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STATE OF NEBRASKA, APPELLEE, V. TIMMY ALLEN TIMMENS, APPELLANT.

805 N.W.2d 704

Filed December 2, 2011. No. S-11-217.

1. **Jurisdiction: Appeal and Error.** It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. ____: ____. An appellate court determines a jurisdictional question that does not involve a factual dispute as a matter of law.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.
4. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
5. **Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
6. **Pleadings: Appeal and Error.** An appellate court reviews the denial of a motion to alter or amend the judgment for an abuse of discretion.
7. **Postconviction: Final Orders.** Within a postconviction proceeding, an order granting an evidentiary hearing on some issues and denying a hearing on others is a final order as to the claims denied without a hearing.
8. **Effectiveness of Counsel: Appeal and Error.** When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel failed to bring a claim on appeal that actually prejudiced the defendant. That is, courts begin by assessing the strength of the claim appellate counsel purportedly failed to raise.
9. ____: ____. Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal.
10. ____: ____. When a case presents layered ineffectiveness claims, an appellate court determines the prejudice prong of appellate counsel's performance by focusing on whether trial counsel was ineffective under the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
11. ____: ____. Under the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a court determines (1) whether counsel's performance was deficient and (2) whether the deficient performance actually prejudiced the defendant in making his or her defense. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
12. ____: ____. If trial counsel was not ineffective, then the defendant suffered no prejudice when appellate counsel purportedly failed to bring an ineffective assistance of trial counsel claim.

13. **Criminal Law: Effectiveness of Counsel.** Trial counsel's performance was deficient if it did not equal that of a lawyer with ordinary training and skill in criminal law in the area.
14. **Effectiveness of Counsel: Presumptions.** When considering whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.
15. **Effectiveness of Counsel: Attorney and Client.** The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions.
16. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** Trial counsel is afforded due deference to formulate trial strategy and tactics. When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.

Appeal from the District Court for Dawson County: JAMES E. DOYLE IV, Judge. Affirmed.

Jeffrey M. Wightman, of Wightman & Wightman, for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and CASSEL, Judge.

STEPHAN, J.

In 2001, Timmy Allen Timmens was convicted of second degree murder in connection with the death of Tracy Giugler and was sentenced to serve a term of 45 years' to life imprisonment. We affirmed his conviction and sentence on direct appeal.[1] Timmens was represented by different attorneys at trial and on direct appeal.

In 2008, Timmens filed a motion for postconviction relief in which he alleged that his trial counsel was ineffective in several particulars and that his appellate counsel was ineffective in failing to raise ineffective assistance of trial counsel on direct appeal. The district court for Dawson County dismissed all but one of the claims without an evidentiary hearing and denied the remaining claim following an evidentiary hearing.

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[1] *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002).

Timmens perfected this appeal after the district court overruled his motion to alter or amend the judgment. We affirm.

I. BACKGROUND

1. Trial

The evidence from Timmens' jury trial is fully summarized in our opinion on direct appeal[2] and will be restated here only to the extent necessary to address the postconviction issues.

At all relevant times, Timmens and Giugler were in a relationship and lived together in Overton, Nebraska. On Friday, July 21, 2000, Timmens went to a bar in Overton with Gary Paben. Appearing as a witness for the State at trial, Paben testified they arrived at the bar while it was still light outside. Paben testified he and Timmens drank whiskey and Coke. He acknowledged that he had a lot to drink and that Timmens drank the same amount. Paben testified that they stayed at the bar until approximately midnight when the bartender "shut [them] off." After leaving the bar, Paben and Timmens walked to Timmens' home.

When they arrived, Giugler was sleeping on the couch in the living room. Paben passed out on Timmens' bed but woke up when he heard "what appeared to sound like two people arguing" outside. He heard angry voices and what sounded like a woman say "'help.'" A neighbor heard what sounded like a fence being torn down and the slamming of a garbage can lid in the alley that separated her backyard from Timmens' backyard.

On July 22, 2000, after Giugler was reported missing, law enforcement officers investigated and eventually found her body in the basement of Timmens' home. The pathologist who conducted the autopsy testified that the cause of Giugler's death was blunt trauma to the head, chest, abdomen, and upper and lower extremities, with hemorrhaging and rib fractures resulting from an extensive and forceful beating.

Timmens' counsel requested an intoxication instruction, and the jury was instructed:

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[2] *Id.*

> There has been evidence that [Timmens] was intoxicated at the time that the crime with which he is charged was committed.
>
> Intoxication is a defense only when a person's mental abilities were so far overcome by the use of alcohol that he could not have had the required intent. You may consider evidence of alcohol use along with all the other evidence in deciding whether [Timmens] had the required intent.

The jury found Timmens guilty of second degree murder.

2. Direct Appeal

On direct appeal, Timmens' new attorney assigned that the trial court erred in not suppressing certain evidence and in imposing an excessive sentence. Appellate counsel did not assert that trial counsel had been ineffective. We rejected each of the assigned errors and affirmed.

3. Postconviction Proceedings

In his motion for postconviction relief, Timmens alleged his trial counsel was ineffective in failing to file a motion to suppress evidence and in failing to make various trial objections. He also alleged trial counsel was ineffective for not vigorously pursuing an intoxication defense. Timmens alleged his appellate counsel was ineffective in failing to raise and thereby preserve the ineffective assistance of trial counsel issues on direct appeal. He further alleged that appellate counsel was ineffective for failing to assign error to the district court's denial of his pro se motion to appoint new trial counsel.

After reviewing the files and records from Timmens' trial and appeal, the district court determined that they affirmatively showed that Timmens was not entitled to relief on his postconviction claims, with the exception of the claim pertaining to the intoxication defense. The court ordered an evidentiary hearing on that claim and denied and dismissed all the other claims. At the hearing, the court received deposition testimony of Paben, Timmens, and Timmens' trial counsel.

Timmens testified in his deposition that he did not remember any of the events immediately preceding Giugler's death and

that he told his trial counsel this. But he also testified that he told his trial counsel that he was intoxicated that evening and that he understood his counsel was aware of this after deposing Paben prior to trial. Timmens testified that he did not recall discussing an intoxication defense with his trial counsel and that counsel did not argue or develop an intoxication defense at his trial. He also testified that while he was awaiting trial, his counsel arranged for him to be evaluated by a psychologist "[t]o determine [his] state of mind." According to Timmens, the evaluation was never completed, because he told the psychologist that he could not remember anything about the events leading to Giugler's death.

Timmens' trial counsel testified that Timmens never instructed him to pursue an intoxication defense and that Timmens insisted he did not kill Giugler and was wrongfully accused. Counsel testified that he obtained a court order for a mental health evaluation to explore the viability of "state-of-mind defenses," such as an intoxication defense. Counsel stated he explained the importance of the evaluation to Timmens, but Timmens refused to speak with the psychologist, "because in doing that, he would have to admit that he did something wrong, and that's something he would not do." Accordingly, counsel did not develop or argue an intoxication defense at Timmens' trial. Explaining his reason for not doing so, counsel testified, "I don't recall anything [Timmens] said about intoxication having anything to do with this case or this crime, because he didn't do it. He didn't kill this woman, he said. So that, to me, negated any effort to try to do anything, because he didn't do it."

Following the evidentiary hearing, the district court entered an order denying the intoxication defense claim and incorporating the prior order that had dismissed all other postconviction claims. The district court found that trial counsel's performance was not deficient. The court explained, "The thrust of . . . trial counsel's dilemma was Timmens was insisting he did not commit the crime, while the presentation of evidence of an intoxication defense would concede Timmens caused [Giugler's] death but without intent to do so. According to trial counsel, Timmens insisted 'he didn't do it.'" Based upon

this finding, the court concluded that trial counsel acted reasonably in selecting a trial strategy consistent with Timmens' claim that he did not commit the crime. The court further concluded that the "apparent tactic of trial counsel in requesting an intoxication instruction was to take advantage of Paben's trial testimony, adduced by the State, by having the court, not Timmens or his counsel, introduce the intoxication defense via the instructions."

Timmens filed a motion to alter or amend the judgment pursuant to Neb. Rev. Stat. § 25-1329 (Reissue 2008) on October 21, 2010. The motion sought reconsideration of the court's findings on the intoxication defense claim in light of a December 26, 2000, letter addressed to Timmens from his trial counsel. The motion also asked the court to consider the cumulative effect of Timmens' ineffective assistance of counsel allegations. After finding the letter was not newly discovered evidence and the motion was based on arguments previously asserted and rejected, the district court denied Timmens' motion. Timmens filed a timely notice of appeal from that order.

II. ASSIGNMENTS OF ERROR

Timmens assigns, summarized and renumbered, that the district court erred in (1) summarily dismissing all but one of his ineffective assistance of appellate counsel claims, (2) failing to find appellate counsel was prejudicially ineffective in not assigning and arguing a claim of ineffective assistance based on trial counsel's failure to vigorously pursue an intoxication defense, and (3) denying Timmens' motion to alter or amend the judgment.

III. STANDARD OF REVIEW

[1-3] It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[3] An appellate court determines a jurisdictional question that does not involve a factual dispute as a matter of law.[4] When reviewing questions of

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[3] See *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011).

[4] *Id.*

law, an appellate court resolves the questions independently of the lower court's conclusion.[5]

[4,5] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[6] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.[7] With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[8] an appellate court reviews such legal determinations independently of the lower court's decision.[9]

[6] An appellate court reviews the denial of a motion to alter or amend the judgment for an abuse of discretion.[10]

IV. ANALYSIS

1. Jurisdiction

The district court entered two separate orders denying Timmens' postconviction claims. The first order denied all claims, except that relating to the intoxication defense, without an evidentiary hearing. The second order, entered after the evidentiary hearing, denied the remaining claim. The State argues that we lack jurisdiction over any issues in this appeal arising from the first order, because Timmens did not perfect a timely appeal after entry of that order. Timmens counters that we have jurisdiction over all issues, because the second order, from which he perfected a timely appeal, incorporates the first order by reference.

[7] The State's position is correct. Within a postconviction proceeding, an order granting an evidentiary hearing on some issues and denying a hearing on others is a final order

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[5] *Id.*; *State v. Gibilisco*, 279 Neb. 308, 778 N.W.2d 106 (2010).

[6] *Gibilisco, supra* note 5.

[7] *Id.*; *State v. Hudson*, 277 Neb. 182, 761 N.W.2d 536 (2009).

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

[9] *Gibilisco, supra* note 5; *Hudson, supra* note 7.

[10] See *Mandolfo v. Mandolfo*, 281 Neb. 443, 796 N.W.2d 603 (2011).

as to the claims denied without a hearing.[11] The order denying all but one of Timmens' postconviction claims without an evidentiary hearing was entered on April 14, 2009. Timmens' notice of appeal, filed March 11, 2011, is therefore untimely with respect to that order.[12] Timmens' right to appeal the 2009 order was time barred and could not be resurrected by the district court's reference to that order in its subsequent order denying the remaining postconviction claim following the evidentiary hearing. Accordingly, our jurisdiction extends only to the assignments of error relating to the intoxication defense and the motion to alter or amend the judgment, as to which the appeal is timely.

2. Ineffective Assistance of Counsel

(a) General Principles

[8,9] Timmens argues the district court erred in failing to find that his appellate counsel was prejudicially ineffective for not raising the ineffectiveness of trial counsel on appeal. When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel failed to bring a claim on appeal that actually prejudiced the defendant.[13] That is, courts begin by assessing the strength of the claim appellate counsel purportedly failed to raise.[14] Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal.[15]

[10-12] When, as here, the case presents layered ineffectiveness claims, we determine the prejudice prong of appellate counsel's performance by focusing on whether trial counsel

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[11] See *Yos-Chiguil, supra* note 3. See, also, *State v. Poindexter*, 277 Neb. 936, 766 N.W.2d 391 (2009); *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004); *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

[12] See Neb. Rev. Stat. § 25-1931 (Reissue 2008).

