

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

THE STATE OF NEBRASKA,
Plaintiff,

vs.

CONNIE JOHNSON,
Defendant.

Case No. 20418

**ORDER DENYING
POSTCONVICTION RELIEF**

DATE OF HEARING: No hearing held.
DATE OF DECISION: March 16, 2000.
APPEARANCES: No appearances.
SUBJECT OF ORDER: Amended motion for post conviction relief.
FINDINGS: The court finds and concludes that:

1. The Nebraska Supreme Court recently stated the applicable principles of law in *State v. Lyle*, 258 Neb. 262, ___ N.W.2d ___ (1999):

- a. A defendant requesting postconviction relief must establish the basis for such relief.
- b. A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal.
- c. An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proven, constitute an infringement of the movant's rights under the state or federal Constitution. An evidentiary hearing is not required when the motion alleges only conclusions of fact or law. Further, when the motion properly alleges an infringement of the defendant's constitutional rights, an evidentiary hearing should still be denied when the records and files affirmatively show that the defendant is entitled to no relief.
- d. Under the test enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), in order to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution and Neb. Const. art. I, § 11, a defendant must

show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defendant, that is, demonstrate a reasonable probability

that but for counsel's deficient performance, the result of the proceeding would have been different.

e. The two prongs of the test in *Strickland v. Washington, supra*, deficient performance and prejudice, may be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed.

2. The amended motion fails to establish a basis for relief.

3. The record affirmatively shows that the defendant was advised of, and acknowledged that she understood, the possible penalties for the conviction.

4. The record affirmatively shows that the defendant was advised of the effective time before parole eligibility and before mandatory discharge under the "truth-in-sentencing" provisions.

5. The amended motion does not allege that her appointed counsel affirmatively advised the defendant of any matter erroneously. The amended motion does not allege that she ever inquired of her appointed counsel regarding the possibility that the confinement under the concurrent Nebraska sentence might be longer than that under the concurrent Iowa sentences.

6. The plea bargain recited prior to entry of plea gave clear and definite warning of the recommended sentence. That sentence was in fact imposed by the court. The "truth-in-sentencing" advisement specifically advised the defendant of the time required on her sentence before parole eligibility and before mandatory release. There is no reasonable ground for misunderstanding of the possible penalties, the penalty in fact imposed, and the effect of that penalty.

7. At most, the allegations of the amended motion raise a claim that the defendant formed a belief regarding the relationship of the Iowa sentence to the Nebraska sentence that her appointed counsel somehow failed to anticipate and dispel. This clearly fails to meet the requirement to establish a basis for relief. The amended motion fails to state a basis for a claim of ineffective assistance of counsel. Moreover, the record affirmatively shows that counsel's performance was not deficient.

8. The amended motion should be denied without an evidentiary hearing.

ORDER: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The defendant's amended motion for postconviction relief is denied without an evidentiary hearing.

Signed in chambers at O'Neill, Nebraska, on March 16, 2000.

DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

9 Mail a copy of this order to all counsel of record and to any pro se parties.

Done on _____, 20__ by ____.

9 Enter judgment on the judgment record.

Done on _____, 20__ by ____.

9 Mail postcard/notice required by § 25-1301.01 within 3 days.

Done on _____, 20__ by ____.

9 Note the decision on the trial docket as: Signed "Order Denying Postconviction Relief" entered.

Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge