

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STATE V. RICEHILL

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

STATE OF NEBRASKA, APPELLEE,

V.

DANIEL W. RICEHILL, APPELLANT.

Filed April 3, 2012. No. A-11-425.

Appeal from the District Court for Dodge County: GEOFFERY C. HALL, Judge. Affirmed.

Avis R. Andrews for appellant.

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

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

MOORE, Judge.

INTRODUCTION

Daniel W. Ricehill appeals from the order of the district court for Dodge County, which denied his motion for postconviction relief. Pursuant to authority granted to this court under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. Because we find no error in the district court's decision, we affirm.

BACKGROUND

Ricehill was 17 years old at the time of the alleged crimes. After the State filed its initial complaint in county court, Ricehill filed a motion to transfer the matter to juvenile court, which was denied by the county court on June 19, 2006.

On July 20, 2006, the State filed an information in district court, charging Ricehill with first degree sexual assault, in violation of Neb. Rev. Stat. § 28-319(1)(a) (Reissue 2008), a Class II felony; robbery, in violation of Neb. Rev. Stat. § 28-324 (Reissue 2008), a Class II felony; use of a deadly weapon to commit a felony, in violation of Neb. Rev. Stat. § 28-1205

(Reissue 2005), a Class III felony; and theft of property having a value of over \$1,500, in violation of Neb. Rev. Stat. § 28-511 (Reissue 2008), a Class III felony.

On August 11, 2006, Ricehill filed a motion to suppress all DNA evidence. Before this motion was heard, Ricehill entered into a plea agreement and a plea hearing was held before the district court on September 7. In exchange for Ricehill's pleas, the State agreed to amend count I of the information from first degree sexual assault, a Class II felony, to attempted first degree sexual assault, a Class III felony; to dismiss the theft charge; and not to file additional charges. There was no agreement on sentencing recommendations. Ricehill informed the court that that was his understanding of the plea agreement. The court warned Ricehill, and Ricehill indicated his understanding that the court was not bound by any recommendations made at the time of sentencing by either Ricehill's attorney or the county attorney. After the court advised Ricehill of the nature of the charges and the corresponding penalties, Ricehill informed the court that he understood the elements of each count and the possible penalties. Ricehill then pled no contest to attempted first degree sexual assault, robbery, and use of a weapon to commit a felony.

Prior to accepting Ricehill's pleas, the district court informed Ricehill of his presumption of innocence, his right to counsel, his right to a speedy trial, his right to a jury trial, his right to call and confront witnesses, his privilege against self-incrimination, and specifically that by pleading, he would be waiving any hearing on pending motions. Ricehill indicated that he understood each of those rights and that he was waiving those rights by pleading to the charges. Ricehill told the court that no one had threatened him or promised him anything to waive his rights, that he did not have any questions about his rights, and that the court did not use any phrases that he did not understand. Ricehill also informed the court that he had had a chance to discuss his rights with his attorney.

A discussion then occurred between Ricehill, his attorney, and the district court concerning Ricehill's age and the prior attempt to transfer the matter to juvenile court. Ricehill informed the court that his parents were not present at the hearing, that he had not discussed the matter with his parents, and that he would like to do so. Accordingly, the court continued the plea hearing so that Ricehill could talk to his parents.

At the continued hearing, on September 22, 2006, the following exchange occurred between the district court and Ricehill:

THE COURT: You've consulted with your mother?

[Ricehill]: Yes, I have.

THE COURT: I don't know if you've had contact with your father regarding the plea agreement or not.

[Ricehill]: I did write him and my lawyer did send a letter to him, and he sent me a letter back saying I should follow through with the plea agreement.

THE COURT: Okay, and you've had an opportunity to talk about the plea agreement with your mother?

[Ricehill]: Yes, I have.

THE COURT: And your mother is present today?

[Ricehill]: Yes, she is.

