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claim is that it is an action on an account.[31] As such, it is a single claim for an amount exceeding $4,000, and § 25-1801 is inapplicable.[32] We find no merit to Thomas & Thomas' cross-appeal.

CONCLUSION

We find no merit to Hathaway Switzer's claim that it was not liable for the services provided by Thomas & Thomas. Nor do we find merit to any of the arguments for attorney fees. But we find that the court erred in entering judgment against Switzer individually. The court's judgment, to the extent that it holds Hathaway Switzer liable in the sum of $5,992, is affirmed. The judgment is reversed to the extent that it holds Switzer personally liable, and the cause is remanded to the district court with directions to dismiss Thomas & Thomas' claim against Switzer as an individual.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating in the decision.

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[31] See, generally, *Sodoro, Daly v. Kramer*, 267 Neb. 970, 679 N.W.2d 213 (2004).

[32] See *Schaffer v. Strauss Brothers*, 164 Neb. 773, 83 N.W.2d 543 (1957) (refusing fees under former version of § 25-1801, based on rejection of plaintiff's argument that he filed 71 claims for $20 each instead of 1 claim for $1,420). See, also, *Hancock v. Parks*, 172 Neb. 442, 110 N.W.2d 69 (1961).

STATE OF NEBRASKA, APPELLEE, V. ROBERT J. DUNKIN, APPELLANT.

807 N.W.2d 744

Filed January 13, 2012. No. S-11-220.

1. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
2. **Postconviction: Appeal and Error.** On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.

3. **Effectiveness of Counsel: Appeal and Error.** Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that an appellate court reviews independently of the lower court's decision.
4. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** 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*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
5. **Postconviction: Pleas: Effectiveness of Counsel.** In a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
6. **Effectiveness of Counsel: Pleas: Proof.** Within the plea context, in order to satisfy the prejudice requirement to establish an ineffective assistance of counsel claim, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial.
7. **Effectiveness of Counsel: Presumptions: Appeal and Error.** The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.
8. **Trial: Pleas: Mental Competency.** A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense.
9. ____: ____: ____. The test of mental capacity to plead is the same as that required to stand trial.
10. **Pleas: Mental Competency: Right to Counsel: Waiver.** A court is not required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his or her right to counsel; a competency determination is necessary only when a court has reason to doubt the defendant's competence.
11. **Effectiveness of Counsel: Mental Competency: Proof.** In order to demonstrate prejudice from counsel's failure to investigate competency and for failing to seek a competency hearing, the defendant must demonstrate that there is a reasonable probability that he or she was, in fact, incompetent and that the trial court would have found him or her to be incompetent had a competency hearing been conducted.
12. **Constitutional Law: Trial: Mental Competency.** An individual has a constitutional right not to be put to trial when lacking mental competency.
13. **Postconviction: Effectiveness of Counsel: Presumptions: Proof.** Under certain circumstances, the nature of counsel's deficient conduct in the context of the prior proceedings can lead to a presumption of prejudice, negating the defendant's need to offer evidence of actual prejudice in a postconviction case.
14. **Postconviction: Effectiveness of Counsel: Presumptions: Appeal and Error.** After a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will

be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Sanford Pollack, of Pollack & Ball, L.L.C., for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

Robert J. Dunkin pled no contest to the charge of murder in the second degree. The district court accepted Dunkin's plea, entered a judgment of guilty, and subsequently sentenced Dunkin to 40 years' to life imprisonment. Dunkin did not directly appeal the judgment, but filed a motion for postconviction relief which alleged that his constitutional right to the effective assistance of counsel had been violated. Following an evidentiary hearing, the district court denied Dunkin's request for postconviction relief. Dunkin appeals.

II. BACKGROUND

1. CONVICTION AND SENTENCING PROCEEDINGS

Dunkin was charged by information with murder in the first degree and use of a weapon to commit a felony in connection with the death of his girlfriend, Lynn Anderson. Pursuant to plea negotiations, the information was amended to charge Dunkin with murder in the second degree, to which Dunkin pled no contest. The district court accepted Dunkin's plea and entered a judgment of guilty. On April 28, 2009, the court sentenced Dunkin to 40 years' to life imprisonment. No direct appeal was taken from Dunkin's conviction and sentence.

On February 23, 2010, Dunkin filed a pro se "Motion to Vacate and Set Aside Sentence and Conviction Pursuant to [Neb. Rev. Stat.] §§ 29-3001 to 29-3004 [(Reissue 2008)]." Dunkin alleged that his constitutional right to the effective

assistance of counsel had been violated. Dunkin asserted that his trial counsel coerced and pressured Dunkin to plead no contest to the charge of second degree murder, failed to investigate Dunkin's state of mind at the time of the offense, failed to have Dunkin undergo a mental health examination or retain a medical professional to testify, failed to adequately present evidence at the suppression hearing, failed to adequately prepare for trial, made sentencing representations to Dunkin that he would receive a sentence of 20 to 30 years' imprisonment, and failed to perfect an appeal of Dunkin's sentence despite Dunkin's request.

Dunkin also filed a motion to withdraw his plea of no contest, wherein he claimed that he had been promised prosecutors would recommend a minimum sentence of 20 to 30 years' imprisonment and that he had been promised by his attorney he would be paroled upon first eligibility. At the time of the plea, Dunkin claimed he was so "mentally impaired/medicated that he didn't fully understand what was going on" because he was on a number of medications, the combined effect of which "is not known to Dunkin." He claimed he was experiencing hallucinations, delusions, a confused state, disorientation, disturbed concentration, anxiety, drowsiness, dizziness, weakness, fatigue, and headache. Dunkin claimed, at the time of the plea, that he had not been evaluated regarding the defense of not guilty by reason of insanity and that the plea was a product of coercion at the hands of his attorney. Dunkin asserted that he believes he has a meritorious defense to the charge of murder in the second degree.

Dunkin filed a motion for appointment of postconviction counsel, which the court granted. The State filed a responsive pleading, and the court conducted an evidentiary hearing on Dunkin's motion for postconviction relief.

2. Evidentiary Hearing on Postconviction Motion

Dunkin testified at the hearing on his postconviction motion. Dunkin stated that he was initially represented by an attorney from the Commission on Public Advocacy, but that Dunkin's brother wanted to hire a private attorney. Dunkin's brother

hired trial counsel to represent him, and Dunkin's brother signed a fee agreement and paid a flat fee of $25,000. Dunkin stated that throughout the proceedings, his mother and brother were in contact with counsel while Dunkin was in jail, to relay messages from Dunkin. Dunkin stated that he could not contact counsel directly because counsel's office did not accept collect telephone calls. Counsel testified, however, that his office policy was to accept collect calls from clients who are in jail.

Dunkin testified regarding his first meeting with counsel on August 1, 2008, during which meeting Dunkin told counsel his version of the events that occurred on January 21 and 22, 2008, which had led to the death of Anderson. Dunkin explained that he had been in a relationship with Anderson for approximately 6 months. The evening of her death, she had gone to Dunkin's house and began crying. The two had previously discussed whether Anderson had cheated on Dunkin, and he again asked her if that was the case. Anderson did not answer, and Dunkin repeatedly asked if she had cheated on him until Anderson got angry. Anderson then jumped out of her chair and swung her purse at Dunkin, which hit him in the head and knocked him to the ground. Anderson swung her arms at Dunkin, and he attempted to restrain her but she bit him on the arm, knocking him to the ground again.

Dunkin testified that Anderson told him she was going to kill him and then reached for a chair where he kept a gun. At the same time, Dunkin moved to reach the gun first; a struggle ensued, during which Anderson kicked Dunkin in the knee and he fell into the wall. When Dunkin fell, the gun went off and struck and killed Anderson. Dunkin testified that he told counsel that Anderson's death was accidental and unintentional. Dunkin stated that counsel told him that he thought Dunkin had a good case for manslaughter.

Dunkin explained to counsel that he had taken a large amount of prescription pills after the incident, including more than 60 Xanax pills, some Percocet, hydrocodone, and "Ambien CR." Dunkin stated that he remembers nothing between the time he took the pills and when he woke up in jail. Dunkin testified that counsel commented he thought that that number of pills

would have killed Dunkin and that Dunkin stated he had taken the pills because he wanted to kill himself because he could not live with what had happened.

(a) Suppression Hearing

Following the incident, Dunkin was taken from his home to a hospital by ambulance because of the possible overdose. Dunkin made statements to medical personnel and police officers during the ambulance ride and after arriving at the hospital. The statements made by Dunkin during this time were recorded by a police officer who rode to the hospital in the ambulance with Dunkin.

Counsel filed a motion to suppress the statements Dunkin had made to law enforcement and medical personnel when he was taken into custody. In the motion to suppress, counsel argued that Dunkin's statements to medical personnel should be suppressed on the basis of doctor-patient privilege. He also claimed that the statements Dunkin made to police officers at the hospital should be suppressed, because Dunkin was not properly advised of his *Miranda* rights. A suppression hearing was scheduled, and on December 23, 2008, Dunkin met with counsel for the second time for approximately 10 minutes immediately prior to the hearing to discuss what would happen.

At the suppression hearing, the State called two police officers to testify; counsel did not call any witnesses on Dunkin's behalf, nor did Dunkin testify. Dunkin met with counsel briefly following the suppression hearing, and counsel explained that the hearing had gone as he expected it would. Dunkin testified that he was lucid during the hearing and understood what was going on.

After taking the motion to suppress under advisement, the court overruled the motion in regard to Dunkin's statements made during transport to the hospital and those made to police officers at the hospital after Dunkin was read his *Miranda* rights, and it sustained the motion in regard to statements he made to police prior to being advised of his *Miranda* rights. The court reserved ruling on statements made by Dunkin to the treating physician at the hospital. Dunkin said that he wanted

to appeal the suppression order but that counsel told him that could not be done because it was not a final, appealable order. Dunkin then told counsel he should try to negotiate a manslaughter charge.

(b) Autopsy Report

Dunkin testified that he told counsel that the autopsy report was incorrect, because it reported that Anderson had died of strangulation and a gunshot wound. Dunkin told counsel that Anderson must have had bruises on her neck and that if this could be confirmed, it would support Dunkin's version of the events—that the death was accidental.

Counsel obtained court approval for appointment of an expert witness. Counsel retained Dr. George Nichols, with whom he had worked in a previous case. Counsel believed Nichols to be highly qualified and retained Nichols to review the autopsy report. Nichols was supplied with the police and medical reports related to Dunkin's case. Counsel testified that Nichols reviewed all of the documents in the case and was unable to confirm Dunkin's version of the events. Counsel stated that Nichols' opinion was generally unfavorable to Dunkin and that he did not receive a written report of Nichols' findings.

Nichols reviewed the bruises on Anderson's neck, with which Dunkin took issue, and determined that the bruises on her neck were not from strangulation or a purse strap as Dunkin had stated, but appeared to be from a "karate chop"-like blow to the neck. After reviewing the documents, Nichols informed counsel that he thought Dunkin's version of the incident was implausible and that it appeared that Anderson's death "was an execution."

(c) Plea Negotiations and Proceeding

On February 10, 2009, counsel presented Dunkin with a plea offer of second degree murder and a dismissal of the gun charge. Dunkin asked counsel, If "this were your kid" in this situation, "what would you tell them [sic] to do?" Counsel said that he would advise him to take the plea deal, because the State would dismiss the gun charge and he would probably be looking at 20 to 30 years' imprisonment, which would be "really close" to what a manslaughter conviction would

get him. Dunkin testified that counsel told him that the judge wanted his plea by the end of the day if he were going to take the deal. Dunkin stated that he felt "pressured" and "rushed" during the meeting regarding the plea offer.

Dunkin met with counsel for a second time also on February 10, 2009, for 10 to 15 minutes. Dunkin testified that at that point, Dunkin felt that they were not ready for trial, which was scheduled for 1 week later. Dunkin stated that they had not discussed strategy and that he had not been prepped to testify, so he decided to take the plea offer. Dunkin testified that counsel told him he had spoken with the prosecutor, the judge, and the parole board and that Dunkin would be let out of prison on his first parole date.

Counsel stated that he did not depose any witnesses because he was able to rely on witness interviews conducted by Dunkin's previous attorney from the Commission on Public Advocacy. Counsel also testified that he felt he was prepared for trial and that he advised Dunkin to take the plea offer, because he felt there was a substantial likelihood Dunkin would be convicted of first degree murder if the case went to trial.

Dunkin entered his plea of no contest to the charge of murder in the second degree on February 10, 2009. At the plea hearing, Dunkin stated that he was taking several medications and that the medications helped him to think more clearly. During postconviction proceedings, however, Dunkin stated that he was suffering from anxiety on February 10 and that as a result, his mind was "racing" and he could not think straight. Dunkin testified that he did not freely and voluntarily plead no contest, because he was heavily medicated, he was not "in the right mind" to make such a decision, and he felt pressured. Dunkin stated that he decided to take the plea, because he had not discussed trial strategy with counsel and he felt rushed.

Dunkin also testified that counsel told him what answers to give to the judge at the plea hearing. Dunkin stated that without that preparation, he would not have been able to properly answer the questions regarding his understanding of the plea. Counsel testified that he did not pressure Dunkin in any way to accept a plea offer; that at all times, he told Dunkin to answer

questions from the court truthfully; and that he told Dunkin he hoped for a sentence of 20 to 30 years' imprisonment, but had made no promises.

Sentencing was scheduled for April 27, 2009. Dunkin did not meet or speak with counsel prior to the sentencing date. On the day of the sentencing hearing, Dunkin and counsel met briefly. Dunkin had prepared a statement for the hearing that he wanted to read so Anderson's family could hear what had happened. Counsel told Dunkin it would be in his best interests not to say anything, and Dunkin refrained from reading his statement and said only that he was sorry and took responsibility for what had happened. The court imposed a sentence of 40 years' to life imprisonment.

(d) Possibility of Appeal

Dunkin had no further contact with counsel following sentencing, nor did they discuss an appeal. Dunkin did not speak with counsel directly regarding an appeal of his conviction or sentence. However, Dunkin testified that he asked his mother, brother, and son to tell counsel that he wanted to appeal. Dunkin stated that he did not receive any correspondence from counsel regarding his ability to appeal and that he never signed a waiver of appeal.

Dunkin's mother, Meredith Chisholm, testified that Dunkin called her on May 8, 2009, and asked her if she would contact counsel to request an appeal. Chisholm contacted counsel on May 12 and left a message. Counsel returned Chisholm's call 2 days later, when Chisholm asked about the chances Dunkin would have on appeal and asked that counsel visit Dunkin in jail. Counsel stated that he believed the chances of success on appeal were slim and that he could not "take any more money from [the family]." Counsel did not speak with Chisholm any further regarding the possibility of an appeal.

Counsel testified that he did not get a written waiver of appeal from Dunkin or advise Dunkin or Chisholm that it would be possible to obtain court-appointed counsel to prosecute an appeal if Dunkin was determined to be indigent. However, counsel stated that he discussed the possibility of a successful appeal with Chisholm within 30 days of Dunkin's

sentencing. At that time, Chisholm did not request that he file an appeal. Counsel further testified that he had explained to Dunkin that he would not be able to appeal the suppression order if he accepted the plea offer. And counsel testified that he also discussed all the other rights that Dunkin would waive if he entered the plea.

(e) Disposition

Following the evidentiary hearing, the district court denied Dunkin's request for postconviction relief. The court determined that Dunkin's plea was made freely and knowingly, without pressure or coercion from counsel and without the promise of a specific sentence. The court also found that counsel was not ineffective in his preparation for trial or in failing to request a competency examination. Finally, the court determined that although counsel engaged in some discussion regarding the possibility of an appeal, counsel was not ineffective in failing to file an appeal, because the record reflects that no request for appeal was made.

In denying Dunkin's claims, the court noted:

> Dunkin cannot bring himself to come to grips with the facts of this case, that is, the killing was not an accident. When his first attorney was unable to obtain a reduced charge of manslaughter, he and his family somehow believed that if they retained the services of a well-known experienced criminal attorney, he would be able to achieve the desired reduction in the original charge of first degree murder to manslaughter. There is no doubt that [counsel] fit Dunkin's qualification. He is an experienced, competent and well respected criminal lawyer. When he first heard Dunkin's version of the facts surrounding the incident, he felt there may be a viable defense theory to the case. However, after reviewing the reports and other documents, and conferring with the forensic pathologist who was retained at the expense of Lancaster County, [counsel] concluded that manslaughter was not an alternative that the state would consider. In fact, at the time of sentencing this court noted that its review of the record and autopsy did not support a theory that the death was

> accidental. Merely because the result of the case is not that hoped for by the defendant does not support a finding of ineffective assistance of counsel.

Dunkin appeals the denial of his motion for postconviction relief. Additional facts relating to Dunkin's plea and conviction will be discussed as necessary in our analysis section below.

III. ASSIGNMENTS OF ERROR

Dunkin assigns that the district court erred in (1) failing to grant Dunkin's request for postconviction relief, because Dunkin's constitutional right to the effective assistance of counsel was violated throughout the discovery, trial, plea, and sentencing phases of his case, and (2) failing to grant Dunkin's request for postconviction relief, because Dunkin's right to the effective assistance of counsel was violated when trial counsel disregarded Dunkin's request to appeal his sentence.

IV. STANDARD OF REVIEW

[1-3] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[1] On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.[2] Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that we review independently of the lower court's decision.[3]

V. ANALYSIS

Dunkin argues that the district court erred in denying his motion for postconviction relief on the basis of ineffective assistance of counsel. Dunkin claims that his trial counsel failed to properly investigate the case, retain experts, conduct discovery, and prepare for trial. Had trial counsel properly prepared, Dunkin asserts that he would not have entered a plea of no contest but would have insisted on a trial. Dunkin argues that counsel should have requested a competency hearing

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

[2] *State v. Poindexter*, 277 Neb. 936, 766 N.W.2d 391 (2009).

[3] *State v. Yos-Chiguil, supra* note 1.

and investigated Dunkin's mental health. Dunkin also asserts that trial counsel disregarded Dunkin's request to appeal his sentence.

[4] 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*,[4] to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case.[5] The two prongs of this test, deficient performance and prejudice, may be addressed in either order.[6]

1. Plea

[5-7] In a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.[7] Within the plea context, in order to satisfy the prejudice requirement to establish an ineffective assistance of counsel claim, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial.[8] The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.[9]

(a) Pressure to Enter Plea

Dunkin argues that he did not freely and voluntarily plead no contest to the amended information, because counsel pressured him to plead to the amended charge. Dunkin claims he

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

[5] *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010).

[6] *Id.*

[7] *Id.*

[8] *State v. Yos-Chiguil, supra* note 1.

[9] *State v. McDermott*, 267 Neb. 761, 677 N.W.2d 156 (2004); *State v. George*, 264 Neb. 26, 645 N.W.2d 777 (2002); *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001); *State v. Silvers*, 260 Neb. 831, 620 N.W.2d 73 (2000).

accepted the plea agreement only because he recognized that his counsel was not ready for trial. The district court concluded that Dunkin's arguments were without merit, because the record did not reflect that counsel pressured Dunkin to plead no contest and Dunkin failed to present any evidence of prejudice resulting from counsel's allegedly deficient pretrial investigation.

The record affirmatively reflects that Dunkin freely and voluntarily entered his plea. During the plea proceeding, the following colloquy occurred:

> THE COURT: Have you discussed the plea proceedings that we are conducting here today with [counsel]?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Did he explain the Amended Information and the charge to you together with the rights we have been discussing?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: And did [counsel] discuss with you all of the possible defenses to this charge that you might have if you were to have a trial?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Are there any defenses that you feel you may have or any facts about the case that you feel might be helpful to your defense that you have not discussed with [counsel]?
>
> THE DEFENDANT: No, Your Honor.
>
> THE COURT: In other words, have you told him everything about the case that you feel he needs to know to be able to represent you properly?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Are you satisfied with the job he's done as your attorney?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Do you feel he is a competent lawyer, that he knows what he's doing?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Is there anything you have asked [counsel] to do in regard to representing you in this matter that he has failed to do?

THE DEFENDANT: No, Your Honor.

THE COURT: And have you had enough time to talk with him about the case?

THE DEFENDANT: Yes, Your Honor.

We agree with the district court that the record does not indicate that Dunkin was in any way uncertain or reluctant to enter his plea.

Based upon our review of the record, the district court's finding that Dunkin was not pressured or coerced is not clearly erroneous. Accordingly, we conclude that the court did not err in denying Dunkin's claim for postconviction relief.

(b) Adequacy of Preparation

In addition, Dunkin apparently argues that but for counsel's ineffective representation at the suppression hearing, Dunkin would not have entered a plea of no contest, but would have insisted on going to trial. Dunkin asserts that counsel's failure to obtain an order suppressing the entirety of the statements Dunkin made to police officers and medical personnel on the night of the incident contributed to his decision. He argues that counsel's statement that the suppression order was not appealable also contributed to his acceptance of the plea. Dunkin claims he believed the determinations in the suppression order could not be reviewed. If he had known the issues would be preserved following a trial, he would not have taken the plea.

The postconviction court determined that because an order overruling a motion to suppress is not a final, appealable order, Dunkin's claim is without merit. We agree and note that the record does not indicate that counsel represented to Dunkin that the suppression order could never be appealed. Counsel only indicated that he was unable to file an interlocutory appeal in the case. And there is nothing in the record to suggest that the suppression order was entered erroneously. Accordingly, Dunkin has failed to establish that trial counsel was ineffective in this regard.

Finally, Dunkin asserts that he accepted the plea because counsel did not follow his instructions to interview witnesses and investigate the case. Dunkin requested that counsel interview

Dunkin's sons, various experts, and character witnesses and argues that counsel should have subpoenaed such witnesses to testify at trial. Again, Dunkin claims that if counsel had interviewed or subpoenaed these witnesses, Dunkin would have insisted on going to trial. But Dunkin presented no evidence that any of these witnesses could have presented testimony both relevant to the case and favorable to Dunkin. The district court noted that Dunkin's sons had already been subpoenaed by the State and that counsel contacted a forensic pathologist, Nichols, per Dunkin's request. The court concluded, however, that the expert testimony would not be helpful to Dunkin, as it contradicted Dunkin's version of the incident. We agree with the district court that there is no evidence that Dunkin was prejudiced by counsel's failure to call these witnesses. Nor did counsel's decision not to call these witnesses unduly pressure or coerce Dunkin to accept a plea.

Dunkin has failed to establish that counsel's preparation for the case was unreasonable or inadequate. And Dunkin has not established prejudice: The record does not indicate a reasonable probability that, but for counsel's alleged errors, Dunkin would not have entered his plea and would have insisted on going to trial. Dunkin's claim regarding inadequate preparation is therefore without merit.

(c) Competency

[8-10] Dunkin also argues that counsel was ineffective for failing to request a mental health evaluation or competency examination to determine whether Dunkin understood the effect of the plea proceedings. A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense.[10] The test of mental capacity to plead is the same as that required to stand trial.[11] A court is not required to make a competency determination in every case in which a defendant seeks to plead guilty or to

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[10] *State v. Vo, supra* note 5.

[11] *Id.*

waive his or her right to counsel; a competency determination is necessary only when a court has reason to doubt the defendant's competence.[12]

[11] In order to demonstrate prejudice from counsel's failure to investigate competency and for failing to seek a competency hearing, the defendant must demonstrate that there is a reasonable probability that he or she was, in fact, incompetent and that the trial court would have found him or her incompetent had a competency hearing been conducted.[13] The issue of prejudice in this case is necessarily bound up in the law of competency, and we will turn to that now.[14]

[12] An individual has a constitutional right not to be put to trial when lacking mental competency.[15] In *State v. Guatney*,[16] we said that the test of competency to stand trial is whether the defendant has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense. We held that the defendant was clearly competent when expert witnesses agreed he could appreciate the proceedings in court; understand the nature of the roles that the judge, the prosecutor, and the defense attorney would play; and cooperate with his attorneys to provide for a defense.[17] The defendant's unstable emotional state, paranoid ideation, and occasional outbursts in court did not render him incompetent.[18]

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[12] *Id.*

[13] See, *Hull v. Kyler*, 190 F.3d 88 (3d Cir. 1999); *Felde v. Butler*, 817 F.2d 281 (5th Cir. 1987); *Matheney v. Anderson*, 377 F.3d 740 (7th Cir. 2004); *Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997); *Futch v. Dugger*, 874 F.2d 1483 (11th Cir. 1989); *Nelson v. State*, 43 So. 3d 20 (Fla. 2010); *Ridgley v. State*, 148 Idaho 671, 227 P.3d 925 (2010).

[14] See *Hull v. Kyler, supra* note 13.

[15] See, *Indiana v. Edwards*, 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008); *State v. Fox*, 282 Neb. 957, 806 N.W.2d 883 (2011); *State v. Hessler*, 282 Neb. 935, 807 N.W.2d 504 (2011).

[16] *State v. Guatney*, 207 Neb. 501, 299 N.W.2d 538 (1980). See, also, *State v. Fox, supra* note 15; *State v. Hessler, supra* note 15.

[17] *State v. Guatney, supra* note 16.

[18] *Id.*

The fundamental question is whether the defendant's mental disorder or condition prevents the defendant from having the capacity to understand the nature and object of the proceedings, comprehend the defendant's own condition in reference to such proceedings, and to make a rational defense.[19] Here, the record demonstrates that Dunkin had the capacity to understand the proceedings and assist in his defense.

Prior to accepting Dunkin's plea of no contest to the charge of murder in the second degree, the district court made a number of inquiries as to Dunkin's background and articulated the rights he was waiving by entering the plea. During this inquiry, Dunkin informed the court that he was 44 years of age, had completed high school and taken some college courses, and had been employed as an area facilities manager for apartments in several states. Dunkin stated which prescription medications he was taking and for what purpose, that he had taken the prescribed dosage, and that the medication was not affecting his ability to understand the proceedings. The record also reflects the following exchanges regarding Dunkin's understanding of the proceedings:

> THE COURT: . . . [H]ave I used any words here so far that you don't understand?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Do you have any questions about any of these rights?
>
> THE DEFENDANT: No, Your Honor, I do not.
>
> THE COURT: And are you in fact waiving and giving up the rights we have been discussing freely and voluntarily?
>
> THE DEFENDANT: Yes, Your Honor.
>
> . . . .
>
> THE COURT: And do you still wish to plead no contest to the charge in the Amended Information?
>
> THE DEFENDANT: Yes, I do, Your Honor.
>
> THE COURT: Again, are you freely and voluntarily entering this plea and waiving your rights?
>
> THE DEFENDANT: Yes, Your Honor.

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[19] *Id.*

> THE COURT: . . . [I]s there anything else you wish to say at this time or any questions you have either of [counsel] or myself before I accept your plea?
>
> . . . .
>
> THE DEFENDANT: No, Your Honor.

The only evidence in the record to support Dunkin's assertion that he did not voluntarily enter his plea is his own testimony that counsel coached Dunkin in answering the court's questions. There is nothing in the record to corroborate this allegation. Nor is there evidence of any mental or physical symptoms relating to Dunkin's medications or his purported anxiety issues. The record of Dunkin's plea proceeding does not reflect that Dunkin was incompetent to enter his plea. Dunkin's responses to questions from the court were appropriate and reflected his knowledge that he was appearing in court for the purpose of entering a plea of no contest and that he understood the consequences of such action as they were explained to him by the judge.

Though Dunkin claims that counsel was ineffective for failing to raise the competency issue, Dunkin testified at the evidentiary hearing in February 2009 that he believed himself to be competent to stand trial. So, Dunkin apparently does not seek to prove that he was prejudiced by the absence of a competency hearing. He argues that "[i]t would have seemed prudent, *even though nothing may have come of it*, to request a mental health evaluation or competency examination."[20] Accordingly, Dunkin has not established the prejudice required on this claim. Moreover, because the record affirmatively reflects that Dunkin was competent to enter his plea, his counsel was not ineffective for failing to raise the issue of competency—an argument that has no merit—in the trial court.[21]

(d) Promise of Specific Sentence

Dunkin claims that counsel was ineffective in failing to object to the State's alleged breach of the plea agreement when he was sentenced to 40 years' to life imprisonment rather than

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[20] Brief for appellant at 22 (emphasis supplied).

[21] See *State v. Vo, supra* note 5.

20 to 30 years' imprisonment. The district court determined that Dunkin's allegation that a specific sentence was promised or that the plea agreement was conditioned on such a sentence was without merit. The district court discussed sentencing with Dunkin at the plea hearing:

> THE COURT: I assume there has been a plea agreement here, is that correct?
>
> [Counsel for the State:] There has, Judge. The plea agreement is in exchange for the State filing the amended charge of second degree murder, . . . Dunkin would plead guilty or no contest to that charge. No other charges stemming from the events of January 21, 2008, would be filed against . . . Dunkin.
>
> THE COURT: [Defense counsel], is that your understanding of the plea agreement?
>
> [Defense counsel]: That's accurate, Your Honor.
>
> THE COURT: And . . . is that your understanding of the plea agreement?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: And is this an agreeable way to dispose of the matter as far as you are concerned?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Other than this agreement, has anyone connected with law enforcement or anyone else made any threats, direct or indirect, used any force or held out any promises of any kind to get you to come in here today and to enter this plea and to waive your rights?
>
> THE DEFENDANT: No, Your Honor.
>
> THE COURT: Has anyone made any promises or representations to you as to what the actual sentence in this case might be should you enter this plea?
>
> THE DEFENDANT: No, Your Honor.
>
> THE COURT: Do you understand that within the limits of the statute the determination of the appropriate sentence is entirely up to the Court?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: And do you still wish to plead no contest to the charge in the Amended Information?
>
> THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Again, are you freely and voluntarily entering this plea and waiving your rights?

THE DEFENDANT: Yes, Your Honor.

There is no evidence that Dunkin was promised a certain sentence, and other than his testimony at the evidentiary hearing below, there is no evidence that Dunkin believed he was guaranteed a sentence of 20 to 30 years' imprisonment. The record reflects that counsel told Dunkin he hoped for such a sentence, but this does not support an ineffectiveness claim. Dunkin's arguments to the contrary are without merit.

2. Failure to File Direct Appeal

[13,14] Dunkin contends that his trial counsel was ineffective for failing to file a direct appeal in response to his request that he do so. Under certain circumstances, the nature of counsel's deficient conduct in the context of the prior proceedings can lead to a presumption of prejudice, negating the defendant's need to offer evidence of actual prejudice in a postconviction case.[22] After a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief.[23]

Assuming without deciding that the same principle would apply where conviction is the result of a guilty or no contest plea, the critical question of fact is whether Dunkin directed his counsel to file a direct appeal on his behalf. After reviewing the evidence received at the postconviction hearing, the district court concluded that he did not. As noted above, Dunkin's mother, Chisholm, contacted counsel to discuss the possible success of an appeal, but the record does not indicate that she specifically requested counsel to pursue an appeal. And there is no evidence that Dunkin attempted to contact counsel by letter or telephone to make such a request himself. It is uncontested that Dunkin and counsel had no contact following the

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[22] *State v. Amaya*, 276 Neb. 818, 758 N.W.2d 22 (2008).

[23] *Id.*

sentencing proceedings. Based upon our review of the record, we conclude that these findings are not clearly erroneous.

VI. CONCLUSION

For the reasons discussed above, we conclude that the district court did not err in denying Dunkin's motion for postconviction relief, and we affirm its judgment.

AFFIRMED.

WRIGHT, J., not participating in the decision.