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application for a domestic abuse protection order by denying Michael's counsel the opportunity to examine Michael or cross-examine Rebecca. We reverse the order of the district court which extended the protection order for 1 year, and we remand the cause with directions to set aside the protection order and to dismiss the protection order proceedings.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
WILLIAM J. MOSER, JR., APPELLANT.
822 N.W.2d 424

Filed October 16, 2012. No. A-11-951.

1. **Effectiveness of Counsel: Appeal and Error.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. Determinations regarding whether counsel was deficient and whether this deficiency prejudiced the defendant are questions of law that an appellate court reviews independently of the lower court's decision. An appellate court reviews factual findings for clear error.
2. **Postconviction: Pleas: Effectiveness of Counsel.** In a postconviction proceeding brought by a defendant convicted on a plea of guilty or no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
3. **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.
4. **Postconviction: Pleas: Waiver: Effectiveness of Counsel.** Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, 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.
5. **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 pled guilty and would have insisted on going to trial.
6. **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.

7. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs: Evidence.** If the initial stop was unconstitutional, any subsequent search and evidence obtained through the search are constitutionally inadmissible as the "fruit of the poisonous tree."
8. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
9. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** An officer's stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation has occurred.
10. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** If an officer has probable cause to stop a violator, the stop is objectively reasonable and any ulterior motivation is irrelevant.
11. **Police Officers and Sheriffs: Probable Cause: Appeal and Error.** In reviewing a determination of probable cause, an appellate court focuses on the facts known to law enforcement officers, not the conclusions the officers drew from those facts.
12. **Constitutional Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** In determining whether the community caretaking exception to the Fourth Amendment applies, a court should assess the totality of the circumstances surrounding the stop, including all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction.
13. ____: ____: ____: ____. A community caretaking exception to the Fourth Amendment should be narrowly and carefully applied in order to prevent its abuse.
14. **Effectiveness of Counsel: Pleas: Proof.** In a claim for ineffective assistance of counsel in a plea setting, factors to be considered include the likely penalties the defendant would face if convicted at trial, the relative benefit of the plea bargain, and the strength of the State's case. Self-serving declarations that the defendant would have gone to trial will not be enough; the defendant must present objective evidence showing a reasonable probability that he or she would have insisted on going to trial.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Reversed and remanded with directions.

Jerod L. Trouba, of Knoepfle & Trouba, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

INBODY, Chief Judge, and MOORE and RIEDMANN, Judges.

MOORE, Judge.

INTRODUCTION

Pursuant to a plea agreement, William J. Moser, Jr., was convicted of manufacture of a controlled substance, which conviction was affirmed following his direct appeal. Moser filed a motion for postconviction relief, claiming that he received ineffective assistance of counsel for counsel's failure to file a motion to suppress evidence seized following a traffic stop and failure to advise Moser regarding such procedure. After an evidentiary hearing, that motion was denied. Because we find that a reasonable probability exists that Moser would not have pled guilty to the charge, but would have insisted on seeking suppression of the evidence, we reverse the order of the district court and remand the cause with directions to set aside the conviction, to allow Moser to withdraw his plea, and for further proceedings.

BACKGROUND

On August 19, 2009, Moser was charged with manufacture of a controlled substance and possession of a firearm during the manufacture of a controlled substance, both of which are Class IB felonies. On November 10, Moser pled guilty to the charge of manufacture of a controlled substance, pursuant to a plea agreement with the State. In exchange for Moser's plea, the State dismissed the remaining charge.

The factual basis provided by the State established that during a traffic stop of Moser's vehicle in Madison County, Nebraska, Trooper David Ramsey determined that Moser was driving under suspension. Moser was arrested, and during an inventory search of his vehicle, Ramsey found "a coffee filter containing an off-white powdery substance, two syringes, a straw, and a cotton swab." An investigator with the Nebraska State Patrol learned of the arrest and recognized Moser's name as matching that of an individual who had been purchasing an unusual amount of pseudoephedrine. Moser was interviewed at the detention facility after waiving his *Miranda* rights and admitted that he had been manufacturing methamphetamine at his residence in Platte County, Nebraska. As a result, a search

warrant was obtained for Moser's residence, which search uncovered 374.42 grams of methamphetamine and numerous items used to manufacture methamphetamine.

The court found that Moser entered his plea freely, voluntarily, knowingly, and intelligently and that a factual basis existed for the same. The court found Moser guilty beyond a reasonable doubt, and on December 4, 2009, Moser was sentenced to a term of 20 years' imprisonment.

Moser, who was represented by counsel different from his trial counsel, filed a direct appeal. Among other things, Moser alleged numerous claims of ineffective assistance of trial counsel, including a claim that counsel was ineffective for failing to advise him regarding a motion to suppress the evidence derived from the search of his vehicle and residence pursuant to the Fourth Amendment and failing to ultimately file said motion. On April 23, 2010, in case No. A-09-1284, this court affirmed the judgment of the district court, finding that the record was insufficient to review Moser's claims of ineffective assistance of trial counsel.

On June 16, 2010, Moser filed a pro se motion for postconviction relief alleging that he received ineffective assistance of counsel in that (1) trial counsel failed to file a motion to suppress the evidence derived from the search of Moser's vehicle and house, (2) trial counsel failed to file a motion to suppress the statements made by Moser to law enforcement, (3) trial counsel failed to advise Moser about his right to challenge the search of his vehicle, and (4) trial counsel failed to advise Moser about his right to challenge the admissibility of the statements made to law enforcement. On April 12, 2011, Moser, with new counsel, filed a second amended motion for postconviction relief. Moser made the same allegations regarding trial counsel's ineffective assistance.

On June 28, 2011, an evidentiary hearing was held on Moser's second amended motion for postconviction relief. During the evidentiary hearing, Moser proceeded only with respect to the claim that trial counsel was ineffective for failing to seek the suppression of all evidence obtained as a result of the allegedly unconstitutional traffic stop of his vehicle and

for failing to advise him regarding possible suppression of such evidence.

At the evidentiary hearing, Ramsey testified that on April 17, 2009, he was monitoring traffic near an intersection where there had been a number of traffic accidents. Ramsey observed Moser's vehicle traveling northbound on the highway, and he noticed that the upper portion of the passenger side of the windshield was shattered and thought that it could have been recently involved in a crash. Ramsey stopped Moser's vehicle because of the shattered windshield. The damage to the windshield was roughly the size of a basketball with a few "spider" cracks coming off of it. Ramsey thought that Moser would have difficulty seeing cross-traffic to his right and that oncoming motorists might have difficulty looking through the area. Moser testified that it was conceivable that he could not see through the shattered portion if he was trying to look directly through it. However, he testified that the area was outside of his line of vision and that he could see underneath it.

Ramsey testified that this was the first traffic stop that he had made for a shattered windshield. Ramsey first indicated that if he had issued Moser a ticket, he would have cited either Neb. Rev. Stat. § 60-6,256 (Reissue 2010) (obstruction of view through windshield) or Neb. Rev. Stat. § 60-6,255 (Reissue 2010) (windshield transparency), but he also testified that he was not sure which statute he would cite for a shattered windshield. Ramsey was later asked by the county attorney about concerns surrounding the safety of the windshield. Ramsey indicated that whether the integrity of the glass was compromised by the shatter or whether it would be more susceptible to breaking and possibly injuring people inside the vehicle was also a concern. Ramsey was aware of Neb. Rev. Stat. § 60-6,263 (Reissue 2010), which requires vehicles to be equipped with safety glass. Ramsey did not believe that Moser's windshield would have had the kind of strength that the safety glass statute required due to the damage. Ramsey did not issue Moser a ticket for the view obstruction to his windshield and testified that he would not have given him

a citation, but, rather, that a "[f]ix-it ticket" would have been issued.

Ramsey testified that through his training, he believed that he had authority to stop vehicles if he perceived safety concerns. He testified to examples of "safety" stops, including observing a pickup pulling a trailer where the safety chain has fallen off and is dragging on the road, as well as observing a vehicle with a partially raised hood. Ramsey testified that he had not received any reports of accidents in the area of the stop on the day in question. However, Ramsey thought that the shatter pattern of Moser's windshield could cause a wreck and was a safety concern.

Photographs of Moser's vehicle were taken approximately 1½ years after the traffic stop and were entered into evidence at the hearing. According to Ramsey, the damage to the windshield shown in the photographs looked worse than it did when he stopped Moser's vehicle. Ramsey indicated that the pattern of the shattered windshield was a similar size and location, but that the windshield was "caved in" and the cracks were longer in the photographs.

A videotape of the traffic stop was entered into evidence. In it, Ramsey can be heard before the stop indicating that he was stopping Moser's vehicle for view obstruction, because the windshield was shattered. After the stop, Ramsey mentioned the shattered windshield and indicated that he wanted to know if Moser could see out of it. Additionally, Ramsey's report from the incident indicated the reasons for the stop were his belief that Moser's vehicle had recently been involved in a crash and that the windshield of Moser's vehicle caused a view obstruction.

