

**CLERK OF THE NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS**
2413 State Capitol, P.O. Box 98910
Lincoln, Nebraska 68509-8910
(402) 471-3731
FAX (402) 471-3480

January 29, 2020

Jimmy L Livingston
Penitentiary
PO Box 2500
Lincoln, NE 68542-2500

IN CASE OF: A-19-000322, State v. Jimmy L. Livingston
TRIAL COURT/ID: Lancaster County District Court CR17-1541

The following filing: Petition Appellant for Further Review
Filed on 12/20/19
Filed by appellant Jimmy L Livingston

Has been reviewed by the court and the following order entered:

Petition of appellant for further review denied.

Respectfully,

Clerk of the Supreme Court
and Court of Appeals

NOTICE: THIS OPINION IS NOT DESIGNATED FOR
PERMANENT PUBLICATION AND MAY NOT BE CITED
EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

NEBRASKA SUPREME COURT
COURT APPEALS

State of Nebraska,)
)
 Appellee,)) No. A-19-322
 v.)
)
 Jimmy L. Livingston,)) **MEMORANDUM OPINION**
)) **AND**
 Appellant.)) **JUDGMENT ON APPEAL**

PIRTLE, RIEDMANN, and WELCH, Judges.

WELCH, Judge.

INTRODUCTION

Jimmy L. Livingston appeals the denial of his motion for postconviction relief without an evidentiary hearing. On appeal, he contends that: (1) the district court misled him into believing his postconviction motion was sufficient by conducting a hearing on the State's motion to deny his motion for postconviction relief; and (2) the district court erred in denying his motion for postconviction relief without an evidentiary hearing. For the reasons set forth herein, we affirm.

STATEMENT OF FACTS

Following his plea, Livingston was convicted of second degree assault and possession of a firearm by a prohibited person. The district court sentenced Livingston to 19 to 20 years' imprisonment



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for second degree assault and 11 to 20 years' imprisonment for possession of a firearm by a prohibited person and ordered that the sentences be served consecutively. On direct appeal, we summarily affirmed his conviction and sentence. See *State v. Livingston*, A-18-0485. Livingston was represented by his trial counsel on direct appeal.

Subsequently, in December 2016, Livingston, acting pro se, filed a motion for postconviction relief. His postconviction motion raised claims related to alleged deficiencies in the original citation issued by arresting officers; the officer's probable cause affidavit; the district court's original order of probable cause finding; the complaint; and the information all relating to the original charge to which he pled, was convicted, was sentenced, and appealed. In response to this postconviction motion, the State filed a motion to deny an evidentiary hearing, and the district court held a hearing on the State's motion. The district court denied Livingston's motion for postconviction relief without an evidentiary hearing finding the records and files reviewed affirmatively showed Livingston was not entitled to postconviction relief. Livingston now appeals pro se from that order of dismissal.

ASSIGNMENTS OF ERROR

Livingston contends the district court misled him to believe that his postconviction motion was sufficient by holding a hearing on the State's motion and that the district court erred in denying his motion for postconviction relief without an evidentiary hearing. In his brief, Livingston also argues the district court lacked jurisdiction. However, because he did not assign as error the lack of jurisdiction, we do not analyze this issue. See *U.S. Pipeline v. Northern Natural Gas Co.*, 303 Neb. 444, 930 N.W.2d 460 (2019) (to be considered by appellate court, alleged error must be both specifically assigned and specifically argued in brief of party asserting error).

STANDARD OF REVIEW

In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief. *State v. Privett*, 303 Neb. 404, 929 N.W.2d 505 (2019).

ANALYSIS

HEARING ON STATE'S MOTION

On appeal, Livingston first argues the district court misled him to believe that his postconviction motion was sufficient by

holding a hearing on the State's motion. He further argues the hearing gave a rebuttable presumption to his allegations. That is the extent of Livingston's argument. Contrary to his argument, the record reveals that following Livingston's filing a motion for postconviction relief, the State filed a response requesting dismissal of the postconviction motion on various grounds upon which a hearing was conducted. Following that hearing, the court entered an order of dismissal on various grounds, some of which are assigned as error and discussed in the next section of this opinion. Livingston appears to argue that the hearing on the State's motion to dismiss misled him to believe his postconviction motion was sufficient to entitle him to a hearing; yet he does not argue anything which would suggest any legal or factual abnormality in the State's motion or the court's hearing, or a basis for being misled, and we can find none.

The hearing held in March 2019 was a hearing on the State's motion to deny Livingston's motion for postconviction relief without an evidentiary hearing. During the hearing, the district court received into evidence the bill of exceptions from the plea and sentencing hearings as well as the filings from the district court case. After considering Livingston's motion and the State's arguments, the court dismissed the motion without a hearing. Some of the bases for that dismissal are discussed in the next section;

however, there is nothing in this record which suggests any procedural abnormality. Further, we note that the procedure used by the district court in this case, i.e. holding a hearing to determine which files and records the court may review prior to considering the State's motion to deny a prisoner an evidentiary hearing on a motion for postconviction relief, was approved by the Nebraska Supreme Court in *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002). Accordingly, Livingston's first assignment of error fails.

DENIAL OF MOTION FOR POSTCONVICTION RELIEF

Livingston next contends the district court erred in denying his motion for postconviction relief without an evidentiary hearing. Specifically, Livingston's postconviction motion raised claims related to alleged deficiencies in the original citation issued by officers, the officer's original probable cause affidavit, the district court's original order of probable cause finding, the complaint, and the information all relating to charges filed upon which he pled, was convicted, was sentenced, and appealed. The district court reviewed the record and applicable case law, and found the record established that Livingston was not entitled to postconviction relief.

The Nebraska Supreme Court has stated, "[p]ostconviction relief is a very narrow category of relief, available only to

remedy prejudicial constitutional violations that render the judgment void or voidable." *State v. Henderson*, 301 Neb. 633, 637, 920 N.W.2d 246, 255 (2018). Further, the Nebraska Supreme Court has articulated:

A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution. A defendant is required to make specific allegations instead of mere conclusions of fact or law in order to receive an evidentiary hearing for postconviction relief. When a district court denies postconviction relief without conducting an evidentiary hearing, an appellate court must determine whether the petitioner has alleged facts that would support the claim and, if so, whether the files and records affirmatively show that he or she is entitled to no relief.

Generally, a voluntary guilty plea or plea of no contest waives all defenses to a criminal charge. Thus, when a defendant pleads guilty or no contest, he or she is limited to challenging whether the plea was understandingly and voluntarily made and whether it was the result of ineffective assistance of counsel.

State v. Privett, 303 Neb. 404, 408, 929 N.W.2d 505, 510 (2019).

Here, Livingston pled guilty to second degree assault and possession of a firearm by a prohibited person. Accordingly, Livingston is limited to challenging the plea on grounds that the

plea was not made understandingly and voluntarily or that it resulted from ineffective assistance of counsel. However, Livingston did not assert challenges to those issues.

Instead, Livingston contends there are deficiencies in the original citation issued by officers; the officer's original probable cause affidavit; the district court's original probable cause finding; the complaint and information upon which he pled and was convicted, sentenced and appealed; and that there was a lack of jurisdiction. First, Livingston argues two officers of the Lincoln Police Department, while issuing a citation in lieu of arrest, did not swear upon an oath before someone with the authority to administer oaths and affirmations. Second, Livingston argues one of the officers did not swear upon an oath before someone with the authority to administer oaths and affirmations when submitting an affidavit of probable cause. Third, Livingston asserts the order of probable cause finding is unsupported by reckless and negligent assertions not sworn to upon an oath before someone with authority to make such oaths and affirmations. Fourth, Livingston argues the Deputy Lancaster County Attorney did not swear upon an oath, on information and belief, to the allegations within the complaint issued on November 27, 2017. Fifth, Livingston claims that the Deputy Lancaster County Attorney did not swear upon an oath before anyone with the authority to take oaths and

affirmations when submitting the information filed December 14, 2017. Lastly, Livingston contends the district court lacked the necessary authority on April 24, 2018, to render its judgment because there was no legal process and the court lacked subject matter jurisdiction and personal jurisdiction.

After reviewing the record, we find that the district court properly dismissed Livingston's motion without an evidentiary hearing for several reasons. First, we note that in his motion, Livingston has only alleged conclusions of fact and law. Livingston has not specified how he was prejudiced by any of the alleged issues and has, therefore, failed to assert specific allegations that would constitute an infringement of his rights. See *State v. Cook*, 290 Neb. 381, 860 N.W.2d 408 (2015) (evidentiary hearing is not required when motion for postconviction relief alleges only conclusions of fact or law).

Second, even if Livingston supported these conclusory allegations with specific facts on this subject matter, the specific allegations here would not render his conviction void or voidable under the United States or Nebraska Constitutions. To obtain postconviction relief, Livingston needed to allege facts which, if proved, constituted a denial or violation of his rights under the United States or Nebraska Constitutions causing the judgment against him to be void or voidable. See *State v. Newman*,

300 Neb. 770, 916 N.W.2d 393 (2018) (explaining that in motion for postconviction relief, defendant must allege facts which, if proved, constitute denial or violation of his or her rights under U.S. or Nebraska Constitution, causing judgment against defendant to be void or voidable).

Third, because the issues now raised by Livingston were known to him at the time of his direct appeal, he is procedurally barred from bringing these issues on a postconviction motion. See *State v. Tyler*, 301 Neb. 365, 918 N.W.2d 306 (2018) (motion for postconviction relief is not substitute for direct appeal). Therefore, the district court did not err when it declined to hold an evidentiary hearing on the matter.

CONCLUSION

For the reasons set forth above, we affirm the order of the district court denying Livingston's motion for postconviction relief without an evidentiary hearing.

AFFIRMED.

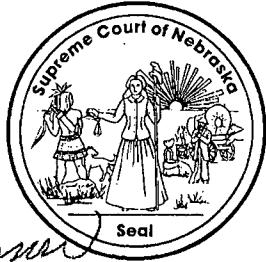
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1 Memo Opinion

Date
11/25/2019

I, Wendy A. Wussow, Clerk of the Nebraska Supreme Court, certify that I have compared the following 9 page(s) to be a full, true, and correct copy of the original record on file.

Court of Appeals No: A-19-0322
Caption: State v. Jimmy L. Livingston
Trial Court: Lancaster County District Court
Trial Court No: CR17-1541



IN TESTIMONY WHEREOF, I have placed my signature and seal of said court.

Date: November 25, 2019 BY THE COURT: Wendy A. Wussow

CLERK

Jimmy L Livingston
PO Box 22500
Lincoln, NE 68542-2500

D 02 CR 17 0001541 State v. Jimmy L Livingston

03/04/2019 Order

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Assigned to: Jodi L Nelson

Attachment 2-4

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

THE STATE OF NEBRASKA,

CASE NO. CR 17-1541

Plaintiff,

ORDER

v.

JIMMY LIVINGSTON,

Defendant.

This matter came before the court on March 1, 2019, on the State's motion to deny evidentiary hearing, Filing No. 5, which directly relates to defendant's verified motion for postconviction relief, Filing No. 7. Chief Deputy County Attorney Bruce Prenda and Senior Certified Law Student Maureen Larson appeared for the state. The defendant appeared telephonically, pro se. Exhibits 1 and 2 were received, arguments were heard, and the matter was taken under advisement. The court, now being fully informed, finds as follows:

The court is not required to grant an evidentiary hearing on a motion for postconviction relief which "alleges only conclusions of law and fact; nor is an evidentiary hearing required under the Nebraska Postconviction Act when the motion for relief does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant." *State v. Von Dorn*, 234 Neb. 93, 95, 449 N.W.2d 530, 532 (1989). A defendant requesting postconviction relief "must establish the basis for such relief, and the

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findings of the district court will not be disturbed unless they are clearly erroneous.” *State v. McHenry*, 268 Neb. 219, 223, 682 N.W.2d 212, 219 (2004).

The purpose of the Postconviction Act is to provide relief from a miscarriage of justice. The Act was not intended to be used as a procedure to obtain further review by a defendant dissatisfied with his conviction and sentence. See *State v. Huffman*, 190 Neb. 319, 207 N.W.2d 696 (1973). The Nebraska Supreme Court has “repeatedly held that a motion for postconviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated on direct appeal.” *State v. Victor*, 242 Neb. 306, 310, 494 N.W.2d 565, 569 (1993); see also *State v. Perry*, 268 Neb. 179, 186, 681 N.W.2d 729, 735 (2004) (stating that a motion for postconviction relief “cannot be used to secure review of issues which were or could have been litigated on direct appeal”). If the facts that support the issue raised in a postconviction proceeding were known at the time of the trial or appeal, and were not raised, then they are deemed waived. *State v. Dandridge*, 255 Neb. 364, 371, 585 N.W.2d 433, 438 (1998); *State v. Cole*, 207 Neb. 318, 320, 295 N.W.2d 776, 778 (1980).

An evidentiary hearing may be denied in a postconviction action when the records and files in the case affirmatively show that the defendant is entitled to no relief. *Dandridge*, 255 Neb. at 367, 585 N.W.2d at 435; *State v. Luna*, 230 Neb. 966, 968, 434 N.W.2d 526, 528 (1989).

The court has reviewed the files and records herein in light of the applicable case law. Specifically, the court has considered Exhibits 1 and 2, as well as the transcript of the proceedings in the County Court of Lancaster County, Nebraska at CR 17-16040 attached to the defendant’s motion for postconviction relief. The court finds that those records and files affirmatively show that the defendant is not entitled to postconviction relief.

Accordingly, the court finds that the state's motion to deny evidentiary hearing, Filing No. 7, should be, and hereby is sustained and the defendant's motion for postconviction relief, Filing No. 6, should be, and hereby is overruled, and dismissed without further hearing.

DATED this 4 day of March, 2019.

BY THE COURT:



Jodi L. Nelson
District Court Judge

cc Chief Deputy County Attorney Bruce Prenda
bprenda@lancaster.ne.gov

Jimmy L. Livingston, #87535, Defendant
Nebraska State Penitentiary
P.O. Box 22500
Lincoln, NE 68542-2500

**JODI L. NELSON
DISTRICT JUDGE**

SHARON M. HOUGH
Bailiff

THIRD JUDICIAL DISTRICT
THE JUSTICE AND LAW ENFORCEMENT CENTER
575 SOUTH 10TH
LINCOLN, NEBRASKA 68508

PHONE 402-441-7371 FAX 402-441-3833

RUSSELL ZIERKE
Court Reporter

April 1, 2019

Mr. Jimmy Livingston, #87535
Nebraska State Penitentiary
P.O. Box 22500
Lincoln, NE 68542-2500

***RE: State v. Jimmy Livingston
CR 17-1541***

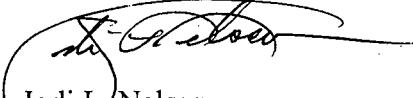
Dear Mr. Livingston:

Today the following entry was made in the Judge's minutes re above case:

4-1-19 - Nelson (smh)
008 - Defendant's motion to proceed in forma pauperis considered.
Ruling deferred pending submission of a certified copy of the
defendant's inmate account sheet for the most recent six-month
period. Submission to be made within 21 days.

A copy of this entry is sent to defendant.

Sincerely,


Jodi L. Nelson
District Judge

JLN:smh

Attachment 3-1