The State then recited the plea agreement. Ricehill again stated that was his understanding of the plea agreement and that it was the plea agreement he had discussed with his parents. The district court, as it had at the previous hearing, warned Ricehill that it was not bound by any recommendations made at the time of sentencing by either Ricehill's attorney or the county attorney. Ricehill responded that he understood and confirmed for the court that he was again freely and voluntarily withdrawing his not guilty pleas after consultation with his parents. The court re-advised him as to the nature of the charges and possible penalties, and Ricehill again indicated his understanding of the charges and penalties and pled no contest to all three charges.

The district court re-advised Ricehill of his various rights, and Ricehill again acknowledged his understanding that by pleading he would be waiving those rights as well as any motions or defenses. Ricehill's trial counsel specifically advised the court that the parties had reached the plea agreement in lieu of proceeding with the motion to suppress that Ricehill had filed. The court again told Ricehill he would be waiving a hearing on his motion by pleading to the charges. Ricehill told the court that he understood and again told the court that no one had threatened or promised him anything to waive his rights, that he did not have any questions about his rights, and that the court had not used any words he did not understand.

Ricehill told the district court that he had discussed all of his rights with his trial counsel, and in response to the court's questioning, Ricehill informed the court that his counsel had explained the charges set forth in the amended information, that he had discussed with his counsel all of the facts as he believed them to be as well as any defenses, that he had had enough time to prepare and discuss the case with his counsel, that he was satisfied with the job his attorney had done for him, that he felt his attorney was competent and knew what he was doing, that he felt his attorney fully understood the case and all available defenses, and that his attorney had put in an adequate amount of time in researching, investigating, and preparing.

The State then provided a factual basis which showed that on March 31, 2006, the victim reported to the police that a man had forced his way into her home and attempted to sexually assault her. The man held a sharp object, later determined to be a screwdriver, to her neck and demanded that she give him money. The man physically assaulted the victim and then attempted to penetrate her with his penis after removing her pajama bottoms. The victim was unsure if he had penetrated her. Afterward, the man took her car keys, some money, and her vehicle. The victim described the man as in his early twenties with long, dark hair. Approximately 45 minutes later, the vehicle was stopped by law enforcement. Ricehill was driving the vehicle, and there was a male passenger with him. The passenger advised law enforcement that Ricehill had indicated earlier in the evening that he was leaving to get a car and that he later showed up with the vehicle in which they were stopped.

Prior to accepting Ricehill's pleas, the district court asked Ricehill if after consulting with his parents and his counsel he felt the plea agreement was in his best interests. Ricehill responded affirmatively and again affirmed that no one had threatened him or promised him anything to plead to the charges. The court then accepted Ricehill's pleas and found him guilty of all three charges.

On November 6, 2006, the district court sentenced Ricehill to consecutive terms of incarceration of 10 to 20 years for attempted first degree sexual assault, 6 to 10 years for robbery, and 4 to 8 years for use of a deadly weapon to commit a felony.

On July 1, 2009, Ricehill filed a pro se motion for postconviction relief, alleging various claims of ineffective assistance of counsel. Specifically, Ricehill alleged that his trial counsel failed to challenge the victim's prior inconsistent statements, failed to file a motion to suppress the screwdriver due to lack of fingerprints, failed to challenge the attempted first degree sexual assault when no DNA or physical evidence supported the charge, misadvised him to plead no contest and waive his constitutional rights, and misadvised him that he could or would get only a 10-year sentence because of the plea agreement.

An evidentiary hearing was held on Ricehill's motion on March 10, 2011. The district court heard testimony from Ricehill and his mother, Rebecca Cloud, and received various exhibits into evidence, including bills of exception for the plea hearings, a deposition of trial counsel, and a letter from trial counsel to Ricehill. The evidence also included a timesheet from trial counsel, showing that he communicated with both Ricehill and Cloud on numerous occasions outside of hearing dates by telephone, in person, or by letter.

