

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

THE STATE OF NEBRASKA,

Plaintiff,

vs.

ROBERT J. FRICKEL,

Defendant.

Case No. 19276

**ORDER ON
POSTCONVICTION
AND RELATED MOTIONS**

DATE OF HEARING: No hearing held (taken under advisement by order entered June 19, 2002).

DATE OF RENDITION: August 14, 2002.

DATE OF ENTRY: See court clerk's file-stamp date per § 25-1301(3).

APPEARANCES: None.

SUBJECT OF ORDER: Defendant's: (1) motion to vacate or set aside sentence and conviction (filed May 13, 2002), (2) motion for appointment of counsel (filed May 13, 2002), and, (3) second motion and affidavit to proceed in forma pauperis (filed May 20, 2002).

MEMORANDUM:

1. This court begins by reviewing certain principles of law applicable to postconviction proceedings.

a. In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *State v. Dean*, 264 Neb. 42, ___ N.W.2d ___ (2002).

b. 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. *Id.* An evidentiary hearing is not required when a motion for postconviction relief alleges only conclusions of fact or law. *Id.* In considering a motion for postconviction relief, the district court need not grant an evidentiary hearing if the motion and the files and records of the case affirmatively show that the defendant is not entitled to relief. *Id.*

c. Under the Nebraska Postconviction Act, the district court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether any substantial issues are raised, before granting a full evidentiary hearing. *Id.*

d. The defendant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial. *Id.*

e. 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.

f. A motion for postconviction relief is not a substitute for an appeal. *State v. Gamez-Lira*, 264 Neb. 96, ___ N.W.2d ___ (2002). 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, no matter how the issues may be phrased or rephrased.

g. The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity. *Hall v. State*, 264 Neb. 151, ___ N.W.2d ___ (2002). Postconviction proceedings are not a tool whereby a defendant can continue to bring successive motions for relief. *Id.* After a first motion for postconviction relief has been judicially determined, any subsequent motion for postconviction relief from the same

conviction and sentence may be dismissed by the district court, unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for postconviction relief. *Id.*

h. Under the postconviction act, it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant. *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002). Where the postconviction action contains no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint appellate counsel for an indigent defendant. *Id.*

2. The court's records show that a jury found the defendant guilty of murder in the first degree and use of a firearm to commit a felony. The court sentenced the defendant to life imprisonment on the murder count. The court also sentenced the defendant to imprisonment for not less than six years and eight months nor more than 20 years imprisonment on the firearm count. The sentences run consecutively. The court determined and credited the sentence for time served prior to sentencing. Trial counsel perfected a direct appeal to the Supreme Court. The Supreme Court affirmed by memorandum opinion. *State v. Frickel*, 242 Neb. xvii (1993) (No. S-92-0447). The defendant, through different retained counsel, filed a motion for postconviction relief on December 1, 1994. On January 19, 1995, this court denied the motion without an evidentiary hearing. The court pronounced decision and made its trial docket entry on January 19, 1995. Under the statute then effective, the time for appeal commenced running upon performance of both of those acts. Although the defendant filed a notice of appeal on March 1, 1995, the Supreme Court dismissed the appeal for lack of jurisdiction, undoubtedly because more than 30 days had elapsed from January 19, 1995, before the attempted appeal. *State v. Frickel*, 248 Neb. xxiv (1995) (No. S-95-0203). In the absence of a timely appeal, this court's ruling on the December 1, 1994, postconviction motion became final.

3. On May 13, 2002, the defendant filed a second motion for postconviction relief. This court allowed time for submission of briefs, and subsequently took the matter under advisement.

4. Many of the defendant's alleged claims constitute mere conclusions and not allegations of fact, including paragraphs 6.A.1.1. through 6.A.1.7., 6.A.1.9., 6.A.1.10., 6.A.1.15. through 6.A.1.19., 6.B.1., and 6.B.3. through 6.B.5., all inclusive. The Supreme Court has consistently required that a defendant make specific allegations instead of mere conclusions of fact or law in order to receive an evidentiary hearing for postconviction relief. For example, in *State v. Smith*, 256 Neb. 705, 592 N.W.2d 143 (1999), the defendant alleged that trial counsel was deficient in allowing comment upon the defendant's invocation of the right to remain silent, but the Supreme Court concluded that the defendant's motion did not state facts to support that conclusion – such as who made the comments, what comments were made, when the comments were made, and how the comments violated his rights. In *State v. Russell*, 239 Neb. 979, 479 N.W.2d 798 (1992), the defendant claimed ineffective assistance of counsel because counsel raised only frivolous issues on appeal, but the Supreme Court determined that the defendant should not receive an evidentiary hearing because the motion merely stated the bald conclusion that his counsel presented frivolous arguments, rather than informing the court what those arguments were, or alleging facts from which the court could determine the frivolity of the issues presented on direct appeal. Similarly, in *State v. Threet*, 231 Neb. 809, 438 N.W.2d 746 (1989), the defendant alleged that counsel was ineffective in failing to procure witnesses or utilize available evidence in the defendant's favor, but the Supreme Court concluded that because the defendant did not specify what witnesses could have been procured or evidence adduced, the trial court need not conduct an evidentiary hearing. The listed paragraphs of the current motion suffer from the same defect.

5. In addition, those listed paragraphs, together with all of the other claims related to the trial and direct appeal, are procedurally barred by the defendant's first

postconviction motion, which was denied by this court. The current motion completely fails to show on its face that the basis relied upon for relief was not available at the time of filing of the prior motion. This court is not required to entertain successive motions on grounds which were or could have been previously raised.

6. Paragraph 6.C. alleges ineffective assistance of postconviction counsel in several respects. Although all of the subparagraphs 6.C.1. through 6.C.3. suffer from the same lack of specificity discussed above, they also fail for a more basic reason. Under the U.S. Constitution, a defendant in a criminal case has a right to effective assistance of counsel. *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002). The assistance of counsel provision in the U.S. Constitution applies to direct appeals only. *Id.* Any right to effective assistance of counsel under NEB. REV. STAT. § 29-3004 (Reissue 1995) is statutory only and cannot render a prisoner's conviction void or voidable under the U.S. or Nebraska Constitution. *Id.* The same rule obviously applies to retained counsel. It inevitably follows that a prisoner does not have a constitutional right to effective assistance of postconviction counsel. *Id.* Such claims regarding postconviction counsel cannot form the basis for postconviction relief.

7. The defendant has included paragraph 6.D. and its subparagraphs in this postconviction motion, which appear to state a request for forensic DNA testing under the DNA Testing Act. NEB. REV. STAT. § 29-4116 *et seq.* (Supp. 2001). The opening paragraph of the motion makes clear that overall motion is made pursuant to the postconviction statute. NEB. REV. STAT. § 29-3001 *et seq.* (Reissue 1995). A request for DNA testing has no place in a postconviction motion nor any relationship to the postconviction statute. *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000). However, in the interest of efficiency, this court will treat paragraph 6.D. and its subparagraphs as a separate motion for forensic DNA testing pursuant to the new statutory framework.

8. In *State v. El-Tabech, supra*, the Nebraska Supreme Court determined that, in the absence of a legislatively mandated procedure, there was no recourse then available under which a prisoner alleging actual innocence is able to bring a claim after the time period has run to bring a motion for new trial. The Legislature responded by enacting the DNA Testing Act (the act). NEB. REV. STAT. § 29-4116 *et seq.* (Supp. 2001). The act authorizes DNA testing under certain circumstances and prescribes procedures for making such determinations.

9. The act authorizes the filing of the motion with or without supporting affidavits. NEB. REV. STAT. § 29-4120 (1) (Supp. 2001). No affidavit was filed with the current motion. The defendant was required to serve the county attorney with a copy of the motion. NEB. REV. STAT. § 29-4120(2) (Supp. 2001). The certificate of service attached to the motion asserts that such service was made. The act then imposes certain duties upon the county attorney. NEB. REV. STAT. §§ 29-4120(3) and 29-4120(4) (Supp. 2001). The act then contemplates a determination by the court either upon affidavits or after a hearing.

10. This court concludes that the matter should be submitted upon affidavits. The defendant should be required to make any showing desired under § 29-4122 for appointment of counsel. The county attorney should be required to submit the inventory required by § 29-4120(4) and given the opportunity to oppose any showing under § 29-4122.

