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conductor nor the engineer saw brakelights illuminated on the vehicle. Thus, there is a question of material fact as to whether Mario Sr. was grossly negligent in the operation of his vehicle. We therefore reverse the district court's grant of summary judgment in favor of Sulhoff for further proceedings consistent with this opinion.

VI. CONCLUSION

For the foregoing reasons, we find that the order of the district court granting summary judgment in favor of Union Pacific is correct and is affirmed as to Becerra's claims that Union Pacific failed to keep a proper lookout and failed to control the train.

However, we find that there are genuine issues of material fact regarding Union Pacific's maintenance of the concrete barrier. Therefore, we reverse, and remand the district court's grant of summary judgment in favor of Union Pacific on this issue for further proceedings consistent with this opinion.

We therefore reverse the order of the district court granting summary judgment in favor of Sulhoff and remand the cause for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
MICHAEL MESADIEU, APPELLANT.
837 N.W.2d 585

Filed August 27, 2013. No. A-12-357.

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.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
3. **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.
4. **Effectiveness of Counsel: Appeal and Error.** 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.

5. **Records: Appeal and Error.** It is the responsibility of the party appealing to have included within the bill of exceptions matters from the record which it believes material to the issues presented for review. Absent such a record, as a general rule, the decision of the lower court as to the assigned errors is to be affirmed.
6. **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 at trial or on direct appeal, 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; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
7. **Effectiveness of Counsel: Proof: Appeal and Error.** In order to show prejudice due to ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
8. **Effectiveness of Counsel: Proof.** The two prongs of the ineffective assistance test, deficient performance and prejudice, may be addressed in either order.
9. **Pleas: Waiver.** Normally, a voluntary guilty plea waives all defenses to a criminal charge.
10. **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.
11. **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.
12. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** When a court denies relief without an evidentiary hearing, the appellate court must determine whether the petitioner has alleged facts that would support a claim of ineffective assistance of counsel and, if so, whether the files and records affirmatively show that he is entitled to no relief.
13. **Effectiveness of Counsel: Pleas: Proof.** Self-serving declarations that a defendant would have gone to trial will not be enough; a defendant must present objective evidence showing a reasonable probability that he or she would have insisted on going to trial.
14. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is generally not appropriate for consideration on appeal.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Reversed and remanded for further proceedings.

Michael Mesadieu, pro se.

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

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

PER CURIAM.

INTRODUCTION

Michael Mesadieu, acting pro se, appeals the order of the Douglas County District Court denying his motion for postconviction relief without an evidentiary hearing. Because we find that the record before this court does not affirmatively show that Mesadieu is not entitled to relief, we reverse the order of the district court denying Mesadieu an evidentiary hearing and remand the cause to the district court for an evidentiary hearing.

STATEMENT OF FACTS

Background Information.

In 2005, pursuant to a plea agreement with the State, Mesadieu pled no contest to one count of attempted first degree murder and one count of use of a deadly weapon to commit a felony. Mesadieu was 17 years old at the time of the incident which led to these charges. The State provided a factual basis which indicated that on March 1, 2005, an unlicensed cabdriver received a call to pick up somebody. When the cabdriver arrived, Mesadieu and two other individuals got into the cab, and Mesadieu immediately pulled out a handgun and attempted to rob the cabdriver. During the events that ensued thereafter, Mesadieu fired numerous shots pointblank at the cabdriver, several of which shots struck her in the left arm and hand. The two other individuals, who were eventually named as codefendants, reported that Mesadieu fired the gun. The gun was found by police during a search conducted pursuant to a warrant.

In exchange for Mesadieu's pleas, the State dropped two additional charges against Mesadieu and further agreed to not file any additional charges. The district court accepted Mesadieu's pleas, found him guilty, and later sentenced him to

30 to 32 years' imprisonment for attempted first degree murder and to 10 to 15 years' imprisonment for use of a deadly weapon to commit a felony. The sentences were ordered to run consecutively, and Mesadieu was given 290 days' credit for time served.

In case No. A-05-1564, Mesadieu appealed to this court, with the same trial counsel and appellate counsel, assigning only that the district court abused its discretion by imposing excessive sentences; we summarily affirmed.

Motion for Postconviction Relief.

On July 15, 2011, with new counsel, Mesadieu filed a verified motion for postconviction relief in which he alleged numerous allegations upon which an evidentiary hearing could be granted. The motion stated that at the time of the entry of the no contest pleas, he was only 17 years old; that trial counsel failed to advise him that pursuant to Neb. Rev. Stat. § 29-1816 (Cum. Supp. 2012), he could request a transfer to juvenile court; and that the district court failed to advise him of the same. Mesadieu alleged that trial counsel failed not only to advise him of such a process, but also to attempt to move the case to juvenile court, which violated his rights of due process insomuch as a codefendant was allowed to transfer his case to juvenile court. Mesadieu further alleged that due to his young age and participation in special education classes, he was denied due process without further inquiry as to whether his pleas were made knowingly, intelligently, and voluntarily. Mesadieu also raised allegations of ineffective assistance of counsel, stating that he informed his attorney he was innocent and wished to proceed to trial, but that his attorney failed to request a plea withdrawal and failed to advise Mesadieu of an intoxication defense.

In April 2012, the district court entered an order denying Mesadieu's motion for postconviction relief without a hearing. The court first determined that the allegations regarding the district court's failure to advise him pursuant to § 29-1816 and the involuntariness of his plea were procedurally barred, because those issues were known and could have been litigated on direct appeal. The district court further found that

the allegations of ineffective assistance of counsel were without merit because Mesadieu did not raise any allegations showing prejudice he suffered in light of the plea bargain and the strength of the State's case. The court noted that even if Mesadieu had raised any facts relating to prejudice, those claims would be refuted by the record provided during the plea hearing. It is from this order that Mesadieu has timely appealed.

ASSIGNMENTS OF ERROR

On appeal, Mesadieu assigns that (1) the district court erred by committing plain error in denying Mesadieu the opportunity to be heard; (2) the district court erred by committing reversible error in failing to grant Mesadieu's request for postconviction relief, because he received ineffective assistance of counsel when trial counsel failed to request to have his case transferred to juvenile court pursuant to § 29-1816(2)(a); and (3) the court's legal conclusion prevented Mesadieu from any procedural mechanism by which he could adequately develop his claims of ineffectiveness and denial of due process.

STANDARD OF REVIEW

[1] 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. *State v. Golka*, 281 Neb. 360, 796 N.W.2d 198 (2011).

[2-4] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012). On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous. *Id*. 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. *Id*.

ANALYSIS

Opportunity to Be Heard.

Mesadieu assigns that the district court committed plain error by denying Mesadieu the opportunity to be heard. Mesadieu's

argument on this assignment is based upon an allegation contained within his brief that an ex parte hearing was held during which the State presented evidence and Mesadieu was denied participation, after which the district court denied the motion for a postconviction hearing.

[5] It is the responsibility of the party appealing to have included within the bill of exceptions matters from the record which it believes material to the issues presented for review. Absent such a record, as a general rule, the decision of the lower court as to the assigned errors is to be affirmed. *State v. Thompson*, 10 Neb. App. 69, 624 N.W.2d 657 (2001). We have carefully reviewed the record before the court; there is absolutely no showing in the record of an ex parte hearing as alleged by Mesadieu.

Ineffective Assistance of Counsel.

Mesadieu next argues that the district court erred by failing to grant him an evidentiary hearing, because he received ineffective assistance of counsel when trial counsel failed to preserve or move the district court to transfer his case to juvenile court pursuant to § 29-1816. In his brief, Mesadieu contends that but for this alleged deficiency by trial counsel, he would not have entered into the plea agreement and would have insisted on proceeding to trial.

[6-8] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel at trial or on direct appeal, 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; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009). Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *Id.* In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* The two prongs of this test, deficient performance and prejudice, may be addressed

in either order. *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012).

[9-11] Normally, a voluntary guilty plea waives all defenses to a criminal charge. *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011). 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. Dunkin, supra*. 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. *Id*.

[12] At this stage of the proceedings, the real question we address is not whether Mesadieu is entitled to postconviction relief, but whether his pleadings are sufficient to grant him an evidentiary hearing. When a court denies relief without an evidentiary hearing, the appellate court must determine whether the petitioner has alleged facts that would support a claim of ineffective assistance of counsel and, if so, whether the files and records affirmatively show that he is entitled to no relief. See *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007).

In his motion for postconviction relief, Mesadieu alleges that trial counsel was ineffective for failing to advise him that he could request to move the case to juvenile court and for failing to file a motion to do so. Mesadieu argues that had he been given such an advisement, he would have insisted on going to trial rather than entering into a plea agreement.

[13] Self-serving declarations that a defendant would have gone to trial will not be enough; a defendant must present objective evidence showing a reasonable probability that he or she would have insisted on going to trial. *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011); *State v. Seeger*, 20 Neb. App. 225, 822 N.W.2d 436 (2012). In his motion for postconviction relief, Mesadieu argues that he was not informed of his right to transfer his case to juvenile court, that trial counsel failed to make such a request, and that he incurred prejudice as a result, i.e., that he would have insisted

on going to trial rather than entering into a plea agreement with the State. Having reviewed the pleadings, and reading them liberally, we conclude that those pleadings are sufficient to state a claim for postconviction relief. Further, because the record does not affirmatively show that Mesadieu is not entitled to relief, he is entitled to an evidentiary hearing. The order of the district court is reversed, and the cause is remanded for such hearing.

Postconviction Statutes.

[14] Mesadieu also assigns that the district court's conclusion demonstrates a failure by the State to provide him with a procedural mechanism for him to adequately develop his postconviction claims. Having determined that the district court erred by failing to grant him an evidentiary hearing, we need not address this assignment of error because Mesadieu will now have an opportunity to develop his postconviction claims. However, we note that the arguments contained within Mesadieu's brief appear to challenge the constitutionality of the postconviction statutes, because the district court found he was procedurally barred from raising certain claims. The record indicates that Mesadieu did not properly raise or preserve any challenge to the constitutionality of the statute before the trial court and, further, that he did not give proper notice of his challenge or comply with Neb. Ct. R. App. P. § 2-109(E) (rev. 2012). See *State v. Norman*, 282 Neb. 990, 808 N.W.2d 48 (2012). A constitutional issue not presented to or passed upon by the trial court is generally not appropriate for consideration on appeal. *Id*.; *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006).

CONCLUSION

The record before this court does not affirmatively show that Mesadieu is not entitled to relief; therefore, we find that the district court erred by denying the motion for postconviction relief without a hearing. The order of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

INBODY, Chief Judge, dissenting.

Although I understand the majority's position in this matter, given that these are serious felony convictions and also given the young age of Mesadieu at the time of the charges, I respectfully disagree with the resolution of the case.

The crux of Mesadieu's verified motion for postconviction relief revolves around his contentions that he received ineffective assistance of counsel because he was not advised he could move to transfer his case to juvenile court pursuant to § 29-1816 and that his attorney did not make any such motion. In his motion for postconviction relief, Mesadieu alleges that had he been advised he could transfer his case to juvenile court, he would not have entered into the plea agreement, but would have instead insisted on proceeding to trial. Case law is clear that self-serving declarations that a defendant would have gone to trial will not be enough. See, *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011); *State v. Seeger*, 20 Neb. App. 225, 822 N.W.2d 436 (2012). Mesadieu's motion for postconviction relief does not identify any specific facts that would satisfy any of the appropriate statutory factors for removal to juvenile court, nor does he allege that a motion for removal to juvenile court, if made, would have been successful. Mesadieu is required to present objective evidence showing a reasonable probability that he would have insisted on going to trial, and other than his self-serving statement setting forth that he would have gone to trial, he has failed to make any allegations supporting this claim. In my opinion, Mesadieu's motion for postconviction relief does not allege facts sufficient to warrant an evidentiary hearing, and accordingly, I would have affirmed the decision of the district court denying Mesadieu's motion for postconviction relief without a hearing.