

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

THE STATE OF NEBRASKA,

Plaintiff,

vs.

RUSSELL R. FROST,

Defendant.

Case No. CR99-5

**ORDER ON
POSTCONVICTION
AND RELATED MOTIONS**

DATE OF HEARING: No hearing held (taken under advisement by order entered January 4, 2003).

DATE OF RENDITION: February 4, 2003.

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

APPEARANCES: None.

SUBJECT OF ORDER: Defendant's: (1) post conviction motion (filed January 3, 2003); (2) motion for appointment of counsel (filed January 14, 2003); (3) motion for personal recognizance bond (filed January 15, 2003).

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, 645 N.W.2d 528 (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, 645 N.W.2d 562 (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, 646 N.W.2d 572 (2002).

h. Where the record discloses that a plea of guilty was understandingly and voluntarily entered, it is not subject to post conviction relief. *State v. Terrell*, 220 Neb. 137, 368 N.W.2d 499 (1985).

i. 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 the defendant entered a plea of guilty to the charge of Sexual Assault of a Child (§ 28-320.01), a Class IIIA felony. The factual basis was provided by the court's questions and the defendant's answers. The court subsequently sentenced the defendant to imprisonment for not less than two years nor more than five years and to pay the costs of prosecution. The court determined and credited the sentence for time served prior to sentencing. The defendant did not appeal.

3. On January 3, 2003, the defendant filed his motion for postconviction relief. This court allowed time for submission of briefs, and took the matter under advisement. Neither party submitted any brief.

4. The sole ground alleged in the motion asserts "ineffective assistance of counsel in that our counsel advised us to plead guilty when in fact there wasn't a shred of evidence to convict [defendant.] [Defendant] had perfect defense to the charge (presumption of innocence)[.] The State[']s case [was] based solely on he said she said and defendant would not have been convicted by any jury on the evidence at bar where only evidence was 11[-]year[-]old child falsely accusing [defendant] of assault[.] Counsel should have fought case whereas he denied effective assistance of counsel by waiving all (advising us to waive) our rights."

5. The defendant's alleged claim constitutes a mere conclusion and not an allegation of fact. 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 current motion suffers from the same defect.

6. The defendant further failed to sufficiently allege prejudice from the claimed deficiency of counsel. The defendant's own factual allegation implicitly admits that the victim would have testified against the defendant. The defendant's claim that he "would not have been convicted by any jury" constitutes a bald conclusion without any factual basis.

7. The records of this court affirmatively show that the defendant entered his guilty plea freely, voluntarily, knowingly, and intelligently. His own statements regarding a factual basis support the charge of a sexual touching of an underage child. The defendant's allegation in the post conviction motion contradicts his own previous admissions in open court. This guilty-plea-based conviction is not subject to post conviction relief.

8. Because the court's records affirmatively show that the defendant is not entitled to relief, the motion for post conviction relief must be denied without a hearing. For the same reasons, the motion for appointment of counsel must be denied. The motion for personal recognizance bond similarly lacks merit.

ORDER: IT IS THEREFORE ORDERED that:

1. The defendant's motion for postconviction relief is denied without an evidentiary hearing.
2. The defendant's motion for appointment of counsel under the postconviction act is denied.
3. The defendant's motion for personal recognizance bond is denied.
4. This is a final order.

Signed in chambers at **Ainsworth**, Nebraska, on **February 4, 2003**;
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, stating: "Postconviction motion denied; motion for appointment of counsel denied."
Done on _____, 20____ by _____.
- Enter judgment on the judgment record.
Done on _____, 20____ by _____.

William B. Cassel
District Judge

Mailed to: