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In imposing attorney discipline, we evaluate each case in light of its particular facts and circumstances. *State ex rel. Counsel for Dis. v. Walocha*, 283 Neb. 474, 811 N.W.2d 174 (2012). In his response to our order to show cause, respondent has consented to the entry of a judgment imposing identical discipline, or greater or lesser discipline, as we deem appropriate. The order of the Arizona Supreme Court publicly reprimanded the respondent and placed him on probation for a period of 1 year. We grant the motion for reciprocal discipline, enter a judgment of public reprimand, and place respondent on probation for a period of 1 year, effective March 20, 2012.

CONCLUSION

The motion for reciprocal discipline is granted. It is the judgment of this court that respondent should be and is publicly reprimanded and placed on probation for a period of 1 year, effective March 20, 2012. Respondent is directed to pay costs and expenses in accordance with Neb. Ct. R. §§ 3-310(P) and 3-323(B) of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF PUBLIC REPRIMAND.

STATE OF NEBRASKA, APPELLEE, V. RUSSELL S. PITTMAN, APPELLANT.

826 N.W.2d 862

Filed March 1, 2013. No. S-11-415.

1. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact, and, in particular, determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law.
2. **Postconviction: Appeal and Error.** In appeals from postconviction proceedings, an appellate court independently resolves questions of law.
3. **Kidnapping.** Whether a kidnapping victim was voluntarily released without serious bodily harm should be determined by the trial judge.

4. **Kidnapping: Sentences.** The provisions of Neb. Rev. Stat. § 28-313(3) (Reissue 2008) are mitigating circumstances which may reduce the penalty for kidnapping and are therefore a matter for the court at sentencing, not the jury.
5. ____: ____. Neb. Rev. Stat. § 28-313(3) (Reissue 2008) creates a single criminal offense, even though it is punishable by two different ranges of penalties depending on the treatment accorded to the victim.
6. **Kidnapping.** Rescue is not a voluntary release of a kidnapping victim.
7. **Constitutional Law: Effectiveness of Counsel.** An ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
8. **Effectiveness of Counsel: Proof: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order.

Petition for further review from the Court of Appeals, IRWIN, MOORE, and PIRTLE, Judges, on appeal thereto from the District Court for Saunders County, MARY C. GILBRIDE, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Leo J. Eskey, of Leo J. Eskey Law Offices, for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, and MCCORMACK, JJ.

WRIGHT, J.

NATURE OF CASE

Russell S. Pittman was convicted and sentenced for the Class II felony offense of attempted kidnapping. See *State v. Pittman*, 5 Neb. App. 152, 556 N.W.2d 276 (1996) (*Pittman I*). His conviction and sentence were affirmed on appeal. On postconviction, the district court denied Pittman's claims for relief, including his claim of ineffective assistance of counsel. Pittman claimed that for the purpose of determining his sentence, his trial and appellate counsels should have challenged the classification of the felony. Criminal attempt is currently

a Class II felony when the crime attempted is a Class IA felony, and it is a Class III felony when the crime attempted is a Class II felony. See Neb. Rev. Stat. § 28-201(4)(a) and (b) (Cum. Supp. 2012).

The Nebraska Court of Appeals found that Pittman's counsel was ineffective for not challenging the classification at sentencing and remanded the cause to the postconviction court for resentencing. See *State v. Pittman*, 20 Neb. App. 36, 817 N.W.2d 784 (2012) (*Pittman II*). We granted the State's petition for further review, but denied Pittman's petition for further review. For the reasons stated herein, we reverse the decision of the Court of Appeals and affirm the decision of the postconviction court, which denied Pittman's claims for relief.

SCOPE OF REVIEW

[1] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact, and, in particular, determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law. See *State v. Diaz*, 283 Neb. 414, 808 N.W.2d 891 (2012).

[2] In appeals from postconviction proceedings, an appellate court independently resolves questions of law. See *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

FACTS

In the early morning on March 17, 1995, Pittman was arrested while outside the Czechland Inn in Prague, Nebraska. Dina F., his estranged wife, was working alone at the Czechland Inn, a bar, when she noticed an unfamiliar car parked at the back of the bar. Someone was ducking to the side of the car, and she believed that the person was Pittman. Pittman later parked his car by Dina's and stated that he would not leave until they talked.

Apparently thinking that Dina had called law enforcement, Pittman walked to a pay telephone and called the 911 emergency dispatch service. A deputy sheriff advised him to go home, but, instead, he returned to the bar. Dina then called a friend, who called law enforcement. A deputy sheriff arrested

Pittman, searched his car, and discovered a sawed-off shotgun, a pry bar, and a duffelbag which contained wirecutters and plastic cable ties. In his home, law enforcement found chains and dog collars attached to Pittman's bed.

At trial, the State's theory was that Pittman attempted to abduct Dina with the intent to commit sexual assault. The evidence demonstrated that Pittman did not succeed in restraining Dina, and she was not harmed. However, he was prevented from kidnapping and carrying out his intentions toward Dina because law enforcement arrived at the scene before Pittman could follow through with his plan.

After a bench trial, Pittman was convicted of attempted kidnapping and other related offenses. With respect to the attempted kidnapping, the court sentenced Pittman for a Class II felony offense. Pittman's convictions and sentences were affirmed by the Court of Appeals. See *Pittman I*. It concluded that the State presented sufficient evidence at trial to demonstrate that Pittman took a substantial step toward kidnapping his victim. *Id*.

Pittman sought postconviction relief. He alleged a variety of claims for postconviction relief, including that his trial and appellate counsel were ineffective for failing to challenge the classification of his attempted kidnapping conviction. He claimed the conviction should have been of a Class III felony, as opposed to a Class II felony, because Dina was not kidnapped and did not suffer any bodily injury. Pittman argued, therefore, that he should have been sentenced for the lesser Class III offense.

After an evidentiary hearing, the postconviction court denied and dismissed Pittman's amended petition for postconviction relief. Pittman appealed, alleging that his trial and appellate counsel were ineffective for failing to challenge the classification of his crime. At the time he was sentenced, criminal attempt was a Class II felony offense when the crime attempted was a Class IA felony offense. Criminal attempt was a Class III felony offense when the crime attempted was a Class II felony offense. See § 28-201(4)(b) (Reissue 1995). His sentence of 20 to 25 years' imprisonment for attempted kidnapping fell within the limits for conviction

of a Class II felony offense but exceeded the maximum sentence for a Class III felony offense. Neb. Rev. Stat. § 28-105 (Reissue 1995).

The Court of Appeals determined that trial and appellate counsel were ineffective in failing to challenge the classification of Pittman's crime. It reversed his sentence for attempted kidnapping and remanded the cause with directions to resentence Pittman based on the then-existing statutory penalties allowed for a Class III felony offense. It affirmed the district court's denial of Pittman's other claims for postconviction relief. See *Pittman II*. We granted the State's petition for further review.

ASSIGNMENT OF ERROR

The State claims, restated, that Pittman's trial counsel was not ineffective for failing to challenge Pittman's sentence for a Class II felony for the attempted kidnapping.

ANALYSIS

The State claims Pittman's counsel was not ineffective. Pittman was convicted of attempted kidnapping, and on direct appeal, his conviction and sentence were affirmed by the Court of Appeals. The appellate court concluded the evidence was sufficient to show that Pittman took a substantial step toward kidnapping Dina.

Kidnapping is defined in Neb. Rev. Stat. § 28-313 (Reissue 2008), which provided:

> (1) A person commits kidnapping if he abducts another or, having abducted another, continues to restrain him with intent to do the following:
>
> . . . .
>
> (c) Terrorize him or a third person; or
>
> (d) Commit a felony . . . .
>
> . . . .
>
> (2) Except as provided in subsection (3) of this section, kidnapping is a Class IA felony.
>
> (3) If the person kidnapped was voluntarily released or liberated alive by the abductor and in a safe place without having suffered serious bodily injury, prior to trial, kidnapping is a Class II felony.

The attempted kidnapping charge required application of § 28-201 (Reissue 1995): "(1) A person shall be guilty of an attempt to commit a crime if he: . . . (b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime."

For sentencing purposes, attempted kidnapping was a Class II felony if the crime attempted was a Class IA felony offense. It was a Class III felony if the crime attempted was a Class II felony offense. See § 28-201(4)(a) and (b) (Reissue 1995).

In this postconviction appeal, the issue is whether the mitigating factors in § 28-313(3) should have been applied to Pittman's sentence. Section 28-313(3) reduces a Class IA felony to a Class II felony depending on the treatment afforded the kidnapping victim.

[3-5] Whether a kidnapping victim was voluntarily released without serious bodily harm should be determined by the trial judge. See *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002). The provisions of § 28-313(3) are mitigating circumstances which may reduce the penalty for kidnapping and are therefore a matter for the court at sentencing, not the jury. *Becerra, supra*. Section 28-313(3) creates a single criminal offense, even though it is punishable by two different ranges of penalties depending on the treatment accorded to the victim. See *Becerra, supra*. If the person kidnapped is eventually released without having suffered serious bodily injury prior to trial, kidnapping is a Class II felony. See § 28-313(3).

In *Becerra, supra*, the defendant claimed ineffective assistance of counsel because trial counsel failed to offer jury instructions on the lesser-included offense of kidnapping as a Class II felony. Under § 28-313, any factual finding about whether the person kidnapped was voluntarily released affects whether the defendant will receive a lesser penalty instead of an increased penalty. *Becerra, supra*. Because there was no evidence to support a finding by the trial court that the defendant voluntarily released or liberated the victim, the defendant's motion for postconviction relief was properly overruled.

[6] Rescue is not a voluntary release of a kidnapping victim. *State v. Delgado*, 269 Neb. 141, 690 N.W.2d 787 (2005). In *Delgado*, the defendant kidnapped and sexually assaulted a young girl. He kept her in his car in a park overnight. When law enforcement arrived on the scene the next day looking for the victim, the defendant attempted to hide the victim under a tree and denied knowledge of her whereabouts. We concluded that the mitigating factors in § 28-313(3) were not present because the rescue was not a voluntary release. The defendant had also physically and sexually abused the victim.

In the case at bar, trial counsel did not argue that the mitigating factors in § 28-313(3) should be applied to Pittman's sentence. Pittman was not able to kidnap Dina because law enforcement arrived on the scene and prevented him from completing his intention to kidnap and sexually assault Dina. Prevention by law enforcement of Pitman's attempt to kidnap Dina is analogous to the rescue in *Delgado*. In both situations, the defendant did not voluntarily release the victim. Law enforcement arrived to rescue the victim. Since law enforcement authorities prevented Pittman from kidnapping Dina, he cannot claim he voluntarily released her. The purpose of the mitigating factors is to encourage kidnappers to release their victims without harm. Such factors are not meant to benefit Pittman, who was prevented by law enforcement from carrying out his intent to kidnap and sexually assault Dina.

[7,8] An ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012). To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *Edwards, supra*. An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order. *Id*.

The factors in § 28-313(3) are mitigating circumstances. There are no mitigating factors applicable to Pittman's

sentence. Therefore, his trial and appellate counsel were not ineffective.

Pittman has failed to establish that trial and appellate counsel were ineffective in failing to raise at sentencing or on direct appeal that Pittman should have been sentenced for attempted kidnapping as a Class III felony. The court properly denied Pittman's postconviction claim of ineffective assistance of counsel.

CONCLUSION

We reverse the Court of Appeals' decision, which reversed the sentence and remanded the cause to the trial court for resentencing, and remand the cause to the Court of Appeals with directions to affirm the postconviction court's decision denying Pittman's claims for relief.

REVERSED AND REMANDED WITH DIRECTIONS.

MILLER-LERMAN and CASSEL, JJ., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. TERRI L. CRAWFORD, RESPONDENT.

827 N.W.2d 214

Filed March 1, 2013. No. S-11-626.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Attorneys at Law.** A license to practice law confers no vested right, but is a conditional privilege, revocable for cause.
3. ____: ____. The license to practice law is granted on the implied understanding that the attorney's conduct will be proper and that the attorney will abstain from practices that discredit the attorney, the profession, and the courts.
4. ____: ____. Violation of any of the ethical standards relating to the practice of law or any conduct of an attorney in his or her professional capacity which tends to bring reproach on the courts or the legal profession constitutes grounds for suspension or disbarment.