21-124048-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

JEFFERY D. NELSON,

Movant / Appellant,

vs.

STATE OF KANSAS,

Respondent / Appellee.

On Appeal from the District Court of McPherson County
Honorable John B. Klenda, District Judge
District Court Case No. 2018-CV-000052

BRIEF OF THE APPELLANT

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ORAL ARGUMENT REQUESTED

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Nature of the Case

Jeffery Nelson appeals from the denial after a limited evidentiary hearing of a K.S.A. § 60-1507 motion alleging ineffective assistance of post-conviction counsel and a claim under *Brady v. Maryland*, 373 U.S. 83 (1963).

In 2008, a jury convicted Mr. Nelson of first-degree murder, burglary, and forgery, and he was sentenced to a "hard 50" life sentence. *See State v. Nelson*, 291 Kan. 475, 476-79, 243 P.3d 343 (2010). The Supreme Court affirmed the convictions but ordered resentencing. *Id.* at 488. He again was sentenced to the "hard 50," which the Supreme Court then affirmed. *See State v. Nelson*, 296 Kan. 692, 695, 294 P.3d 323 (2013).

Mr. Nelson then filed a timely *pro se* § 60-1507 motion alleging ineffective assistance of trial and appellate counsel. *See Nelson v. State*, No. 114,435, 2017 WL 462403 at *3 (Kan. App. Feb. 3, 2017) (unpublished). Michael Whalen was appointed to represent him. *Id.* at *1. Mr. Whalen later testified that despite having seven weeks to amend the *pro se* motion, which he had done for private clients, he did not obtain prior counsel's files and made no investigation outside the claims in Mr. Nelson's *pro se* motion, because he believed he had no duty to do so as appointed counsel (R3 at 21, 41-42, 57-62). Relief was denied, and this Court affirmed.

Within one year of *Nelson III*, Mr. Nelson filed a § 60-1507 motion alleging ineffective assistance by Mr. Whalen in failing to investigate and discover meritorious post-conviction claims (R1 at 4). After a limited hearing at which Mr. Whalen testified (R3), the court denied relief, holding Mr. Whalen "had no duty to raise additional issues not raised in [Mr.] Nelson's original pro se motion" (R1 at 169). Mr. Nelson appeals (R1 at 171).

Statement of the Issues

First issue: The district court erred in holding Mr. Nelson's appointed K.S.A. § 60-1507 counsel, Michael Whalen, had no duty to investigate and raise claims not in Mr. Nelson's original *pro se* motion, requiring a full evidentiary hearing on Mr. Nelson's claims that Mr. Whalen rendered ineffective assistance. Mr. Nelson had a right to effective assistance of appointed § 60-1507 counsel under the *Strickland* standard, including the duty to engage in a reasonable investigation before deciding not to seek to amend the *pro se* motion. Mr. Nelson now is entitled to an evidentiary hearing to prove Mr. Whalen's failure to investigate and raise the claims he would have discovered prejudiced him.

Second issue: The district court erred in denying Mr. Nelson a full evidentiary hearing on his *Brady* claim that the prosecution failed to disclose evidence favorable to the defense about its witness Keith Hewitt, which Mr. Nelson did not discover until 2018.

Statement of Facts

A. Underlying criminal case

1. Charges

In 2007, Jeffery Nelson was charged in the District Court of McPherson County with the first-degree murder of his stepfather, Stanley Swartz, the burglary of Mr. Swartz's residence, and three counts of forgery for using checks stolen from Mr. Swartz. *State v. Nelson*, 291 Kan. 475, 476-79, 243 P.3d 343 (2010) ("*Nelson I*"). Attorney Stephen Ariagno entered his appearance as retained counsel on April 30, 2007, before the murder charge was added (R3 at 93). Upon it being added, the court appointed him to represent Mr. Nelson in the murder case. *Nelson v. State*, No. 114,435, 2017 WL 462403 at *3 (Kan. App. Feb. 3, 2017) (unpublished) ("*Nelson III*").

In *Nelson I*, the Supreme Court summarized the State's case against Mr. Nelson as this:

> The relevant events occurred over a 3-day time span. On [April] 24, 2007, Nelson went to the house of his stepfather Swartz, just as Swartz was getting ready to leave for work. Swartz indicated Nelson was not welcome and waited for Nelson to leave before going to work. Nelson returned while Swartz was at work and broke into the garage. Nelson used a ladder to crawl through an attic space connecting the garage to the house because the garage did not have direct access to the house. Once inside the attic space, the ceiling buckled and Nelson fell through, creating a hole. When Swartz returned home after work, Nelson was gone. Swartz reported the break-in to police and said his checkbook was missing.
>
> At 9:38 p.m. that same day, Nelson used an ATM to deposit a $5,000 forged check from Swartz' account. Nelson then picked up his friend, Keith Hewitt. They drove to Wal-Mart, and Nelson

bought a baseball bat. As they were leaving the parking lot, Nelson asked Hewitt if he would help him beat up Swartz. Hewitt testified at trial that he talked Nelson out of this. The two then went to a club. Nelson took Hewitt home at 2 a.m., but Nelson returned at 3 a.m. and offered Hewitt $500 to help him "take care of" Swartz. Hewitt refused.

The next day, April 25, 2007, Nelson and Swartz had a chance encounter at Wal-Mart that became heated, but not physical. Sometime later that day Nelson deposited a $100 forged check from Swartz' account into his friend Misty Sauder's account. At around 10 p.m. Nelson asked Amber Moore, a girl he was dating, if she wanted to watch a movie. Moore picked Nelson up at his grandparents' house; he asked her if she would think poorly of him if he beat someone up; and then he asked her to drive him by Swartz' employer to see if his truck was in the parking lot. It was. Nelson then asked Moore to drive him back to his grandparents' house where he retrieved the bat. He told Moore he needed the bat for protection because he was going to beat up Swartz.

Moore and Nelson drove by Swartz' workplace again to make sure Swartz' truck was still there, and then Moore dropped Nelson off at Swartz' house. He told Moore to tell him when Swartz was driving home. Swartz returned home around 11 p.m. Moore believed Nelson was hiding in the bushes. She drove around until 1 a.m., when she told Nelson she was going home. She testified Nelson told her he "could not do it," and they went back to Moore's house. At around 2:30 a.m., Nelson borrowed Moore's car, took the baseball bat, and said he was returning to Swartz' home.

Nelson disputes what happened next. The State contends Nelson entered the home, discovered Swartz sleeping in his bed, and hit him on the back of the head while he slept. The coroner testified Swartz' death was caused by a blunt force trauma to the head, and there were no defensive wounds. A detective testified there was no evidence of a struggle in the home. Nelson's defense theory was that Swartz let him into his house, they fought,

Nelson tried to leave, and Swartz pulled him back into a fight. Finally, Nelson grabbed the bat, Swartz reached for it, and Nelson hit him with it. This defense theory is based on varying statements Nelson gave the police. Nelson did not testify at trial.

Initially, Nelson told a detective he got into a fight with Swartz between 11:30 and 11:45 p.m. on April 25. He said they fought over the bat and he hit Swartz with it. He said Swartz was fine when he left. Nelson later added greater and sometimes conflicting details about the physical altercation. This portion of the interview is more difficult to follow, but begins with Nelson saying that he went into a room in Swartz' house and found the bat. Swartz was standing in the room's doorway. Nelson chopped at Swartz with the bat, and Swartz backed into his bedroom. Swartz antagonized Nelson by saying he had better hit him hard, and Nelson told Swartz not to give him an excuse. Nelson then approached Swartz, and Swartz reached for the bat, eventually catching it. Nelson pushed Swartz, and he "finally" hit Swartz several times with the bat. He said Swartz ended up on the bed, lying on his back and side. Nelson told the detective he went to Swartz' house to "fucking end the animosity and all the bullshit and all the shit [Swartz] was doing."

Later in the same interview, after additional prodding from the detective, Nelson said he was going to tell the truth about what happened. Nelson admitted he brought the bat with him and did not find it in a room in Swartz' house. At some point, Nelson told a detective it was kind of hard to walk around the corner, look in the bathroom, and close the door while holding the bat without it being obvious. Then Nelson said Swartz asked if he was hiding something, and Nelson tried to "play it off like I wasn't doing anything." Nelson grabbed the door handle and pulled it. Swartz pushed him twice and slapped him on the head. Then Nelson said he pushed him back, pulled out the bat, and hit him. Nelson continually stated there was no blood when he left.

Moore testified at trial that Nelson returned to her house around 6:30 a.m. that morning, April 26. She said Nelson was pale and told her he thought he killed Swartz. Later that day, Swartz was

> discovered on his couch by a coworker when Swartz did not show up for work. Swartz was alive but unresponsive. There were pools of blood on Swartz' bed, pillow, and in the master bedroom; blood was found going from the bedroom, down the hallway, and in the bathroom; and there were sheets that trailed blood through the house to the couch.
>
> Also that day, Nelson deposited a $400 forged check from Swartz' account. Nelson then dropped off an apartment rental application and test drove a BMW at a dealership. Nelson told Moore he was going to sell Swartz' vehicles for a down payment. While Nelson was occupied with the car, Moore received a phone call that Swartz had been taken to the hospital, and everyone suspected Nelson beat him. Moore and Nelson left the dealership. Moore testified that she and Nelson retrieved the clothes Nelson was wearing at the time he hit Swartz with the bat, got the bat out of a dumpster where Nelson had stashed it, drove to the country, and discarded the items. Moore later led police back to retrieve these items.
>
> On May 19, 2007, Swartz died from complications arising from the head injuries.

291 Kan. at 476-79.

2. Pretrial proceedings

On August 21, 2007, Mr. Ariagno filed a motion to determine Mr. Nelson's competency to stand trial, noting Mr. Nelson had a history of mental illness and had been hospitalized at Prairie View (R1 at 108-09). At a hearing that day, Mr. Ariagno told the court Mr. Nelson's competency to stand trial and his mental state at the time of the crimes were "issues of interest" (PCAR20[1] at 6). He said he would pursue the "mental state" issue

[1] The record in Mr. Nelson's post-conviction appeal in No. 101,065 is cited "PCAR." He has requested the district court clerk to add it to the record on appeal in this case, but the clerk has not yet done so.

through the Board of Indigents' Defense Services ("BIDS") (PCAR20 at 6). He also stated he had discussed this issue with Mr. Nelson, and Mr. Nelson's mental state would be "part and parcel" of his defense (PCAR20 at 6). The court ordered a competency evaluation (PCAR20 at 7).

The competency evaluation, which Mr. Ariagno kept in his file, found Mr. Nelson was competent to stand trial, but advised he would benefit from a more in-depth psychological evaluation (R1 at 50, 110-12). Mr. Ariagno's file also contained a copy of a psychological evaluation Prairie View performed on Mr. Nelson in 1997, diagnosing him with major depressive disorder, Tourette's Disorder, and oppositional defiant disorder, as well as a possible learning disability (R1 at 113-15). The file also contained an admission summary from Prairie View from 2006, which referred to Mr. Nelson's sexual abuse as a child by a babysitter (R1 at 117-21). It also contained letters and an e-mail from Misty Souder in August and July 2007 and July 2008 mentioning Mr. Nelson's sexual abuse by Mr. Swartz and by a babysitter, and asking him to look into a forensic psychologist (R1 at 122-24).

On October 24, 2007, Mr. Ariagno and the prosecutor jointly moved for an order directing the Department of Social Rehabilitation Services to produce all records concerning Mr. Nelson, which the court granted (R1 at 125-26). But Mr. Ariagno never consulted with any expert regarding this or pursued further investigation of a mental disease or defect defense (R1 at 51).

A preliminary hearing was held October 9, 2007 (PCAR11). Amber Moore testified she had entered into an immunity agreement with the prosecution to avoid being charged as an accomplice to first-degree murder,

and she had made statements beforehand (PCAR11 at 52, 109-10). Mr. Ariagno's file contained an e-mail from July 2008 informing him Ms. Moore had told others that the prosecutor and detectives were "threatening" her and she had wanted to speak with Mr. Ariagno about that (R1 at 135). On April 27, 2007, Ms. Moore had told police she denied any knowledge of or involvement in the confrontation between Mr. Nelson and Mr. Swartz, and when asked to take a polygraph exam, she answered she would need to consult an attorney (R1 at 134). Later that same day, she gave written and oral statements implicating Mr. Nelson in Mr. Swartz's injuries (R1 at 54).

At the preliminary hearing, Detective Mark Brinck testified that when he questioned Mr. Nelson on May 7, 2007, Mr. Nelson already was represented by Mr. Ariagno and invoked his right to counsel (PCAR11 at 143). Mr. Ariagno told the court he would move to suppress Mr. Nelson's statements to Detective Brinck (PCAR11 at 149). He never did (R1 at 60).

At a hearing January 24, 2008, Mr. Ariagno argued statements Mr. Swartz made to law enforcement were testimonial hearsay whose admission would violate the Confrontation Clause, but the district court held that per *State v. Corrigan*, 10 Kan.App.2d 55, 691 P.2d 1311 (1984), they were admissible because Mr. Nelson was responsible for Mr. Swartz's death and therefore waived had forfeited his objections (PCAR12 at 24-29). The prosecutor told the court Mr. Swartz's hearsay statements to police would play a "substantial role in this case" (PCAR12 at 28). Mr. Ariagno said he believed the court's ruling was correct, and he would not be objecting to the hearsay statements (PCAR12 at 26-29). At trial, law enforcement officers,

detailed below, testified to hearsay statements of Mr. Swartz without objection (AR15 at 143-51, 161-63, 164-66, 181-82, 227-28).

Mr. Ariagno's file also contains information that prosecution witness Keith Hewitt was placed in protective custody for mental health issues in 2006 and 2007, including forms stating he was "suffering from a severe mental disorder," "lacks capacity to make an informed decision concerning treatment," and "is likely to cause harm to himself or others" (R1 at 140-45). In September 2007, Mr. Hewitt was charged with drawing a check intending to defraud, which was pending when he testified at Mr. Nelson's trial (R1 at 146-47). After the trial, Mark Rudy, one of Mr. Nelson's prosecutors, dismissed the charge (R1 at 147). No information about this is in Mr. Ariagno's file or the discovery (R1 at 65).

3. Trial

The case proceeded to a jury trial in January 2008 (AR12[2] and AR13). *Nelson III*, 2017 WL 462403 at *3. But on the second day of trial, the court declared a mistrial on Mr. Ariagno's motion after jurors reported they knew witnesses in the case (AR13 at 131-44). *Id.*

The case then was tried to a jury over five days in April 2008 (AR14 through AR17). *Id.* The State presented these witnesses:

- Deborah Johnson, a pathologist who testified about the autopsy on Mr. Swartz, which determined his death was a homicide caused by complications of the blunt force trauma to the head (AR15 at 27-83);

[2] The record in Mr. Nelson's appeal in No. 101,065 from his conviction and sentence is cited "AR." He has requested the district court clerk to add it to the record on appeal in this case, but the clerk has not yet done so.

- Steven Smith, a trauma surgeon who testified about Mr. Swartz's injuries, hospitalization, and death (AR15 at 85-92);
- Zachary Biegler, a paramedic who responded to the initial 911 call and testified to Mr. Swartz's status and injuries (AR15 at 96-117);
- Fergus Thornton, a physician who testified to the effects of Mr. Swartz's injuries (AR15 at 118-24);
- Todd Martens, a McPherson police officer who testified to the scene in Mr. Swartz's home April 26, 2007 (AR15 at 132-38);
- Mikel Golden, a McPherson police detective who testified he responded to Mr. Swartz's residence April 24, 2007, due to a theft of checks and investigated the burglary and theft (AR15 at 141-58);
- Shawn Gallagher, a McPherson police officer who testified to what Mr. Swartz told him about the theft of the checks (AR15 at 180-82);
- Dawn Rohr, a Bank of America employee who testified one of the stolen checks was deposited via ATM in Mr. Nelson's account the evening of April 24, 2007, and another April 25 with a teller (AR15 at 183-97);
- Tasha Dauer, a People's Bank employee who testified Mr. Nelson deposited checks from Mr. Swartz made out to Mr. Nelson on separate occasions two days apart (AR15 at 205-12);
- Patricia Unruh, a Bank of America teller who testified Mr. Nelson presented a check to her from Mr. Swartz to cash April 25, 2007 (AR15 at 219-23);

- Kay Graham, a Great Plains Federal Credit Union employee who testified Mr. Swartz came in April 25, 2007, to stop payment on the stolen checks (AR15 at 225-27);
- Keith Hewitt, who testified to interactions with Mr. Nelson between April 24 and 26, 2007 the Supreme Court recounted in *Nelson I*, and to his interactions with and statements to police in the following week (AR15 at 236-51);
- Amber Moore, a woman who said she was dating Mr. Nelson in April 2007, and testified under an immunity agreement with the prosecution from October 2007, who testified to interactions the Supreme Court recounted in *Nelson I* (AR16 at 10-81). On cross-examination, she testified law enforcement had threatened to take her children if she did not cooperate, and said, "if you decide to tell us you can go free" (AR16 at 58-59). During her testimony, she also asked whether Mr. Ariagno's notes reflected "how [Mr. Nelson] sent two women to come after me?" (AR16 at 75). The court sustained Mr. Ariagno's objection to this and instructed the jury to disregard (AR16 at 75). Mr. Ariagno did not use Ms. Moore's initial statements to law enforcement to impeach her testimony. During deliberations, the jury requested a read-back of Ms. Moore's testimony (AR16 at 183-84).
- Calvin Bruner, Mr. Swartz's coworker who testified to finding Mr. Swartz on April 26, 2007, and calling 911 (AR16 at 84-90);
- Todd Martens, a McPherson police officer who testified about investigating a burglary of checks from Mr. Swartz's home in August

2000, in the course of which Mr. Swartz told him Mr. Nelson was not to be there and had no permission to take his checks (AR16 at 91-95);

- Mike Terry, a McPherson police detective who testified about investigating the August 2000 check theft, in the course of which Mr. Nelson admitted to having stolen them and forged them, for which he was convicted, and then investigating Mr. Swartz's beating in April 2007 and finding no usable fingerprints (AR16 at 95-182);
- Lisa Burdet, a KBI forensic analyst who testified she tested some items from the scene of Mr. Swartz's beating for DNA but was unable to find any DNA or blood other than Mr. Swartz's (AR16 at 183-203);
- The State was allowed to admit Mr. Nelson's past convictions for burglary and forgery (AR17 at 3); and
- Mark Brinck, a McPherson police detective who testified he spoke with Mr. Hewitt and that Mr. Hewitt conveyed the same information he had stated during his testimony, and also that Mr. Nelson had confessed to him what the Supreme Court recounted in *Nelson I*, Mr. Nelson's statement of which was admitted as an exhibit (AR17 at 6-102). During cross-examination, Mr. Ariagno questioned Detective Brinck about Mr. Nelson stating Mr. Swartz had abused him when he was a child and social services had gotten involved (AR17 at 87).

Mr. Ariagno did not present any witnesses for Mr. Nelson (AR17 at 102). He later testified:

> that in preparation for trial he did legal research and reviewed evidence and discovery materials. He also investigated potential witnesses. Ariagno spoke with … potential witnesses but did not believe they had any helpful information. He chose not to call

> any character witnesses because he did not want to open up any character issues at trial. He believed the theory of defense at trial was self-defense, but he did not remember much about the case or how it proceeded.
>
> Ariagno also testified he discussed the case and possible defenses with Nelson. He said he discussed whether Nelson should testify. He advised Nelson that he did not believe it was a good idea but told him he would help Nelson prepare if he did decide to testify.
>
> Ariagno testified he discussed the matter with Nelson and advised him against testifying. He said he told Nelson "it was his decision and his decision alone and he could make whatever decision he wanted, but I told him I didn't think he'd make a very good witness and that he would subject himself to cross examination that I didn't think was a good idea." Ariagno said he would not have said he would 'coach' Nelson, but he did offer to help prepare Nelson if Nelson wanted the help.

Nelson III, 2017 WL 462403 at *15.

In closing argument, Mr. Ariagno argued the jury should convict Mr. Nelson of the forgery counts but acquit him of burglary because there was no evidence of intent to steal at the time he entered the house and acquit him of murder because he had acted in self-defense (AR17 at 157-73). The court agreed to instruct the jury on self-defense, but denied an instruction on voluntary manslaughter by imperfect self-defense (AR17 at 106-08).

The jury convicted Mr. Nelson of all offenses as charged. *Nelson I*, 291 Kan. at 479. The court sentenced him to a "hard 50" sentence of life imprisonment without possibility of parole for 50 years on the murder count, finding three aggravating factors under K.S.A. § 21-4636. *Id.*

4. Appeal, remand, and second appeal

Mr. Ariagno filed a timely notice of appeal to the Supreme Court, and Meryl Carver-Allmond of the Appellate Defender Office was appointed to represent Mr. Nelson on appeal. *Nelson III*, 2017 WL 462403 at *3.

Ms. Carver-Allmond raised four issues on appeal: (1) a challenge to the denial of the imperfect self-defense instruction; (2) a challenge to the inclusion of a PIK instruction allowing the jury to infer intent for the consequences of voluntary acts; and (3) a challenge to the admission of Mr. Nelson's 2000 burglary and forgery convictions; and (4) a challenge to the district court's imposition of the "hard 50" sentence under an improper evidentiary standard. *Nelson I*, 291 Kan. at 479-88.

In November 2010, the Supreme Court affirmed Mr. Nelson's convictions. It held he was not entitled to a self-defense instruction at all, as "under any version of" his story, "a reasonable jury could not have concluded [he] had an honest belief that Swartz was threatening imminent use of unlawful force justifying Nelson to employ deadly force." *Id.* at 481-82. It held the PIK instruction was proper. *Id.* at 484-85. It held Mr. Ariagno did not preserve the challenge to the admission of the prior convictions, because while he objected when the State first sought to admit them, he did not object when Officer Terry testified about them. *Id.* at 485-86.

But the Supreme Court reversed the "hard 50" sentence. It held the district court used the wrong standard in weighing aggravating factors, and remanded "to determine whether aggravating circumstances exist under a preponderance of the evidence standard." *Id.* at 488.

On remand in February 2011, Mr. "Ariagno informed the district court that Nelson had expressed concerns regarding his representation of Nelson during the jury trial. Ariagno believed a conflict existed based on Nelson's assertion that he was ineffective. The court granted Ariagno's request to withdraw and appointed another attorney," Kevin Loeffler, "to represent Nelson at his resentencing hearing." *Nelson III*, 2017 WL 462403 at *3.

The district court again sentenced Mr. Nelson to a "hard 50" sentence. *Id.* At the resentencing hearing, Mr. Nelson's sister, Darcy Holub, and his grandmother, Doris Nelson, testified Mr. Swartz had abused Mr. Nelson growing up, and Mr. Nelson alleged Mr. Swartz had sexually abused him, too (PCAR23 at 28). The court found the aggravating factors outweighed the mitigating factors, but found one mitigating factor was physical abuse by Mr. Swartz, though not the allegations of sexual abuse such that "the defendant was under the influence of extreme mental or emotional disturbances" under K.S.A. § 21-4637(b) (PCAR2 at 15).

Mr. Nelson again appealed to the Supreme Court, and Ms. Carver-Allmond again was appointed to represent him. *Id.* at *4. She argued the district court had abused its discretion in imposing the hard 50 sentence. *State v. Nelson*, 296 Kan. 692, 695, 294 P.3d 323 (2013) ("*Nelson II*"). The Supreme Court affirmed the sentence. *Id.* It issued its mandate on March 11, 2013. *Nelson III*, 2017 WL 462403 at *3.

B. Proceedings in the first post-conviction relief case

1. Initial proceedings

On December 24, 2013, Mr. Nelson filed a handwritten *pro se* K.S.A. § 60-1507 motion on a Judicial Council form (R4 at 59-62). He alleged Mr. Ariagno was unconstitutionally ineffective by failing: (1) to communicate and consult with him; and (2) to interview and investigate witnesses including his sister, who would have provided testimony to past abuse by Mr. Swartz (R4 at 55-57). He also alleged Ms. Carver-Allmond was ineffective by failing: (1) to raise a claim that trial counsel was ineffective; (2) to raise a claim of instructional error as to a different jury instruction; and (3) to file a petition for a writ of certiorari in the U.S. Supreme Court due to certiorari having been granted in the interim in *Alleyne v. United States*, 570 U.S. 99 (2013), impacting the fact-finding leading to his "hard 50" sentence (R4 at 55-57).

On January 22, 2014, the district court ordered an evidentiary hearing on Mr. Nelson's § 60-1507 motion and appointed attorney Michael Whalen to represent him, stating "Mr. Nelson is entitled to assistance of counsel in connection with the motion" under § 60-1507 and "I am hereby appointing Mr. Whalen as counsel for Mr. Nelson in connection with the motion" (R4 at 96). On February 18, 2014, the Paul E. Wilson Project for Innocence & Post–Conviction Remedies at the University of Kansas School of Law filed a brief in support of the claim concerning *Alleyne*, to which an affidavit of Ms. Carver-Allmond was attached (R4 at 63-95).

2. Michael Whalen's representation

Mr. Whalen later testified at a limited evidentiary hearing discussed below at p. 27. He said had practiced law for 25 years and handled more than 40 § 60-1507 cases at the district court level, both retained and appointed (R3 at 5-6). He said that even when retained for a § 60-1507 representation to file the initial motion itself alleging ineffective assistance of counsel, he only obtained the prior attorneys' files "maybe fifty percent of the time" and would hire an investigator or experts "if it was necessary" (R3 at 8). Still, he acknowledged ineffective assistance claims are not necessarily apparent from the court record, requiring him to go outside the record and investigate (R3 at 12-13). He said he was only being paid $750 (R3 at 111).

Mr. Whalen testified that when he received the letter from the district court appointing him to represent Mr. Nelson, it meant "there is a justiciable issue that's been presented by the" motion (R3 at 11). He acknowledged this meant he had to provide Mr. Nelson effective assistance under the *Strickland* standard, though he said *Strickland* did not include a duty to investigate (R3 at 11-12, 118-19). He acknowledged that because the Supreme Court issued its mandate in *Nelson II* March 11, 2013, he had until March 11, 2014, in which to file an amended § 60-1507 motion, which was "a little less than two months" from when he had been appointed (R3 at 20-21).

At the end of his representation in the district court, Mr. Whalen submitted a claim to BIDS for reimbursement for his services (R3 at 13-14; R4 at 49-52). He said that while he wrote off some things he did, like some e-

mails or phone calls, the BIDS form recorded "the majority of everything that I did" (R3 at 14-15).

On January 26, 2014, four days after Mr. Whalen was appointed, Mr. Nelson sent Mr. Whalen a letter from a prison in Pontiac, Illinois, where he was housed at the time (R3 at 23-25; R4 at 1). Mr. Nelson stated he had a supplemental § 60-1507 draft he wanted to file, he had several witnesses who would testify, he anticipated Mr. Whalen interviewing them, and his family were all involved, particularly his grandmother, with whom Mr. Nelson gave Mr. Whalen permission to speak (R3 at 23-25; R4 at 1-3).

Mr. Whalen claimed he did not have sufficient time to prepare an amended § 60-1507 motion between being appointed and March 11, 2014 (R3 at 108). But his BIDS form does not reflect any work in the case at all until February 14, 2014 (R4 at 50). He did not pick up the court file until May 2014, and before that his work consisted only of some two hours of correspondence and review (R4 at 50).

On March 3, 2014, Mr. Nelson wrote to Mr. Whalen expressing dissatisfaction and stating if Mr. Whalen did not want to represent him, please let him know and he would request different counsel (R3 at 26-29; R4 at 4-6). He discussed potential witnesses that were missing from trial, including his sister, and what they would testify, and offered more to testify to Mr. Swartz's character as a "creep" and "stalker" (R3 at 26-29; R4 at 4-6).

On April 9, 2014, Mr. Nelson wrote to Mr. Whalen stating Mr. Ariagno did not allow him to testify or call a single witness, despite Mr. Nelson giving him several witnesses, and indeed left town the day before the prosecution

resting to attend a concert (R3 at 29-32; R4 at 7-10). He gave Mr. Whalen the names and telephone numbers of three witnesses, including his grandmother and his two sisters, and said what he expected them to say (R3 at 29-32; R4 at 7-10).

On June 24, 2014, Mr. Nelson wrote to Mr. Whalen about "another potential issue for me to raise on a supplemental motion," the failure to get a warrant to go through his phone (R3 at 32-33; R4 at 11-12). Mr. Whalen wrote him back June 25, stating he could not look into any issue that was not part of Mr. Nelson's "petition," including Mr. Ariagno preventing Mr. Nelson from testifying (R3 at 34-35; R4 at 14). Mr. Whalen also stated, "I am very good at what I do and I am very busy because of it. I can't give every client personal attention they desire. I will do the best that I can to be sure that you have the best representation and the best opportunity for success" (R3 at 34; R4 at 13). Mr. Whalen testified he was very busy at the time (R3 at 34).

On July 20, 2014, Mr. Nelson wrote to Mr. Whalen stating he had prepared a supplemental § 60-1507 motion on the Fourth Amendment phone issue he was ready to mail to Mr. Whalen (R3 at 43-44; R4 at 15-17). He wrote more letters to Mr. Whalen about this issue July 25 and July 28, 2014 (R3 at 44-47; R4 at 18-21). He stated that because he was no longer *pro se*, the district court would not accept a filing from him, but instead it would have to come from Mr. Whalen (R3 at 45; R4 at 20).

On August 3, Mr. Nelson wrote to Mr. Whalen pointing out again that he and Mr. Ariagno never discussed a defense or witnesses, even though he gave Mr. Ariagno names and telephone numbers of witnesses, including

Martina Brison, a person who Mr. Swartz had abused, discussing this in detail and asking Mr. Whalen to contact Mr. Nelson's family about this and also obtain a social services file detailing abuse Mr. Nelson and others had suffered at Mr. Swartz's hands (R3 at 48-51; R4 at 25-34). Mr. Whalen did not attempt to get any social services records, but said he did receive an e-mail from Ms. Brison detailing her testimony, to which he said he responded, though his response was not in his file (R3 at 51-54; R4 at 37-48). He said he never attempted to interview Ms. Brison (R3 at 54-55). He said his e-mail response was that he "did not believe the issues or the information that she raised was necessarily pertinent to the petition that was filed" and was not sure her testimony would be admissible (R3 at 55). He also did not ask Mr. Ariagno whether he had contact with Ms. Brison (R3 at 55).

Mr. Whalen acknowledged Mr. Nelson repeatedly asked him to amend or supplement his *pro se* § 60-1507 motion, but he believed that any issue not stated in that motion was not something he had to address (R3 at 35, 55-56). He said he limited himself solely to what was in Mr. Nelson's "petition" (R3 at 115-17). He said he never discussed this with Mr. Nelson (R3 at 56).

Mr. Whalen said Mr. Nelson's motion only could be amended after the one-year limitation period in § 60-1507 when it related back to the original petition or fit the "manifest injustice" exception (R3 at 57-58). He stated he had done both of these in other cases for "private clients" (R3 at 61-62, 121). But he said this did not apply in Mr. Nelson's case, because "I was not appointed to file a new petition in this case. I was appointed to represent [Mr. Nelson] on the petition that was filed," and therefore he did not have to

file an amended § 60-1507 or seek to file new issues for manifest injustice (R3 at 58). He also claimed he could strategically decide not to investigate here because it was "a case of overwhelming evidence" (R3 at 59). Still, he acknowledged that in his reply to the State's response and at the § 60-1507 evidentiary hearing, he tried to get in Mr. Ariagno not allowing Mr. Nelson to testify even though it was not in Mr. Nelson's § 60-1507 motion (R3 at 64-66; R4 at 47).

The record of the pleadings and transcripts in Mr. Nelson's case exceeded 2,000 pages, and while Mr. Whalen initially said he "believed" he had read all of it, the only entries in his BIDS form related to this were 1.9 hours one day reviewing ineffective assistance issues and 2.7 hours reviewing the court file and jury instructions (R3 at 67-69; R4 at 50). When asked about this, he said he only would have read what was "relevant," and he could determine that without reading the whole record (R3 at 70).

Mr. Whalen said he believed the evidence against Mr. Nelson was "overwhelming," with "bad facts" including a confession (R3 at 37). He initially said he believed he had spoken with Jennifer Nelson, one of Mr. Nelson's sisters, as well as with Mr. Nelson's grandmother, Doris Nelson (R3 at 38-39). But after going through his file, he found no references to Jennifer Nelson, nor were there any references in his BIDS claim form, and he said he did not recall speaking with Jennifer Nelson (R3 at 39-41). His BIDS claim form only had one twelve-minute call to Doris Nelson in August 2014 (R3 at 42; R4 at 51). He stated he spoke with Mr. Ariagno "once or twice" but did not recall what they discussed (R3 at 40). His BIDS claim form detailed only

one 18-minute call to Mr. Ariagno in September 2014 (R3 at 41; R4 at 51). He never obtained Mr. Ariagno's or Mr. Loeffler's files or BIDS forms (R3 at 41, 74, 82, 102). He never obtained the discovery in the case (R3 at 84).

Still, Mr. Whalen claimed he did read the pretrial transcript where Mr. Ariagno discussed competency and a potential mental health defense, and the trial court told him he would have to make a request through BIDS for that and file a notice of intent to make that defense (R3 at 71). He said he nonetheless did not ask Mr. Ariagno about this, and he did not recall seeing Mr. Ariagno's motion to determine competency in which he discussed Mr. Nelson having psychiatric problems and hospitalizations since 1997, though he did recall seeing a competency report recommending further mental evaluation (R3 at 72-74). But because he never obtained Mr. Ariagno's file, he saw no further information about this, such as psychiatric records (R3 at 74-76). He acknowledged this could be significant and relevant, possibly leading to a forensic evaluation, which he said he had done in other cases and he did not request here (R3 at 76-80). He also acknowledged evidence that Mr. Swartz had sexually abused Mr. Nelson could have been mitigating evidence at resentencing that the district court stated it had not found, but he never considered bringing any claim against Mr. Loeffler for failure to present that evidence (R3 at 102-03).

Mr. Whalen said he "vaguely" remembered Amber Moore entering into an immunity agreement with the State and did not recall that she had admitted law enforcement had threatened to take her children if she did not cooperate (R3 at 82-83). He agreed this potentially could raise a legal issue

as to her testimony's admissibility (R3 at 83). Because he did not obtain the discovery, he did not know she had made two different statements or that she had invoked the right to counsel and was ignored, and did not realize Mr. Ariagno had not used her prior statement to impeach her (R3 at 84-85, 96-97). He did not consider raising an issue as to either of these in representing Mr. Nelson or even ask Mr. Ariagno about them, because they were not part of Mr. Nelson's *pro se* motion (R3 at 85, 96-97). He also did not get a copy of Ms. Moore's immunity agreement or investigate its validity (R3 at 89).

Mr. Whalen said he was unaware whether Mr. Nelson had retained Mr. Ariagno at the time he was interviewed by law enforcement, but after being shown documents from the underlying case agreed Mr. Ariagno appeared April 30 and Mr. Nelson was interviewed May 7 (R3 at 89-93). He said he reviewed the pretrial transcript in which Mr. Ariagno began asking about this, but the prosecutor objected that it was not a suppression hearing and Mr. Ariagno stated he anticipated filing a motion to suppress Mr. Nelson's statement (R3 at 93-94). He said he did not ask Mr. Ariagno about this or consider raising this issue, even though the confession was critical to the case and the "overwhelming evidence" Mr. Whalen said there was (R3 at 93-94).

Mr. Whalen agreed Ms. Moore's testimony that Mr. Nelson sent two women after him, to which Mr. Ariagno did not object, was potentially prejudicial and possibly raised a substantial legal issue (R3 at 95). But he was unaware of it until being questioned in this case and did not ask Mr. Ariagno about it or pursue the issue further (R3 at 95-96).

Mr. Whalen agreed that because he did not obtain Mr. Ariagno's file, he also was "unaware of on at least two occasions prior to trial" that Mr. Hewitt, whose testimony about Mr. Nelson offering him $500 to beat up Mr. Swartz Mr. Whalen agreed was "damaging" to Mr. Nelson, "was found to have a severe mental disorder and was actually entered into protective custody," which could have been used to impeach his testimony (R3 at 97-98). He also was unaware that Mr. Hewitt had a pending misdemeanor theft charge that was dismissed after his testimony by one of the same prosecutors prosecuting Mr. Nelson, which he agreed would have been *Brady* material (R3 at 98-100).

Mr. Whalen knew about witness Lindsay Krehbiel, who would have refuted Mr. Hewitt's testimony about the $500, but he did not contact her (R3 at 100-01). He stated he raised her testimony in the § 60-1507 evidentiary hearing anyway despite it not being in Mr. Nelson's motion (R3 at 100-02).

Mr. Whalen said he recalled the transcript of the hearing about the admissibility of Mr. Swartz's hearsay statements, and was aware that in holding it admissible the district court relied on case law that later was overruled (R3 at 104). He also recalled Mr. Ariagno did not object at trial just to preserve the error (R3 at 104). He acknowledged this can be an ineffective assistance claim, but stated he did not consider raising it (R3 at 105).

Mr. Whalen admitted that he could have amended Mr. Nelson's § 60-1507 to include witnesses not named in it or called witnesses not named in it because that would relate back to the claim in it that Mr. Ariagno had not investigated or called witnesses (R3 at 124). But he "chose not to," including ones he never investigated (R3 at 124-25).

3. Proceedings

The § 60-1507 case proceeded to an evidentiary hearing in September 2014. *Nelson III*, 2017 WL 426403 at *3. The only witnesses were Mr. Ariagno, Ms. Carver-Allmond, Mr. Nelson, and Doris Nelson. *Id.* at *12-16.

After the hearing, the district court denied Mr. Nelson's § 60-1507 motion on all claims. *Id.* at *3. Mr. Nelson timely appealed to this Court, where he remained represented by Mr. Whalen. *Id.* at *1. The only issues Mr. Whalen addressed on appeal were Ms. Carver-Allmond's failure to raise the *Alleyne* claim and Mr. Ariagno's failure to investigate witnesses or provide a defense. *Id.* at *5-17.

This Court affirmed the district court's decision. *Id.* at 18. Mr. Nelson petitioned the Supreme Court for review, which was denied December 22, 2017. *Id.* at *1. This Court issued its mandate December 29, 2017.

C. Proceedings below

On June 15, 2018, through retained attorney David Miller, Mr. Nelson filed a new motion under § 60-1507 (R1 at 4). It raised eleven claims of ineffective assistance of post-conviction counsel by Mr. Whalen in failing to thoroughly investigate the case, interview witnesses, and adequately prepare for the § 60-1507 hearing, and in failing to raise ineffective assistance of counsel claims against Mr. Ariagno or Mr. Loeffler for:

- Failing to raise hearsay and Confrontation Clause objections to testimonial statements of Mr. Swartz to law enforcement;
- Failing to investigate and put on a mental disease or defect defense at trial, and as mitigating evidence at sentencing;

- Failing to object to Ms. Moore's testimony on the basis that her agreement with the prosecution was improper;
- Failing to move to suppress Ms. Moore's involuntary statements to law enforcement;
- Failing to move to suppress Mr. Nelson's confession to law enforcement;
- Failing to move for a mistrial when Ms. Moore testified Mr. Nelson "sent two men after her" to intimidate her from testifying;
- Failing to investigate and impeach Ms. Moore's testimony;
- Failing to investigate and impeach Mr. Hewitt's testimony; and
- Failing to investigate and put on evidence of Mr. Nelson's significant mental health history as mitigating evidence at resentencing.

(R1 at 11-12). In a brief seeking an evidentiary hearing, Mr. Nelson detailed each of these and showed the evidence for each (R1 at 35-70).

Mr. Miller had a forensic psychologist, Dr. Marilyn Hutchinson, Ph.D., perform a complete psychological evaluation of Mr. Nelson in December 2018 (R1 at 127). She diagnosed Mr. Nelson with post-traumatic stress disorder subsequent to childhood sexual abuse, major depression, bipolar II, hypomanic, Tourette's Syndrome, and personality disorder NOS with antisocial and borderline traits (R1 at 131). She concluded that had she been the examining psychologist at the time of Mr. Nelson's trial, she would have testified Mr. Swartz's sexual abuse of Mr. Nelson "was the prime contributor" to the actions Mr. Nelson took when he went to Mr. Swartz's home on April 26, 2007 (R1 at 132). Seeing Mr. Swartz in his underwear "was a very probable trigger to the rage [Mr. Nelson] held for his sexual abuse as a child.

In that moment, he acted without thought or specific intent. This testimony could have been useful to assist the jury and the Court in understanding Mr. Nelson's state of mind at the time of the commission of the crime. It also would have supplied significant mitigating information concerning sentencing" (R1 at 132).

After briefing (R1 at 14-15, 35-70, 86) and argument (R2), the district court ordered a "limited evidentiary hearing" to hear Mr. Whalen's testimony (R1 at 91, 93). The court held the hearing in February 2020 (R3), and invited briefing thereafter (R1 at 98). Neither party submitted any briefing, and instead Mr. Miller proffered evidence in favor of Mr. Nelson's claims that Mr. Whalen rendered ineffective assistance (R1 at 103-48).

On March 27, 2020, the district court issued a decision (R1 at 149), which it amended later that same day (R1 at 160). It denied Mr. Nelson's § 60-1507 motion concerning Mr. Whalen, holding that in a § 60-1507 claim, "[u]ntimely new claims of ineffective assistance of trial counsel cannot be bootstrapped onto timely raised claims of ineffective assistance of trial counsel" (R1 at 169). It held,

> each claim which is the basis for ineffective assistance of counsel could have been raised in Nelson's original pro se motion. The Court agrees that Whalen had no duty to raise additional issues not raised in Nelson's initial motion. There is no claim in Nelson's current motion that Whalen acted ineffectively on any of the issues raised in Nelson's pro se motion. Absent a duty to expand Nelson's pro se motion, Nelson has stated no legal claim for relief.

(R1 at 169).

Mr. Nelson timely appealed to this Court (R1 at 171).

Argument and Authorities

First issue: The district court erred in holding Mr. Nelson's appointed K.S.A. § 60-1507 counsel, Michael Whalen, had no duty to investigate and raise claims not in Mr. Nelson's original *pro se* motion, requiring a full evidentiary hearing on Mr. Nelson's claims that Mr. Whalen rendered ineffective assistance. Mr. Nelson had a right to effective assistance of appointed § 60-1507 counsel under the *Strickland* standard, including the duty to engage in a reasonable investigation before deciding not to seek to amend the *pro se* motion. Mr. Nelson now is entitled to an evidentiary hearing to prove Mr. Whalen's failure to investigate and raise the claims he would have discovered prejudiced him.

Record Location Where Raised

Mr. Nelson's raised this issue in his request for an evidentiary hearing at R1 at 37-42. The State's counterargument is at R1 at 81-85. The district court ruled on this issue at R1 at 169.

* * *

Standard of Appellate Review

"The extent of a movant's statutory right to effective assistance of counsel during a K.S.A. 60-1507 proceeding is a question of law over which this court" has unlimited review. *Robertson v. State*, 288 Kan. 217, 227, 201 P.3d 691 (2009).

* * *

Jeffery Nelson claimed his appointed § 60-1507 counsel, Michael Whalen, rendered ineffective assistance when he failed to investigate and discover meritorious § 60-1507 claims and amend Mr. Nelson's *pro se* § 60-1507 motion accordingly. The district court held Mr. Whalen had no duty to engage in that investigation, and therefore denied Mr. Nelson relief without a

full evidentiary hearing. This was error. A § 60-1507 movant who has been appointed counsel is entitled to the effective assistance of that counsel under the *Strickland* standard, which includes reasonably investigating the movant's case. Mr. Whalen failed that standard, and taking Mr. Nelson's allegations not refuted by the record as true, this prejudiced Mr. Nelson. He now is entitled to a full evidentiary hearing on his claims.

A. A *pro se* § 60-1507 movant who is appointed counsel has the right to effective assistance of that counsel under the *Strickland* framework, which includes a duty to engage in a reasonable investigation of the movant's case to determine whether to amend the *pro se* motion, and the district court erred in holding otherwise.

The district court denied Mr. Nelson's 2018 § 60-1507 motion, holding as a matter of law that prior § 60-1507 counsel had "had no duty to raise additional issues not raised in Nelson's initial [*pro se*] motion" (R1 at 169). Effectively, it held appointed § 60-1507 counsel has no duty to engage in a reasonable investigation of a case before concluding that an amended motion is unnecessary. That is not the law of Kansas.

In *Robertson*, the Kansas Supreme Court stated that while there may be "no constitutional right to effective assistance of counsel in an action pursuant to K.S.A. 60-1507" (citing *Brown v. State*, 278 Kan. 481, 483, 101 P.3d 1201 (2004), and *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)[3]),

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[3] *But see Martinez v. Ryan*, 566 U.S. 1, 8 (2012) (stating, without deciding, that "the Constitution may require States to provide counsel in initial-review collateral proceedings because 'in [these] cases … state collateral review is the first place a prisoner can present a challenge to his conviction'" (alteration and omission in original) (quoting *Coleman v. Thompson*, 501 U.S. 722, 755 (1991)).

"there is a conditional rightto [*sic*] counsel protected by statute." 288 Kan. at 228 (citing K.S.A. § 22-4506(b)). "Once this statutory right to counsel attaches, a movant is entitled to effective assistance of counsel." *Id.* That is, "[o]nce appointed, counsel for a K.S.A. 60-1507 motion must, within the stricture of required candor to the court and other ethical rules, pursue relief for the client." *Id.* at 229.

The "conditional statutory right to the effective assistance of counsel in a K.S.A. 60-1507 proceeding … applies regardless of whether counsel was appointed or retained." *Skaggs v. State*, 59 Kan. App. 2d 121, 132, 479 P.3d 499 (2020) (citing *McIntyre v. State*, 54 Kan. App. 2d 632, 638-43, 403 P.3d 1231 (2017) (citing K.S.A. § 22-4506(b) and (c)). This makes sense, because "[a]n appointed lawyer has the same obligations to the client as retained counsel …." KRPC 6.2 cmt. 3. Either way, "[o]nce this statutory right attaches, a K.S.A. 60-1507 movant is entitled to effective assistance of counsel." *Skaggs*, 59 Kan. App. 2d at 132.

In *Mundy v. State*, the Kansas Supreme Court confirmed the same standards for effective assistance of counsel in criminal cases generally govern those for counsel in a § 60-1507 proceeding:

> [I]n order to establish [a] 60-1507 attorney, once appointed, violated his duty to provide effective assistance of counsel, [a movant] must establish the same elements as she will have to establish in order to show her trial counsel was ineffective under the constitutional standard established by the Sixth Amendment to the United States Constitution. This means that to establish ineffective assistance of either 60-1507 counsel or trial counsel, [the movant] must show: "'(1) counsel's performance was deficient, which means counsel made errors so serious that counsel's performance was less than that guaranteed by the Sixth

> Amendment, and (2) the deficient performance prejudiced the defense, which requires showing counsel's errors were so serious they deprived the defendant of a fair trial.'"

307 Kan. 280, 294-96, 408 P.3d 965 (2018) (internal citations omitted) (citing *Robertson*, 288 Kan. at 225, *Haddock v. State*, 282 Kan. 475, 512-13, 146 P.3d 187 (2006), and *Strickland v. Washington*, 466 U.S. 668, 686 (1984)).

The Court in *Mundy* held that for § 60-1507 counsel to meet his duty to provide effective assistance, this often will include having to investigate the case and amend the movant's *pro se* motion. *Id.* at 296-98.

There, on appeal from the denial of § 60-1507 relief, appellate counsel for the movant argued prior appointed § 60-1507 counsel had been ineffective, invoking a rule that "as long as the record is sufficient or the claim clearly without merit, an appellate court may consider the quality of the assistance provided by K.S.A. 60-1507 counsel for the first time on appeal." *Id.* at 294.

While the Court ultimately held the record was not clear enough to determine this, it held it was possible from the record that § 60-1507 counsel rendered ineffective assistance because he failed to amend the movant's *pro se* motion, which would require an affirmative strategic decision after a reasonable investigation:

> Under those circumstances, we have trouble categorizing counsel's conduct as clearly effective, as the State suggests, or clearly ineffective, as Mundy suggests. In rejecting the State's position, we recognize some arguable merit, at least facially, to Mundy's claim that her 60-1507 counsel provided ineffective assistance. For example, Mundy's pro se motion was in part dismissed because it insufficiently identified witnesses and facts, and yet 60-1507 counsel never sought to amend Mundy's pro se 60-1507 motion so as to fix the obvious deficiencies. *See, e.g.*, *Thompson v. State*, 293 Kan. 704, 710-13, 270 P.3d 1089 (2011)

> (although K.S.A. 60-215 does not permit 60-1507 movants to amend their motions as of right, a movant could amend with leave of court and leave should be granted freely when justice requires it).
>
> The State posits several reasons why Mundy's 60-1507 counsel might not have amended the pleading, replied to the State's response, or urged a hearing – possibly a strategic decision to rely on the court's obligation to liberally construe pro se pleadings. Indeed, strategy may serve as a virtual safe harbor for counsel's decisions because "[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. *Strickland*, 466 U.S. at 690-91." And ultimately, Mundy bears the burden of demonstrating that counsel's alleged deficiencies were not the result of strategy.
>
> **Here, however, we only have the State's speculation that an affirmative decision was made not to amend the motion and the decision was made after an investigation of law and facts.** The State's speculation cannot serve as evidence, however, and nothing in the record establishes that 60-1507 counsel made a strategic decision. Hence, we cannot reach the conclusion that Mundy's 60-1507 counsel provided effective assistance.

307 Kan. at 296-97 (internal citations modified and omitted) (emphasis added). In short, the *Strickland* framework applies, including its duty to make strategic decisions only after a reasonable investigation. *Id.* At the same time, the movant must "show actual prejudice and [may not] rely on a claim of structural error." *Id.* at 299.

Therefore, the Court in *Mundy* expressly left open that where appointed § 60-1507 counsel fails to engage in a thorough investigation of law and facts relevant to plausible options, for that reason fails to amend the

movant's *pro se* § 60-1507 motion, and the movant can show this prejudiced him, it is ineffective assistance.

In *Powell v. State*, this Court applied this law and decided whether an appointed § 60-1507 counsel's investigation was sufficient to constitute effective assistance. No. 120,679, 2020 WL 7636297 at *7-8 (Kan. App. Dec. 23, 2020) (unpublished). It restated the general *Strickland* standard that applies to appointed § 60-1507 counsel just as it does to trial counsel:

> When analyzing a claim of ineffective assistance of counsel, judicial scrutiny of counsel's performance is highly deferential. The reviewing court must strongly presume that counsel's conduct fell within the broad range of reasonable professional assistance. *State v. Kelly*, 298 Kan. 965, 970, 318 P.3d 987 (2014). It is within the province of a lawyer to decide what witnesses to call, whether and how to conduct cross-examination, and other strategic and tactical decisions. But when counsel lacks the information to make an informed decision due to inadequacies of his or her investigation, any argument of strategy is inappropriate. *Thompson*, 293 Kan. at 704.
>
> If counsel has made a strategic decision after making a thorough investigation of the law and the facts relevant to the realistically available options, then counsel's decision is virtually unchallengeable. *State v. Cheatham*, 296 Kan. 417, 437, 292 P.3d 318 (2013). But the failure to complete a thorough investigation is a ground for establishing ineffective assistance of counsel. *Wilson v. State*, 51 Kan. App. 2d 1, 14, 340 P.3d 1213 (2014).

Id. at *7 (internal citation modified).

The movant's claim of ineffective assistance by § 60-1507 counsel in *Powell* was in the same posture as that in *Mundy*, with the Court considering it "for the first time on appeal only when there are no factual issues and the two-prong ineffective assistance of counsel test can be applied as a matter of

law based upon the appellate record." *Id.* at *4. Based on the record before it, the Court was "not persuaded that [appointed § 60-1507 counsel] failed to investigate," because this was "not supported by the record. [Counsel] interviewed [a witness] and she was prepared to hire an expert to testify that [the movant]'s trial was not handled as a capital murder trial should be conducted." *Id.* at *8. Instead, the movant's

> assertion that a more thorough investigation would have revealed misconduct by the lead detective, prosecutor, or trial counsel is too speculative. We are not saying that further investigation would not reveal deficiencies and misconduct, …. But it is not apparent from this record. … [The movant]'s argument assumes there was something to find without showing us what it is. Without showing us that a more thorough investigation would have uncovered new evidence of [his] innocence, [the movant] argues that [counsel] was ineffective. He argues that she failed to investigate, yet we have no testimony from her about the extent of her investigation. We cannot grant relief based upon speculation.

Id.

So, per *Mundy* and *Powell*, the law of Kansas is that where § 60-1507 counsel fails to engage in an investigation, and the movant shows both counsel's lack of investigation and that a thorough investigation would have turned up meritorious claims for post-conviction relief, § 60-1507 counsel renders ineffective assistance warranting relief. The district court's holding here that appointed § 60-1507 counsel simply has no duty to investigate the movant's case and "raise additional issues not raised in [the movant]'s initial [*pro se*] motion" (R1 at 169) misapplied the law and was error.

B. Mr. Whalen rendered deficient performance as Mr. Nelson's appointed § 60-1507 counsel when by his own admission, with nearly two months available to file an amended motion and the ability thereafter to seek to do so for manifest injustice, he engaged in no investigation of any claims outside Mr. Nelson's *pro se* motion at all.

Here, Mr. Nelson presented what was missing in *Mundy* and *Powell*. He presented appointed § 60-1507 counsel Mr. Whalen's testimony, who openly admitted he engaged in no investigation of Mr. Nelson's case outside the claims in the *pro se* motion, and this was not because of some strategic decision based on an initial reasonable investigation, but because he believed – incorrectly, per above – that he had no duty to do so. Mr. Nelson then presented evidence showing what an investigation into prior counsel's file and the underlying record would have uncovered, which taken as true show Mr. Whalen's failure prejudiced him.

The Supreme Court issued its mandate in Mr. Nelson's appeal from his conviction and sentence March 11, 2013. *Nelson III*, 2017 WL 462403 at *3. That meant his § 60-1507 motion was due one year later on March 11, 2014. Supreme Court Rule 183; *Scaife v. State*, 51 Kan. App. 2d 577, 584, 350 P.3d 1 (2015). So, when the district court appointed Mr. Whalen on January 22, 2014 (R4 at 96), there remained 48 days in which to file an amended motion.