Testimony was given by Moser and his trial counsel about their meetings and discussions of the case. Moser testified that at their initial meeting, Moser told his counsel that he was stopped because he had a cracked windshield and Moser drew a picture of the windshield for trial counsel.

Moser's trial counsel testified that, although he did not specifically remember saying anything to Moser about the legality of the stop for a cracked windshield, he probably would have told Moser that he would look into it. Trial counsel was

not able to recall whether he ever specifically used the term "motion to suppress," whether he explained to Moser what a motion to suppress was, or whether he explained what would happen if he was successful at a motion to suppress hearing.

By their next meeting, trial counsel was of the opinion that Moser had no real defenses and that the proper strategy at the time was to try to get the best plea offer possible. Trial counsel also testified:

> I think I remember telling him that my opinion of the windshield situation was that he did not have a colorful argument for a motion to suppress and it would have been a very short conversation about the windshield. At that time I did not believe that there was any kind of argument to be made on that issue.

On October 22, 2009, trial counsel received a plea offer from the prosecutor, which offer was set to expire on November 6. Trial counsel advised Moser that he should take the plea. Trial counsel believed that Moser exhibited a sense of urgency to get his case over with and that he had a desire to get the best plea possible. Trial counsel's strategy was to make a case at sentencing for "an extended period of intensive supervised probation."

Moser testified that counsel told him that there was probable cause for the stop because the windshield cracks went through his field of vision. Moser testified that there was never any mention of filing a motion to suppress, nor did he know what one was, and that the first time he heard the term was from his appellate counsel on direct appeal. Moser testified that he would not have voluntarily entered a guilty plea if he had known what a motion to suppress could do. Even knowing that counsel could not guarantee that it would be successful, Moser would have wanted him to file a motion to suppress.

Moser testified that his counsel advised him he had a "shot at probation" if he pled to the Class IB felony charge and that he wanted to "tak[e] a shot at probation." Moser believed that it was in his best interests to accept the plea because trial counsel told him that it could be withdrawn.

On October 7, 2011, the district court entered an order denying Moser's request for postconviction relief. The district

court concluded that Ramsey possessed a reasonable suspicion that the condition of Moser's windshield may have been in violation of the prohibition of nontransparent material upon the windshield or the safety glass requirement. The court also concluded that Ramsey's concern that Moser's vehicle may have been recently involved in a collision fell under the community caretaking exception to the Fourth Amendment. Based on these considerations, the court determined that a motion to suppress would have been unsuccessful, so Moser suffered no prejudice from the failure of his trial counsel to file such a motion.

ASSIGNMENT OF ERROR

Moser asserts, consolidated and restated, that the district court erred in denying his motion for postconviction relief.

STANDARD OF REVIEW

[1] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011). Determinations regarding whether counsel was deficient and whether this deficiency prejudiced the defendant are questions of law that an appellate court reviews independently of the lower court's decision. *Id*. An appellate court reviews factual findings for clear error. *Id*.

ANALYSIS

[2,3] In a postconviction proceeding brought by a defendant convicted on a plea of guilty or no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel. *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012). 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. *State v. Dunkin, supra*. The two prongs of this test, deficient performance and prejudice, may be addressed in either order. *Id*.

[4-6] Normally, a voluntary guilty plea waives all defenses to a criminal charge. However, 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. *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007). 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 pled guilty and would have insisted on going to trial. *State v. Dunkin, supra*. 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. *Id*.

Moser asserts that his trial counsel was ineffective in failing to file a motion to suppress the evidence obtained as a result of the allegedly unconstitutional traffic stop of his vehicle and in failing to inform him of this procedure. Moser argues that, but for these deficiencies, he would not have pled guilty but would have insisted on pursuing suppression of the evidence.

[7-10] Moser's claim is premised upon the argument that Ramsey did not have probable cause to stop his vehicle; therefore, all of the evidence obtained after the traffic stop could have been suppressed. If the initial stop was unconstitutional, any subsequent search and evidence obtained through the search are constitutionally inadmissible as the "fruit of the poisonous tree." *State v. Runge*, 8 Neb. App. 715, 601 N.W.2d 554 (1999), citing *State v. Vermuele*, 241 Neb. 923, 492 N.W.2d 24 (1992). It is well established that a traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle. *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012). The question is not whether the officer issued a citation for a traffic violation or whether the State ultimately proved the violation. Instead, a stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation has occurred. *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008). If an officer has probable cause to stop a violator, the

stop is objectively reasonable and any ulterior motivation is irrelevant. *Id.*

Moser argues that the sole reason for the stop of his vehicle—the shattered windshield—does not amount to a traffic violation. Ramsey mentioned two statutes that he would have cited had he issued a ticket to Moser for a traffic violation: §§ 60-6,256 and 60-6,255. We first discuss § 60-6,256, which provides:

> It shall be unlawful for any person to operate a motor vehicle with any object placed or hung in or upon such vehicle, except required or permitted equipment of the vehicle, in such a manner as to obstruct or interfere with the view of the operator through the windshield or to prevent the operator from having a clear and full view of the road and condition of traffic behind such vehicle. Any sticker or identification authorized or required by the federal government or any agency thereof or the State of Nebraska or any political subdivision thereof may be placed upon the windshield without violating the provisions of this section. Any person violating the provisions of this section shall be guilty of a Class V misdemeanor.

Moser relies upon the case of *United States v. Washington*, 455 F.3d 824 (8th Cir. 2006), in support of his argument that § 60-6,256 does not apply to a shattered windshield. The vehicle in *Washington* had a horizontal crack that "'went all the way across the windshield at about eye level with little spider veins that come off the main crack.'" 455 F.3d at 825. Officers stopped the car on the basis of the "'vision obstruction'" caused by the crack. *Id.* A data check was run on the driver which revealed that his license was suspended, so the driver was arrested and Timothy Washington, a passenger, was escorted out of the car. A search of the vehicle revealed a .22-caliber revolver under the passenger seat; upon questioning, Washington blurted out, "'[I]t's mine and I carry it for protection.'" *Id.*

Washington moved to suppress the firearm and his statement, arguing that they were the fruit of an unconstitutional stop, as no state statute or local ordinance prohibited driving

with a cracked windshield. The officer explained that the cracked windshield was the only basis he had for stopping the vehicle, and the government conceded to the magistrate judge that the officer made a mistake of law in believing that a cracked windshield violated § 60-6,256. The magistrate judge concluded that although the officer was mistaken, his mistake of law was objectively reasonable given his training and past experience. The district court adopted the report of the magistrate judge and denied Washington's motion to suppress, finding that the officer's misunderstanding was reasonable in light of the vision obstruction statute, § 60-6,256, as well as the statute requiring a "view of the highway to the rear," Neb. Rev. Stat. § 60-6,254 (Reissue 2010).

On appeal, the Eighth Circuit Court of Appeals disagreed and found that there was no legal justification for the stop grounded in Nebraska law, that the stop was unconstitutional, and that the firearm and Washington's statements to the police should have been suppressed. The court also found that there was not an objectively reasonable basis for the traffic stop, noting that the government did not present any evidence of police manuals or training materials, testimony that the officer was trained to make stops on the basis of cracked windshields, state case law, legislative history, or any other state custom or practice that would support finding a reasonable basis for the stop. Accordingly, Washington's conviction and sentence were vacated.

The next statute relied upon by Ramsey is § 60-6,255, which provides:

> (1) Every motor vehicle registered pursuant to the Motor Vehicle Registration Act, except motorcycles, shall be equipped with a front windshield.
>
> (2) It shall be unlawful for any person to drive any vehicle upon a highway with any sign, poster, or other nontransparent material upon the front windshield, side wing vents, or side or rear windows of such motor vehicle other than a certificate or other paper required to be so displayed by law. The front windshield, side wing vents, and side or rear windows may have a visor or other shade device which is easily moved aside or removable,

> is normally used by a motor vehicle operator during daylight hours, and does not impair the driver's field of vision.
>
> (3) Every windshield on a motor vehicle, other than a motorcycle, shall be equipped with a device for cleaning rain, snow, or other moisture from the windshield, which device shall be so constructed as to be controlled or operated by the driver of the vehicle.

The officer also indicated, in response to questions from the county attorney, that he was familiar with the statute regarding safety glass, § 60-6,263, which provides:

> It shall be unlawful to operate on any highway in this state any motor vehicle, other than a motorcycle, manufactured or assembled, whether from a kit or otherwise, after January 1, 1935, which is designed or used for the purpose of carrying passengers unless such vehicle is equipped in all doors, windows, and windshields with safety glass. Any windshield attached to a motorcycle shall be manufactured of products which will successfully withstand discoloration due to exposure to sunlight or abnormal temperatures over an extended period of time.
>
> The owner or operator of any motor vehicle operated in violation of this section shall be guilty of a Class III misdemeanor.

Safety glass is defined as

> any product composed of glass or such other or similar products as will successfully withstand discoloration due to exposure to sunlight or abnormal temperatures over an extended period of time and is so manufactured, fabricated, or treated as substantially to prevent or reduce in comparison with ordinary sheet glass or plate glass, when struck or broken, the likelihood of injury to persons.

Neb. Rev. Stat. § 60-6,262 (Reissue 2010).

The district court, in its order denying Moser's postconviction action, discussed and distinguished *United States v. Washington*, 455 F.3d 824 (8th Cir. 2006). The district court noted that the sole basis for the stop of Washington's vehicle was a cracked windshield, whereas in this case, Moser's

windshield was "substantially shattered" with "spider" cracks extending from it in all directions. The court found Ramsey had additional reasons for stopping Moser's vehicle, including Ramsey's belief that the vehicle may have been involved in a collision and that the shattered windshield presented a safety concern because it would obstruct the driver's view.

It is clear from the record that Ramsey initially stopped Moser's vehicle due to the shattered windshield, which Ramsey believed would obstruct Moser's visibility. However, this stated reason is not necessarily indicative of a traffic violation. As similarly noted by the Eighth Circuit Court of Appeals in *United States v. Washington, supra*, the statute which Ramsey believed was violated by Moser, § 60-6,256, does not apply to a cracked windshield. See, also, *In re Interest of Frederick C.*, 8 Neb. App. 343, 594 N.W.2d 294 (1999) (Nebraska statutes do not specifically prohibit driving vehicle with shattered windshield).

Although Ramsey and the district court also rely upon § 60-6,255 as support for an alleged traffic violation, this reliance is arguably misplaced. This statute makes it unlawful to have any material, such as a sign or poster, on the windshield and is arguably not referring to the windshield itself. Thus, an argument could be made that the traffic stop was not justified solely on the basis that Moser's windshield was shattered and caused an obstruction to Moser's visibility.

Finally, it is not clear that the safety glass statute, § 60-6,263, supports the stop as a traffic violation in this case, keeping in mind that Ramsey did not assert the safety glass concern as the initial basis for his stop of Moser's vehicle.

[11] We next address Ramsey's concern that Moser's vehicle had recently been in an accident. Again, this stated reason does not necessarily indicate that a traffic violation had occurred. Clearly, Ramsey did not witness an accident involving Moser's vehicle prior to the stop. And, Ramsey admitted that he had not received any reports of accidents in the vicinity at the time of Moser's stop. Rather, the facts known to Ramsey were that Moser's windshield was shattered in the upper corner of the passenger side. Ramsey was arguably speculating that the vehicle may have been involved in an accident, at some unknown

time, due to the location and size of the shattered area of the windshield. In reviewing a determination of probable cause, an appellate court focuses on the facts known to law enforcement officers, not the conclusions the officers drew from those facts. *State v. Carnicle*, 18 Neb. App. 761, 792 N.W.2d 893 (2010) (reversed conviction with directions to sustain motion to suppress where no probable cause to stop vehicle existed because no traffic law was violated). We conclude both that there was a reasonable argument that no traffic violation supported the stop of Moser's vehicle and that there was a reasonable likelihood that the evidence obtained through subsequent searches could have been suppressed had Moser's counsel pursued suppression.

We next address the viability of the community caretaking exception to the Fourth Amendment in this case. The district court found that the exception applied as it related to Ramsey's reasonable belief that Moser's vehicle had recently been involved in a collision.

The Nebraska Supreme Court adopted the community caretaking exception to the Fourth Amendment in *State v. Bakewell*, 273 Neb. 372, 730 N.W.2d 335 (2007). The exception recognizes that

> "[l]ocal police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."

Id. at 376, 730 N.W.2d at 338, quoting *Cady v. Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973).

In *State v. Bakewell, supra*, the officer observed Saul L. Bakewell's vehicle traveling on a highway at 3:15 a.m. The vehicle stopped or slowed considerably five times within approximately 90 seconds while traveling down the highway, with the vehicle eventually pulling off onto the shoulder of the road. The officer pulled off the highway "'to conduct a safety check of the vehicle, make sure that everything was okay and there was [sic] no problems.'" *Id.* at 374, 730

N.W.2d at 337. The first question posed by the officer was whether Bakewell was all right, to which Bakewell responded that he was lost.

The court in *State v. Bakewell, supra*, determined that the officer's actions fell within the community caretaking exception. In reaching this conclusion, the court adopted the standard applied by this court in *State v. Smith*, 4 Neb. App. 219, 540 N.W.2d 374 (1995), wherein we applied the community caretaking exception in a case where an officer observed a pickup in an intersection, which pickup had not moved for several minutes. The officer pulled up behind the pickup, observed that the brake lights were on and that there was no activity in the pickup. We found that the officer was justified in believing that an exigent circumstance might exist and had good reason to make contact with the driver and to provide him aid, if necessary.

[12,13] In determining whether the community caretaking exception to the Fourth Amendment applies, a court should assess the totality of the circumstances surrounding the stop, including all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction. *State v. Bakewell, supra*. The court found that it was reasonable for the officer to conclude that Bakewell was lost or that something was wrong with Bakewell, with his vehicle, or inside the vehicle. Further, because it was approximately 3:15 a.m., it was reasonable for the officer to assume that his assistance might be welcomed. The court noted that this exception should be "narrowly and carefully" applied in order to prevent its abuse. *Id*. at 377, 730 N.W.2d at 338.

The record before us in this postconviction proceeding does not show that Moser's vehicle was traveling in an erratic manner, such as the vehicle in *State v. Bakewell, supra*, or was stopped in traffic, such as the vehicle in *State v. Smith, supra*. There was no evidence that the vehicle had recently been involved in an accident such that it was necessary to check on the status of the vehicle or its occupants. In short, there was no sense of urgency to check on the welfare of the driver in this case, as was present in *Bakewell* or *Smith*. Based

upon this record, it is possible that the community caretaking exception would not have provided a viable justification for the stop of Moser's vehicle had counsel pursued a motion to suppress.

[14] In a claim for ineffective assistance of counsel in a plea setting, factors to be considered include the likely penalties the defendant would face if convicted at trial, the relative benefit of the plea bargain, and the strength of the State's case. Self-serving declarations that the defendant would have gone to trial will not be enough; the defendant must present objective evidence showing a reasonable probability that he or she would have insisted on going to trial. See *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011). The State argues that regardless of any failure by counsel to file a motion to suppress or advise Moser of this procedure, Moser has not shown any prejudice because of his desire to accept the plea offer before it was withdrawn and because he received the benefit of the dismissal of the charge of possession of a firearm during the manufacture of a controlled substance, a Class IB felony. The weakness of this argument by the State, however, is that Moser arguably was interested in the plea only after being advised that he did not have a defense to the stop of his vehicle.

Based upon our independent review of this record, we conclude that Moser has established a reasonable probability that he would not have entered a plea but would have insisted on pursuing suppression of evidence had he been adequately advised of the possible defense that probable cause was lacking for the traffic stop. In reaching this conclusion, we do not make any determination whether a motion to suppress would ultimately be successful, only that an argument could be made for suppression, and we leave such a determination to the trial court on remand. Because Moser has established prejudice from his trial counsel's failure to file a motion to suppress and failure to advise him of this procedure, we must reverse the decision of the district court and remand the cause with directions to set aside Moser's conviction, to allow Moser to withdraw his plea, and for further proceedings.

CONCLUSION

Moser has established the existence of a reasonable probability that had he been adequately advised about the possibility of pursuing suppression of the evidence following the traffic stop of his vehicle, he would not have pled guilty, but would have insisted on filing a motion to suppress and going to trial. Having established prejudice from the ineffective assistance of trial counsel, we reverse the decision of the district court and remand the cause with directions to set aside Moser's conviction, to allow him to withdraw his plea, and for further proceedings.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. RODNEY E. SEEGER, APPELLANT.

822 N.W.2d 436

Filed October 23, 2012. No. A-11-804.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Effectiveness of Counsel: Appeal and Error.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. Determinations regarding whether counsel was deficient and whether this deficiency prejudiced the defendant are questions of law that an appellate court reviews independently of the lower court's decision. An appellate court reviews factual findings for clear error.
3. **Postconviction: Constitutional Law: Proof.** A court must grant an evidentiary hearing on a postconviction motion when the motion contains factual allegations which, if proven, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.
4. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law—or if the records and files in the case affirmatively show that the movant is entitled to no relief—no evidentiary hearing is required.
5. **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.