

FILED

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NEBRASKA SUPREME COURT
COURT APPEALS

IN THE SUPREME COURT OF NEBRASKA

State of Nebraska,)	No. S-19-384.
)	
Appellee,)	
)	
v.)	MEMORANDUM OPINION
)	AND
Joseph J. Buttercase,)	JUDGMENT ON APPEAL
)	
Appellant.)	
)	

HEAVICAN, C.J., MILLER-LEMAN, CASSEL, STACY, FUNKE, and PAPIK.

PAPIK, J.

Joseph J. Buttercase was convicted and sentenced for various charges related to a sexual assault. Now in the latest of several appeals, Buttercase challenges district court orders that denied a motion for new trial, a motion for DNA testing, and a motion for appointment of counsel. He also challenges the denial of a supplemental motion for new trial and a successive motion for postconviction relief. Because all of Buttercase's claims are untimely, procedurally barred, or lack merit, we affirm.

I. BACKGROUND

On August 17, 2012, following a jury trial, Buttercase was convicted in the district court for Gage County of first degree sexual assault, first degree false imprisonment, strangulation, and third degree domestic assault. The victim was Buttercase's former girlfriend, T.F. In December 2012, Buttercase was sentenced to an aggregate term of 26 years and 8 months to 41 years in



prison. His convictions and sentences were later affirmed on direct appeal by the Court of Appeals. See *State v. Buttercase*, No. A-12-1167 (unpublished memorandum opinion released November 5, 2013). On direct appeal, Buttercase was represented by the same counsel who represented him at trial.

On February 19, 2015, Buttercase's new counsel filed a motion for postconviction relief in the district court. On October 2, the district court denied Buttercase's postconviction motion without an evidentiary hearing. Buttercase appealed the district court's decision, and the Court of Appeals affirmed. See *State v. Buttercase*, No. A-15-987 (unpublished memorandum opinion released December 5, 2017).

On December 9, 2015, while his postconviction appeal was still pending, Buttercase filed a motion for return of seized property in the district court. The district court denied the motion, and Buttercase appealed. We affirmed. See *State v. Buttercase*, 296 Neb. 304, 893 N.W.2d 430 (2017).

The current appeal involves two groups of motions with many repetitive and overlapping claims. The first group includes Buttercase's motion for DNA testing, motion for new trial, and motion for appointment of counsel, all filed in the district court on July 14, 2017. The second group consists of Buttercase's supplemental motion for new trial and successive motion for postconviction relief or, as he styled it, "motion to vacate,"

both filed in 2018. Buttercase filed two notices of appeal, and we assigned both to the same docket number. We discuss the relevant facts, the district court's rulings, and the current appeal in more detail below.

II. ASSIGNMENTS OF ERROR

Buttercase assigns, restated, that the district court erred in (1) denying his motion for DNA testing, (2) denying his motion for new trial, (3) denying his motion for appointment of counsel, (4) denying his supplemental motion for new trial, and (5) denying his application for postconviction relief without an evidentiary hearing.

III. STANDARD OF REVIEW

A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *State v. A.D.*, 305 Neb. 154, 939 N.W.2d 484 (2020).

A motion for DNA testing is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Myers*, 301 Neb. 756, 919 N.W.2d 893 (2018).

Generally, decisions regarding appointment of counsel are reviewed for an abuse of discretion. See *id.*

An appellate court reviews de novo the trial court's dismissal of a motion for new trial without an evidentiary hearing. See *State v. Cross*, 297 Neb. 154, 900 N.W.2d 1 (2017).

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. Allen*, 301 Neb. 560, 919 N.W.2d 500 (2018).

Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. *State v. Hessler*, 288 Neb. 670, 850 N.W.2d 777 (2014). When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Id.*

IV. ANALYSIS

1. JURISDICTION

Before reaching the legal issues presented for review, it is our duty to determine whether we have jurisdiction to decide them. See *State v. Fredrickson*, 305 Neb. 165, 939 N.W.2d 385 (2020). Failure to timely appeal from a final order prevents an appellate court's exercise of jurisdiction over the claim disposed of in the order. *State v. Banks*, 289 Neb. 600, 856 N.W.2d 305 (2014).

In this case, the task of determining whether we have appellate jurisdiction is more complicated than it typically is.

This is true because Buttercase seeks review of the district court's denial of several different motions; because he filed several subsequent motions seeking reconsideration of the adverse rulings on some of those motions; and because he filed two notices of appeal. Further, his motions implicate some open questions under our law. But as we will explain, we nonetheless conclude that Buttercase has timely appealed from the orders he seeks to challenge. We begin by reviewing familiar principles relating to the timeliness of appeals.

Appeals must be filed within 30 days after the entry of the judgment, decree, or final order. Neb. Rev. Stat. § 25-1912(1) (Reissue 2016). However, in some cases, we have recognized a mechanism for terminating that period. See, e.g., *Clarke v. First Nat'l Bank of Omaha*, 296 Neb. 632, 895 N.W.2d 284 (2017); *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005). In such cases, § 25-1912(3) provides that the 30-day period may be terminated by filing a motion to alter or amend within 10 days of the judgment. Neb. Rev. Stat. § 25-1329 (Reissue 2016). A new period of 30 days for filing a notice of appeal commences when the terminating motion is ordered dismissed. *Id.* But "[w]hen any motion terminating the time for filing a notice of appeal is timely filed by any party, a notice of appeal filed before the court announces its decision upon the terminating motion shall have no effect, whether filed

before or after the timely filing of the terminating motion.” § 25-1912(3).

Typically, a motion for reconsideration does not terminate the time for appeal and is considered nothing more than an invitation to the court to consider exercising its inherent power to vacate or modify its own judgment. See *State v. Lotter*, 301 Neb. 125, 917 N.W.2d 850 (2018), citing *Kinsey v. Colfer, Lyons*, 258 Neb. 832, 606 N.W.2d 78 (2000). For this reason, we have held that once a notice of appeal is filed, any pending motions to reconsider that have not been ruled upon become moot. See *Kinsey v. Colfer, Lyons, supra*. In some contexts, a motion for reconsideration may also be treated as a motion to alter or amend a judgment for purposes of terminating the appeal period. *State v. Lotter, supra*. To be treated as a motion to alter or amend a judgment, a motion for reconsideration must be filed no later than 10 days after the entry of judgment and seek substantive alteration of the judgment. See *id.* See, also, *State v. Gibilisco*, 279 Neb. 308, 778 N.W.2d 106 (2010).

In light of these principles, we now consider the timeliness of Buttercase’s appeals from the orders he seeks to challenge.

First, Buttercase timely appealed the order denying the motion for new trial, the motion for DNA testing, and the motion for appointment of counsel. On April 16, 2019, the district court denied these three motions. On April 19, Buttercase filed a notice

of appeal. On April 24, Buttercase moved the district court to reconsider and alter or amend the April 16 order. The same day, the district court denied Buttercase's "Motion to Alter or Amend and Motion to Reconsider." On May 1, Buttercase filed another motion to reconsider, requesting that the district court grant, among other things, the motion for new trial, the motion for DNA testing, and the motion for appointment of counsel. On May 2, the district court denied the relief requested in the May 1 motion to reconsider. Buttercase filed a second notice of appeal on May 15.

We have not previously addressed whether motions to alter or amend or motions for reconsideration can operate as terminating motions for appeals of rulings on motions for new trial, motions for DNA testing, and motions for the appointment of counsel. But we need not take up that question today. If Buttercase's motions to reconsider or alter or amend filed on April 24 and May 1, 2019, did not operate as terminating motions, Buttercase timely filed a notice of appeal on April 19, within 30 days of the April 16 order, and the subsequent motions to reconsider were moot. If any of the foregoing motions did operate as terminating motions, the district court disposed of them before Buttercase filed his notice of appeal on May 15. That notice of appeal was filed within 30 days of each order disposing of the terminating motions and was not rendered ineffective by any pending terminating motion. Thus, regardless of whether the April 24 and May 1 motions were terminating motions,

Buttercase's appeal was timely as to the rulings on the motion for new trial, motion for DNA testing, and motion for appointment of counsel.

Similar reasoning leads us to conclude that Buttercase timely appealed the order that denied his supplemental motion for new trial. On March 20, 2019, the district court denied Buttercase's supplemental motion for new trial along with his successive motion for postconviction relief. On March 26, Buttercase filed a motion to reconsider that order to the extent it denied his supplemental motion for new trial. On April 19, within 30 days of the order that rejected his supplemental motion for new trial, Buttercase filed his first notice of appeal in this case. On May 1, Buttercase filed another motion to reconsider, requesting that the district court grant his supplemental motion for new trial and other motions. On May 2, the district court denied Buttercase's requests to reconsider the denial of his supplemental motion for new trial. Buttercase filed his second notice of appeal on May 15.

Again, we need not consider whether Buttercase could file a terminating motion in the context of his supplemental motion for new trial. Buttercase's appeal from the order that denied his supplemental motion for new trial is timely regardless of whether his motions to reconsider operated as terminating motions. If the March 26 and May 1, 2019, motions to reconsider did not operate as terminating motions, Buttercase's April 19 notice of appeal was

timely filed within 30 days of the March 20 order. Under this scenario, both the March 26 motion to reconsider and the May 1 motion to reconsider that followed it were rendered moot.

If Buttercase's motions to reconsider did operate as terminating motions, he still timely appealed the order denying his supplemental motion for new trial. The May 2, 2019, order rejected Buttercase's request for reconsideration of the order that denied his supplemental motion for new trial. Buttercase filed his second notice of appeal on May 15, within 30 days of the May 2 order. Although that notice of appeal specifically designated the April 16 order that addressed the motions for new trial, for DNA testing, and for appointment of counsel as the order appealed from, § 25-1912(1) does not require that the order be correctly identified to confer appellate jurisdiction. See *Dominguez v. Eppley Transp. Services, Inc.*, 277 Neb. 531, 763 N.W.2d 696 (2009).

Finally, Buttercase timely appealed the order that denied his successive motion for postconviction relief. On March 20, 2019, Buttercase's supplemental motion for new trial and successive motion for postconviction relief were denied. On March 26, Buttercase filed a motion to reconsider the March 20 order to the extent it denied his supplemental motion for new trial. As noted above, we have recognized terminating motions in appeals from rulings on motions for postconviction relief. See, e.g., *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005). But the motion to

reconsider did not address the postconviction ruling; it only sought reconsideration of the denial of the supplemental motion for new trial. We need not decide in this case whether the March 26 motion to reconsider operated as a terminating motion with respect to the order denying postconviction relief because, again, Buttercase timely appealed the order denying postconviction relief either way. If the March 26 order was not a terminating motion, Buttercase's April 19 notice of appeal was timely. If the March 26 order was a terminating motion, his May 15 notice of appeal was timely.

For these reasons, we have jurisdiction to consider the errors assigned and argued in Buttercase's brief.

2. MOTION FOR DNA TESTING

Moving to the merits of the appeal, we first address Buttercase's contention that the district court erred in denying his motion for DNA testing filed pursuant to Neb. Rev. Stat. § 29-4120 (Reissue 2016). The motion references a DNA analyst's report, dated October 27, 2011, on testing of samples taken from crime scene evidence. The DNA analyst's report was not received as evidence at trial, but the analyst did testify, and her testimony was consistent with her report.

Buttercase alleged the report was potentially exculpatory but that it had not been disclosed to him until after trial, during discovery arising from a federal indictment. According to

Buttercase, the report's findings of DNA evidence containing a "mixture of at least two individuals" suggested that T.F. could have had sex with multiple males around the time she alleged that Buttercase assaulted her and that one of those males could have caused her injuries. He also generally alleged that the biological material from the crime scene "can be subjected to retesting with more current DNA techniques that provide a reasonable likelihood of more accurate and probative results."

At a hearing on the motion, the district court took judicial notice of the report. Buttercase did not offer any additional evidence. The district court denied Buttercase's motion for DNA testing and his subsequent motions to alter or amend and to reconsider. We conclude that this was not an abuse of discretion.

Under the DNA Testing Act, forensic DNA testing is available for any biological material that is related to the investigation or prosecution that resulted in the judgment; is in the actual or constructive possession of the state, or others likely to safeguard the integrity of the biological material; and either was not previously subjected to DNA testing or can be retested with more accurate current techniques. See § 29-4120(1); *State v. Myers*, 301 Neb. 756, 919 N.W.2d 893 (2018). Pursuant to § 29-4120(5), "[u]pon consideration of affidavits or after a hearing," the court shall order testing upon a determination that (a)(i) the biological material was not previously subjected to DNA testing or (ii) the

biological material was tested previously, but current technology could provide a reasonable likelihood of more accurate and probative results, (b) the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, and (c) such testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced.

Because an action under the DNA Testing Act is civil in nature, the defendant has the burden to provide the district court with affidavits or evidence establishing the factual determinations the district court must make under § 29-4120(5). See *State v. Young*, 287 Neb. 749, 844 N.W.2d 304 (2014). Buttercase did not satisfy this burden.

There is no dispute that the biological material from the crime scene has been subjected to DNA testing. Thus, under Neb. Rev. Stat. § 29-4120(5) (Reissue 2016), Buttercase had the burden to show that current technology could provide a reasonable likelihood of more accurate and probative results. Nothing Buttercase submitted to the district court made such a showing. Similarly, Buttercase's allegation that the DNA analyst's report in this case was not disclosed to him until after trial does not show how current technology could provide a reasonable likelihood of more accurate and probative results. In the absence of the requisite showing by Buttercase, we conclude that the district

court did not abuse its discretion in denying Buttercase's motion for DNA testing.

3. MOTION FOR NEW TRIAL

We now turn to Buttercase's contention that the district court erred in denying his motion for new trial filed July 14, 2017. He asserts various instances of newly discovered evidence pursuant to Neb. Rev. Stat. § 29-2101(5) (Reissue 2016), but many of his allegations can be more accurately characterized as claims of prosecutorial or juror misconduct under § 29-2101(2). Regardless of their framing, none of Buttercase's claims justified a new trial. We address each one in turn below.

(a) Prosecutorial Misconduct

Buttercase's motion for new trial alleged that the prosecution had committed several instances of misconduct. He asserts misconduct in failing to disclose (1) Facebook messages authored by T.F., (2) sex tapes from Buttercase's camcorder, and (3) the aforementioned DNA report. Buttercase also alleged that the State had "mixed another individual[']s discovery with [his] discovery," which raised questions about whether the State was intentionally withholding additional exculpatory evidence.

With respect to his claims that the State failed to disclose the various items mentioned above, Buttercase appears to argue that he is entitled to a new trial both because the failure to disclose those items constituted prosecutorial misconduct and

because the items constitute newly discovered evidence for purposes of § 29-2101(5). As explained below, we find Buttercase was not entitled to a new trial on either basis.

(i) Facebook Messages

Regarding the Facebook messages authored by T.F., Buttercase alleged that he did not receive them until after trial. He claimed that they showed T.F.'s motives to harm him with false accusations.

A new trial may be granted based on "newly discovered evidence material for the defendant which he or she could not with reasonable diligence have discovered and produced at the trial" and materially affects the defendant's substantial rights. Neb. Rev. Stat. § 29-2101(5) (Reissue 2016). A motion for new trial alleging newly discovered evidence must be filed "within a reasonable time after the discovery of the new evidence" and "cannot be filed more than five years after the date of the verdict, unless the motion and supporting documents show the new evidence could not with reasonable diligence have been discovered and produced at trial and such evidence is so substantial that a different result may have occurred." Neb. Rev. Stat. § 29-2103(4) (Reissue 2016).

Here, because Buttercase filed his motion for new trial just shy of five years after the verdict, we must consider whether he did so within a reasonable time. Regarding the Facebook messages, we conclude that he did not. Buttercase's reply brief concedes

that he received the Facebook messages as discovery in his federal case in 2013, after his trial in state district court, but he asserts that the documents were "reduced in size to eight pages per sheet making most of it illegible with parts of the text missing." Reply brief for appellant at 2. According to Buttercase, he did not receive legible documents from his federal counsel until March 9, 2016. But even if the Facebook messages disclosed in 2013 were not legible, Buttercase knew about them at least as early as 2015: the parties do not dispute that Buttercase previously raised the same issue in his first motion for postconviction relief. He filed the current motion for new trial on July 14, 2017. During this interval, Buttercase had ample time to raise the issue of newly discovered evidence in a motion for new trial, but he did not.

And even if we were to consider the filing of the motion for new trial to be timely under § 29-2103(4), Buttercase has not shown that the content of the Facebook messages would have materially affected his substantial rights. Those messages between T.F. and Buttercase's ex-wife state, in relevant part:

[T.F.]: I didn't block you [on social media].
[Buttercase] did. He took over my old account and deleted it.
. . . I had to make a new one. He's only smart in stupid ways
but I'm smart instupid ways so I played his game lol.

[S.P.]: With [Buttercase]...you got to learn his game and play it better . . . its a great feeling to beat him at his own game.

[T.F.]: Damn right! He never saw me comin'! I've got his ass tied up in court for the rest of his natural life. He shouldn't of threatened me with his mommy's law suit money cuz my grandparents have far more. And [Buttercase] took my grandpas ladder so he made it personal with him! Not a wise move.

. . .

[S.P.]: What I read in the papers about what he did to you . . . is horrible . . . im glad you made it out alive . . . I also pray for your safety between now and the time he actually goes to court! . . . I hope with everything in me that he goes to jail...but there is a huge part of me that believes that in one way or another he will got off this to...

[T.F.]: The papers made it seem like no big deal. He beat me for 3 hours straight. Tried to kill me a few times. . . . [Buttercase's attorney] . . . is trying to prove all warrants were executed illegally but the warrants were signed by the same judge who is trying this case so I doubt he will entertain that. . . . Plus my attorney and the judge play golf together and he likes me so hopefully I win my replevin for all my shit he stole from me and he gets fucked in the criminal case. He is looking at 7 felonies and 1 misdemeanor. I don't think he's going far. He should just save the money and give me back all my stuff and his pretty lil blue car to replace the one he stole and wrecked from me. its not like he's ever gonna need it! ;)

. . .

[T.F.]: . . . His problem is he's never been in trouble so maybe some time in the clink will help him grow up.

. . .

[T.F.]: . . . [It] would butt hurt him like no other to think that [his daughter] gets to see me and not him even if she isn't.!!! HAHAAHAHA my brain can do this all day every day because I'm so much better at his games than he is!!!! I admit I crack myself up sometimes!!!!

. . .

[S.P.]: he needs his head fucked with...I think it would do him some good[.]

[T.F.]: he needs his eyes popped out and skull fucked is what he needs.

. . .

[T.F.]: Ya I got questioned by the sheriffs. I told them I didn't know anything about him doing or running drugs. . .

.

Buttercase contends that the Facebook messages may show T.F.'s ulterior motives to harm him with false accusations, in short, that she "set [him] up." Brief for appellant at 14. T.F.'s statements undoubtedly exhibit animosity toward Buttercase, but a reading of the entire exchange shows that as to this criminal case, T.F. was expressing a desire to hold Buttercase to account for his assaultive behavior, something that had not happened in the past. Further, T.F.'s statements about the assault were consistent with her trial testimony. If Buttercase had been able to offer the

Facebook messages at trial, they would not have impeached T.F.'s credibility or altered the outcome of trial.

For similar reasons, we conclude that Buttercase has not shown prosecutorial misconduct related to the Facebook messages. Buttercase asserts that the messages were material exculpatory evidence which the prosecution was required to disclose before trial. That is, he alleges a violation under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Under the U.S. Supreme Court's holding in *Brady*, the prosecution has a duty to disclose all favorable evidence to a criminal defendant prior to trial, even if the defense has not requested it. See *Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999). There are three primary components of a *Brady* violation. First, the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching. *Id.* See also, *State v. Lykens*, 271 Neb. 240, 710 N.W.2d 844 (2006). Second, the evidence must have been suppressed by the State, either willfully or inadvertently. *Id.* Third, prejudice from the suppression must have ensued. *Id.* As we have explained, the Facebook messages were neither exculpatory nor impeaching; therefore, Buttercase was not prejudiced by their absence at trial. As a result, his allegation of prosecutorial misconduct fails.

(ii) Sex Tapes

As for the five sex tapes, Buttercase alleged that this footage from his camcorder was exculpatory because it showed T.F. consenting to acts before the date of the assault that she later claimed were done without her consent during the assault. See Neb. Rev. Stat. § 27-412(2)(a)(ii) (Cum. Supp. 2010) (authorizing admission of victim's prior sexual behavior only to show the victim consented to alleged sexual misconduct).

Buttercase made an argument based on the tapes—that the State withheld video evidence of T.F. previously consenting to certain sex acts—two years before the current motion for new trial when he sought to amend his prior postconviction motion. See *State v. Buttercase*, No. A-15-0987 (memorandum opinion released December 5, 2017). On appeal from the denial of that motion, the Court of Appeals observed that it was unclear how a video of Buttercase and T.F. engaged in consensual sexual activity before the assault would have changed the outcome of the case, as it was undisputed that the two were in a consensual sexual relationship during the months preceding the assault. *Id.*

Based on the Court of Appeals' analysis, the law-of-the-case doctrine precludes reconsideration of whether Buttercase's substantial rights were materially affected. See *State v. Cross*, 297 Neb. 154, 157, 900 N.W.2d 1, 4 (2017) ("[N]ew trial may be granted only if the ground materially affects the defendant's

substantial rights.”) Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication. *State v. Lavalleur*, 298 Neb. 237, 903 N.W.2d 464 (2017). The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit or prosecution. *Id.* Matters previously addressed in an appellate court are not reconsidered unless the petitioner presents materially and substantially different facts. *Id.* Here, Buttercase has presented no such facts that would allow for reconsideration of the Court of Appeals’ conclusion that the tapes would not have had any effect on the outcome at trial. Therefore, the district court did not err in declining to grant a new trial based on the sex tapes.

(iii) *DNA Report*

Buttercase also claims he was entitled to a new trial based on the aforementioned DNA report. As noted above, the report was not offered at trial; but the DNA analyst testified that she had prepared a report, and her trial testimony generally followed the report. Buttercase’s counsel did not object to the testimony but extensively cross-examined the analyst regarding the testing.

Whether the allegations regarding the DNA report are viewed through the lens of newly discovered evidence or prosecutorial misconduct, the district court did not err in denying relief. A report that was referenced at trial would not constitute newly discovered evidence. Further, § 29-2103(3) requires a motion for new trial based on prosecutorial misconduct to be filed within 10 days of the verdict unless "unavoidably prevented." See also, § 29-2101(2). Because Buttercase's counsel was aware of the DNA report well before the verdict, to the extent the motion filed years after trial seeks relief based on alleged prosecutorial misconduct, it is not timely.

(iv) Discovery Materials

Finally, Buttercase's motion for new trial claimed prosecutorial misconduct in that he received another individual's discovery materials from the State along with his own. According to Buttercase, this raised questions about whether the State was withholding exculpatory evidence from him. We fail to see how the State's inclusion of additional discovery materials shows that exculpatory evidence was withheld. And because Buttercase ought to have been aware of the matter before trial, it does not qualify as newly discovered evidence and any claimed *Brady* violations in his motion for new trial, filed more than 10 days after the verdict, were alleged out of time. See §§ 29-2101(2), 29-2101(5), and 29-2103(3).

(b) Judicial Misconduct

Buttercase's motion for new trial alleged several instances of judicial misconduct in that (1) the trial judge admonished him in front of the jury; (2) T.F. sent Buttercase's ex-wife a Facebook message prior to trial stating that her attorney and the judge play golf together and that the judge likes T.F.; and (3) the trial judge's rulings on pretrial motions "made it nearly impossible for a full and proper defense of consensuality." Because this court has previously rejected these claims, the district court did not err in doing so as well.

In *State v. Buttercase*, 296 Neb. 304, 893 N.W.2d 430 (2017), we addressed all three of these allegations of judicial bias when we affirmed the denial of Buttercase's motion for return of seized property. We found that Buttercase had waived these claims of partiality made in his appellate brief by failing to raise them before the district court. Yet we explained that even if we were to consider Buttercase's allegations of judicial bias, they lacked merit. *Id.* See also, *State v. Buttercase*, No. A-15-987 (unpublished memorandum opinion released December 5, 2017) (declining to address the district court's admonishment of Buttercase and T.F.'s Facebook remarks about the judge because they were first raised in Buttercase's appellate brief, filed June 3, 2016).

Buttercase has presented no facts to distinguish the current allegations of judicial misconduct from the ones we have already

rejected. Thus, the law of the case doctrine precludes their reconsideration. See *State v. Lavalleur*, 298 Neb. 237, 903 N.W.2d 464 (2017). We conclude that the district court did not err in declining to retry Buttercase based on judicial misconduct allegations after we stated that they lack merit.

(c) Juror Misconduct

Next, Buttercase argues that the district court erred in denying him a new trial due to juror misconduct. In his motion, Buttercase claimed that "far after trial," his trial counsel informed him that a juror was sleeping during trial. Buttercase claimed that he was unaware of this conduct at the time of trial and it substantially affected his right to a fair trial. He further alleged that juror questionnaires showed that one male juror was married to a woman who worked with T.F. and that another male juror was married to a woman who worked with a witness. The jurors were admonished not to discuss the case, but they were not sequestered. Buttercase alleged the spousal connections created a conflict of interest that justified the male jurors' dismissal because they could have communicated with their spouses about the case. We conclude that Buttercase did not present grounds for new trial.

Again, Buttercase filed his motion for new trial out of time. A motion for new trial based on juror misconduct "shall be filed within ten days after the verdict was rendered unless such filing is unavoidably prevented[.]" §§ 29-2101(2); 29-2103(3). The

current motion for new trial was filed several years after the verdict, and the information upon which Buttercase now bases his allegations of juror misconduct was available to him or his counsel at the time of trial.

(d) Eyewitness Sondra Aden

Buttercase claims that the district court erred in declining to grant his motion for new trial based on the account of eyewitness Sondra Aden, Buttercase's neighbor. But again we discern no basis for a new trial, as this issue has long since been resolved.

The motion for new trial currently before us requested the district court to reconsider its ruling on a previous motion for new trial, which was based on information provided by Aden. According to evidence at trial, Buttercase subjected T.F. to a lengthy and particularly violent sexual assault. After Buttercase's conviction, he moved for new trial based on newly discovered evidence, claiming that after trial, Aden made known that she had observed T.F. leaving Buttercase's residence on the morning after the assault and that T.F. did not appear injured. The district court rejected Buttercase's motion for new trial. On direct appeal, the Court of Appeals affirmed. See *State v. Buttercase*, No. A-12-1167 (unpublished memorandum opinion released November 5, 2013). It reasoned that even assuming without deciding that the evidence was newly discovered, it would not have produced

a substantially different result if offered at trial because it served only to impeach T.F.'s testimony and was cumulative of other testimony that T.F. did not immediately appear to be injured.

Now in this appeal, Buttercase asks us to find error in the district court's decision not to order a new trial based on "newly discovered evidence" that the Court of Appeals squarely rejected. But as explained above, under the law-of-the-case doctrine, the district court was bound by the Court of Appeals' conclusion that Aden's account, even if newly discovered, was not a basis for a new trial. See *State v. Lavalleur*, 298 Neb. 237, 903 N.W.2d 464 (2017). Once the Court of Appeals had spoken, the district court was precluded from reconsidering the issue at a successive stage of the same suit, in the absence of materially and substantially different facts. *Id.* And Buttercase presented no such facts. Accordingly, we conclude that the district court did not err in rejecting Buttercase's attempt to raise the same issue again.

(e) Actual Innocence and Findings of Fact and Conclusions of Law

Finally, Buttercase asserts that based on the foregoing he has established his actual innocence and that the district court committed reversible error in an order that denied a new trial without making findings of fact or conclusions of law. See § 29-2102(2) (if motion for new trial and supporting documents set forth sufficient facts, court shall grant a hearing and make findings of fact and conclusions of law). Having rejected all of the other

grounds upon which Buttercase relies in support of his motion for new trial, we reject these as well.

4. MOTION FOR APPOINTMENT OF COUNSEL

Concurrent with his motions for new trial and for DNA testing, Buttercase moved for the appointment of counsel to represent him on those motions. At a hearing on September 17, 2017, the district court declined to appoint counsel unless and until it granted one or both motions. As noted above, the district court ultimately denied both motions, and we have concluded that it did not err in doing so. Consequently, we conclude that the district court did not err in denying Buttercase the appointment of counsel.

5. SUPPLEMENTAL MOTION FOR NEW TRIAL

Buttercase also contends that the district court erred in denying his supplemental motion for new trial. For reasons explained below, we disagree.

(a) Charlotte Hamlin Interview

Buttercase contends that the district court erred in declining to grant his supplemental motion for new trial based on an alleged police interview of Charlotte Hamlin. Buttercase's supplemental motion for new trial alleged that in July 2017, during the course of litigation related to a child of Buttercase and Hamlin, he learned that Hamlin had been interviewed by police prior to his criminal trial. According to Buttercase's motion, police made misleading statements during the interview to "cause drama"

and interfere with his visitation with his child. Buttercase claims that the State committed prosecutorial misconduct by failing to disclose the details of this interview.

Buttercase has not shown how any withholding of this interview materially affected his substantial rights as is required to obtain a new trial. See § 29-2101. See also, *State v. Cross*, 297 Neb. 154, 900 N.W.2d 1 (2017). Nor did he show prejudice to support any claimed *Brady* violation. The record reveals nothing that shows the interview would have had any effect at trial. The district court did not err in denying a motion for new trial on this ground.

(b) Voir Dire

Buttercase next asserts that he was prejudiced by juror bias because two jurors responded during voir dire that it would "bother" them if the victim and the defendant had previously dated. Buttercase's supplemental motion for new trial alleged that selection of these jurors constituted prosecutorial misconduct and ineffective assistance of counsel. No matter how the claim is framed, Buttercase has not shown he was entitled to an evidentiary hearing or a new trial.

To the extent Buttercase contends that these jurors' statements qualify as newly discovered evidence, he is not entitled to relief. As previously stated, a motion for new trial cannot be filed more than five years after the date of the verdict, unless the motion and supporting documents show the new evidence could

not with reasonable diligence have been discovered and produced at trial. §§ 29-2101(5) and 29-2103(4). Buttercase filed his supplemental motion for new trial more than five years after the verdict. The jurors' statements were made in voir dire. With reasonable diligence, Buttercase's counsel could have addressed any claims of juror bias at trial.

If the claim is based on alleged juror or prosecutorial misconduct, it is also untimely. A motion for new trial based on these grounds must be filed within 10 days of the verdict unless "unavoidably prevented." See §§ 29-2101(2) and 29-2103(3). Buttercase has not explained why he was unavoidably prevented from raising an issue that was evident to his counsel at the outset of trial.

As to any assertion that a new trial was warranted due to ineffective assistance of counsel in jury selection, Buttercase is again incorrect. Ineffective assistance of counsel is not a ground for new trial under § 29-2101.

(c) Cell Phone Records

Buttercase contends that he was entitled to an evidentiary hearing and a new trial because the State illegally obtained his cell phone records. He appears to frame this as an issue of newly discovered evidence and prosecutorial misconduct. Buttercase claims that he did not know prior to trial that the records had been illegally obtained in violation of his rights under the Fourth

Amendment to the U.S. Constitution. Even if Buttercase could repackage a Fourth Amendment claim in this manner, he has not shown a basis for new trial. According to the record, the cell phone records were not received as evidence at trial. Instead, they were used on cross-examination to refresh Buttercase's memory about text messages he sent prior to the assault to women other than T.F. Because Buttercase was aware that the records were in the State's possession, he could have taken steps at the time of trial to determine whether they were illegally obtained. Accordingly, this issue cannot be termed "newly discovered." See § 29-2101(5). And Buttercase was not unavoidably prevented from raising this claimed instance of prosecutorial misconduct within 10 days of trial. See § 29-2103(3).

6. SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF

We next address Buttercase's contention that the district court erred in not granting him an evidentiary hearing upon his successive motion for postconviction relief.

Under Nebraska's postconviction statutes, a prisoner in custody under sentence may move for relief on the ground there was such a denial or infringement of the prisoner's constitutional rights as to render the judgment void or voidable. § 29-3001. If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required

to grant an evidentiary hearing. *State v. Nolan*, 292 Neb. 118, 870 N.W.2d 806 (2015). See also, § 29-3001(2) ("Unless the motion and the files and records of the case show . . . that the prisoner is entitled to no relief," court must hold an evidentiary hearing.)

This is not Buttercase's first motion for postconviction relief. Postconviction proceedings are not a tool whereby a defendant can continue to bring successive motions for relief. *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015). The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity. *Id.* A defendant is entitled to bring a successive proceeding for postconviction relief only if the grounds relied upon did not exist at the time the prior motion was filed. See *State v. Hessler*, 288 Neb. 670, 850 N.W.2d 777 (2014). Likewise, a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal. *State v. Allen*, 301 Neb. 560, 919 N.W.2d 500 (2018).

We have recognized two exceptions to the procedural bar in postconviction proceedings: first, motions based on ineffective assistance of trial or direct appeal counsel which could not have been raised earlier, and second, motions based on newly discovered evidence that was not available at the time the prior motion was filed. See *State v. Hessler*, *supra*.

We conclude that the district court correctly denied Buttercase's successive motion for postconviction relief. Under the principles above, the claims asserted were procedurally barred or were insufficient to show he was entitled to an evidentiary hearing. We analyze each claim below.

(a) Insufficient Evidence and Excessive Sentence

In his successive motion for postconviction relief, Buttercase alleged that evidence at trial was insufficient to support his convictions and that his sentences were excessive. Buttercase could have (and did) raise these issues on direct appeal. See *State v. Buttercase*, No. A-12-1167 (unpublished memorandum opinion released November 5, 2013). A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal. *State v. Allen*, 301 Neb. 560, 919 N.W.2d 500 (2018). Buttercase was procedurally barred from raising these issues in his motion for postconviction relief.

(b) Ineffective Assistance of Trial Counsel

(i) *Walmart Surveillance*

Buttercase argues that the district court erred in not finding merit to his claim that his trial counsel was ineffective in not investigating Walmart surveillance footage. Buttercase alleged in his successive motion for postconviction relief that footage taken of T.F. at Walmart on July 17, 2011, the day after the assault,

would have shown T.F. moving about, apparently uninjured. But Buttercase's motion states that before trial, he asked his counsel to review the surveillance footage and his counsel neglected to do so. Rather than affirmatively showing on its face that this alleged basis for relief was not available when Buttercase first moved for postconviction relief with the assistance of new counsel, his successive motion for postconviction relief shows the opposite. This, along with witness testimony that T.F. was at Walmart on July 17, illustrates that Buttercase could have pursued the matter in his prior motion for postconviction relief. Accordingly, the claim is procedurally barred.

(ii) Eyewitness Sondra Aden

Buttercase claims that his trial counsel was ineffective in failing to investigate the account of eyewitness Aden that T.F. did not appear injured when she left Buttercase's house after the assault. However, Buttercase has not shown that this alleged basis for relief was unavailable at the time of his prior motion. To the contrary, Buttercase relied on Aden's account in a post-trial motion for a new trial. Denial of that motion was later affirmed by the Court of Appeals on direct appeal. See *State v. Buttercase*, No. A-12-1167 (unpublished memorandum opinion released November 5, 2013). Buttercase also raised this issue in his first postconviction motion. See *State v. Buttercase*, No. A-15-0987 (unpublished memorandum opinion released December 5, 2017).

Because Buttercase has not shown the alleged basis for relief was unavailable at the time of the prior motion, he is procedurally barred from raising the issue in his successive motion for postconviction relief.

(iii) *Westlaw Research*

Buttercase next asserts that his trial counsel was ineffective in failing to conduct a Westlaw search that would have revealed T.F.'s grandfather had been convicted of rape decades before. According to Buttercase, this information could have been used to impeach T.F. at trial. While we do not understand how this information could have been used for impeachment, we need not consider that question further. Buttercase's motion does not and cannot show why he could not have sought relief based on this decades-old conviction when he filed his prior postconviction motion. Accordingly, the claim is procedurally barred.

(iv) *Tape Measure Photographs*

Buttercase's successive motion for postconviction relief alleged that his trial counsel was ineffective in failing to object when the State introduced exhibits 40, 41, and 52 through 64 at trial. Buttercase's motion alleged that these "tape measure photographs" had not been disclosed prior to trial and that his trial counsel should have objected on *Brady* grounds. In the current appeal, Buttercase argues that the district court erred in not granting him an evidentiary hearing on this basis.

Buttercase raised a similar issue regarding unidentified photographs in his first motion for postconviction relief. Even if these were not the same photographs to which Buttercase now refers in the current appeal, the photographs now at issue were received at trial, and Buttercase's successive motion for postconviction relief did not demonstrate why he could not have raised this claim in his earlier attempt at postconviction relief. Consequently, the claim is procedurally barred.

(v) *Tungsten Ring*

Buttercase argues in this appeal that the district court erred in not finding merit to his assertion that his trial counsel was ineffective for failing to obtain forensic analysis and testimony concerning Buttercase's tungsten ring. His successive motion for postconviction relief asserts that this claim was presented in his first bid for postconviction relief. Again, Buttercase's successive motion for postconviction relief shows that this is not his first opportunity to raise this claim and thus he is procedurally barred from raising the issue now.

(vi) *Dr. Julie Jurich*

In his successive postconviction motion, Buttercase claimed that his trial counsel was ineffective in failing to make the proper *Daubert* objection to the testimony of Dr. Julie Jurich, a sex therapist who testified about the physical implications of certain sex acts. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,

509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). In the current appeal, Buttercase asserts that the district court erred in rejecting this claim. But Buttercase raised this issue in his first postconviction motion. And although he may have raised it with additional specificity in his successive motion, he has not shown that it was unavailable when he first sought postconviction relief. Accordingly, the issue is procedurally barred.

(vii) *Medical Expert*

Buttercase also argues that the district court erred in denying him an evidentiary hearing based on his claim that his trial counsel was ineffective for failing to call medical expert Jennifer Johnson to testify at trial. According to Buttercase's successive postconviction motion, Johnson, whom he had hired prior to trial, would have testified that T.F.'s injuries were inconsistent with her account of the sexual assault. Buttercase made the same allegation regarding an unnamed expert in his first motion for postconviction relief, the denial of which the Court of Appeals affirmed based on an absence of specific allegations. See *State v. Buttercase, supra*. Regardless of whether the two motions involved the same expert, it is clear that Buttercase, who was aware of this expert prior to trial, failed to show why he could not have made this claim in his first motion. Therefore, the claim is procedurally barred.

(viii) *Change of Venue*

In the current appeal, Buttercase contends the district court erred in not granting an evidentiary hearing based on his successive postconviction claim that his trial counsel was ineffective for failing to move for a change of venue. But again, Buttercase attempts to rehash an allegation he has already made. Buttercase raised the same claim in his first attempt at postconviction relief; the district court rejected it; and the Court of Appeals affirmed. See *State v. Buttercase*, No. A-15-987 (unpublished memorandum opinion released December 5, 2017). Because this claim for relief was clearly available to Buttercase then, he is procedurally barred from raising it now.

(ix) *Mistrial*

Buttercase contends that the district court committed error in declining to grant him an evidentiary hearing based on the allegation that his trial counsel was ineffective when it failed to move for a mistrial after the trial court chastised Buttercase in front of the jury. But his successive postconviction motion does not affirmatively show why he could not have addressed these events, which occurred at the time of trial, in his prior postconviction motion. In fact, as Buttercase acknowledges in his successive postconviction motion, he did previously raise this issue in his first attempt to obtain postconviction relief. As a result, the claim is procedurally barred.

(x) *Text Messages*

Buttercase contends that the district court erred in denying him an evidentiary hearing based on his successive motion's allegation that his trial counsel was ineffective in failing to object to the admission of certain text messages authored by Buttercase. The record reflects that the messages were not received in evidence but were used to refresh Buttercase's memory on cross-examination by the State. In any case, Buttercase could have raised the issue in his first motion for postconviction relief, but he did not. It is thus procedurally barred.

(xi) *Independent DNA Expert*

Buttercase claimed in his successive postconviction motion that his trial counsel was ineffective in not hiring an independent DNA expert to subject the State's DNA evidence to additional analysis. Buttercase argues in the current appeal that the district court erred in declining to grant him an evidentiary hearing on this basis. But Buttercase has made no showing why this claim was not available to him when he filed his first postconviction motion, despite awareness of the presence of DNA evidence before trial commenced. The claim is procedurally barred.

(c) *Ineffective Assistance of Appellate Counsel*

(i) *Franks Hearing*

In his successive motion for postconviction relief, Buttercase claimed that his appellate counsel, the same counsel

who represented him at trial, rendered ineffective assistance in failing to assign and argue that the district court erred in denying his motion for a *Franks* hearing. See *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Now in the current appeal, Buttercase asserts the district court ought to have given him an evidentiary hearing on these grounds. But Buttercase raised this very allegation of ineffective assistance in his prior postconviction motion, and the Court of Appeals rejected it because the hearing pertained to charges that had been severed and dismissed. See *State v. Buttercase*, No. A-15-987 (unpublished memorandum opinion released December 5, 2017). It is procedurally barred.

(ii) *Motions to Suppress*

Buttercase next contends that the district court erred in not granting an evidentiary hearing based on his successive motion's allegation that his appellate counsel was ineffective in failing to assign and argue that the district court erred in denying his first and second motions to suppress. But again, Buttercase attempted to raise this issue in his prior bid for postconviction relief, which the district court rejected. The Court of Appeals affirmed. See *State v. Buttercase*, No. A-15-987 (unpublished memorandum opinion released December 5, 2017). As Buttercase could have—and effectively did—raise this issue in his prior postconviction motion, it is procedurally barred.

(iii) *False Imprisonment Evidence*

Buttercase's next argument pertains to sufficiency of the evidence for the false imprisonment charge. He contended in his successive motion for postconviction relief that his appellate counsel was ineffective in not assigning and arguing that evidence for this charge was insufficient. Buttercase is correct that no such error was assigned and argued on direct appeal. However, Buttercase's successive motion does not show why this issue could not have been raised in his earlier postconviction motion. Consequently, it is procedurally barred.

(iv) *Dr. Julie Jurich*

Buttercase's final claim of ineffective assistance of appellate counsel relates to Jurich's testimony. Buttercase asserts that the district court erred in rejecting his claim that his appellate counsel was ineffective in failing assign and argue that the trial court erred in denying his relevance and Rule 403 objections to Jurich's testimony. It is true that this issue was not assigned and argued on direct appeal. But as noted above, Buttercase was aware of this potential error during the previous postconviction proceedings. And because he has not shown he could not have raised it then, it is procedurally barred.

(d) Prosecutorial Misconduct

(i) *Tape Measure Photographs*

Buttercase's successive motion for postconviction relief argued that the State withheld exhibits 40, 41, and 52 through 64. Buttercase's motion alleged that these "tape measure photographs" had not been disclosed prior to trial but were received at trial. Buttercase argues that the district court erred in not granting him an evidentiary hearing due to this alleged prosecutorial misconduct. But as noted above, the photographs were received at trial. Buttercase could have raised this issue in his first attempt at postconviction relief, and his successive motion did not demonstrate to the contrary. The claim is procedurally barred.

(ii) *Facebook Messages*

Buttercase claimed in his successive motion that an evidentiary hearing was merited because the State withheld exculpatory Facebook messages from him, the same messages discussed above. He asserts that the district court erred in rejecting this argument. However, as we have explained, the parties do not dispute that Buttercase was aware of these messages, at the latest, when he previously sought postconviction relief in 2015. And even if he had not been, the messages were not exculpatory so as to demonstrate a violation of Buttercase's constitutional rights or show he was entitled to postconviction relief. See *State v. Cross*, 297 Neb. 154, 900 N.W.2d 1 (2017). To establish a *Brady*

violation, prejudice must have resulted from the State's suppression of evidence. See *State v. Lykens*, 271 Neb. 240, 710 N.W.2d 844 (2006). As we have already explained, the messages would not have impeached T.F.'s credibility or altered the outcome of trial. Because Buttercase cannot show prejudice, he has not alleged a sufficient basis for postconviction relief.

(iii) *Sex Tapes*

Buttercase asserts that he was entitled to an evidentiary hearing based on his successive motion's allegation that the State failed to disclose the previously-mentioned sex tapes from his camcorder. Buttercase's motion to introduce sex tapes at trial and his role in filming the footage belie any claim that he could not have made this assertion in his first attempt at postconviction relief. In fact, Buttercase unsuccessfully sought to amend his first postconviction motion to include this claim. The Court of Appeals observed that it was unclear how a video showing activity before the July 2011 assault could have changed the outcome of the case and affirmed. See *State v. Buttercase*, No. A-15-987 (unpublished memorandum opinion released December 5, 2017). Thus, even if this claim were not procedurally barred, it would not provide a basis for an evidentiary hearing, as Buttercase cannot demonstrate the prejudice necessary for a *Brady* violation. See *State v. Cross*, *supra*; *State v. Lykens*, *supra*. As such, we conclude

that the district court did not err in denying an evidentiary hearing on this claim.

(iv) *Michelle Collier Interview*

Buttercase's final postconviction allegation of prosecutorial misconduct involves a police interview with his ex-girlfriend, Michelle Collier. He asserts that the district court erred in denying him an evidentiary hearing based on the State's failure to disclose a video of the interview. But Buttercase's successive motion alleges that the video was disclosed at trial, immediately before Collier's testimony. Rather than affirmatively showing that Buttercase could not have raised this claim, though likely waived at trial, in his prior postconviction motion, his successive motion demonstrates the opposite. See *State v. Smith*, 292 Neb. 434, 873 N.W.2d 169 (2016). The claim is procedurally barred.

(e) *Judicial Bias*

Buttercase next argues that he was entitled to an evidentiary hearing due to judicial bias. His successive motion alleged that the district court exhibited partiality in admonishing Buttercase in front of the jury and that partiality was further demonstrated by statements in the Facebook messages discussed above that the judge plays golf with T.F.'s attorney and "likes" T.F. Regarding the admonishment, which occurred at trial, Buttercase's successive motion does not show why he could not have raised this issue in his prior postconviction motion, and we need not consider it. The

same can be said of the Facebook messages, as the parties do not dispute that Buttercase was aware of these messages when he previously sought postconviction relief.

Furthermore, neither of these claims warrant an evidentiary hearing because the record affirmatively shows that Buttercase is not entitled to postconviction relief. As noted earlier, we have already determined in an earlier appeal that these claims lack merit. See *State v. Buttercase*, 296 Neb. 304, 893 N.W.2d 430 (2017). Accordingly, the district court did not err in declining to grant an evidentiary hearing on these grounds. See *State v. Lavalleur*, 298 Neb. 237, 903 N.W.2d 464 (2017).

(f) Juror Bias

In Buttercase's next claim for postconviction relief, he asserts that two jurors exhibited bias in responding during voir dire that it would "bother" them if the victim and the defendant had previously dated. Buttercase's successive postconviction motion alleged both prosecutorial misconduct and ineffective assistance of trial counsel in allowing selection of these jurors. However, Buttercase has not demonstrated why this alleged bias and counsel's response, which was revealed before trial, could not have been raised in his previous motion for postconviction relief. Accordingly, this claim too is procedurally barred.

(g) Constitutionality of Postconviction Act

Buttercase asserts that the district court erred in denying him an evidentiary hearing to address his successive motion's challenge to the constitutionality of the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 25-3001 to 29-3004, as applied to him. Buttercase claims that his constitutional rights were violated by the denial of his motion to amend his first postconviction motion. Buttercase had sought to add the claim that the State failed to disclose video evidence of Buttercase and T.F. engaged in consensual sex acts one month before the assault. The district court denied the motion to amend, and the Court of Appeals affirmed.

In addressing this matter the Court of Appeals determined that the proposed amendment lacked merit:

Whether Buttercase's amendment sufficiently related back to his original postconviction motion or not does not change the fact that Buttercase was not deprived of a substantial right or just result by not being permitted to amend his original motion as requested. His proposed amended claim that the State's failure to turn over the video of Buttercase and the victim engaged in sexual activity one month prior to the assault somehow prejudiced him and denied him due process and effective assistance of counsel is not supported by the record. We note initially that Buttercase's proposed amendment did not explain the significance of the video or how it would have changed the outcome of the case, and was therefore insufficiently pled even if the amendment had been

allowed. Notably, however, it was undisputed at trial that Buttercase and the victim had engaged in consensual sex, including being sexually intimate periodically for several months after they broke up in March 2011. See *State v. Buttercase*, No. A-12-1167 (memorandum opinion released November 5, 2013). Since the assault leading to Buttercase's conviction occurred in July 2011, it is unclear how a video showing Buttercase and the victim engaged in sexual activity approximately one month before the assault would have changed the outcome of the case.

State v. Buttercase, No. A-15-987 (unpublished memorandum opinion released December 5, 2017).

The Court of Appeals' analysis shows that because Buttercase's proposed amendment lacked merit, he was not harmed by the denial of his motion for leave to amend pursuant to the Act. Accordingly, the district court did not err in rejecting his as-applied challenge. Indeed, based on the law-of-the-case doctrine, the district court would have been remiss in finding otherwise. See *State v. Lavalleur*, 298 Neb. 237, 903 N.W.2d 464 (2017) (holdings of appellate court on questions presented become law of the case and those holdings conclusively settle all matters ruled upon expressly or by necessary implication). Consequently, the district court did not err in denying Buttercase's successive motion for postconviction relief on these grounds.

(h) Actual Innocence

Finally, Buttercase contends that all of his postconviction allegations demonstrate his actual innocence. Because we have rejected all of his claims, we reject this one as well.

V. CONCLUSION

For the foregoing reasons, we conclude that the district court did not err in denying Buttercase's motion for DNA testing, motion for new trial, and motion for appointment of counsel. Nor do we find any error in its denial of Buttercase's supplemental motion for new trial and successive motion for postconviction relief or "motion to vacate." Consequently, we affirm.

AFFIRMED.

FREUDENBERG, J., not participating.

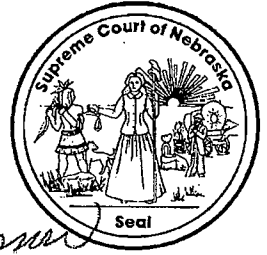
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1 Memo Opinion

Date
06/26/2020

I, Wendy A. Wussow, Clerk of the Nebraska Supreme Court, certify that I have compared the following 46 page(s) to be a full, true, and correct copy of the original record on file.

Supreme Court No: S-19-0384
Caption: State v. Joseph J. Buttercase
Trial Court: Gage County District Court
Trial Court No: CR11-124



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

Date: June 26, 2020

BY THE COURT:

Wendy A. Wussow

CLERK

APPENDIX

B

IN THE DISTRICT COURT OF GAGE COUNTY, NEBRASKA

STATE OF NEBRASKA,)	Case No. CR 11-124
)	
Plaintiff,)	
)	
v.)	ORDER
)	
JOSEPH J. BUTTERCASE,)	
)	
Defendant,)	

NOW on this 20th day of March, 2019, the Defendant's pending motions come on for decision.

1. Motion to Vacate filed April 6, 2018;
2. Motion for Counsel filed April 6, 2018;
3. Motion for Case Progression Hearing filed July 11, 2018;
4. Motion for New trial filed July 11, 2018;
5. Motion for Acquittal filed July 11, 2018;
6. Motion for Summary Judgment filed November 16, 2018; and
7. Motion for Case Progression filed November 16, 2018.

The Defendant stands convicted of first degree sexual assault, first degree false imprisonment, strangulation, and third degree domestic assault for events occurring in 2011 involving a victim who shall be referred to as "TF."

The Court will first discuss the Motion for New trial filed on July 11, 2018. The motion claims that the Defendant should be granted a new trial on three general grounds: first, that the State did not disclose to him prior to trial that it had interviewed Charlotte Hamlin; that two jurors indicated during voir dire that it would "bother them" if they discovered that the Defendant was in a relationship; as a consequence, he claims that his lawyer was ineffective for not striking them; third, that his cell phone records were illegally subpoenaed.

In regard to Ms. Hamlin, the attached documentation reveals that Ms. Hamlin is the mother of the Defendant's daughter who was born around the time of the crimes for which the Defendant stands convicted. She is not "TF." The motion and attached affidavits reveal nothing that indicates how release of the information would have affected the Defendant's trial; rather, they only accuse the State investigator of contacting Ms. Hamlin in an effort to curtail visitation between the Defendant and his infant daughter. It makes no statement showing how this fact, if true, materially affected the substantial rights of the Defendant in this criminal trial.

Further, the mere statement by a juror in voir dire that a prior relationship in a sexual assault trial "might bother him" also fails to show bias of the juror that should lead to disqualification. Significantly,

the Defendant did not attach to his affidavit any of the colloquy showing bias or prejudice of these two jurors, nor was any follow up questioning that may have assuaged this potential issue.

Finally, he attacks the "illegal subpoena" of his phone. Again, there is no showing that this evidence was withheld from the Defendant.

The statute that sets for the standard for a new trial is as follows:

(2) If the motion for new trial and supporting documents fail to set forth sufficient facts, the court may, on its own motion, dismiss the motion without a hearing. If the motion for new trial and supporting documents set forth facts which, if true, would materially affect the substantial rights of the defendant, the court shall cause notice of the motion to be served on the prosecuting attorney, grant a hearing on the motion, and determine the issues and make findings of fact and conclusions of law with respect thereto.


R.R.S. Neb. §29-2102

The Defendant has failed to make the requisite showing. This motion is dismissed.

The balance of the pending motions are dismissed, as they lack substance, are not procedurally correct, or, as in the case of the Motion for Summary Judgement, they are simply not applicable to a criminal case.

IT IS SO ORDERED.

BY THE COURT:


Vicky L. Johnson
District Judge

IN THE DISTRICT COURT OF GAGE COUNTY, NEBRASKA

STATE OF NEBRASKA,)	Case No. CR 11-124
)	
Plaintiff,)	
)	
v.)	ORDER
)	
JOSEPH J. BUTTERCASE,)	
)	
Defendant.)	

NOW on this 16th day of April, 2019, the Defendant's pending Motions for DNA Testing and a New Trial come on for decision.

The Defendant stands convicted of First Degree Sexual Assault, First Degree False Imprisonment, Strangulation, and Third Degree Domestic Assault for events occurring in 2011 involving a victim who shall be referred to as "TF." Trial was had to a jury on August 13-17, 2012, and a guilty verdict on four of the five charges was reached on August 17, 2012.

The Defendant alleges that he was denied access to a DNA report evidence prior to his trial; the State argues that he was not.

At issue is a laboratory report dated October 27, 2011. The Defendant refers to it as Exhibit P in the attachment to his Motion. Sixteen separate samples were identified. Most were tested against known samples of the Defendant and TF. The Defendant was included as a possible source in nine of the samples. He was either excluded or a conclusion was not reached in the other seven samples.

The Defendant argues that as he was excluded as the source of semen in four of the samples, TF obviously had sex with another man who could have been the source of her injuries. He claims that her testimony that she had not had sex with another individual is obviously false, and he should have been allowed to cross-examine her in this regard. See Neb. Rev. Stat. §27-

412. Finally, he argues that as he was unaware of the lab tests at trial, he should be allowed DNA testing.

The State responded by letter brief dated September 22, 2017, which the Defendant has attached as Exhibit S. The State argues generally that the record makes it clear that the Defendant was aware of the lab test results, as his counsel referred to them during trial.

The Defendant proceeds under Neb. Rev. Stat. §29-4116 et. seq. Neb. Rev. Stat. §29-4120 reads as follows :

(1) Notwithstanding any other provision of law, a person in custody pursuant to the judgment of a court may, at any time after conviction, file a motion, with or without supporting affidavits, in the court that entered the judgment requesting forensic DNA testing of any biological material that:

(a) Is related to the investigation or prosecution that resulted in such judgment;

(b) Is in the actual or constructive possession or control of the state or is in the possession or control of others under circumstances likely to safeguard the integrity of the biological material's original physical composition; and

(c) *Was not previously subjected to DNA testing* or can be subjected to retesting with more current DNA techniques that provide a reasonable likelihood of more accurate and probative results. [Emphasis supplied.]

A review of the trial record indicates the following: the State was represented by Mr. Greg Ariza at jury trial, and the Defendant was represented by Mr. Jason Troia. On August 15, 2012, the State called Ms. Melissa Kreikemeier as a witness. (Bill of Exceptions, Volume III, beginning at Page 578). Ms. Kreikemeier is a forensic scientist at the Nebraska State Patrol Crime Laboratory. On page 593, she indicates that she was asked to examine 16 pieces of evidence submitted by the Beatrice Police Department. The victim was identified as T.F. and the Defendant was identified as Joseph Buttercase (p. 594). During Ms. Kreikemeier's testimony, 12 pieces of evidence were offered into evidence, including diagrams and photos of items which

she tested for DNA evidence. During testimony of other witnesses, the actual items tested (jeans, socks, shoes, tee shirt and a second pair of jeans) were received into evidence.


The testimony of Ms. Kreikemeier follows generally the Laboratory Report dated October 27, 2011. This is the evidence which the Defendant claims he did not receive before trial. Significantly, the testimony of Ms. Kreikemeier was received without the Defendant's counsel objecting that he had not seen the results; in fact, he extensively cross-examined the witness on her DNA testing. It is clear to this Court that the defense had prior knowledge of the DNA testing before trial.

Therefore, the Court finds that the items that the Defendant requests to be subjected to DNA testing have previously been tested, that the defense was aware of the results, and that the Motion for DNA Testing should be and hereby is overruled.

As a consequence, thereof, the Motion for New Trial is likewise overruled.

IT IS SO ORDERED.

BY THE COURT:


Vicky L. Johnson
District Judge