Mr. Whalen acknowledged ineffective assistance claims are not necessarily apparent from the court record, requiring him to go outside the record and investigate (R3 at 12-13). But despite claiming to have handled more than 40 § 60-1507 cases at the district court level, both retained and appointed, most dealing with ineffective assistance of counsel (R3 at 5-6), stated he understood the *Strickland* standard applied to his appointment, but

he believed this did not include a duty to investigate (R3 at 11-12, 118-19). He stated he had done this investigation and amendment for "private clients" (R3 at 61-62, 121), but did not have to do so for Mr. Nelson because he was appointed (R3 at 58).

Mr. Whalen's beliefs about his legal duty were simply wrong. And they are troubling, given his insistence he had handled so many prior § 60-1507 cases under the *Strickland* standard. He had the same duties in both retained § 60-1507 cases and appointed ones. *Skaggs*, 59 Kan. App. 2d at 132; *McIntyre*, 54 Kan. App. 2d at 638-43; KRPC 6.2. He had the duty to pursue relief for Mr. Nelson "within the stricture of required candor to the court and other ethical rules …." *Robertson*, 288 Kan. at 229. Per *Strickland*, this includes the duty to engage in a reasonable investigation. *Mundy*, 307 Kan. at 296-97; *Powell*, 2020 WL 7636297 at *7. This duty also is part of an attorney's duty of diligence in ensuring his client's claims are timely brought forth. KRPC 1.3.

But Mr. Whalen repeatedly admitted that because of his incorrect beliefs about his duties, he engaged in no representation at all beyond the four corners of Mr. Nelson's initial § 60-1507 motion. As early as January 26, four days after Mr. Whalen's appointment, Mr. Nelson raised the possibility of an amended motion with Mr. Whalen (R4 at 1-3). Mr. Whalen admitted he knew Mr. Nelson wanted him to amend or supplement his § 60-1507 motion, but said any issue not stated in Mr. Nelson's "petition" was not something he had to address (R3 at 35, 55-56, 115-17). Mr. Whalen's BIDS form reflects he did no work in the case at all until February 14, 2014 (R4 at 50), he did not

pick up the court file until May 2014 (R4 at 50), and while the record exceeded 2,000 pages and Mr. Whalen initially said he "believed" he had read all of it, the only entries in his BIDS form related to this were less than five hours (R3 at 67-69; R4 at 50). He never obtained Mr. Ariagno's or Mr. Loeffler's files or BIDS forms (R3 at 41, 74, 82, 102), never obtained the discovery in the case (R3 at 84). On cross-examination, he stated for each of Mr. Nelson's claims in this case, the reason he did not bring them was he did not have to as they were not in Mr. Nelson's *pro se* motion (R3 at 115-17).

Mr. Whalen's failure to engage in any investigation of Mr. Nelson's case besides the few issues Mr. Nelson had put in his *pro se* motion, including failing to obtain prior counsel's files at all and failing to obtain the record in time to review it for filing an amended motion (or even for seeking to file an amended motion late under § 60-1507(f)'s "manifest injustice" safety valve), was deficient performance meeting the first *Strickland* prong. There was no strategic decision not to amend after a reasonable investigation. Instead, by Mr. Whalen's own admission, there was no investigation at all, and all for the legally erroneous reason that he had no obligation to.

Indeed, Mr. Whalen claimed his review of the record revealed many of the claims Mr. Nelson now charges were ineffective assistance not to raise, all of which he agreed could have been significant, including the possibility of a mental disease and defect defense (R3 at 71-74), evidence Mr. Swartz had sexually abused Mr. Nelson (R3 at 102-03), the threats against Amber Moore to get her to enter into an agreement (R3 at 83), Mr. Nelson's police interview while represented by counsel and invoking his right to counsel (R3 at 89-94),

Ms. Moore's statement about Mr. Nelson sending men after her (R3 at 95), and Lindsay Krehbiel's statements that Mr. Hewitt's testimony about being offered $500 was untrue (R3 at 100-01). He also acknowledged he did not have the full picture on some of these issues because he had not obtained Mr. Ariagno's file (R3 at 74-76, 97-98) or the discovery in the case (R3 at 84-85, 96-97). Still, he asserted that despite seeing these issues, he had no duty to attempt to raise them purely because they were not in Mr. Nelson's *pro se* motion (R3 at 115-17).

This also undercuts the district court's suggestion that "each claim which is the basis for ineffective assistance of counsel" here "could have been raised in Nelson's original pro se motion" (R1 at 169). Absent having the court's file and Mr. Ariagno's and Mr. Loeffler's files, they could not have been raised absent a full investigation.

Mr. Whalen also briefly suggested he was busy at the time he was appointed to represent Mr. Nelson, and this impacted his representation (R3 at 34). That is no excuse, certainly not a legally sufficient one to justify failing to investigate Mr. Nelson's case in a timely manner. KRPC 1.3. If Mr. Whalen was too busy to undertake the appointment in Mr. Nelson's § 60-1507 case while meeting his duty to investigate the case diligently and raise any available claims for relief, he had a duty to decline the appointment or at least inform the district court of this and seek leave to withdraw. KRPC 6.2(a) and (b).

What Mr. Whalen could not do was what he admitted doing here: perform no investigation outside Mr. Nelson's initial *pro se* claims at all, let

alone within the considerable time left – seven weeks – to file an amended motion. This was not a "[s]trategic choic[e] made after thorough investigation of law and facts relevant to plausible options," *Strickland*, 466 U.S. at 690-91, but a wholesale dereliction based on Mr. Whalen's incorrect notion of his duties to Mr. Nelson.

Mr. Nelson has met the first *Strickland* prong.

C. Taking Mr. Nelson's allegations not refuted by the record as true, Mr. Whalen's deficient performance prejudiced Mr. Nelson, requiring a full evidentiary hearing on Mr. Nelson's ineffective-assistance claims concerning Mr. Whalen.

Meeting the second *Strickland* prong, prejudice, requires remand for a full evidentiary hearing on Mr. Nelson's claims concerning Mr. Whalen's performance. Because the district court only granted a limited evidentiary hearing to hear Mr. Whalen's testimony, and then erroneously held Mr. Whalen had no legal duty to investigate and amend Mr. Nelson's § 60-1507 motion, no evidence was heard on the merits of Mr. Nelson's claims. Mr. Nelson now must be allowed to prove what the movants in *Mundy* and *Powell* failed to do: that had Mr. Whalen engaged in that investigation, he would have uncovered claims warranting § 60-1507 relief. Taking Mr. Nelson's factual allegations not refuted by the record as true, he could prove this. Therefore, he is entitled to a full evidentiary hearing to do so.

Section 60-1507(b) provides in relevant part that "[u]nless the motion [under § 60-1507] and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court *shall* … grant a prompt hearing thereon …." (Emphasis added). Supreme Court Rule 183(f) amplifies this, stating in relevant part that "[u]nless the motion to vacate, set aside, or

correct a sentence and the files and records of the case in the sentencing court conclusively show that the movant is entitled to no relief, the court *must* grant a prompt hearing." (Emphasis added).

This standard means that if the "1507 motion list[s] witnesses" and "if the allegations contained in the motion are true" and are not conclusively refuted by the record in the underlying case, the movant "potentially" would be entitled to relief, it "alleg[es] sufficient facts to warrant an evidentiary hearing" and the Court *must* hold an evidentiary hearing. *Jacques v. State*, No. 89,805, 2004 WL 117331 at *3-4 (Kan. App. Jan. 23, 2004) (unpublished). In the context of a claim for ineffective assistance of counsel, this means a hearing is required if "[t]here are not sufficient facts in the" existing "record to establish" whether the claims have merit or not. *Bellamy v. State*, 285 Kan. 346, 357, 172 P.3d 10 (2007). When, viewing the motion this way, "substantial questions of fact remain," a hearing is required. *Id.*

Simply put, a hearing must be held on a § 60-1507 motion if the motion "alleges facts which do not appear in the original record, which if true would entitle the movant to relief, and it identifies readily available witnesses whose testimony would support such facts or other sources of evidence." *State v. Holmes*, 278 Kan. 603, 629, 102 P.3d 406 (2004) (citation omitted). In doing so, the motion must "set forth a factual background, names of witnesses, or other sources of evidence demonstrating movant's entitlement to relief." *Id.* (citation omitted).

All Mr. Nelson's claims of Mr. Whalen's ineffective assistance in failing to investigate and discover the claims he now brings readily fit this standard. Determining their merit will require further evidence.