[13] *State v. Jim*, 278 Neb. 238, 768 N.W.2d 464 (2009); *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

[14] *Id.*

[15] *Id.*

was ineffective under the *Strickland* test.[16] Under that test, a court determines (1) whether counsel's performance was deficient and (2) whether the deficient performance actually prejudiced the defendant in making his or her defense.[17] The two prongs of this test, deficient performance and prejudice, may be addressed in either order.[18] If trial counsel was not ineffective, then the defendant suffered no prejudice when appellate counsel purportedly failed to bring an ineffective assistance of trial counsel claim.[19]

(b) Performance of Trial Counsel

[13,14] In considering whether Timmens' trial counsel performed deficiently in failing to vigorously pursue an intoxication defense, we are guided by established principles. Trial counsel's performance was deficient if it did not equal that of a lawyer with ordinary training and skill in criminal law in the area.[20] When considering whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.[21]

Based upon the evidence presented at the postconviction hearing, the district court found that "trial counsel knew an intoxication defense was possible [and] took the steps necessary to obtain the evidence to present the defense but was stymied by Timmens' insistence he did not commit the crime and Timmens' lack of cooperation in garnering the evidence to present the defense." This factual finding is fully supported by the record, and we accept it as the basis of our independent assessment of counsel's performance under the *Strickland* test.

[15,16] As the U.S. Supreme Court noted in *Strickland*, "The reasonableness of counsel's actions may be determined

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[16] *Id.*

[17] *Id.*

[18] *Gibilisco, supra* note 5. See *State v. Thomas*, 278 Neb. 248, 769 N.W.2d 357 (2009).

[19] *Jim, supra* note 13; *Jackson, supra* note 13.

[20] See, *Gibilisco, supra* note 5; *Thomas, supra* note 18.

[21] *Jim, supra* note 13. See *Hudson, supra* note 7.

or substantially influenced by the defendant's own statements or actions."[22] Given Timmens' insistence that he did not kill Giugler, counsel could hardly mount a defense premised on the notion that Timmens killed her unintentionally while in a state of intoxication. Even if Timmens had been willing to assert the intoxication defense, Timmens' refusal to participate in the mental health evaluation prevented counsel from fully assessing the viability of the defense. We agree with the conclusion of the district court that by requesting an instruction on the intoxication defense based on Paben's testimony with respect to Timmens' alcohol consumption, as elicited by the State, Timmens' counsel was able to provide the jury with a basis for convicting Timmens on a lesser homicide offense while at the same time preserving "the internal consistency of Timmens' defense" that he was innocent and should be acquitted. Trial counsel is afforded due deference to formulate trial strategy and tactics.[23] When reviewing a claim of ineffective assistance of counsel, an appellate court will not second-guess reasonable strategic decisions by counsel.[24] Applying this well-established principle here, we independently conclude that trial counsel's performance with respect to the intoxication defense was not deficient under the *Strickland* standard. It necessarily follows that appellate counsel could not have been ineffective in not raising the issue of trial counsel's performance on direct appeal.

3. Motion to Alter or Amend Judgment

At a hearing on Timmens' motion to alter or amend the judgment, Timmens' counsel requested that it be treated as a motion for new trial based on newly discovered evidence. In a subsequent written order, the district court treated the motion as a timely motion to alter or amend the judgment filed pursuant to § 25-1329, but concluded that the letter did not constitute newly discovered evidence, because it had been in Timmens'

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[22] *Strickland, supra* note 8, 466 U.S. at 691.

[23] *Jim, supra* note 13.

[24] *Id.*; *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003).

possession at the time of the postconviction hearing. The court overruled the motion.

Like the district court, we consider Timmens' motion as a motion to alter or amend the judgment, which may be based upon newly discovered evidence.[25] This court has defined newly discovered evidence as evidence which neither the litigant nor counsel could have discovered by the exercise of reasonable diligence.[26] The evidence must also be more than merely cumulative; it must be competent, relevant, and material, and of such character as to reasonably justify a belief that its admission would bring about a different result if a new trial were granted.[27]

We agree with the district court that the letter upon which Timmens' motion is based does not constitute newly discovered evidence. As admitted in his brief, the letter in question was in Timmens' possession at all relevant times. Its content would not warrant a different resolution of his postconviction claim. The district court did not abuse its discretion in denying the motion to alter or amend the judgment.

V. CONCLUSION

This court lacks jurisdiction over the claims summarily dismissed on April 14, 2009, because Timmens did not timely appeal from that order. Timmens' ineffective assistance claim related to trial counsel's failure to vigorously pursue an intoxication defense is without merit. Finally, the district court did not abuse its discretion in overruling Timmens' motion to alter or amend the judgment.

AFFIRMED.

WRIGHT, J., not participating.

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[25] *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004).

[26] *Id.*; *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

[27] *Id.*