

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

THE STATE OF NEBRASKA,

Plaintiff,

vs.

MARK LYONS,

Defendant.

Case No. 19364

ORDER DENYING MOTIONS

DATE OF HEARING: No hearing held.
DATE OF RENDITION: October 16, 2000.
DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).
TYPE OF HEARING: Not applicable.
APPEARANCES:
For plaintiff: None.
For defendant: None.
SUBJECT OF ORDER: Defendant's: (1) motion for postconviction relief (entitled "verified motion to vacate and set aside conviction and sentence"), and, (2) motion for appointment of counsel.

MEMORANDUM:

1. The defendant seeks postconviction relief, alleging ineffective assistance of trial counsel, who allegedly (a) failed to inform the defendant regarding potential plea negotiations versus risks of trial, (b) failed to inform the defendant of "the overwhelming strength of the state[']s case," and, (c) failed to advise the defendant to plead guilty.

2. The file affirmatively shows that the defendant was afforded separate counsel on his direct appeal and that trial counsel did not represent the defendant in presenting the direct appeal to the Court of Appeals.

3. The Supreme Court restated legal principles applicable to postconviction proceedings in *State v. Soukharith*, 260 Neb. 478, ___ N.W.2d ___ (2000).

a. A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.

b. Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.

c. Failure to appoint counsel in postconviction proceedings is not error in the absence of an abuse of discretion.

d. A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased.

e. In order to establish a right to postconviction relief based on a claim of ineffective counsel, the convicted defendant has the burden first to show that counsel's performance was deficient; that is, that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.

f. The two prongs of the test in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), 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.

g. The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.

h. An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska 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.

4. All of the matters raised in the present motion could have been raised on direct appeal. All of these issues are procedurally barred. The motion for postconviction relief must be denied.

5. As the motion for postconviction relief lacks merit, the motion for appointment of counsel should also be denied.

ORDER:

IT IS THEREFORE ORDERED that:

1. The motion for postconviction relief, filed on October 16, 2000, is denied without an evidentiary hearing.

2. The motion for appointment of counsel is denied.

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

DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

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

9 Done on _____, 20__ by ____.

9 Enter judgment on the judgment record.

9 Done on _____, 20__ by ____.

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

9 Done on _____, 20__ by ____.

⋮ Note the decision on the trial docket as: Signed "Order Denying Motions" entered.

9 Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge