charge of failure to appear.

Pursuant to a plea agreement, Jones pled guilty to obstructing a peace officer, a Class I misdemeanor; and DUI, a Class W misdemeanor. The State dismissed the remaining charges. For the factual basis, the State requested the court to take judicial notice of the probable cause affidavit. The probable cause affidavit set forth the following:

> On 8-17-2024 at approximately 0232 hours, the above vehicle [a 2013 Gray Kia Optima] was observed driving eastbound . . . [then] turned north . . . The vehicle did not turn into the closest lane of traffic, making an improper turn. A traffic stop was made . . . The driver, [Jones], identified himself via a NE [driver's] license. [Jones] was observed to have red/watery eyes, he was emitting an odor of alcohol, and [had] rapid slurred speech. [Jones] refused [standard field sobriety tests] and was detained in the back of a cruiser for a [preliminary breath test]. After a waiting period, [Jones] failed [the preliminary breath test]. During the observation period, [Jones] made the unsolicited statement [that] he was at the bar drinking Sprite. [Jones], who was still in the backseat, was told he was under arrest for DUI and to turn away from police and place his hands behind his back. [Jones] refused. At one point, [Jones] tried exiting the cruiser and had to be pushed back inside by police. [Jones] ultimately refused to face away from police and had to be pushed away by officers. Officers had to grab ahold of [Jones'] arms. At this point, [Jones] straightened his right arm, resisting officers['] attempts to arrest him. Once one handcuff was applied to [Jones'] wrist, officers had to use a considerable amount of force to pull [Jones'] right arm to his left arm to complete the handcuffing process. Eventually, [Jones] was placed into custody and transported to jail for testing.
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> Once at jail, [Jones] was told to walk to the sally port doors to enter the jail. [Jones] refused to walk and [had] to be physically escorted by officers. At this point, [Jones] began to walk/run away from the sally port door towards the garage door of the sally port. Officers were able to quickly catch [Jones]. [Jones] was drug back to the entrance. Once again, [Jones] attempted to run away again however, officers were able to hold onto [Jones]. Officers had to push [Jones] up against the cruiser to maintain control of him until the sally port door opened up. [Jones] was . . . physically escorted into the jail. At this point, several correctional officers took control of [Jones].
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> [Jones] was escorted to the DUI testing table at the jail by correctional officers. Jail staff patted [Jones] down per their policy. Officers attempted to tell [Jones] he needed to sit down in the chair and not stand up from the chair. [Jones] continued to scream at officers and attempted to get in [the officers' faces;] however, correctional officers were able to hold him back. Based off of [Jones'] behavior, the DUI chemical testing was not continued and it was considered a refusal.
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> [Jones] was found to have 2 prior DUI convictions on 05-19-2023 . . . and 05-19-2023 . . . [Jones] was cited and lodged for . . . 3rd offense DUI, Escape, and Resisting Arrest . . . .

When asked, defense counsel stated that she had no objection to the court taking judicial notice of the affidavit of probable cause.

After reviewing the probable cause affidavit, the court found that there was a factual basis to accept Jones' guilty pleas, stating that "[t]here is not [a] BAC, it just shows a refusal. I make that finding beyond a reasonable doubt."

After finding Jones guilty of the charged offenses, the county court immediately proceeded to an enhancement hearing, after which the court found that Jones' DUI was a third offense. The court then proceeded to sentencing. During this portion of the hearing, the State argued that the current offense was

> the third DUI in a rather short period of time. We'd also note that during this DUI, he was revoked on his prior DUI[']s. The only reason why it was not a felony is that he did not provide a sample, otherwise it would have been a felony interlock violation. Additionally, the officers did not read the advisement, . . . which is why it's not a felony refusal third. So obviously, this could have been a lot worse for him; he's getting a break here.

Defense counsel stated:

> Your Honor, I don't believe [Jones] was actually revoked on a DUI at that same time. I think that's why we came to the agreement we did. . . . I don't think [Jones] needed an interlock at this time. But nonetheless, we are requesting a straight sentence to be imposed. Prior to . . . [Jones'] incarceration, he was attending Colorado Technical University and was majoring in cybersecurity. . . . Jones has one more year to graduate with his BA in cybersecurity. He was also a student at SCC as well, at the same time. While he was going to school, he coached basketball . . . and ran the City of Guards program. Since he has been in jail, he has taken this time to reflect and to take responsibility for his actions. He attends bible study daily and is going to AA. His mind is more clear now that he is sober and he would like to keep it that way. He also has a four-year-old son that he wants to be a positive example to. This case occurred last August and he hasn't picked up anything new since this case. So with that, we are requesting a minimum sentence to be imposed and for the sentence to [run] concurrent with his other sentence.

