IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL
(Memorandum Web Opinion)

STATE V. COVER

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STATE OF NEBRASKA, APPELLEE,

V.

ZACHARY K. COVER, APPELLANT.

Filed November 10, 2026. No. A-26-402.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Leslie E. Cavanaugh for appellant.

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

RIEDMANN, Chief Judge, and PIRTLE and PICCOLO, Judges.

PIRTLE, Judge.

I. INTRODUCTION

Zachary K. Cover appeals his plea-based convictions for third degree domestic assault and terroristic threats in the district court for Douglas County. He contends that his trial counsel was ineffective in various respects and that he received excessive sentences. Based on the reasons that follow, we affirm.

II. BACKGROUND

In July 2025, Cover was charged by information with burglary and terroristic threats. The charges arose from a July 12 incident involving Cover's ex-girlfriend, Elizabeth McClelland. On that date, officers responded to a radio call at Lakeside Hospital in Omaha. McClelland reported that at her residence on South 66th Street her ex-boyfriend, Cover, was in her closet when she

returned home. He pepper-sprayed her in the face with mace, causing her pain. He was also armed with a stun gun and a shotgun and threatened her with both.

McClelland was able to de-escalate the situation; she took Cover's weapons from him and drove him to his mother's house. McClelland then drove to a hospital to get treatment for the pepper spray on her face. She called law enforcement once she arrived at the hospital. Law enforcement determined a window at McClelland's residence had been broken into, and McClelland gave them Cover's bag, which contained a shotgun, pepper spray, a stun gun, ropes, a ball gag, handcuffs, and condoms.

The State filed an amended information on March 6, 2026, charging Cover with third degree domestic assault and terroristic threats. Cover entered into a plea agreement with the State, and pursuant to the plea agreement, Cover pled no contest to the two charges.

During the plea hearing, Cover affirmed he understood all of his rights, what he was being charged with, and the possible penalties. He confirmed that no one had made any promises in exchange for his pleas other than the plea agreement, and he understood the district court alone would decide his sentences. Cover informed the court that he understood a no contest plea would be treated the same as a guilty plea, he was entering his no contest pleas freely and voluntarily, and he had sufficient time to speak with his attorney about the pleas and that he was satisfied with his representation. He stated he had no questions for the court regarding his pleas. The court accepted Cover's no contest pleas to third degree domestic assault and terroristic threats. The court ordered a presentence investigation report (PSI) and scheduled sentencing.

At the sentencing hearing, the district court stated it had reviewed the PSI and noted Cover's mental health issues and lack of criminal history. The court sentenced Cover to consecutive terms of 1 year's imprisonment for third degree domestic assault and 3 years' imprisonment for terroristic threats followed by 18 months of post-release supervision.

III. ASSIGNMENTS OF ERROR

Cover assigns that his trial counsel was ineffective for (1) promising that the prosecutor would recommend probation and that he would receive probation as his sentence and (2) failing to inform him that he could not change his mind about pleading no contest and freely withdraw the plea, and refusing to file a motion to withdraw his pleas. Cover also assigns that the district court abused its discretion in imposing excessive sentences.

IV. STANDARD OF REVIEW

Whether a claim of ineffective assistance of counsel may be determined on direct appeal is a question of law. *State v. Clark*, 315 Neb. 736, 1 N.W.3d 487 (2024). 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 and whether the defendant was or was not prejudiced by counsel's alleged deficient performance. *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. Hagens*, 320 Neb. 65, 26 N.W.3d 174 (2025). 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*.

V. ANALYSIS

1. Ineffective Assistance of Counsel

Through different counsel, Cover contends that his trial counsel provided ineffective assistance in two ways. When 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 in a subsequent postconviction proceeding. *State v. Vazquez*, 319 Neb. 192, 21 N.W.3d 615 (2025).

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 his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *State v. Vazquez, supra*. 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 in a claim of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Id*.

To raise an ineffective assistance of counsel claim on direct appeal, the defendant must allege deficient performance with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to recognize whether the claim was brought before the appellate court. *Id*. When a 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. *Id*. When a conviction is based upon a plea of no contest, 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 no contest. *State v. Miller*, 315 Neb. 951, 2 N.W.3d 345 (2024).

Once raised, an appellate court will determine whether the record on appeal is sufficient to review the merits of the ineffective performance claims. *Id*. The record on direct appeal is sufficient to conclusively determine a claim of ineffective assistance of counsel if it establishes either that trial counsel's performance was not deficient, that the appellant will not be able to establish prejudice as a matter of law, or that trial counsel's actions could not be justified as a part of any plausible trial strategy. *Id*. Conversely, an ineffective assistance of counsel claim will not be addressed on direct appeal if it requires examination of facts not contained in the record. *Id*.

(a) Promise of Probation

Cover first assigns that his trial counsel was ineffective because counsel promised him that the prosecutor would recommend probation and he would receive probation. We determine the record is sufficient to refute this claim on direct appeal.

