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utmost importance, for his safety and the safety of others, that Petersen remain alert and unimpaired at work. Clearly, his use of marijuana prior to reporting to work had the potential to affect his job performance and jeopardize the safety and security of DHHS. These reasons, coupled with his admitted usage of marijuana and refusal to submit to a drug test after several requests, equate to just cause for termination of his employment, and we find that the district court's affirmation of Petersen's termination conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. This assignment of error is without merit.

Remaining Assignments of Error.

[6] Having determined that the district court did not err by affirming Petersen's termination of employment, we need not address Petersen's remaining arguments that there was no evidence he was under the influence of drugs and that he was terminated for fear of his possible future actions. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it. *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006).

CONCLUSION

For the foregoing reasons, we conclude that the district court did not err in affirming the termination of Petersen's employment with DHHS for admittedly smoking marijuana just prior to reporting for work and refusing to take a drug test. Therefore, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DAVID A. DERR, APPELLANT.
809 N.W.2d 520

Filed November 8, 2011. No. A-11-101.

1. **Effectiveness of Counsel: Records: Appeal and Error.** It is the responsibility of the appellate courts to determine whether the record presented on direct appeal

is sufficient to address the claims of ineffective assistance of trial counsel when appellate counsel is different from trial counsel.

2. **Effectiveness of Counsel: Proof.** In order to prevail on an ineffective assistance of counsel claim, a defendant must show that his or her counsel's performance was deficient and that he or she was prejudiced by that deficient performance.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

D. Brandon Brinegar, Deputy Buffalo County Public Defender, of Ross, Schroeder & George, L.L.C., for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

IRWIN, MOORE, and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

This direct appeal involves issues of ineffective assistance of trial counsel. Appellate counsel is different from trial counsel. In the brief of David A. Derr, he asks that this court "find the record to be insufficient to allow [his] assigned errors to be addressed on direct appeal, and that [his] claims of ineffective assistance of counsel are preserved for postconviction review." Brief for appellant at 11. Derr's brief also states, "Essentially, [he] has no argument on direct appeal." *Id.* at 7.

[1] It is the responsibility of the appellate courts to determine whether the record presented on direct appeal is sufficient to address the claims of ineffective assistance of trial counsel when appellate counsel is different from trial counsel. Therefore, since Derr presumed the record was inadequate for review of these issues and failed to allege that any of counsel's actions prejudiced him or, stated another way, did not sufficiently allege his ineffective assistance of counsel claims, we are constrained to find that Derr's assertions of ineffective assistance of counsel are without merit.

II. BACKGROUND

The underlying facts of this case are undisputed. In September 2009, Derr's 12-year-old daughter reported to police that Derr

had subjected her to sexual contact. Derr was subsequently arrested and charged with first degree sexual assault. Derr eventually pled no contest to an amended charge of attempted third degree sexual assault of a child. Derr was sentenced to a term of imprisonment of not less than 18 months or more than 5 years. Represented by appellate counsel different from his trial counsel, Derr timely appealed to this court. The case was submitted without oral argument pursuant to Neb. Ct. R. App. P. § 2-111(E)(5)(a) (rev. 2008).

III. ASSIGNMENT OF ERROR

Derr asserts that he was denied effective assistance of trial counsel.

IV. STANDARD OF REVIEW

Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. *State v. McDaniel*, 17 Neb. App. 725, 771 N.W.2d 173 (2009). When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. *Id.*

V. ANALYSIS

On appeal, Derr argues that he was denied his right to effective assistance of counsel because of his trial counsel's failure to (1) inform Derr that he could move to withdraw his no contest plea prior to the sentencing hearing, (2) adequately review the contents of the presentence report with Derr prior to the sentencing hearing, and (3) inform Derr that he could ask that the sentencing hearing be continued in order to obtain further evidence and/or expert witnesses. Derr acknowledges that his assertions are being raised for the first time on direct appeal and recognizes that the issues may not be ripe for resolution on appeal because of the lack of an evidentiary record.

Derr is also clearly aware of the rule that where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent

from the record, or the issue will be procedurally barred on postconviction review. See, e.g., *State v. Dunster*, 278 Neb. 268, 769 N.W.2d 401 (2009). In fact, in his appellate brief, Derr specifically asks that this court "find the record to be insufficient to allow [his] assigned errors to be addressed on direct appeal, and that [his] claims of ineffective assistance of counsel are preserved for postconviction review." Brief for appellant at 11. Derr does not provide any further argument concerning the merits of his ineffective assistance of counsel claims.

[2] The analysis section of Derr's brief is limited to his general argument that his trial counsel provided ineffective assistance and a brief recitation of how his counsel's performance was deficient. Derr does not allege how any of trial counsel's actions prejudiced him. In order to prevail on an ineffective assistance of counsel claim, a defendant must show that his or her counsel's performance was deficient and that he or she was prejudiced by that deficient performance. *State v. Thomas*, 278 Neb. 248, 769 N.W.2d 357 (2009). Because Derr did not allege both that his counsel's performance was deficient and that such deficient performance was prejudicial to him, resolution of his assertions of ineffective assistance of counsel hinges not on the adequacy of the record before us, but on his failure to provide this court with sufficient allegations of ineffective assistance of counsel.

1. Withdrawal of No Contest Plea

Derr alleges that his trial counsel was ineffective because counsel failed to inform him that he could withdraw his no contest plea prior to the sentencing hearing. Derr does not allege any possible grounds or reasons for the withdrawal of his plea. The right to withdraw a plea previously entered is not absolute. *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010). Because Derr does not allege the grounds for a withdrawal of his plea, he cannot demonstrate that a motion to withdraw the plea would have been successful. Thus, he cannot demonstrate that he was prejudiced by his counsel's failure to advise him that he could withdraw his plea. This assertion has no merit.

2. Review of Presentence Report

Derr alleges that his trial counsel was ineffective because counsel failed to adequately review the contents of the presentence report with Derr prior to the sentencing hearing. The record reveals that Derr's trial counsel did review the presentence report prior to the trial. In fact, at the sentencing hearing, counsel spoke at length about the information contained in the report. The record does not indicate whether Derr's trial counsel reviewed the report with Derr. However, even if his counsel did fail to review the report with him, Derr has not alleged how he was prejudiced by counsel's actions. Specifically, Derr has not alleged how the ultimate outcome of the sentencing hearing would have been different had he had the opportunity to review the report with counsel. This assertion has no merit.

3. Motion to Continue Sentencing Hearing

Derr alleges that his trial counsel was ineffective because he failed to inform Derr that he could ask that the sentencing hearing be continued in order to obtain further evidence and/or expert witnesses. Derr does not specify what other evidence or witnesses he could have called at the sentencing hearing if granted a continuance. Moreover, he does not allege what any additional evidence or testimony would have shown or whether it would have altered the outcome of the sentencing hearing. Because Derr does not specifically allege what other evidence or testimony he would have presented at the sentencing hearing, he cannot demonstrate that he was prejudiced by his counsel's failure to inform him that the sentencing hearing could be continued. This assertion has no merit.

VI. CONCLUSION

Derr has not shown that he was prejudiced by his trial counsel's alleged deficient performance. As such, we reject his assigned error that his counsel was ineffective, and we affirm his conviction and sentence.

Affirmed.