Jones then made the following statement:

> I just want you to see that I have been taking the steps . . . to do better in my life, and this whole situation has really made me realize . . . just stay away from alcohol and . . . steps that I need to take to have a better lifestyle. That doesn't excuse for me not taking accountability for my actions; that's why I pleaded today. I just want you to take that [into] consideration. And I thought it wasn't revoked, like she said, and that when they administered the breath test, they didn't really have a number for it. Like, they said before they took me to jail, so I know I could do something with that, but, [it] doesn't matter. At the end of the day, I just wanted to take full accountability and understand that I'm very sorry for my actions and that you guys can see that I'm trying to take the correct steps to have a better lifestyle and just a better life. So I appreciate you for giving me the option to speak. Thank you.

The county court stated that it took into consideration Jones' criminal history and the information provided by counsel and Jones' comments. The court found that Jones was "currently incarcerated," was not a suitable candidate for probation, and anything less than a period of incarceration would depreciate the seriousness of the offenses and promote disrespect for the law. For the third offense DUI conviction, the court sentenced Jones to 270 days' imprisonment, a 15-year license revocation, ordered Jones not to drive for 45 days, and imposed a $1,000 fine. After 45 days, the court stated that Jones could "operate a motor vehicle only if equipped with an ignition interlock device, only if you have an ignition interlock permit for the operation of the same, both at your own expense." The court sentenced Jones to 30 days' imprisonment for obstructing a peace officer. The court ordered the sentences to be served at the Department of Corrections, "given that's where he's currently placed." The sentences were ordered to run consecutively to each other and consecutive to any other sentence, but the court ordered that for the $1,000 fine, "he can sit that out concurrent."

Jones timely appealed to the Lancaster County District Court. Jones' statement of errors contended that the county court erred in accepting his guilty plea to DUI when the factual basis was insufficient to support his plea and in ordering his sentences to be served consecutively. He also assigned as error that his trial counsel was ineffective for advising Jones to plead guilty to DUI when the evidence was insufficient to support the plea. The district court affirmed Jones' convictions and sentences based upon its determinations that the probable cause affidavit relied upon for the factual basis was sufficient to support Jones' pleas, trial counsel did not misadvise Jones to take the plea because sufficient evidence existed to convict Jones, and the county court did not abuse its discretion in imposing consecutive sentences. Jones has now appealed to this court and is represented by new counsel.

ASSIGNMENTS OF ERROR

Jones' assignments of error, restated, are that (1) the district court erred in affirming the county court's acceptance of his plea, despite an insufficient factual basis for the offense of DUI; (2) the district court abused its discretion in affirming the county court's order requiring his sentences to be served consecutively; and (3) his trial counsel was ineffective for advising him to plead to DUI when the factual basis was insufficient to support his plea.

STANDARD OF REVIEW

In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion. *State v. Johnson*, 310 Neb. 527, 967 N.W.2d 242 (2021). Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. *Id*. When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*.

A trial court is afforded discretion in deciding whether to accept guilty pleas, and an appellate court will reverse the trial court's determination only in case of an abuse of discretion. *State v. Mead*, 313 Neb. 892, 987 N.W.2d 271 (2023).

Whether a claim of ineffective assistance of counsel may be determined on direct appeal is a question of law. *State v. Mora*, 298 Neb. 185, 903 N.W.2d 244 (2017). In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance. *Id.*

An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Rejai*, 320 Neb. 599, 29 N.W.3d 225 (2026). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id*.

It is within the discretion of the trial court to impose consecutive rather than concurrent sentences for separate crimes. *State v. Mora, supra*.

ANALYSIS

SUFFICIENCY OF FACTUAL BASIS TO SUPPORT PLEA TO DUI

Jones' first assignment of error is that the district court erred in affirming the county court's acceptance of his plea, despite an insufficient factual basis. Jones does not assign or argue the sufficiency of the evidence to support his conviction for obstructing a peace officer.

> Before addressing Jones' assigned error, we note that the State contends that
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> The Nebraska Supreme Court has indicated that a defendant may be treated as having waived any objection to the sufficiency of the State's factual basis where the defendant failed to object to its sufficiency upon inquiry by the court. *See State v. Dicken*, 321 Neb. 301, 34 N.W.3d 97 (2026) (discussing *State v. Ettleman*, 303 Neb. 581, 930 N.W.2d 538 (2019).

Brief for appellee at 10. In *State v. Cutaia*, No. A-21-002, 2021 WL 5071963 at *4-5 (Neb. App. Nov. 2, 2021) (selected for posting to court website), this court noted that

> it is possible for a defendant to waive challenges to the factual basis under certain circumstances. In *State v. Ettleman*, 303 Neb. at 594, 930 N.W.2d at 547, after finding that the State's factual basis was insufficient to support the offense, the Nebraska Supreme Court held: "Our opinion today should not be read to preclude a defendant from being treated as having waived an objection to the sufficiency of the State's factual basis where the record of a plea colloquy demonstrates that the trial court specifically asked the defendant or his or her counsel whether the factual basis provided by the State is sufficient to support the plea and the defendant failed to object to its sufficiency upon inquiry by the court."

However, the court also noted:

> Here, unlike *Ettleman*, after the State provided the factual basis, the district court asked defense counsel "Any comment regarding the factual basis?" to which counsel

> responded "No objection for the purposes of factual basis, Your Honor." Thus, because the record demonstrates that the district court specifically asked defense counsel if he had any comments regarding the factual basis and counsel responded that he had no objections, [the defendant] has waived the issue of the sufficiency of the factual basis to support his pleas.

State v. Cutaia at 5.

In the instant case, unlike *Cutaia*, defense counsel did not state that she had no objection to the factual basis; rather, counsel stated that she had no objection to the court taking judicial notice of probable cause affidavit. Because of this distinction, we find that Jones has not waived his objection to the State's factual basis. We now consider Jones' assigned error that the factual basis provided by the State was insufficient to support his conviction for third offense DUI.

The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, except for the defenses of insufficiency of the indictment, information, or complaint; ineffective assistance of counsel; and lack of jurisdiction. *State v. Blaha*, 303 Neb. 415, 929 N.W.2d 494 (2019). However, to support a plea of guilty or no contest, the record must establish, inter alia, that there is a sufficient factual basis for the plea. *State v. Jenkins*, 303 Neb. 676, 931 N.W.2d 851 (2019). A defendant does not waive a challenge to the factual basis by entering a plea, because a sufficient factual basis is a prerequisite for a judicial finding that the plea was entered into understandingly and voluntarily. See, also, *State v. Clemens*, 300 Neb. 601, 915 N.W.2d 550 (2018); *State v. Schiesser*, 24 Neb. App. 407, 888 N.W.2d 736 (2016).

Neb. Rev. Stat. § 60-6,196 (Reissue 2021) provides:

> (1) It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle:
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> (a) While under the influence of alcoholic liquor or of any drug;
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> (b) When such person has a concentration of eight-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood; or
>
> (c) When such person has a concentration of eight-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath.
>
> (2) Any person who operates or is in the actual physical control of any motor vehicle while in a condition described in subsection (1) of this section shall be guilty of a crime and upon conviction punished as provided in sections 60-6,197.02 to 60-6,197.08.

One accused of a crime, including the crime of DUI, may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence established guilt beyond a reasonable doubt. *State v. Miller*, 312 Neb. 17, 978 N.W.2d 19 (2022). A DUI offense can be shown either by evidence of physical impairment and well-known indicia of intoxication or simply by excessive alcohol content shown through a chemical test. *State v. Buol*, 314 Neb. 976, 994 N.W.2d 98 (2023). "Either a law enforcement officer's observations of a defendant's intoxicated behavior or the defendant's poor performance on field sobriety tests constitutes sufficient evidence to sustain a conviction of driving while under the influence of alcoholic liquor." *State v. Mitchell*, 23 Neb. App. 657, 664, 876 N.W.2d 1, 8, *affirmed* 294 Neb. 832, 884 N.W.2d 730 (2016). Impairment can be shown by observation of witnesses, especially police officers, because they are trained to

recognize the signs of impairment. *State v. Falcon*, 260 Neb. 119, 615 N.W.2d 436 (2000). Law enforcement's observations of a defendant's intoxicated behavior may constitute sufficient evidence to sustain a conviction for driving under the influence of alcohol. *Id*.

A violation of § 60-6,196 is one offense which can be proven in more than one way. *State v. Baue,* 258 Neb. 968, 607 N.W.2d 191 (2000). Section 60-6,196 provides that a person may be guilty of DUI if the evidence establishes that the person operated a motor vehicle while under the influence of alcohol or while having an impermissible blood or breath alcohol content. In *Baue*, this court affirmed a defendant's conviction for DUI where the law enforcement officer testified that there was an odor of alcohol on the defendant's breath, that the defendant's eyes were bloodshot and watery, the defendant demonstrated signs of intoxication during field sobriety tests, and the defendant acknowledged consuming four beers prior to driving. *Id*. See, also, *State v. Lujano*, 251 Neb. 256, 557 N.W.2d 217 (1996) (officer's observations including odor of alcohol emanating from defendant, defendant had difficulty maintaining his balance while standing in one spot, and that defendant was "obviously too intoxicated to drive" supported defendant's DUI conviction); *State v. Barnett*, No. A-98-272, 1998 WL 939660 (Neb. App. Dec. 8, 1998) (officer's observations, including that defendant was unable to present driver's license, had "very slow" speech, failed to comprehend what officer was saying, was "wobbly and staggered," had "bloodshot, glassy eyes," and "had a strong odor of alcoholic beverage on her breath and person" supported conviction for second offense DUI).

Although our review in this appeal is limited to an examination of the record for error or abuse of discretion, based on our examination of the record, we find that the record supports Jones' conviction for third offense DUI. Jones argues that without evidence of his actual blood alcohol content, the factual basis set forth in the probable cause affidavit was insufficient to support the charged offense. But as the above caselaw demonstrates, a violation of § 60-6,196 can be proven in more than one way. That includes through observations of trained officers that the defendant appeared to be operating a vehicle while under the influence.

Here, a law enforcement officer stopped Jones' vehicle after observing an improper turn. During the stop, the officer observed Jones to have red and watery eyes, had rapid and slurred speech, and was emitting an odor of alcohol. And after officers complied with the statutorily prescribed waiting period to administer a preliminary breath test, Jones failed that test. Based on those observations, officers arrested Jones for DUI, but Jones obstructed officers from completing further testing to obtain his actual blood alcohol content. Jones argues that, on this record, without evidence of his actual blood alcohol content, the factual basis provided by the State was insufficient to support his plea thereby rendering that plea involuntary.

But as the Nebraska Supreme Court held in *State v. Morton*, 310 Neb. 355, 966 N.W.2d 57 (2021), albeit in the context of analyzing a sentencing, in relation to a charged offense to which the defendant pled, where a trier of fact could infer the factual basis supported the charged offense to which the defendant pled, the factual basis supported the offense for which the defendant pled, was convicted, and was sentenced.

Because we find that the State's factual basis as included in the probable cause affidavit provides a basis upon which Jones could have been convicted of the charged offense, we reject his claim that the factual basis was inadequate and affirm the district court's affirmation of the county

court's determination that the factual basis supported the offense to which Jones pled. This assignment of error fails.

ALLEGED ERROR REGARDING SENTENCING

Jones next assigns as error that the district court abused its discretion in ordering his sentences to be served consecutively.

It is within the discretion of the trial court to impose consecutive rather than concurrent sentences for separate crimes, even when the crimes arise out of the same incident. *State v. Cook*, 322 Neb. 114, 39 N.W.3d 49 (2026).

Here, while the two charges arose from the same incident, the incident resulted in two separate and distinct charges, supported by the factual basis in the record, to which Jones pled, and the county court was within its discretion to order the sentences to be served consecutively and the district court did not err in affirming. After reviewing the record and finding no abuse of discretion, we reject Jones' assigned error.

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Jones next contends that his trial counsel was ineffective for advising him to plead to DUI when the factual basis was insufficient to support his plea.

When, as here, a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record; otherwise, the issue will be procedurally barred. See *State v. Casares*, 291 Neb. 150, 864 N.W.2d 667 (2015). When the claim of ineffective assistance of counsel is raised in a direct appeal, the appellant is not required to allege prejudice; however, an appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel. *State v. Wood*, 310 Neb. 391, 966 N.W.2d 825 (2021).

The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. *State v. Mendez-Osorio*, 297 Neb. 520, 900 N.W.2d 776 (2017). The determining factor is whether the record is sufficient to adequately review the question. *Id.* The record is sufficient if it establishes either that trial counsel's performance was not deficient, that the appellant will not be able to establish prejudice, or that trial counsel's actions could not be justified as part of any plausible trial strategy. *State v. Blaha*, 303 Neb. 415, 929 N.W.2d 494 (2019).

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. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015). When a conviction is based upon a guilty or no contest plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty. *State v. Blaha, supra.* When the claim is raised in a direct appeal the appellant is not required to allege prejudice; however, an appellant must make specific allegations of the conduct that he or she claims

constitutes deficient performance by trial counsel. *State v. Figures*, 308 Neb. 801, 957 N.W.2d 161 (2021). An ineffective assistance of counsel claim made on direct appeal can be found to be without merit if the record establishes either that trial counsel's performance was not deficient or that the appellant could not establish prejudice. *State v. Casares, supra.*

Jones links this assignment of error to his earlier argument that the factual basis was insufficient to support his DUI conviction and, therefore, his counsel was ineffective for advising him to plead to it. But having found that the factual basis was sufficient to support Jones' pleas, we find that Jones' trial counsel was not ineffective for advising Jones to accept the plea. As a matter of law, counsel cannot be ineffective for failing to raise a meritless argument to the trial court. *State v. Jaeger*, 311 Neb. 69, 970 N.W.2d 751 (2022). This claim fails.

CONCLUSION

Having considered and rejected Jones' assigned errors, we affirm his convictions and sentences.

AFFIRMED.