In his deposition, trial counsel testified that he discussed Ricehill's constitutional rights with him at their initial conference. Trial counsel testified that before entering the plea agreement, he discussed the case in detail with Ricehill, including what the State had to prove and any defense that Ricehill could present to contradict the State's evidence. Trial counsel indicated that he personally reviewed and discussed all of the police reports with Ricehill. There was no question in trial counsel's mind that Ricehill fully knew, despite his age and education level, what the State was proposing, the alternatives, what the plea agreement offered, the risks of not taking the plea agreement, his chances for probation, and the amount of time he might have to serve if going forward with the plea agreement. Ricehill had an eighth grade education at the time, having dropped out of school in ninth grade. Trial counsel testified that Ricehill was engaged in all parts of their discussions and understood what was going on. Trial counsel testified that Ricehill understood that withdrawing the motion to suppress was "part of the deal" in going ahead with the plea agreement.

Trial counsel testified that, prior to the plea agreement, he had various conversations with Cloud about the case and at least one telephone call with Ricehill's father. He did not discuss the plea agreement or Ricehill's defenses with either of Ricehill's parents while they were physically present with Ricehill and trial counsel.

Trial counsel outlined the terms of the plea agreement in a letter, dated September 1, 2006, sent to Ricehill while in jail and copied to Ricehill's parents. Trial counsel did not hear back from Ricehill's father, but Cloud responded that she was not opposed to the plea agreement "given the status of the case." The letter sets forth the plea proposal and further states, in relevant part:

As we discussed in our conferences, if you enter into the foregoing plea agreement, [the judge] would be able to sentence you from 1 to 50 years on [the robbery count] and 1 to 20 years on [the attempted first degree sexual assault count]. It will be the Judge's decision whether to run these concurrently or consecutively. This will be the

discretion of the District Judge but I am hopeful that he would run your time on these cases concurrently.

. . . .

Pursuant to Nebraska law, whatever sentence the Judge gives you on Use of a Weapon to Commit a Felony, will have to be served consecutive to the sentences on Robbery and Attempted First Degree Sexual Assault. . . .

I wish I could tell you the amount of time the Judge would give you in this matter but it would be pure guess on my part. . . . I would be hopeful that the total amount of time that you would have to serve before being eligible for parole would be no more than ten (10) years. Although this is my wish, I cannot guaranty this to you.

It is my understanding that given the facts and circumstances of this case, you wish to proceed with the foregoing plea proposal. If so, we will enter that plea on **Thursday, September 7th, at 11:00 a.m.** If you do not wish to accept this plea proposal, we would have the right to proceed with the Motion to Suppress scheduled at that date and time.

(Emphasis in original.)

Trial counsel testified in his deposition that it was never a question of who committed the crime; but, rather, it was what the State could prove against Ricehill. The DNA evidence showed a match between Ricehill's semen and fluid obtained from the victim. Trial counsel took the position that law enforcement failed to obtain Ricehill's signature as necessary before collecting the sample from him and felt that the motion to suppress would have succeeded on this basis. Trial counsel testified about other evidence showing that Ricehill was the individual who assaulted the victim, including the victim's description of the intruder's physical characteristics and clothing that were consistent with Ricehill's characteristics and clothing, the fact that the individual took the victim's car and Ricehill was found driving the car, photographs of shoe prints taken at the scene which matched Ricehill's shoes, and statements made by the passenger. Trial counsel felt the main advantages of the plea agreement was avoiding the first degree sexual assault charge and getting rid of the theft charge. He also indicated that the State was not going to recommend consecutive sentences. Trial counsel testified that without the DNA evidence, an attempted sexual assault was "what basically took place" based upon the statements and other physical evidence. Trial counsel stated, "I don't see how going through a trial was going to get him anything less than [attempted sexual assault]."

Trial counsel opined that if Ricehill had gone to trial, he would have been convicted of the charges he pled to, would have been convicted of the additional theft charge, and would have run the added risk of being convicted of the greater charge of sexual assault. Also, because Ricehill did not have any memory of the incident, it would have been difficult to successfully challenge the State's evidence.

Trial counsel testified that Ricehill inquired about a direct appeal and that counsel advised him of his rights in this regard. The day after Ricehill was sentenced, trial counsel advised him of the 30-day timeframe for filing an appeal. Trial counsel told Ricehill he could not recommend an appeal "given the sentence imposed by the judge," but he informed Ricehill that he had the right to appeal and that if Ricehill wanted to appeal, he could discuss it with trial counsel or write him a letter. Ricehill called trial counsel on November 21, 2006, and they

discussed his appeal options. Trial counsel explained the appeal process, again explained that the only basis for appeal would be that the sentences were an abuse of discretion, and told Ricehill that he felt an appeal would not be successful. Trial counsel advised Ricehill that he had learned that the State was not happy with the sentences and that if Ricehill appealed, the State would cross-appeal, alleging that the sentences were too lenient, although trial counsel described this to Ricehill as a minimal risk. Trial counsel told Ricehill he had until December 5 to make a final decision and to tell trial counsel what he wanted to do about an appeal. Ricehill telephoned trial counsel on November 29, and after their conversation, counsel followed up with a letter confirming his understanding that he was not to appeal, stating that he agreed with Ricehill's decision, and stating that he did not believe an appeal would be successful.

Ricehill testified at the evidentiary hearing about his understanding of the plea agreement. Specifically, Ricehill testified, "I understood that -- my lawyer had mentioned to me that I was only to get no more than 10 years, as in trying to sweeten up the deal towards me, that the count of theft would be dropped" and that as a result, he pled to the three counts of the amended information. When asked if he had wanted to go to trial, Ricehill responded that he did not know what he wanted at the time. Ricehill testified further about his expectation that he would be sentenced to no more than 10 years based on what his trial counsel told him. Ricehill stated that if he had known that he was going to be sentenced to more than 10 years, he would not have pled as he did and would have gone to trial. Ricehill acknowledged that he probably received the September 2006 letter from his trial counsel. After reviewing the letter, Ricehill testified that the promise of a 10-year sentence was not in the letter but occurred in sessions between Ricehill and trial counsel.

Ricehill also asserted that there were communication problems between him and his trial counsel, stating, "Well, me being young, I didn't understand what was going on. I wanted to . . . believe in my lawyer. I wanted to trust him. I wanted to confide in him, but he . . . didn't try and gain my trust in any way." When asked how often he met with trial counsel, Ricehill replied, "Probably right before a hearing," and he stated that these meetings lasted about 5 to 10 minutes. Ricehill stated that trial counsel briefly reviewed Ricehill's constitutional rights with him "[s]omewhere along the lines of our second meeting" but asserted that his rights were not explained sufficiently for him to understand what he was giving up when he entered his pleas. Because of lack of trust or communication, Ricehill felt that he was not getting good advice from trial counsel on what decisions to make. Ricehill felt that trial counsel did not put in enough time on the case and if trial counsel had done so, Ricehill could have obtained the trust he was looking for and that would have resulted in a different outcome in his case. Ricehill testified that he only briefly discussed his case with his parents and never when his trial counsel was also present. Ricehill claimed that his trial counsel never discussed with him the difference between consecutive and concurrent sentences, that he did not know what these were, but that if it had been explained to him, it probably would not have made a difference in his pleas. Ricehill claimed that he felt pressured to enter the plea agreement and that he felt the plea agreement was his only choice because of what his trial counsel had told him.

Ricehill also expressed concerns at the evidentiary hearing about the work performed by his trial counsel in investigating the evidence against Ricehill. When asked whether he was able to review evidence, police reports, or other information from his attorney, Ricehill stated that he

