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Court of Appeals of Nebraska.

STATE of Nebraska, appellee,
v.
Jonathon C. BUCKLEY, appellant.

No. A–10–910. | April 19, 2011.

Appeal from the District Court for Buffalo County: John P. Icenogle, Judge. Remanded with directions.

Attorneys and Law Firms

Justin R. Herrmann, of Jacobsen, Orr, Nelson, Lindstrom & Holbrook, P.C., L.L.O., for appellant.

Jon Burning, Attorney General, and Goerge R. Love for appellee.

IRWIN, SIEVERS, and CASSEL, Judges.

Opinion

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

SIEVERS, Judge.

***1** Jonathon C. Buckley was arrested after he entered a Wells Fargo bank in Kearney, Nebraska, and took some 20 bank employees and customers hostage, some of whom were held for over 2 hours. Prior to his arrest, Buckley surrendered to police without any shots being fired or physical injuries. Although he secured $80,000 in cash from a bank teller as part of the negotiations with police, he gave that money to police when he left the bank and surrendered. After being arraigned in the county court for Buffalo County, Buckley was bound over to the Buffalo County District Court and arraigned on an amended information. Pursuant to a plea agreement, Buckley pled no contest to four counts of kidnapping, Class II felonies, and one count of use of a firearm to commit a felony, a Class IC felony, in exchange for which the State dismissed two additional charges.

At the arraignment hearing held in the district court on July 6, 2010, the court advised Buckley of the maximum and mandatory minimum sentences for the kidnapping and use of a firearm charges, and after doing so, asked Buckley if he "had any questions about the statutes or the penalties," to which Buckley responded, "No, I do not, your honor." The court did not specifically advise Buckley that a use of a firearm conviction carries the proviso by statute that a mandatory consecutive sentence to the sentences for the other crimes is required. See Neb.Rev.Stat. § 28–1205(3) (Cum.Supp.2010). Buckley pled no contest to each of the five charges, and after a factual basis was provided by the State, the court accepted his pleas.

At the sentencing hearing held on August 16, 2010, Buckley's counsel stated:

> And we understand that the sentence on the use of a firearm has to be consecutive to any other sentences imposed. And what we would ask the Court to do at this point is to take into account the fact that there are mental illnesses present, that he does not have any prior record and make—fashion a term of commitment on the four kidnapping charges that are concurrent to each other and then the sentence on the use of a weapon statutorily consecutive to that.

After providing Buckley with a chance to be heard, the court asked Buckley's counsel if he or Buckley knew of any legal reason why a sentence should not be imposed and counsel replied, "No, sir, Your Honor, we do not." Buckley was then sentenced to concurrent terms of 30 to 50 years' imprisonment on the first two counts of kidnapping. He received the same concurrent sentences on the remaining two kidnapping counts, which were ordered to be served consecutively to the sentences for the first two kidnapping counts. Buckley was also sentenced to 20 to 30 years' imprisonment on the use of a firearm

conviction, to run consecutively to the other sentences. The judge explained that Buckley would be eligible for parole in 40 years and for institutional release in 65 years. Buckley appeals. Pursuant to Neb. Ct. R.App. P. § 2–111(B)(l) (rev.2008), this case was ordered submitted without oral argument.

ASSIGNMENTS OF ERROR

***2** Buckley assigns four errors in his brief to this court. They are that the district court: (1) erred in finding that his no contest pleas were entered freely, voluntarily, knowingly, and intelligently; (2) abused its discretion by imposing excessive sentences; and (3) abused its discretion in ordering the sentences imposed on counts I and II to run consecutively with counts III and IV. He also alleges seven individual claims of ineffective assistance of trial counsel.

STATE'S SUGGESTION OF REMAND

Rather than file a responsive brief, the State filed a "Suggestion of Remand," which claims that the dispositive issue at this juncture from Buckley's assigned errors is whether his no contest pleas were voluntarily and intelligently entered. The State asserts that his other three assignments of error are thus "not ripe for review." Brief for appellee at 8. The State analogizes this scenario to *State v. Curnyn*, 202 Neb. 135, 274 N.W.2d 160 (1979), and asks that we remand the cause pursuant to the procedure outlined in that opinion. The State cites to a number of cases in which the Supreme Court either followed the procedure outlined in Curnyn or cited favorably to it. See, *State v. Williams*, 220 Neb. 415, 370 N.W.2d 150 (1985); *State v. Clark*, 217 Neb. 417, 350 N.W.2d 521 (1984); *State v. Schaeffer*, 218 Neb. 786, 359 N.W.2d 106 (1984); *State v. Fischer*, 218 Neb. 678, 357 N.W.2d 477 (1984); *State v. McMahon*, 213 Neb. 897, 331 N.W.2d 818 (1983); *State v. Lewis*, 192 Neb. 518, 222 N.W.2d 815 (1974).

In *Curnyn, supra*, the defendant was charged with burglary and entered a plea of not guilty at his arraignment. Thereafter, he was allowed to withdraw his plea and, pursuant to a plea agreement, pled guilty to burglary. The district court apparently failed to inform the defendant of the statutory penalties applicable to the offense of burglary. The defendant perfected an appeal to the Supreme Court alleging that the district court accepted his plea without properly advising him of the applicable penalties. However, the Supreme Court did not reach the merits of that issue on appeal because it sustained the State's motion for summary affirmance on procedural grounds. Approximately 1 year later, the defendant filed a postconviction motion to vacate and set aside judgment in the district court, asserting the same basis as he did in his direct appeal. The district court concluded that the defendant was entitled to no relief. He then perfected an appeal to the Nebraska Supreme Court, and the court remanded the matter to the district court with directions. The Supreme Court stated:

> We believe this case should be governed by the principles announced in *State v. Lewis*, 192 Neb. 518, 222 N.W.2d 815 (1974). In that case we stated: "The practice of advising a defendant who is about to enter a plea to a felony of the possible penalties on conviction, although not made mandatory by any statute in this state, is one of long standing in this jurisdiction and antedates the adoption of the standards in *State v. Turner*, [186 Neb. 424, 183 N.W.2d 763 (1971), *disapproved on other grounds*, *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986)]. No doubt the failure in this case is the result of oversight and failure to use a check list. In *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274, upon which the defendant relies, the Supreme Court of the United States vacated the judgment of conviction and ordered that the defendant be permitted to plead again. We do not interpret that case as holding that under a record such as we have in this case any such procedure is constitutionally required. *The constitutional requirement is that the plea be voluntary and intelligent and the determination of that fact be reliably determined* .... The record here supports at least by implication a conclusion that the defendant in fact knew the consequences of her plea. This implication arises from the fact that she was represented by counsel throughout and had adequate consultation with him, and that when she was advised of the penalties just before sentencing she expressed no surprise, and when asked if she had any reason to give why sentence should not be imposed, she gave no relevant response. Further, at that time her counsel did, in her presence, say that no legal reason existed why sentence should not be imposed."

***3** *State v. Curnyn*, 202 Neb. 135, 139–40, 274 N.W.2d

157, 160 (1979), quoting *State v. Lewis*, 192 Neb. 518, 222 N.W.2d 815 (1974). The *Curnyn* court found that most of the elements from *Lewis*—justifying an implication that the defendant knew the consequences of the plea—were present. Nonetheless, the *Curnyn* opinion held:

> Since, in this case, the extent of the defendant's knowledge of the applicable penalties is a matter in dispute and cannot be clearly determined from the record of this case without indulging in inferences, we deem it advisable, without vacating and setting aside defendant's conviction and sentence, to remand this matter to the trial court with leave to the defendant to apply to the trial court to withdraw his plea. Should defendant fail to do so within 10 days of the issuance of the mandate in this case, then the sentence shall be carried into execution. If the defendant elects to withdraw his plea, the trial court shall hold an evidentiary hearing to determine whether the defendant was, in fact, aware of the possible penalties for the offense of burglary at the time he entered his plea. If the court finds he was not aware of the penal consequences of the plea, the judgment of conviction shall be deemed vacated and he shall be permitted to plead again. If it determines the defendant was aware of the penalties and consequences of the plea, the judgment and sentence shall stand.

202 Neb. at 140–41, 274 N.W.2d at 161. We note that there was a motion to vacate in *Curnyn*, but that such is not a prerequisite for what we shall reference as a "*Curnyn* remand." See, *State v. Jackson*, 220 Neb. 656, 371 N.W.2d 679 (1985); *State v. Williams*, 220 Neb. 415, 370 N.W.2d 150 (1985); *State v. Fischer*, 218 Neb. 678, 357 N.W.2d 477 (1984); *State v. McMahon*, 213 Neb. 897, 331 N.W.2d 818 (1983); *State v. Lewis*, 192 Neb. 518, 222 N.W.2d 816 (1974).

The State argues that, similar to *Curnyn*, it can be implied from the record that Buckley knew the consequences of his plea, even though the trial judge did not properly inform him with respect to the use of a firearm charge when Buckley was arraigned on the amended information. We agree that clearly such an inference is present given that Buckley's trial counsel stated in his presence at sentencing, "[W]e understand that the sentence on the use of a firearm *has to be consecutive to any other sentences imposed*." (Emphasis supplied.) And, as in *Curnyn*, Buckley had counsel throughout the proceedings; no objection to the sentence was made when it was imposed; and counsel gave no legal reason why the sentence should not be imposed. Nonetheless, the State asserts that the extent of Buckley's knowledge of the penal consequences of his plea is in dispute in the same sense as in *Curnyn* and its progeny, and thus, the matter should be returned to the district court for a *Curnyn* remand. The State's assertion that the extent of Buckley's knowledge of the penal consequences of his plea must be determined on remand to the trial court, despite the facts we recited above, obviously derives from, first, the similarities between the procedural background of this case and Curnyn, and second, the Supreme Court's apparent disapproval in Curnyn of using inferences at the appellate level to determine the extent of the defendant's knowledge of the penal consequences of his plea when there has not been a proper advisement of penalties before the plea by the court—as is true here.

***4** Clearly, we must follow *Curnyn*, *supra*, meaning a remand to the district court, and if Buckley fails to file a motion to withdraw his plea within 10 days, his sentence will stand and be "carried into execution." On the other hand, if he moves to withdraw his plea, an evidentiary hearing will be held to determine the extent of his knowledge of the penal consequences of his plea, despite the shortcomings in the trial court's advisement thereof. If the trial court allows the withdrawal of the plea, then Buckley would seem to have two choices: (1) go to trial on the charges or (2) plead, with or without a plea bargain, after a new and proper advisement regarding the penal consequence of the plea. If the trial court were to determine that Buckley was in fact aware of the penalties for the use of a firearm charge, then the judgment and sentence will stand and be executed. See *Curnyn*, *supra*. Therefore, we sustain the State's suggestion of remand, and remand the cause to the district court for Buffalo County with directions to employ the procedure of a *Curnyn* remand.

REMAINING ASSIGNMENTS OF ERROR

We have dealt with Buckley's assignment of error that the plea was not voluntarily entered through our ruling on the State's suggestion of remand. However, there are three other assignments of error, the latter of which includes multiple claims of ineffective assistance of trial counsel. The existing authority teaches that, despite the remand, we should now decide the remaining assignments of error. For example, in *State v. Lewis*, 192 Neb. 518, 222 N.W.2d 815 (1974), the defendant entered a no contest plea, but on appeal the Supreme Court ordered what we have termed a *Curnyn* remand, because of inadequate advisement of penalties. Nonetheless, the *Lewis* court decided the defendant's claim of excessive sentence against her. And in *State v. Jackson*, 220 Neb. 656, 371 N.W.2d 679 (1985), and *State v. Fischer*, 218 Neb. 678, 357 N.W.2d 477 (1984), the court likewise ordered *Curnyn* remands, but also decided the excessive sentence claims adverse to the respective defendants on the merits. Based on such authority, we now address the merits of the remaining assignments of error, as was done in *Lewis*, *Jackson*, and *Fischer*.

Did Buckley Receive Ineffective Assistance of Trial Counsel?

Buckley's final assignment of error is that he received ineffective assistance of trial counsel, but we discuss it before the excessive sentence claim because the information which we set forth from the record on these claims is also germane to the trial court's determination of the sentences to be imposed.

To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Balvin*, 18 Neb.App. 690, 791 N.W.2d 352 (2010). That is, the defendant must demonstrate a reasonable probability that, but for counsel's defective performance, the result of the proceeding would have been different. See *State v. Dawn*, 246 Neb. 384, 519 N.W.2d 249 (1994). When the defendant has entered a guilty plea, counsel's deficient performance constitutes prejudice if the defendant shows with reasonable probability that but for counsel's errors, the defendant would have insisted on going to trial rather than pleading guilty. *Id.* And in that vein, it should be noted that a plea of no contest is equivalent to a plea of guilty. See *State v. Gonzalez–Faguaga*, 266 Neb. 72, 662 N.W.2d 581 (2003). We note that with numerous witnesses inside and outside the bank, the evidence the State could marshal against Buckley would be substantial—a fact of consequence in assessing prejudice in a plea-based ineffectiveness claim.

***5** Because Buckley's appellate counsel is different from his trial counsel, he must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to him or is apparent from the record, or the issue will be procedurally barred on postconviction review. See *State v. York*, 273 Neb. 660, 731 N.W.2d 597 (2007). Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. *Id.* When the issue has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. *Id.*

With this foundation in place, we now examine Buckley's seven specific claims of ineffective assistance of trial counsel, which we have renumbered as follows:

> Trial counsel was defective for
>
> (1) failing to challenge the psychological report prepared by Dr. John Meidlinger and retain a second mental health expert to examine Buckley for the purpose of determining his competency to stand trial;
>
> (2) failing to retain a mental health expert to examine Buckley for the purpose of inquiring into his sanity at the time of the commission of the alleged offenses;
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> (3) failing to plead or pursue the defense of not responsible by reason of insanity pursuant to Neb.Rev.Stat. § 29–2203 (Reissue 2008);
>
> (4) failing to object to the district court's receipt of certain portions of the presentence investigation (PSI) containing highly prejudicial statements attributed to Buckley, which, if actually made, were the result of his mental illness;
>
> (5) failing to offer evidence at sentencing in support of any argument in mitigation, including but not limited to character witnesses and witnesses with first-hand knowledge of Buckley's mental health and day-to-day behaviors that could testify to, among other things, the significant deterioration of his mental health around the time of the commission of the alleged offenses;

(6) failing to offer evidence at sentencing to support his argument in mitigation based upon Buckley having "suffered and experienced a long history of mental health problems and mental illness," including but not limited to his medical or psychiatric records relating to past treatment for mental illness; and

(7) pressuring Buckley into accepting the plea agreement without fully advising him of the consequences of the plea.

We find that some of Buckley's ineffective assistance of trial counsel claims can be decided presently. In order to review the first three numbered claims, it is necessary to detail certain aspects of Dr. Meidlinger's psychological evaluation, including the impetus for said evaluation.

On April 20, 2010, Buckley's trial counsel applied to the district court for a psychological evaluation pursuant to Neb.Rev.Stat. § 29–1823 (Reissue 2008) "at the expense of the County for the reason that [Buckley] may be mentally incompetent to stand trial ." The application notes that the request is based on counsel's observations of Buckley during interviews and on statements made during such interviews and that the State does not object to said evaluation. The application requests that Dr. Meidlinger, a licensed psychologist, perform the evaluation. The court sustained the application and ordered that Dr. Meidlinger would perform the evaluation and deliver it to Buckley's counsel and the court for review.

***6** Dr. Meidlinger's psychological evaluation is included in the PSI. A letter from Buckley's trial counsel to the State probation office also appears in the PSI preceding the evaluation, and it states, "We had asked that this Psychological Report be provided to you, as part of the [PSI].... Buckley indicated to [the judge] that he did not object to you receiving this document."

The psychological report states that the reason for the referral is to determine whether Buckley is competent to stand trial, specifically, "whether or not he has the capacity to consult with his counsel and the capacity to assist in preparing his defense." The evaluation included review of Buckley's previous mental health hospitalizations, a 2–hour interview, review of approximately 30 pages of handwritten notes Buckley provided to Dr. Meidlinger at the end of the session, and intellectual testing.

Dr. Meidlinger reported that he reviewed records of Buckley's four brief hospitalizations at Richard Young Hospital in Kearney covering dates between March 25, 2009, and January 26, 2010. The first two hospitalizations were based on statements Buckley made regarding his intention to commit suicide. The third followed an evaluation by a medical doctor who diagnosed Buckley as having psychosomatic pain and suicidal feelings, and the fourth was prompted by Buckley's report in an emergency room that he was having anxiety attacks and experiencing auditory hallucinations. The report states the hospital records indicate that at least some of Buckley's physical complaints were not supported by any clinical evidence and that he was diagnosed with "Factitious Disorder with Predominant Psychological Symptoms and Personality Disorder with Histrionic and Borderline Features." The report explains that factitious disorder means a person who feigns physical or psychological symptoms in order to appear sick.

The psychological evaluation also makes reference to additional hospitalizations Buckley reported to Dr. Meidlinger, which do not have independent support in our record. He told Dr. Meidlinger that he was hospitalized in a Colorado facility in 2002 where he claims to have been diagnosed with "Paranoid Schizophrenia and Porphyria." He reported an additional hospitalization in a Colorado facility at the age of 18 due to having "violent images in my head. I wanted to kill teachers and blast away at other kids." According to the report, Buckley also "report[ed] recurring episodes beginning in adolescence during which he sees people and hears things." He reports he mostly sees the shadow of people or "just movement out of the corner of my eye." Buckley reported no additional hospitalizations prior to his admission at Richard Young Hospital in March 2009.

Additionally, Buckley reported that when he was 14 or 15, he broke up with a girlfriend, which apparently prompted him to discuss blowing up a school with a friend. He told Dr. Meidlinger that the friend told police about the plan and that "I was handcuffed and taken in a police car to [a] juvenile detention facility." He reports being held in some sort of an evaluation facility for 5 days until the doctor at the facility recommended commitment. Dr. Meidlinger's report then recites, "Somehow, against medical advice, he was discharged and expelled from school. He reports he was never charged with anything."

***7** Dr. Meidlinger's detailed report also contains various examples of statements Buckley made during a 2–hour interview with him. For instance, Buckley stated that he has a "primordial urge" to kill and reported that he

"continues to ruminate with sadness that he did not keep up his courage to both kill someone and be killed." The report notes Buckley's statement, "I should be put to death or it's going to happen again." Also, when asked about the incident at the bank, Buckley reported that "one girl went out with tears in her eyes and I could smell the fear. It was delicious." According to the report, Buckley also informed Dr. Meidlinger that he believes he deserves to be placed in solitary confinement for the rest of his life because "I love solitary and it's not like my life is getting any better."

However, Dr. Meidlinger discounts the genuineness of Buckley's statements, finding that he "has a strong tendency toward hyperbole and histrionics." The report also states that Buckley indicated that his decision to take over the bank was partly motivated by a desire to embarrass the television station from which he had recently been fired by identifying himself as an employee. According to the report, Buckley spoke in "an impressive English accent" throughout the entire interview. When Dr. Meidlinger asked Buckley why he was speaking with an accent, he replied, "I don't know. I simply woke up one morning speaking like this." He then shared with Dr. Meidlinger that he actually used to work in a movie theater and spoke in various accents at work to entertain his coworkers. Dr. Meidlinger notes that throughout the interview, Buckley expressed a desire to be placed in a long-term psychiatric facility, "where [Dr. Meidlinger opined] he could obtain the sympathy he craves."

Dr. Meidlinger reports that the results of intellectual testing indicate that Buckley is functioning at the top of the average range of intellectual ability near the cut off for the bright average range. The report recites that such results are "consistent with his presentation and use of language throughout the interview."

Ultimately, Dr. Meidlinger determined:

> Buckley is quite bright and quite capable intellectually of understanding the nature of the proceedings in court. I believe that he is intellectually capable of consulting with his counsel and capable intellectually of assisting in the preparation of his defense. I believe, however, that he has a very primitive personality disorder and a desire to be placed in a long-term psychiatric facility. I further believe his desire is likely to motivate the degree to which he cooperates with counsel and the manner in which he cooperates. I believe that he is likely to skew perceptions of himself in the direction of having a severe mental illness. I do not believe that his decision to present himself as having severe psychiatric problems is one which he made solely for the purpose of evading prosecution. His prior records from Richard Young Hospital suggest a strong pre-existing desire to paint himself as mentally ill in order to obtain sympathy, recognition and attention from mental health professionals.
>
> ***8** ... Buckley is intellectually capable of understanding and responding logically to the charges against him. Furthermore, I do not believe that he is suffering from major mental health disorders such as Schizophrenia or severe Bipolar Disorder which would impair his ability to perceive and respond to reality. I believe, however, that his personality disorder may guide him in the direction of continuing to play a role which I would describe as, "mad genius," as a way of gaining sympathy and entree into a mental health facility. I would anticipate, if he finds himself incarcerated at the penitentiary, that he will continue to play that role.

Further, Dr. Meidlinger recommended that trial counsel share the evaluation with Buckley and advise him of the potential consequences of continuing on his present course "as opposed to engaging in a more rational collaboration."

Buckley first claims that trial counsel was deficient for failing to retain a second mental health expert to examine him for the purpose of determining his competency to stand trial. Buckley's trial counsel specifically selected Dr. Meidlinger to conduct the psychological evaluation of Buckley, and according to the letter from Buckley's trial counsel, Buckley indicated to the trial judge that he did not object to the inclusion of said evaluation in the PSI. Furthermore, Meidlinger's diagnosis of factitious disorder is in line with diagnoses resulting from Buckley's four prior hospitalizations at Richard Young Hospital. Dr. Meidlinger is obviously qualified to perform the analysis of Buckley's competence to stand trial. It is fundamental that trial counsel is afforded due deference to formulate trial strategy and tactics. *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008). When reviewing an ineffective assistance of counsel claim, the court will not second-guess reasonable strategic decisions made by counsel. *Id.* Trial counsel's selection of Dr. Meidlinger as the examiner is clearly entitled to this presumption of reasonableness. And, there is no authority that allows a defendant to "shop" at public expense for a mental health expert until he gets an opinion that suits him. What we designated above as the first ineffectiveness claim is resolved against Buckley as such is completely meritless.

Buckley next avers that trial counsel was deficient for failing to retain a mental health expert to examine him for the purpose of inquiring into his sanity at the time of the commission of the crimes. Counsel's motion for appointment of a mental health expert to examine Buckley did not make sanity at the time of the crimes a purpose of the examination, nor did the court-appointed psychologist opine on whether Buckley was sane at such time. Additionally, the record before us shows that Buckley had some degree of mental illness at the time of these offenses, plus he had been hospitalized on four occasions for mental health matters in the 10 months preceding the crimes. Therefore, we cannot determine this claim on the record before us.

***9** Buckley asserts that trial counsel also provided ineffective assistance for failing to plead or pursue the defense of not responsible by reason of insanity. For the same reasons that we outlined with respect to the previous claim of ineffectiveness, we are unable to resolve this claim on the record before us.

Buckley next claims that trial counsel was deficient for failing to object to the district court's receipt of certain portions of the PSI containing "highly prejudicial" statements. For example, one sentence from Buckley's handwritten "Defendant's Statement" in the PSI reads, "My mother would tell you that I didn't want to hurt anyone but me & that I'm sorry for causing the trauma that I did, but she's wrong." The law is clear that a sentencing judge may consider relevant information contained in a PSI to determine an appropriate sentence within the statutorily authorized penalty, punishment, or disposition applicable to the crime for which the defendant has been convicted. *State v. Clear*, 236 Neb. 648, 463 N.W.2d 581 (1990). Thus, even if Buckley's trial counsel had objected to these statements made by Buckley contained in the PSI, such objection would have been overruled. As such, counsel's failure to object was not deficient nor would the lack of such objection be prejudicial. This claim is resolved against Buckley as being without merit.

The fifth and sixth claims of ineffectiveness relate to trial counsel's alleged failure to offer mitigating evidence at sentencing. However, even if true, these matters do not, and could not, meet the standard of prejudice in a plea-based effectiveness claim—that but for counsel's ineffectiveness he would not have entered the plea but would have insisted on going to trial. See *State v. Dawn*, 246 Neb. 384, 519 N.W.2d 249 (1994). Therefore, we resolve the fifth and sixth ineffectiveness claims against Buckley.

The final claim of ineffectiveness is for counsel allegedly pressuring Buckley into accepting the plea agreement without fully advising Buckley of the consequences of the plea. The record clearly shows that Buckley was properly advised by the court of the penal consequences of his pleas to the kidnapping charges, and thus, even if counsel did not advise him about the consequence of these pleas, he was not unaware of such. As to the consequences of the plea with respect to the use of a firearm charge, although counsel stated in Buckley's presence at sentencing that "we understand that the sentence on the use of a firearm has to be consecutive to any other sentences imposed," that statement standing alone is simply not enough for us to conclude that Buckley was actually advised by trial counsel of the consequences of his plea to that crime, or that Buckley received ineffective advice regarding the plea. As such, we find that the record is insufficient for us to adequately review this ineffectiveness of counsel claim.

Were Sentences Imposed Excessive?

Buckley was sentenced to concurrent terms of 30 to 50 years' imprisonment on kidnapping counts I and II; he was sentenced to concurrent terms of 30 to 50 years' imprisonment on kidnapping counts III and IV, to run consecutive to the sentences on counts I and II; and for count VII, use of a firearm, he was sentenced to 20 to 30 years' imprisonment, to run consecutive to all other sentences. Thus, his cumulative sentence was 80 to 130 years' imprisonment. He claims the sentences are excessive, including the imposition of the consecutive sentence for some of the kidnapping convictions. We disagree.

***10** Buckley's sentences are within the statutory limits. Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Losinger*, 268 Neb. 660, 686 N.W.2d 582 (2004). The rules concerning sentence review are well established:

> In considering a sentence to be imposed, the sentencing court is not limited in its discretion to any

> mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.... Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.... A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence.

State v. Anglemyer, 269 Neb. 237, 248, 691 N.W.2d 153, 163 (2005) (citations omitted). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005).

Buckley entered a bank wielding a sawed-off shotgun. He took numerous people hostage, threatened them with death, and held some of them for over 2 hours. During this time, he engaged in a "stand-off" with police, including a SWAT team, and sought publicity to air his grievances relating to his former employer. He indicated that his end goal was to commit suicide by having the police kill him, and to achieve notoriety in doing so.

The PSI reveals the severe and lasting psychological trauma to which various hostages were subjected—including attempts to make "final" calls to their loved ones. One of the victim impact statements in the PSI states, "I will never be the same. He took away our sense of security in our workplace and has made me a completely different person. I do not trust strangers not to do something bad. I have been on medication for anxiety so I can function in a normal capacity," Another victim expressed in her victim impact statement:

> Today I keep a close eye on the people that enter the bank. I get nervous when it is someone who looks a little different. I am tuned into the noises that people make and the sounds coming from the lobby, all things that were just background noise before are now front and center in my mind. I see people who remind me of ... Buckley, or who are wearing a trench coat and I'm on edge. Even seeing Yoo Hoo or miniature Snickers bars in the grocery store sends my mind spinning back to that day as I watched him casually eating and drinking while he was holding a sawed off shotgun and making threats to kill a hostage.
>
> ***11** The incident will never be erased from my memory, but I am determined to keep it from having a lasting negative effect on my life. I truly believe the only way I can accomplish this goal is in knowing that ... Buckley will be locked away safely for the rest of his life.

Yet another victim expressed:

> One of the worst moments for me was when I used my boss' phone to text my mom.... All I said to her was there was a gunman in the bank, that I was hiding, and to please pray and that I loved her. When she replied I could tell she was upset, so I called her and talked to her quietly.... When I hung up the phone, I was a mess, because I realized that I may have just talked to my mom for the last time. I realized that may have been the last chance I had to tell her I love her. No one should have to say goodbye like that.

That same victim stated, "There isn't a day that goes by that I don't think about this.... When you experience something this traumatizing, it just doesn't go away."

While Buckley has no prior criminal history, he obviously terrorized his hostages, and had no regard for the harm he was inflicting on them in the guise of obtaining a forum to

rail against his employer. His victims faced a sawed-off shotgun wielded by an angry, distraught, and unpredictable criminal for over 2 hours.

There is no doubt that the cumulative sentences are severe as even with "good time" he will serve 40 years in prison. However, the fact that he did not kill anyone is hardly the basis for a finding that the sentences were excessive given the magnitude and seriousness of the crimes of which Buckley stands convicted. The test here is not what sentence we would have imposed, but considering the factors outlined, whether the trial court has abused its discretion in its sentencing decision. The psychological examination of Buckley detailed in the preceding section cannot be ignored, and a number of statements and threats contained therein are very ominous and reveal a person who poses a substantial and continuing danger to society. The public is entitled to be protected from Buckley. We cannot say that the sentences imposed were an abuse of discretion, including the court's imposition of sentences on counts I and II that run consecutively to the sentences imposed on counts III and IV. See *State v. Tweedy*, 196 Neb. 246, 247, 242 N.W.2d 626, 627 (1976) ("[w]e have consistently held that it is within the discretion of the [d]istrict [c]ourt to direct that sentences imposed for separate crimes be served consecutively"). This claim is without merit.

CONCLUSION

For the foregoing reasons, we remand the cause to the district court for Buffalo County with directions to follow the procedure of a "*Curnyn* remand." And, in keeping with the aforementioned teachings of *State v. Jackson*, 220 Neb. 656, 371 N.W.2d 679 (1985); *State v. Fischer*, 218 Neb. 678, 357 N.W.2d 477 (1984); and *State v. Lewis*, 192 Neb. 518, 222 N.W.2d 815 (1974), we resolve Buckley's two allegations of abuse of discretion regarding his sentences against him, as well as his claims that trial counsel was deficient for failing to (1) retain a second mental health expert to challenge Dr. Meidlinger's psychological evaluation, (2) object to portions of the PSI, and (3) offer certain mitigating evidence at sentencing.

***12** REMANDED WITH DIRECTIONS.

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