At the plea hearing, Cover affirmed he understood the possible penalties he faced, including imprisonment. Cover stated that no one had made any promises to get him to plead no contest and that he understood that the district court alone decided what sentences would be

imposed. As the Nebraska Supreme Court has noted, a defendant cannot secure relief by recanting assurances made to the trial court during the sanctity of a full and formal court proceeding "'after the doors of the prison clang shut.'" *State v. Vanderpool*, 286 Neb. 111, 118, 835 N.W.2d 52, 58 (2013), quoting *State v. Scholl*, 227 Neb. 572, 419 N.W.2d 137 (1988). Because Cover's specific representations to the district court refute his claim, we determine this assignment fails.

(b) Finality of Plea and Refusal to File Motion to Withdraw

Cover next assigns that his trial counsel was ineffective because counsel failed to inform him that he could not change his mind about the plea nor freely withdraw the plea, and counsel refused to file a motion to withdraw his plea. We determine the record is sufficient to refute this claim on direct appeal.

At the plea hearing, Cover affirmed that he understood that a no contest plea would be treated the same as a guilty plea. He affirmed that he understood the rights he was giving up in pleading no contest, i.e., the right to a trial. Cover stated he had sufficient time to discuss the plea with his attorney and was satisfied with his representation. Furthermore, he stated he had no questions for the district court regarding the pleas. As previously set forth above, a defendant cannot secure relief by recanting assurances made to the trial court during the sanctity of a full and formal court proceeding "'after the doors of the prison clang shut.'" *Id.* Cover's specific representations to the court demonstrate he understood the finality of a plea, refuting his claim.

The right to withdraw a plea previously entered is not absolute. *State v. Miller, supra*. When a defendant moves to withdraw his or her plea before sentencing, a court, in its discretion, may sustain the motion for any fair and just reason, provided that such withdrawal would not substantially prejudice the prosecution. *Id*. The defendant has the burden to show the grounds for withdrawal by clear and convincing evidence. *Id*. The Nebraska Supreme Court has held that a defendant's change of mind alone is not a fair and just reason to withdraw a guilty or no contest plea, reasoning that if second thoughts alone could constitute a fair and just reason to withdraw a plea, the requirement that a defendant demonstrate a fair and just reason before being permitted to withdraw a plea would be rendered completely hollow. See *id*.

Cover argues that after he entered his pleas, he regretted doing so and wished to withdraw his plea and proceed to trial, but his trial counsel refused to pursue a motion to withdraw. Cover's trial counsel was not deficient. Cover's change of mind about pleading no contest was not a fair and just reason to withdraw his no contest plea. Therefore, trial counsel's performance was not deficient for failing to file a motion to withdraw.

We find that this ineffective assistance of counsel claim fails because the record affirmatively refutes Cover's claim and trial counsel's performance was not deficient.

2. EXCESSIVE SENTENCE

Cover assigns that the district court abused its discretion by imposing excessive sentences because it failed to adequately consider mitigating factors.

Cover was convicted of third degree domestic assault, a Class I misdemeanor and terroristic threats, a Class IIIA felony. See, Neb. Rev. Stat. § 28-323 (Reissue 2016); Neb. Rev. Stat. § 28-311.01 (Reissue 2016). A Class I misdemeanor is punishable by up to 1 year's imprisonment. Neb Rev. Stat. § 28-106 (Reissue 2016). A Class IIIA felony is punishable by up to 3 years'

imprisonment and 18 months' post-release supervision. Neb. Rev. Stat. § 28-105 (Supp. 2025). Cover's sentences are within statutory limits.

Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. King*, 316 Neb. 991, 7 N.W.3d 884 (2024). In determining a sentence to be imposed, relevant factors customarily considered and applied are the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime. *Id*. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id*.

Cover asserts that his lack of criminal record, low risk for drug and alcohol use, and his mental health, including his willingness to get help for his mental health, were mitigating factors the district court failed to consider. He contends that if the court had properly considered the sentencing factors, his sentence would have been substantially shorter.

The district court stated it had reviewed the PSI, which included information about Cover's lack of criminal record, lack of substance use, and mental health. There is nothing in the record to suggest that the court did not consider the mitigating factors Cover identifies. Cover is essentially arguing that the court should have weighed the relevant sentencing information differently. It is not the proper function of an appellate court to conduct a de novo review of the record to determine what sentence it would impose. *State v. Hagens*, 320 Neb. 65, 26 N.W.3d 174 (2025). We determine that the court did not abuse its discretion in sentencing Cover.

VI. CONCLUSION

We conclude that Cover's ineffective assistance of trial counsel claims fail and that the district court did not abuse its discretion in imposing his sentences. We therefore affirm Cover's convictions for third degree domestic assault and terroristic threats.

AFFIRMED.