judgment as a matter of law.[35] In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment was granted, and give that party the benefit of all reasonable inferences deducible from the evidence.[36]

Here, the district court correctly found that Wilson had a valid leasehold interest. Thus, the claim Wilson filed against the property was not false or malicious. And the record lacks any evidence to suggest Wilson filed the claim to slander the title to the property. She believed, rightfully so, that she had a valid interest in the property. The district court did not err in granting Wilson's motion for summary judgment, as no genuine issue of material fact could be drawn from the facts presented.

CONCLUSION

The district court correctly determined that Wilson had a valid legal interest in the leased property. Fieldgrove was required to give at least 6 months' notice of his intention to terminate the lease and failed to do so. Therefore, the lease was renewed for an additional year commencing March 1, 2008. The district court did not err in granting Wilson's motion for summary judgment on Fieldgrove's slander of title claim.

AFFIRMED.

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[35] See, *Ashby v. State*, 279 Neb. 509, 779 N.W.2d 343 (2010); *Bamford v. Bamford, Inc.*, 279 Neb. 259, 777 N.W.2d 573 (2010).

[36] *Bamford, supra* note 35; *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009).

STATE OF NEBRASKA, APPELLEE, V. ERIC T. MCGHEE, APPELLANT.

787 N.W.2d 700

Filed September 3, 2010. No. S-10-337.

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

2. **Effectiveness of Counsel: Appeal and Error.** With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
3. **Postconviction: Right to Counsel: Appeal and Error.** Failure to appoint counsel in postconviction proceedings is not error in the absence of an abuse of discretion.
4. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. However, if the motion alleges only conclusions of fact or law, or 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. 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. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
6. **Expert Witnesses.** The weight and credibility of an expert's testimony are a question for the trier of fact.
7. ____. Triers of fact are not required to take opinions of experts as binding upon them.
8. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.
9. **Postconviction: Right to Counsel.** There is no federal or state constitutional right to an attorney in state postconviction proceedings.
10. ____: ____. Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant.
11. **Postconviction: Justiciable Issues: Right to Counsel.** When the assigned errors in a postconviction petition before the district court contain no justiciable issues of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Eric T. McGhee, pro se.

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

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

Following a jury trial, Eric T. McGhee was convicted of first degree murder and use of a weapon to commit a felony in the 2003 shooting death of Ezra Lowry. McGhee was sentenced to life imprisonment on the murder conviction and to 5 to 10 years' imprisonment on the use of a weapon conviction. We affirmed the convictions and sentences on direct appeal.[1] McGhee then filed a motion for postconviction relief in which he alleged that his defense counsel's performance was constitutionally ineffective at trial and on direct appeal. The district court for Douglas County denied the postconviction motion without an evidentiary hearing, and McGhee now appeals from that order. We affirm.

BACKGROUND

On March 11, 2003, the same day the information charging McGhee was filed, his attorney filed a motion to determine McGhee's competency to stand trial. Following a hearing, the district court determined that McGhee was not then competent to stand trial, but that there was a substantial probability that he would become competent in the foreseeable future. The court committed McGhee to the Lincoln Regional Center until such time as he became competent to stand trial, and ordered that institution to submit written reports to the court every 6 months.

Periodic review hearings were held. At a review hearing in late 2005, Dr. Bruce Gutnik testified for McGhee. Gutnik opined that McGhee remained incompetent to stand trial. Dr. Louis Martin testified for the State and opined that McGhee was then competent to stand trial. The court accepted Martin's testimony and found McGhee competent. McGhee's counsel

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[1] *State v. McGhee*, 274 Neb. 660, 742 N.W.2d 497 (2007).

then filed a notice that McGhee intended to plead not responsible by reason of insanity.

The events that led to the fatal shooting are set forth in detail in our opinion on direct appeal.[2] Briefly summarized, the shooting occurred at McGhee's home, where he, Lowry, and others had been drinking and smoking marijuana. As we noted in the direct appeal, McGhee did not contest that he shot Lowry; rather, his theory of defense was that his actions did not amount to first degree murder and that in any event, he was not responsible by reason of insanity.

Gutnik and Martin gave conflicting expert testimony at trial on the issue of McGhee's sanity at the time of the shooting. Gutnik diagnosed McGhee as suffering from paranoid schizophrenia with a history of alcohol and cannabis abuse and possible dementia. Gutnik testified that in his opinion, McGhee did not know the difference between right and wrong at the time he shot Lowry. Martin testified that McGhee had been under his care for approximately 2 years, beginning with the initial commitment for the purpose of determining competency to stand trial. Martin testified that in his opinion, although McGhee suffered from a mental illness, McGhee nevertheless understood what he was doing when he shot Lowry and also understood that his actions were wrong. On direct appeal, we concluded that the jury must have believed Martin's testimony and that this testimony was "sufficient admissible evidence for the jury to conclude that McGhee was not insane at the time he shot Lowry."[3]

McGhee sought postconviction relief on grounds that his defense counsel was ineffective in (1) failing to acquire a third expert to evaluate and testify regarding his mental status with respect to the issues of competency and sanity, (2) failing to properly advise him regarding waiver of the privilege against self-incrimination and the advisability of testifying in his own behalf, (3) failing to impeach the testimony of one of the State's principal witnesses at trial, and (4) failing to preserve

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[2] *Id.*

[3] *Id.* at 669, 742 N.W.2d at 505.

and raise on direct appeal the issue of whether the trial court erred in receiving and permitting the jury to hear a recording of a conversation McGhee had with his sister during his pretrial incarceration. In response, the State filed a motion to deny postconviction relief. McGhee filed a reply. The district court concluded on the basis of McGhee's motion and the files and records of the case that McGhee was not entitled to postconviction relief and dismissed his motion without conducting an evidentiary hearing.

Although McGhee's postconviction motion and subsequent pleadings included in the record on this appeal were filed pro se, the district court at some point appointed counsel to represent McGhee in postconviction proceedings before that court. Counsel for McGhee appeared at the hearing which preceded the district court's decision to deny postconviction relief without conducting an evidentiary hearing. Following entry of its order, the district court denied McGhee's request for appointment of counsel to represent him on this appeal.

ASSIGNMENTS OF ERROR

McGhee contends, restated and summarized, that the district court erred in (1) denying postconviction relief without conducting an evidentiary hearing, (2) failing to appoint counsel to represent him on this appeal, and (3) failing to make a definitive ruling on the State's motion to deny postconviction relief.

STANDARD OF REVIEW

[1,2] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[4] With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[5] an appellate court reviews such legal determinations independently of the lower court's decision.[6]

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[4] *State v. McKinney*, 279 Neb. 297, 777 N.W.2d 555 (2010); *State v. Dunster*, 278 Neb. 268, 769 N.W.2d 401 (2009).

[5] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[6] *State v. McKinney, supra* note 4; *State v. Dunster, supra* note 4.

[3] Failure to appoint counsel in postconviction proceedings is not error in the absence of an abuse of discretion.[7]

ANALYSIS

[4] The principal issue presented in this appeal is whether the district court erred in denying postconviction relief without conducting an evidentiary hearing. An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.[8] However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required.[9]

Claims of Ineffective Assistance of Counsel

[5] McGhee was represented by the Douglas County public defender's office at trial and on direct appeal, so this postconviction proceeding is his first opportunity to raise claims of ineffective assistance of counsel.[10] 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*,[11] to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case.[12] 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.[13] The two

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[7] *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001); *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000).

[8] *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010); *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009).

[9] *Id.*

[10] See, *State v. Jones*, 264 Neb. 671, 650 N.W.2d 798 (2002); *State v. Soukharith, supra* note 7.

[11] *Strickland v. Washington, supra* note 5.

[12] *State v. McKinney, supra* note 4.

[13] *Id.*

prongs of this test, deficient performance and prejudice, may be addressed in either order.[14]

McGhee's principal argument is that defense counsel was ineffective in not obtaining a third expert to evaluate and testify concerning his competence to stand trial and his sanity at the time of the shooting. McGhee characterizes the conflicting expert testimony as a "stalemate,"[15] and he alleged in his postconviction motion that a third expert opinion would have broken the stalemate by providing additional support for either his expert, Gutnik, or the State's expert, Martin.

In assessing postconviction claims that trial counsel was ineffective in failing to call a particular witness, we have upheld dismissal without an evidentiary hearing where the motion did not include specific allegations regarding the testimony which the witness would have given if called. For example, in *State v. Davlin*,[16] the defendant claimed that trial counsel was ineffective in failing to adduce the testimony of certain witnesses. We affirmed dismissal of the postconviction claim without an evidentiary hearing, reasoning that there was nothing in the postconviction motion or record to indicate the nature of any exculpatory evidence which the witnesses would have given if called. In *State v. Threet*,[17] we held that a postconviction allegation that defense counsel was ineffective in failing to procure witnesses favorable to the defendant was properly dismissed without an evidentiary hearing where the motion did not specifically identify the witnesses or the nature of their testimony. We stated that in the absence of specific allegations in this regard, "a trial court need not conduct a discovery hearing to determine if anywhere in this wide world there is some evidence favorable to defendant's position."[18]

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[14] *Id.*

[15] Brief for appellant at 11.

[16] *State v. Davlin,* *supra* note 8.

[17] *State v. Threet*, 231 Neb. 809, 438 N.W.2d 746 (1989), *disapproved on other grounds, State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004).

[18] *Id.* at 813, 438 N.W.2d at 749.

[6,7] McGhee's allegations are similarly lacking in specificity. He does not identify another expert who would have testified that he was incompetent to stand trial or legally insane at the time of the shooting. He alleges only that if another expert had been consulted, his or her opinions would have served to "break and mitigate the stalemate between Dr. Gutnik and Dr. Martin." Both McGhee's premise and his conclusion are incorrect. There was no "stalemate," only conflicting expert testimony on disputed issues. And even if a second expert had testified in support of McGhee's position, it does not follow that the competency and sanity determinations would necessarily or even probably have been different. The weight and credibility of an expert's testimony are a question for the trier of fact,[19] and triers of fact are not required to take opinions of experts as binding upon them.[20] Whether there had been one or two experts testifying in support of McGhee's claims of incompetency and insanity, the judge and jury would have been free to reject such testimony and accept the testimony of Martin with respect to these issues.[21] And on appeal, this court would have been required to give deference to the determination of the finders of fact on questions of weight and credibility of expert testimony, as we did in the direct appeal of this case.[22] We therefore conclude that McGhee did not allege facts which, if proved, would establish a reasonable probability that the outcome of his case would have been different if his trial counsel had retained another psychiatric expert. Because McGhee's allegations are insufficient to satisfy the prejudice prong of the *Strickland* analysis, we need not consider his allegations with respect to the performance prong.

[8] For completeness, we note that the district court determined that McGhee's three other claims of ineffective assistance of counsel were also without merit. McGhee's assignments

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[19] *State v. Kuhl*, 276 Neb. 497, 755 N.W.2d 389 (2008).

[20] *Hilliard v. Robertson*, 253 Neb. 232, 570 N.W.2d 180 (1997).

[21] See *Bruno v. State*, 111 Neb. 715, 197 N.W. 612 (1924) (holding weight of testimony not determined by number of witnesses).

[22] See *State v. McGhee, supra* note 1.

of error are broad enough to encompass the disposition of these claims, but his brief includes no argument directed to them. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.[23] Because McGhee makes no specific argument with respect to the district court's disposition of his remaining claims of ineffective assistance of counsel, we need not address them.

Denial of Motion to Appoint Counsel for Appeal

[9-11] McGhee contends that the district court erred in denying his motion for appointment of counsel to represent him in this postconviction appeal. There is no federal or state constitutional right to an attorney in state postconviction proceedings.[24] Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant.[25] When the assigned errors in a postconviction petition before the district court contain no justiciable issues of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant.[26] Having determined that McGhee's motion for postconviction relief presented no justiciable issues, the district court did not abuse its discretion in denying McGhee's motion for appointment of appellate counsel.

Disposition of State's Motion

We find no merit to McGhee's argument that the district court failed to clearly adjudicate the State's motion to deny postconviction relief. The district court's order concluded: "**IT IS, THEREFORE, ORDERED** that Defendant's Motion for Postconviction Relief is denied and Defendant is not entitled to

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[23] *State v. Thompson*, 278 Neb. 320, 770 N.W.2d 598 (2009); *State v. Amaya*, 276 Neb. 818, 758 N.W.2d 22 (2008).

[24] *State v. Soukharith, supra* note 7.

[25] *State v. Vo, supra* note 8; *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007).

[26] *Id.*

an evidentiary hearing." That order effectively disposed of all matters then pending before the court.

CONCLUSION

For the reasons discussed, we affirm the judgment of the district court dismissing McGhee's motion for postconviction relief without an evidentiary hearing.

AFFIRMED.