11. Section 29-4122 requires appointment of counsel for an indigent defendant for such motions “[u]pon a showing by the [defendant] that DNA testing may be relevant to the [defendant’s] claim of wrongful conviction.” NEB. REV. STAT. § 29-4122 (Supp. 2001). The bare allegations of the present motion do not constitute such a showing. If a supporting affidavit submitted as authorized by the order below states *specific facts* making such showing, the court will make the appointment using the procedure specified by § 29-4122. However, if no affidavit is submitted or any submitted affidavits fail to make such showing, counsel will not be appointed. After the question of appointed counsel is determined, the defendant and the plaintiff should be granted leave to submit affidavits on

the issues for determination under § 29-4120(5) and any desired briefs. The court would then consider the motion, and affidavits and briefs on the substantive issue, to make the determination contemplated by § 29-4120(5).

12. Although this court severs part of the defendant's purported postconviction motion for treatment as a motion under the DNA Testing Act, the denial of postconviction relief probably constitutes a final, appealable order. *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). Accordingly, the defendant's second motion to proceed in forma pauperis (filed May 20, 2002) is now ripe for consideration. The defendant's second motion cures the defects observed in the first motion. The second motion has been filed for more than 30 days and no objection has been raised. The second motion should be granted.

13. The court expressly determines that there is no just reason for delay and that a final order should be entered denying the motion for postconviction relief, except the severed motion arising under the DNA Testing Act, and denying the motion for appointment of counsel under the postconviction act. NEB. REV. STAT. § 25-1315(1) (Cum. Supp. 2000).

ORDER:

IT IS THEREFORE ORDERED that:

1. The defendant's motion for postconviction relief (filed May 13, 2002) is denied, except to the extent that paragraph 6.D. and its subparagraphs are severed for consideration as a separate motion under the DNA Testing Act.

2. Paragraph 6.D. and the subparagraphs thereof are severed for separate consideration construed as a motion under the DNA Testing Act.

3. The defendant's motion for appointment of counsel under the postconviction act (filed May 13, 2002) is denied.

4. Upon the express determination recited above, the entry of this order in regard to the denial of all postconviction act relief and the denial of appointment of counsel under the postconviction act shall constitute the entry of a final order on such claims.

5. The defendant's motion to proceed in forma pauperis (second motion filed May 20, 2002) is granted, and the defendant is authorized to proceed without prepayment of fees and costs or security, and the officers of the court are directed to issue and serve all the necessary writs, process, and proceedings and perform all such duties without charge. Such expenses shall be paid by the County of Holt.

6. The further proceedings on the severed motion under the DNA Testing Act shall be held as follows:

a. The defendant shall file with the court clerk any affidavit or affidavits intended as a showing under § 29-4122 within 30 days from the date of entry of this order. Any brief relating to the § 29-4122 showing shall be submitted by the defendant to the trial judge (NOT filed with the clerk pursuant to Unif. Dist. Ct. R. 5B) at the time of filing such affidavit or affidavits.

b. The Holt County Attorney shall file the inventory contemplated by § 29-4120(4) within 45 days of the date of entry of this order.

c. The plaintiff shall file any affidavit or affidavits intended to oppose the showing under § 29-4122 within 45 days from the date of entry of this order. Any brief relating to the § 29-4122 showing shall be submitted by the plaintiff to the trial judge (NOT filed with the clerk pursuant to Unif. Dist. Ct. R. 5.B.) at the time of filing such affidavit or affidavits.

d. Unless this court's jurisdiction has been suspended by appeal from the final order denying all postconviction relief and denying appoint of postconviction counsel, determination of the sufficiency of any showing under § 29-4122 upon any such affidavits and briefs shall be considered on **Monday, October 7, 2002**, at **9:30 a.m.**, or as soon thereafter as the same may be heard.

e. Unless this court's jurisdiction has been suspended by appeal from the denial of postconviction relief and appointment of postconviction counsel, scheduling of

further proceedings on the motion will be established upon consideration of whether the defendant has made the showing contemplated by § 29-4122.

Signed in chambers at **Ainsworth**, Nebraska, on **August 14, 2002**;
DEEMED ENTERED upon file stamp date by court clerk.

BY THE COURT:

If checked, the court clerk shall:

- Mail a copy of this order to all counsel of record and any pro se parties.
Done on _____, 20____ by _____.
- Note the decision on the trial docket as: [date of filing] **Signed "Order on Postconviction and Related Motions" entered.**
Done on _____, 20____ by _____.
- Mail postcard/notice required by § 25-1301.01 within 3 days: "Postconviction motion denied as to all postconviction relief and motion for appointment of counsel on postconviction relief denied."
Done on _____, 20____ by _____.
- Enter judgment on the judgment record.
Done on _____, 20____ by _____.

William B. Cassel
District Judge

Mailed to: