



**CLERK OF THE NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS**

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May 21, 2021

Lucio P Munoz #86974
Penitentiary
PO BOX 22500
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IN CASE OF: S-20-000590, State v. Lucio P. Munoz
TRIAL COURT/ID: Scotts Bluff County District Court CR17-46

The following internal procedural submission: Submission to Court
Submitted on 04/27/21

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

Affirmed. Freudenberg, Justice.

A certified copy of the Published Opinion is attached.

Respectfully,

Clerk of the Supreme Court
and Court of Appeals

NEBRASKA SUPREME COURT ADVANCE SHEETS
309 NEBRASKA REPORTS
STATE v. MUNOZ
Cite as 309 Neb. 285

7. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing is not required on a motion for postconviction relief when (1) the motion does not contain factual allegations which, if proved, constitute an infringement of the movant's constitutional rights rendering the judgment void or voidable; (2) the motion alleges only conclusions of fact or law without supporting facts; or (3) the records and files affirmatively show that the defendant is entitled to no relief.
8. **Postconviction: Effectiveness of Counsel: Records: Appeal and Error.** A motion for postconviction relief asserting ineffective assistance of trial counsel is procedurally barred where a defendant was represented by a different attorney on direct appeal than at trial and the alleged deficiencies in trial counsel's performance were known or apparent from the record.
9. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.
10. **Postconviction: Effectiveness of Counsel.** To warrant an evidentiary hearing based on counsel's failure to make an alibi defense, the defendant must allege something more than the broad factual conclusion that there was some unspecified evidence that would have shown the defendant was not in the vicinity at the time of the crime.
11. **Postconviction.** In a motion for postconviction relief, a defendant is required to specifically allege what the testimony of potential witnesses would have been if they had been called at trial in order to avoid dismissal without an evidentiary hearing.
12. _____. Absent specific allegations, a motion for postconviction relief effectively becomes a discovery motion to determine whether evidence favorable to a defendant's position actually exists.
13. **Rules of Evidence: Hearsay: Proof.** Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
14. **Rules of Evidence: Hearsay.** Hearsay is not admissible unless otherwise provided for in the Nebraska Evidence Rules or elsewhere.
15. **Effectiveness of Counsel.** As a matter of law, counsel is not ineffective for not attempting to adduce inadmissible testimony.
16. **Appeal and Error.** Appellate courts do not generally consider arguments and theories raised for the first time on appeal.
17. **Postconviction: Appeal and Error.** In an appeal from the denial of postconviction relief, an appellate court will not consider for the first time on appeal claims that were not raised in the verified motion.

Appeal from the District Court for Scotts Bluff County:
ANDREA D. MILLER, Judge. Affirmed.

NEBRASKA SUPREME COURT ADVANCE SHEETS
309 NEBRASKA REPORTS
STATE v. MUNOZ
Cite as 309 Neb. 285

Lucio P. Munoz, pro se.

Douglas J. Peterson, Attorney General, and Nathan A. Liss
for appellee.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE,
PAPIK, and FREUDENBERG, JJ.

FREUDENBERG, J.

I. INTRODUCTION

The defendant appeals from the denial of postconviction relief without an evidentiary hearing. The defendant had presented four layered claims of ineffective assistance of counsel concerning the failure to investigate witnesses, make an alibi defense, present expert witness testimony, or move in limine to exclude statements. The district court found that the allegations presented no more than conclusions of fact and law that lacked the necessary specificity to warrant an evidentiary hearing.

II. BACKGROUND

Following a jury trial, Lucio P. Munoz was found guilty of first degree murder and use of a deadly weapon to commit a felony in relation to the death of his girlfriend. He was sentenced to life for the murder conviction and a consecutive 20 to 40 years' imprisonment for the weapon conviction.

On direct appeal, we affirmed the convictions and sentences.¹ Munoz was represented by new counsel. Munoz subsequently filed a pro se motion for postconviction relief, which the district court denied without an evidentiary hearing. Munoz appeals.

1. TRIAL

The facts pertaining to the trial are fully set forth in our opinion in *State v. Munoz*.² We reiterate those facts that are most relevant to the postconviction motion.

¹ See *State v. Munoz*, 303 Neb. 69, 927 N.W.2d 25 (2019).

² *Id.*

NEBRASKA SUPREME COURT ADVANCE SHEETS

309 NEBRASKA REPORTS

STATE v. MUNOZ

Cite as 309 Neb. 285

The State presented evidence that at approximately 10 p.m. on December 30, 2016, Munoz reported to a neighbor in his apartment complex that his girlfriend had been raped. The police were called, and two officers arrived at approximately 11 p.m. The girlfriend, who was intoxicated and had been sleeping in Munoz' bedroom, did not know why the police had been called and refused to make a report.

At approximately 2 a.m. on December 31, 2016, Munoz called his son, stating he had done something bad and wanted to kill himself. The police were called and arrived around 3 a.m. at Munoz' apartment to check on him. Munoz said his girlfriend had gone home. The bedroom door was closed, and officers did not venture beyond it. Munoz went with the officers to a hospital after he locked his apartment door with a deadbolt.

Munoz left the hospital around 8 a.m. and went directly to his son's house. At some point, arrangements had been made for Munoz to visit his brother in Illinois. A friend drove him there that same day. Munoz did not stop at his apartment to retrieve any belongings.

A neighbor alerted the property manager on January 3, 2017, that she had not seen Munoz or the victim since December 30. The property manager used a master key to unlock the deadbolt and found the deceased victim on the bed in the bedroom.

An autopsy revealed the victim had suffered 37 stab wounds. She appeared to be wearing the same clothing that the officers' body cameras recorded her wearing on December 31, 2016. A sexual assault kit showed no DNA other than the victim's. The State's blood spatter expert described bloodstain patterns found at the scene, which indicated the brutal nature of the crime and that "[s]omebody with blood on them" had walked to the bathroom and washed it off. No forensic evidence was found that positively linked Munoz to the crime.

Munoz has a brother in Texas who began searching for Munoz due to a concern that "something had happened . . . where he live[s]." When the brother was able to reach Munoz,

NEBRASKA SUPREME COURT ADVANCE SHEETS

309 NEBRASKA REPORTS

STATE v. MUNOZ

Cite as 309 Neb. 285

Munoz asked him to forgive him and said he was going to die in prison.

After Munoz was located in another state, law enforcement was dispatched to transport him back to Nebraska. During the course of their travel, Munoz made several unsolicited comments to law enforcement, including that he was "going to get the death penalty."

2. MOTION FOR POSTCONVICTION RELIEF

In his motion for postconviction relief, Munoz alleged that trial counsel was ineffective for failing to object to jury instructions and for failing to challenge jurors for cause. The district held that both of these allegations were procedurally barred for failing to raise such issues on direct appeal. In doing so, the district court stated, "When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record."

Munoz also raised in his motion several layered claims against appellate counsel.

(a) Alibi and Flight Witnesses
and Alibi Defense

First, Munoz alleged that trial counsel was deficient in failing to depose or interview potential witnesses Manuel Trevino and Jolene Condon before trial. Munoz stated that Trevino and Condon had knowledge of Munoz' "whereabouts." In a separate section presumably referring to these witnesses but never mentioning any witness by name, Munoz also broadly alleged that trial counsel was ineffective for failing to make an "alibi-defense" based on "proof that he was nowhere in the v[i]cinity or area" when the victim was murdered. Munoz generally asserted that appellate counsel rendered ineffective assistance in relation to these claims.

Munoz claimed Condon's testimony "would have presented an rebuttable presumption to the [S]tate's theory of how

NEBRASKA SUPREME COURT ADVANCE SHEETS

309 NEBRASKA REPORTS

STATE v. MUNOZ

Cite as 309 Neb. 285

[Munoz] allegedly murdered the victim" and "would have contradicted the [S]tate's evidence underlining proof of [Munoz'] alibi during the time of the victim's murder." He did not describe Condon's potential testimony in any further detail.

Munoz asserted Trevino had engaged in conversation with Munoz' son "instrumental to [Munoz'] desire to travel out of town during the time the alleged crime supposedly took place," which would have been "pivotal" "inasmuch that Trevino possess knowledge of the events unfolding that lead to [Munoz'] desire to travel, devoid of covering up, or having a scapegoat."

The district court denied Munoz' claims relating to Trevino and Condon on the grounds that Munoz had failed to assert "any specific allegations as to what testimony witnesses would have given" or "any exculpatory evidence that has been uncovered by the testimony." As to the separate alibi-defense claim, the court found there were "no facts asserted showing who would be called as an alibi, what the alibi would testify and thus no showing of any exculpatory evidence."

(b) Failure to Suppress Statements

Second, Munoz asserted that trial counsel was ineffective by failing to suppress his "statements." He generally asserted that appellate counsel rendered ineffective assistance in relation to this claim. Munoz did not elaborate in the motion as to what statements he was referring to or the reason why his statements were allegedly inadmissible. In denying the claim without an evidentiary hearing, the district court observed, "There are no facts asserted showing any statements of Munoz which would be suppressed and further no showing of any exculpatory evidence. This claim is not specifically argued in the pleading but stated."

(c) Failure to Call Expert Witness
on Blood Spatters

Third, Munoz asserted that trial counsel was ineffective "by failing to call or interview an 'Expert Witness' to refute the

NEBRASKA SUPREME COURT ADVANCE SHEETS
309 NEBRASKA REPORTS
STATE v. MUNOZ
Cite as 309 Neb. 285

[S]tate's theory alleging the 'blood spattered' evidence was culpable proof of [Munoz'] guilt." He generally asserted that appellate counsel rendered ineffective assistance in relation to this claim.

This expert allegedly "would have been able to determine with professional certainty the time, day, and detailed involvement of the crime, particularly, the evidence DNA and other intricacies involving the murder of the victim." No other details were set forth in the motion for postconviction relief. The district court concluded that Munoz had failed to assert "any specific allegations as to what testimony witnesses would have given" or "any exculpatory evidence that has been uncovered by the . . . expert findings."

(d) Motion in Limine

Fourth, Munoz alleged the ineffective assistance of appellate counsel for not preserving "the challenge of [Munoz'] motion in limine filed in the lower district court, thereby assigning such as error in [Munoz'] brief of appellant, for review." There was no description of the evidence subject to the motion in limine, why it was inadmissible, and how it prejudiced him. The district court found that the allegation did not warrant an evidentiary hearing because the postconviction motion alleged no specific statement or evidence that should have been included in the motion in limine.

III. ASSIGNMENTS OF ERROR

In his appeal from the denial of his motion for postconviction relief, Munoz assigns as error that (1) trial and appellate counsel rendered ineffective assistance of counsel; (2) Munoz received "ineffective assistance via direct appeal review, in violation of the 5th, 6th and 14th Amendment to the United States Constitution, and Article I, §§ 3, 13 and 23 of the Nebraska Constitution"; and (3) trial counsel was ineffective by failing to object to the trial court's failure to properly prepare jury instructions in violation of "his 5th, 6th[,] 11 and 13 of Nebraska Constitution."

NEBRASKA SUPREME COURT ADVANCE SHEETS
309 NEBRASKA REPORTS
STATE v. MUNOZ
Cite as 309 Neb. 285

IV. STANDARD OF REVIEW

[1] 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.³

[2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.⁴

V. ANALYSIS

[3] 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.⁵

[4-6] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*,⁶ to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case.⁷ The two prongs of this test—deficient performance and prejudice—may be addressed in either order, and the entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable.⁸ To show that counsel's performance was deficient, a defendant must

³ *State v. Stelly*, 308 Neb. 636, 955 N.W.2d 729 (2021).

⁴ *Id.*

⁵ *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015).

⁶ *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

⁷ *State v. Stelly*, *supra* note 3.

⁸ *Id.*

NEBRASKA SUPREME COURT ADVANCE SHEETS
309 NEBRASKA REPORTS
STATE v. MUNOZ
Cite as 309 Neb. 285

show that counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law.⁹

[7] An evidentiary hearing is not required on a motion for postconviction relief when (1) the motion does not contain factual allegations which, if proved, constitute an infringement of the movant's constitutional rights rendering the judgment void or voidable; (2) the motion alleges only conclusions of fact or law without supporting facts; or (3) the records and files affirmatively show that the defendant is entitled to no relief.¹⁰

1. ASSERTIONS AGAINST TRIAL COUNSEL AND
SEPARATE ALIBI-DEFENSE CLAIM

In his appellate brief, Munoz makes several assertions against trial counsel that he argues the district court should have granted an evidentiary hearing on, but which Munoz fails to tie to any argument of ineffective assistance of appellate counsel. In this regard, Munoz asserts that he told trial counsel about his alibi that "he was nowhere in the v[i]cinity or area when [the victim] was murdered," yet trial counsel "prejudicially failed to give notice to the [S]tate prosecution and the court, pursuant to [Neb. Rev. Stat. §] 29-1927, as required." (Emphasis omitted.) Munoz also argues that trial counsel was ineffective by failing to object to jury instructions. With the exception of the alibi defense, these allegations were stated in the motion for postconviction relief directly against trial counsel only and were not presented as a layered claim against appellate counsel for failing to assert the ineffectiveness of trial counsel.

[8,9] A motion for postconviction relief asserting ineffective assistance of trial counsel is procedurally barred where a defendant was represented by a different attorney on direct

⁹ *Id.*

¹⁰ See, *State v. Parnell*, 305 Neb. 932, 943 N.W.2d 678 (2020); *State v. Allen*, 301 Neb. 560, 919 N.W.2d 500 (2018).

NEBRASKA SUPREME COURT ADVANCE SHEETS
309 NEBRASKA REPORTS
STATE v. MUNOZ
Cite as 309 Neb. 285

appeal than at trial and the alleged deficiencies in trial counsel's performance were known or apparent from the record.¹¹ Further, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.¹²

[10] We agree with the district court that the claims made directly against trial counsel only are procedurally barred. To the extent the claim regarding an alibi defense was a separate claim from the allegations regarding the potential testimony of Trevino and Condon, it was not argued on appeal as a layered claim and we therefore need not consider whether the court erred in denying such a claim. However, we also find that the broad allegation in the motion for postconviction relief that trial counsel was ineffective for failing to make an alibi defense constituted mere conclusions of fact and law without supporting facts, which did not warrant an evidentiary hearing. To warrant an evidentiary hearing based on counsel's failure to make an alibi defense, the defendant must allege something more than the broad factual conclusion that there was some unspecified evidence that would have shown the defendant was not in the vicinity at the time of the crime.¹³

2. LAYERED CLAIMS

Munoz makes four general arguments of appellate counsel's ineffectiveness by failing to raise on direct appeal claims of ineffective assistance of trial counsel. These generally correspond to the four stated claims in his motion for postconviction relief.

(a) Alibi and Flight Witnesses

We hold that Munoz' claims regarding the failure to depose or interview potential witnesses Trevino and Condon before

¹¹ *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

¹² *State v. Sundquist*, 301 Neb. 1006, 921 N.W.2d 131 (2019).

¹³ See *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009).

NEBRASKA SUPREME COURT ADVANCE SHEETS
309 NEBRASKA REPORTS
STATE v. MUNOZ
Cite as 309 Neb. 285

trial failed to allege more than conclusions of fact and law and, to the extent the motion presented more specific facts, those facts, if proved, would not constitute an infringement of Munoz' constitutional rights rendering the judgment void or voidable. Thus, the district court did not err in denying the claims without an evidentiary hearing.

[11,12] Our case law is clear that in a motion for postconviction relief, a defendant is required to specifically allege what the testimony of potential witnesses would have been if they had been called at trial in order to avoid dismissal without an evidentiary hearing.¹⁴ Absent specific allegations, a motion for postconviction relief effectively becomes a discovery motion to determine whether evidence favorable to a defendant's position actually exists.¹⁵

Munoz' allegations as to Condon's testimony consist entirely of legal conclusions and conclusions of fact without supporting facts. Munoz alleged Condon's testimony "would have presented an rebuttable presumption to the [S]tate's theory of how [Munoz] allegedly murdered the victim" and "would have contradicted the [S]tate's evidence underlining proof of [Munoz'] alibi during the time of the victim's murder." This fails to satisfy the requirement that the motion include specific allegations regarding the testimony that the witness would have given if called.

Munoz' allegations regarding Trevino's potential testimony are somewhat more specific. In essence, Munoz alleged that Trevino could have testified that in a conversation with Munoz' son, Munoz' son reported to Trevino that Munoz had a "desire to travel out of town during the time the alleged crime supposedly took place." This was alleged to be relevant exculpatory evidence because it pertained to Munoz' "whereabouts

¹⁴ *State v. Foster*, 300 Neb. 883, 916 N.W.2d 562 (2018), *disapproved on other grounds*, *State v. Allen*, *supra* note 10. See, also, e.g., *State v. Henderson*, 301 Neb. 633, 920 N.W.2d 246 (2018).

¹⁵ *State v. Foster*, *supra* note 14.

NEBRASKA SUPREME COURT ADVANCE SHEETS
309 NEBRASKA REPORTS
STATE v. MUNOZ
Cite as 309 Neb. 285

during the time the victim was found.” It was further alleged that Trevino’s testimony was relevant to “the events unfolding that lead to [Munoz’s] desire to travel, devoid of covering up, or having a scapegoat.” From Munoz’s arguments on appeal, it appears that the reference to Munoz’s “desire to travel, devoid of covering up” was an assertion that Trevino’s testimony would have been relevant to diminish the inference of guilt surrounding his flight to Illinois.

The alleged testimony as to Munoz’s “whereabouts” was insufficiently specific to warrant an evidentiary hearing. And, regardless, Munoz’s “whereabouts” when the victim was found would not have been exculpatory under the facts of this case, which indicated the victim had been murdered several days before.

Because Munoz failed to allege when the conversation about traveling to Illinois took place—specifically, whether it took place before the murder—the facts alleged are insufficient to demonstrate that, if true, Munoz’s convictions were the product of ineffective assistance of counsel. A conversation taking place after the murder, in which Munoz indicated a “desire to travel,” would only strengthen the inference of flight.

[13-15] Moreover, Trevino’s potential testimony about such a conversation with Munoz’s son would have been inadmissible hearsay.¹⁶ Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.¹⁷ Hearsay is not admissible unless otherwise provided for in the Nebraska Evidence Rules or elsewhere.¹⁸ Trevino’s testimony about what Munoz’s son had said would have been to prove the truth of

¹⁶ See *State v. Hill*, 298 Neb. 675, 905 N.W.2d 668 (2018).

¹⁷ *State v. Poe*, 292 Neb. 60, 870 N.W.2d 779 (2015). See, also, Neb. Rev. Stat. § 27-801(3) (Reissue 2016).

¹⁸ *State v. Poe*, *supra* note 17. See, also, Neb. Rev. Stat. § 27-802 (Reissue 2016).

NEBRASKA SUPREME COURT ADVANCE SHEETS
309 NEBRASKA REPORTS
STATE v. MUNOZ
Cite as 309 Neb. 285

the matter that Munoz intended to go out of town. As a matter of law, counsel is not ineffective for not attempting to adduce inadmissible testimony.¹⁹

(b) Expert Witness on Mental Stability

Munoz argues on appeal that the district court erred in dismissing a layered claim concerning trial counsel's alleged ineffectiveness in failing to call an expert witness to testify as to Munoz' mental stability during the time of the victim's death. He does not expand upon this assertion, and thus, it was insufficient because it failed to specifically allege what the testimony of potential expert witnesses would have been if the witness had been called at trial.

[16,17] Furthermore, this claim does not appear in Munoz' motion for postconviction relief. Appellate courts do not generally consider arguments and theories raised for the first time on appeal.²⁰ In an appeal from the denial of postconviction relief, we will not consider for the first time on appeal claims that were not raised in the verified motion.²¹

(c) Expert Witness on Blood Spatters

We also agree with the district court that Munoz failed to allege more than mere conclusions of fact or law without supporting facts in relation to his layered claim that trial counsel was ineffective "by failing to call or interview an 'Expert Witness' to refute the [S]tate's theory alleging the 'blood spattered' evidence was culpable proof of [Munoz'] guilt." Munoz did not indicate whose "evidence DNA" he was referring to, how the exact time of the murder could be established by such an expert, what the professional certainty of the time of the

¹⁹ See *State v. Allen*, *supra* note 10.

²⁰ *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015).

²¹ See, *State v. Haynes*, 299 Neb. 249, 908 N.W.2d 40 (2018), *disapproved on other grounds*, *State v. Allen*, *supra* note 10; *State v. Harris*, 294 Neb. 766, 884 N.W.2d 710 (2016).

NEBRASKA SUPREME COURT ADVANCE SHEETS
309 NEBRASKA REPORTS
STATE v. MUNOZ
Cite as 309 Neb. 285

crime would be, or how it might have changed the result of the trial.

(d) Motion in Limine

Lastly, Munoz argues on appeal that the district court erred in dismissing his claim that appellate counsel was ineffective "by failing to assert as error trial counsel's failure to file a Motion in Limine as asserted in ground two of his Motion for Postconviction Relief."²² He generally asserts prejudice as a result, but does not describe the evidence he believes should have been the subject of the motion in limine, why it should have been excluded, and how the result at trial would have been different but for its admission.

It does not appear that this allegation was raised in the postconviction motion. In his motion for postconviction relief, Munoz described the ineffective assistance of appellate counsel as not preserving "the challenge of [Munoz'] motion in limine filed in the lower district court, thereby assigning such as error in [Munoz'] brief of appellant, for review." The failure to file a motion in limine is a different assertion than the failure to appeal the denial of a motion in limine made at trial.

In any event, the allegation in the motion for postconviction did not contain any description of the evidence subject to the motion in limine, why the evidence was inadmissible, and how it prejudiced him. We agree with the district court that the allegations did not warrant an evidentiary hearing, because the postconviction motion alleged no specific statement or evidence that should have been included in the motion in limine.

VI. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court dismissing, without an evidentiary hearing, Munoz' motion for postconviction relief.

AFFIRMED.

²² Brief for appellant at 8.

JUL 22 2020

DARLA SIMPSON, CLERK

IN THE DISTRICT COURT FOR SCOTTS BLUFF COUNTY, NEBRASKA

THE STATE OF NEBRASKA,
Plaintiff,

vs.

LUCIO MUNOZ,
Defendant.

Case No. CR 17-46

MEMORANDUM ORDER

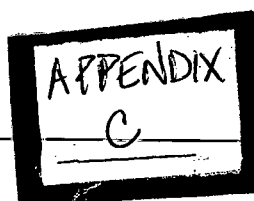
NATURE OF THE CASE

Now pending before the Court is Defendant Lucio Munoz's motion for postconviction relief.

I. PROCEDURAL BACKGROUND

On November 16, 2017, Lucio Munoz, hereinafter "Munoz" was convicted by a jury of First Degree Murder and Use of a Weapon To Commit a Felony. Munoz was sentenced on January 4, 2018 on Count 1 to term of life imprisonment and on Count 2 to 20 years to 40 years with 365 days credit, to be served consecutive to each other. The matter was timely appealed to the Nebraska Court of Appeals which upheld the conviction and sentence. Fuentres was represented at trial by Bernard Straetker and on appeal by Kelly Breen.

On February 24, 2020, Munoz, filed a Verified Motion For Postconviction Relief and Motion for Appointment of Counsel for Postconviction Relief. The Court set a hearing on May 1, 2020 to determine whether a full evidentiary hearing should be held. A records review hearing was conducted and evidence submitted. The matter was taken under advisement.



II. ANALYSIS

Postconviction proceedings are treated as civil in nature. A defendant requesting postconviction relief must establish the basis for such relief. The defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the United States or Nebraska Constitution, causing the judgment against him or her to be void or voidable. *State v. Williams*, 253 Neb. 111 (1997); *State v. Schoonmaker*, 249 Neb. 330 (1996); *State v. Glover*, 276 Neb. 662 (2008). *State v. Watson*, 295 Neb. 802 (2017).

To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome. *State v. Custer*, 298 Neb. 279, 285 (2017).

A motion for post conviction relief cannot be used to secure review of issues that were known to the defendant and could have been litigated on direct review, no matter how those issues may be phrased or rephrased. *State v. Ryan*, 248 Neb. 405 (1995). When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred. *State v. Filholm*, 287 Neb. 763 (2014).

Munoz's motion for postconviction relief centers on the ineffective assistance of his court appointed counsel at trial Bernard Straetker hereinafter referred to as "Straetker" and ineffective assistance of his appellate counsel, Kelly Breen, hereinafter referred to as "Breen". Munoz asserts Straetker was ineffective at trial by:

- (a). Failing to interview Jolene Condon and Manuel Trevino (asserted as ground one).
- (b). Failing to raise the defense of an alibi (asserted as ground one).
- (c). Failing to call an expert witness (asserted as ground one).
- (d). Failing to object to jury instructions (asserted as ground three and four).
- (e). Failing to challenge for cause jurors (asserted as ground five).

Munoz asserts Breen was ineffective on appeal by:

- (a). Failing to assert as error trial counsel's failure to file a motion in limine (asserted as ground two).
- (b). Failing to assert trial counsel was ineffective as alleged against Straetker above (asserted as ground two).

Discussion

Munoz claims that Straetker was ineffective in his representation during trial for failing to interview Jolene Condon and Manuel Trevino; failing to raise an alibi defense; failing to call an expert witness; failing to object to jury instructions and failing to challenge for cause jurors. Munoz was represented at trial by Straetker. On appeal Breen represented Munoz. A motion for post conviction relief cannot be used to secure review of issues that were known to the defendant and could have been litigated on direct review, no matter how those issues may be phrased or rephrased. *State v. Ryan*, 248 Neb. 405 (1995). When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of

trial counsel's ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred. *State v. Filholm*, 287 Neb. 763 (2014). Because Munoz obtained a new attorney on appeal, he was required to assert any known or apparent claims of ineffective assistance of counsel on direct appeal. There is no showing or assertions the claims made against Straetker listed as (a)-(e) were not known or apparent on appeal. There is no showing the claimed relief was newly discovered. As such no relief is available to Munoz as asserted against Straetker for ineffective assistance of counsel.

Next, Munoz alleges that Breen was ineffective by failing to preserve on appeal a challenge to defendant's motion in limine. No specific statement or evidence is alleged in Munoz's motion asserting what challenge Munoz could make and Breen would preserve for further review. Post conviction relief is only available if the defendant proves that there was a violation of either a federal or state constitutional right as to render the conviction and judgment void or voidable. *State v. Watson*, 295 Neb. 802 (2017). Munoz has no specific allegations that testimony which would have been included in the motion in limine was prejudicial to his trial. This allegation has no merit and requires no postconviction evidentiary hearing.

Munoz alleges that Breen was ineffective by failing to assert on appeal Straetker was ineffective at trial for failing to interview witnesses, failing to assert an alibi defense, failing to call an expert witness and failing to file a motion to suppress statements of Munoz.

In assessing postconviction claims of ineffective assistance of counsel for failure to call a particular witness, the Nebraska Supreme Court has upheld the dismissal without an evidentiary hearing where the motion did not include specific allegations as to what testimony such witnesses would have given or what exculpatory evidence may have been uncovered by the retention of experts. *State v. Dubray*, 294 Neb. 937, 885 N.W.2d 540 (2016). Here, Munoz asserts ineffective assistance of counsel for failing to call Condon and Trevino as witnesses and by failing to call an expert witness. Munoz does not assert any specific allegations as to what testimony witnesses would have given nor any exculpatory evidence that has been uncovered by the testimony or expert findings. The allegations have no merit and requires no postconviction evidentiary hearing.

Munoz alleges Straetker was ineffective for failing to assert an alibi defense and Breen was ineffective for failing to preserve on appeal the failure to file an alibi defense. Post conviction relief is only available if the defendant proves that there was a violation of either a federal or state constitutional right as to render the conviction and judgment void or voidable. *State v. Watson*, 295 Neb. 802 (2017). There are no facts asserted showing who would be called as an alibi, what the alibi would testify and thus no showing of any exculpatory evidence.

Munoz alleges Straetker was ineffective for failing to file a motion to suppress and Breen was ineffective for failing to preserve on appeal the motion to suppress Munoz's statements. There are no facts asserted showing any statements of Munoz which would be suppressed and further no showing of any exculpatory evidence. This claim is not specifically argued in the pleading but stated.

The claims against Breen for ineffective assistance of counsel for failing to preserve errors of Straetker have no merit and requires no postconviction relief.

When taken as individual allegations or read together as a whole, there is no evidence of deficient performance on the part of Straetker and Breen. Even if deficient performance had been shown, there is further no evidence any deficient performance prejudiced Munoz trial or undermined confidence in the outcome of trial.

III. CONCLUSION

Having reviewed the record and considered the arguments of counsel the Court hereby concludes that Munoz is not entitled to postconviction relief. The requested relief is denied in its entirety and the motion is dismissed.

DATED: July 22, 2020.

BY THE COURT:

Andru Miller

District Judge

cc: Dave Eubanks
Lucio Munoz