saw no need to do so because he did not know what to do. Ricehill testified that he did not have a chance to discuss conflicting statements made by the victim with trial counsel and that if he had been able to do so, his pleas would have been different. Ricehill also asserted that he was not able to discuss inconsistencies in the statements regarding the weapon with his attorney. Ricehill was asked if he felt that challenges to various pieces of evidence would have made a difference in his case with respect to the plea agreement and the outcome. Ricehill responded, "It would have been a better plea if there was a better understanding of the evidence and such research that my attorney should have conducted. It was -- there was no conversation about the evidence" Ricehill felt that because of his memory issues at the time of the incident, it was important to him that trial counsel closely examine and challenge the evidence. Ricehill stated that trial counsel failed to adequately investigate the evidence and object and preserve objections to various aspects of the evidence against Ricehill. Ricehill did not feel that trial counsel adequately investigated the lack of physical evidence, such as fingerprints and DNA. Ricehill was also concerned that the motion to suppress DNA evidence was not heard as a result of the plea agreement. Ricehill testified that he was not sufficiently advised by trial counsel on what it meant to give up the hearing on his motion to suppress. Ricehill stated that a hearing on his motion would have been advantageous to him because "it probably wouldn't have gotten this far." Ricehill understood that if they had proceeded with the motion to suppress, the DNA evidence would have been thrown out. Ricehill also wanted trial counsel to investigate the passenger. Ricehill felt that trial counsel's failure to depose the victim, the passenger, or any investigators was a "lapse" in his case.

Ricehill also testified about his trial counsel's alleged failure to file a direct appeal. Ricehill testified that he discussed his appeal rights with his trial counsel. Specifically, he testified that he attempted to call his trial counsel within the 30-day period and that he wanted to appeal. Ricehill claimed that he spoke with his trial counsel by telephone on one occasion and told him he wanted to appeal. According to Ricehill, his trial counsel told him that it would not be a good idea; that the prosecution would cross-appeal; and that, after Ricehill told him he would still like to appeal, he would not do so.

Cloud claimed that she was never consulted about whether Ricehill should accept the plea agreement. Cloud testified that Ricehill's trial counsel "just went ahead and told [her] what he was going to do" and that her attempts to meet with him to discuss the matter further were either unsuccessful or only resulted in the attorney telling her the same thing, that Ricehill was going to plead no contest because he did not recall anything, and that this was the only option that would get Ricehill less time. According to Cloud, prior to Ricehill's pleas, his trial counsel did not tell her exactly how much time Ricehill might be getting but that "he's going to get seven for this, a 10-year and a two-year for this, five-year, and that's what he told me." Cloud testified that Ricehill's attorney never arranged for a meeting between himself, Cloud, and Ricehill to discuss the plea agreement together. Cloud testified to her belief that Ricehill did not understand the plea agreement and was confused about the proceedings.

The district court entered an order on April 27, 2011, denying Ricehill's motion for postconviction relief. The court was "not impressed" with the credibility of Ricehill's evidence, stating, "It appears that this is clearly an example of Buyer's Remorse meets Monday Morning Quarterback." The court noted that Ricehill was 17 years old at the time of his convictions but

stated that his criminal history suggested he was a “veteran of the Court system” and associated consequences. The court noted Ricehill’s admission at the evidentiary hearing that his motion for postconviction relief contained false statements. The court also found Cloud’s credibility to be questionable. The court was impressed by the services provided by Ricehill’s trial counsel. The court concluded that Ricehill was fully aware of the possible penalties and consequences of his pleas at the time of the plea agreement and that he gained significant benefit from trial counsel’s experience and expertise in that a favorable plea agreement was reached. The court concluded that Ricehill had not met his burden of proof in that his evidence was not credible and his motion was without merit. Ricehill subsequently perfected his appeal to this court.

ASSIGNMENT OF ERROR

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

STANDARD OF REVIEW

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. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011).

A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *Id.* 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

Ricehill asserts that the district court erred in denying his motion for postconviction relief. His arguments focus on trial counsel’s alleged failure to communicate, failure to properly investigate, and failure to file a direct appeal. Ricehill also argues that he was pressured to accept the plea agreement, was not allowed adequate opportunity to communicate with his parents, and was under the impression that he would receive a sentence of not more than 10 years. Ricehill argues that, but for these deficiencies, he would have insisted on going to trial rather than pleading to the charges.

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.* A lawyer’s performance is deficient if his or her performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. *State v. Lee, 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. *State v. Dunkin, supra*.

The evidence does not show that trial counsel's performance was deficient with respect to his communications with Ricehill. The timesheet received into evidence at the evidentiary hearing shows that counsel communicated with Ricehill and Cloud on numerous occasions outside the context of hearing dates. In his deposition, trial counsel outlined his discussions with Ricehill about Ricehill's rights, the evidence, and the plea agreement. Trial counsel firmly believed that Ricehill fully understood his various options and the risks. The September 2006 letter sent by trial counsel to Ricehill and his parents outlines the plea agreement and explains the sentencing possibilities in great detail. Even if trial counsel's communications with Ricehill were deficient, Ricehill cannot show that he was prejudiced. The record is replete with the trial judge's detailed explanations of Ricehill's rights; the possible sentences resulting from his plea; and Ricehill's acknowledgment of his understanding of his rights, the nature of the charges, the possible sentences, and the details of the plea agreement.

With respect to trial counsel's investigation of the evidence, trial counsel testified about his understanding of the evidence against Ricehill, the difficulties posed by Ricehill's memory issues, and the risks posed if Ricehill had gone to trial instead of accepting the plea agreement. The decision to proceed with the plea agreement rather than a trial reflects trial counsel's reasonable trial strategy under the circumstances of this case. In determining whether trial counsel's performance was deficient, courts give counsel's acts a strong presumption of reasonableness. *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011). When reviewing claims of ineffective assistance, an appellate court will not second-guess trial counsel's reasonable strategic decisions. *Id.* Contrary to Ricehill's assertions at the evidentiary hearing, we note that at the continued plea hearing, Ricehill informed the court that he had discussed the facts and any defenses he might have with his attorney; that he had had enough time to do so; that his attorney fully understood the case; that his attorney had spent an adequate amount of time researching, investigating, and preparing; and that Ricehill was satisfied with his attorney's work.

Although Ricehill now argues that he would have gone to trial if not for his trial counsel's alleged deficient performance, Ricehill's arguments fail to establish, beyond his self-serving declarations, a reasonable probability that he would have insisted on going to trial. In a claim for ineffective assistance of counsel, 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. See *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011). Self-serving declarations that he would have gone to trial will not be enough; he must present objective evidence showing a reasonable probability that he would have insisted on going to trial. *Id.* The evidence shows that the State had a strong case against Ricehill, even without the DNA evidence. If Ricehill had insisted on going to trial, he would have risked a Class II felony conviction for first degree sexual assault, which carries a maximum penalty of 50 years' imprisonment; a Class III felony conviction for theft, which carries a maximum of 20 years' imprisonment, a \$25,000 fine, or both; plus additional charges. See, § 28-319; § 28-511; Neb. Rev. Stat. § 28-518 (Reissue 2008); Neb. Rev. Stat. § 28-105 (Reissue 2008). By accepting

the plea agreement, he received the benefit of the reduced charge of attempted sexual assault and the dismissal of the theft charge.

Finally, we note that Ricehill did not allege, in his postconviction motion, that his trial counsel failed to file a direct appeal after being requested to do so by Ricehill, nor did the district court address the issue in its order ruling on Ricehill's motion. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *State v. Diaz*, 283 Neb. 414, ___ N.W.2d ___ (2012). Accordingly, we decline to address the issue beyond noting that Ricehill's testimony on this issue is contradicted by the deposition of his trial counsel and that the district court was not impressed with the credibility of Ricehill's evidence. In an evidentiary hearing for postconviction relief, the postconviction trial judge, as the trier of fact, resolves conflicts in evidence and questions of fact, including witness credibility and the weight to be given a witness' testimony. *State v. Benzel*, 269 Neb. 1, 689 N.W.2d 852 (2004).

CONCLUSION

The district court did not err in denying Ricehill's motion for postconviction relief.

AFFIRMED.