Mr. Nelson's brief in support of his request for an evidentiary hearing explains this well (R1 at 47-69), and the Court should read it in full. In short, he detailed for each of his issues what testimony and other evidence supported them (R1 at 47-69), and he then made a proffer of the documentary evidence (R1 at 103-48). Taking the allegations as true, none of which the record refutes, Mr. Whalen failure to investigate led him to not discover meritorious claims that:

- Mr. Ariagno was ineffective in failing to raise hearsay and Confrontation Clause objections to the testimonial statements made by Stanley Swartz to law enforcement officers;
- Mr. Ariagno was ineffective in failing to investigate and put on a mental disease or defect defense at trial, and as mitigating evidence at sentencing;
- Mr. Ariagno was ineffective in failing to object to Ms. Moore's testimony on the basis that her agreement with the prosecution was improper;
- Mr. Ariagno was ineffective in failing to move to suppress Ms. Moore's involuntary statements to law enforcement;
- Mr. Ariagno was ineffective in failing to move to suppress Mr. Nelson's confession to law enforcement;

- Mr. Ariagno was ineffective in failing to move for a mistrial when Ms. Moore testified Mr. Nelson "sent two men after her" to intimidate her from testifying;
- Mr. Ariagno was ineffective in failing to investigate and impeach Ms. Moore's testimony using her prior inconsistent statements to law enforcement;
- Mr. Ariagno was ineffective in failing to investigate and impeach Mr. Hewitt's testimony using evidence about his mental health, his criminal history, or that he had a deal with the prosecution; and
- Mr. Loeffler was ineffective in failing to investigate and put on mitigating evidence at sentencing of Mr. Nelson's significant mental health history and that Mr. Swartz had sexually abused him.

(R1 at 47-69, 103-48). Moreover, the State's only response to Mr. Nelson's request for an evidentiary hearing on these claims was that Mr. Whalen had no duty to investigate Mr. Nelson's case (R1 at 84-85), which as explained above is untrue.

D. Mr. Nelson's claims of ineffective assistance of post-conviction counsel are timely, or alternatively must be heard to prevent manifest injustice.

The district court also briefly suggested Mr. Nelson's claims of Mr. Whalen's ineffective assistance were untimely because they constituted an improper second or successive § 60-1507 motion (R1 at 169). This was error. Section 60-1507(f)(1) provides in relevant part that § 60-1507 motions must be brought within one year of "[t]he final order of the last appellate court in this state to exercise jurisdiction on *a direct appeal* or the termination of such

appellate jurisdiction ...." (Emphasis added). But "direct appeal" does not mean only a direct appeal from the original conviction and sentence. *See, e.g.*, *Wilkerson v. State*, 38 Kan. App. 2d 732, 734, 171 P.3d 671 (2007) (appeal of a probation revocation is a "direct appeal" starting the one-year limitation period); *Baker v. State*, 297 Kan. 486, 492, 303 P.3d 675 (2013) (one-year limitation period did not begin until time to appeal a resentencing expired).

Here, Mr. Nelson's "direct appeal" from the denial of his first § 60-1507 motion, the assistance of Mr. Whalen in which is at issue in this § 60-1507 motion, became final when this Court issued its mandate in *Nelson III* on December 22, 2017. He filed his § 60-1507 motion in this case on June 15, 2018, well within the one-year limitation period of § 60-1507(f)(1).

Alternatively, if the "direct appeal" had to be *Nelson II*, the one-year limitation period must be extended to prevent manifest injustice. Section 60-1507(f)(2) provides the one-year limitation of § 60-1507(f)(1) may be extended "to prevent a manifest injustice." Under § 60-1507(f)(2)(A), "For purposes of finding manifest injustice under this section, the court's inquiry shall be limited to determining why the prisoner failed to file the motion within the one-year time limitation or whether the prisoner makes a colorable claim of actual innocence." The movant bears the burden to prove manifest injustice by a preponderance of the evidence. Supreme Court Rule 183(g).

In *Ludlow v. State*, this Court held that a claim of ineffective assistance of post-conviction counsel fits this safety valve, because it necessarily does not arise until after the one-year time limitation of an appeal from a conviction and sentence. No. 105,303, 2011 WL 5833609 at *2 (Kan. App.

Nov. 18, 2011) (unpublished). This is because "'[b]arring a claim before it arose clearly would constitute a manifest injustice warranting an extension of the one-year limitation period,'" and so "60-1507 movants have a statutory right to effective assistance of counsel that outside of the statutory time limit results in manifest injustice because it becomes temporally impossible for the claims ever to be reviewed." *Id.* (quoting *Pouncil v. State*, No. 98,276, 2008 WL 2251221 at *5 (Kan. App. May 30, 2008) (unpublished) (also holding ineffective assistance claim by post-conviction counsel was within "manifest injustice" safety valve of § 60-1507(f)(2)).

Here, Mr. Nelson had the right the effective assistance of his appointed § 60-1507 counsel. As in *Ludlow* and *Pouncil*, the claims in his 2018 § 60-1507 motion did not arise within one year after the conclusion of *Nelson II* and were not discovered until after that one year. So, barring his claims that Mr. Whalen rendered ineffective assistance before they even arose or could be discovered is a manifest injustice. It would effectively deny him a method to vindicate his right to effective assistance of post-conviction counsel.

Mr. Whalen's failure to investigate Mr. Nelson's case and file an amended § 60-1507 motion was deficient performance. Taking Mr. Nelson's allegations as true, that deficient performance prejudiced him by depriving him of meritorious § 60-1507 claims. Mr. Nelson now is entitled to a full evidentiary hearing to prove this.

<u>Second issue:</u> The district court erred in denying Mr. Nelson a full evidentiary hearing on his *Brady* claim that the prosecution failed to disclose evidence favorable to the defense about its witness Keith Hewitt, which Mr. Nelson did not discover until 2018.

Record Location Where Raised

Mr. Nelson raised this issue in his request for an evidentiary hearing at R1 at 65. He raised it again at the limited evidentiary hearing at R3 at 99-100. The district court denied an evidentiary hearing on it at R1 at 169.

* * *

Standard of Appellate Review

When "a district court denies a 60-1507 motion based only on the motion, files, and records after a preliminary hearing, [this Court is] in as good a position as that court to consider the merits. So [it] exercise[s] de novo review." *Grossman v. State*, 300 Kan. 1058, 1061, 337 P.3d 687 (2014).

* * *

Besides claims that appointed counsel Michael Whalen rendered ineffective assistance, in his 2018 § 60-1507 motion Mr. Nelson also brought a claim based on evidence his new counsel only discovered in 2018. Specifically, the prosecution failed to disclose that its witness Keith Hewitt was charged with a crime of dishonesty at the time of his testimony against Mr. Nelson, which was dismissed once he testified against Mr. Nelson. Had the prosecution disclosed this to Mr. Nelson's trial counsel, it could have been used to impeach Mr. Hewitt's testimony that Mr. Nelson had offered him money to injure Mr. Swartz. This stated a well-pleaded claim under *Brady v. Maryland*. Regardless of the claims against Mr. Whalen, Mr. Nelson is entitled to a full evidentiary hearing on this claim now.

Under *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution must "disclose evidence favorable to the defense, even after conviction, if the State knew of that evidence during trial." *State v. Robinson*, 309 Kan. 159, 160, 432 P.3d 75 (2019).

Here, Mr. Nelson alleged that while investigating his 2018 § 60-1507 motion filed below, his counsel discovered prosecution witness Keith Hewitt "was charged with a crime of dishonesty, a Class A Misdemeanor, in McPherson County Case Number 07CR193 on September 10, 2007. This case was pending during [Mr. Nelson]'s trial, and at the time Mr. Hewitt testified in this matter" (R1 at 65). Counsel also discovered that the case "was subsequently dismissed on July 17, 2008, after the Petitioner's trial, by Assistant McPherson County Attorney, Mark Rudy," who was one of the prosecutors in Mr. Nelson's case (R1 at 65).

Mr. Nelson proffered the materials his counsel's investigator had discovered, which showed Mr. Hewitt was charged with drawing a check with intent to defraud, a crime of dishonesty, on May 5, 2007, which Mr. Rudy dismissed on July 17, 2008 (R1 at 146-48). Mr. Nelson's trial at which Mr. Hewitt testified was in April 2008.

As Mr. Nelson pointed out, this could have been used to impeach Mr. Hewitt's testimony (R1 at 65) (citing *State v. Stamps*, No. 113,071, 2016 WL 2809208 at *23 (Kan. App. May 13, 2016) (unpublished)). In *Stamps*, this Court held "a party may examine a witness and bring up extrinsic evidence on a relevant matter concerning that witness' credibility," which does not "requir[e] that the witness be convicted of a crime involving dishonesty before

a party can attack that witness' credibility," so a defendant may "rais[e] the fact that [a witness] was charged with" a crime of dishonesty to impeach his testimony. *Id.*

No information about the charges against Mr. Hewitt was in Mr. Ariagno's file (R1 at 65). Therefore, it was "unknown whether Attorney Ariagno knew about this pending charge at the time of trial, and/or whether this information was disclosed by the State under its *Brady* obligations" (R1 at 65). Accordingly, "[a]n evidentiary hearing will need to be held to determine whether this is an ineffective assistance of counsel claim, a claim under *Brady*, or both" (R1 at 65). Either way, Mr. Nelson did not discover it until 2018 (R1 at 65). He sought to have Mr. Ariagno, himself, Mark Rudy, and Keith Hewitt testify as to his claim (R1 at 65-66).

The law of Kansas is that regardless of Mr. Nelson's claims that Mr. Whalen rendered ineffective assistance, a full evidentiary hearing is required to determine the merits of this claim, beginning with whether the failure to bring it earlier would prevent a manifest injustice.

As explained above at pp. 42-43, while § 60-1507 motions must be brought within one year of the termination of appellate jurisdiction, § 60-1507(f)(2) provides this may be extended "to prevent a manifest injustice." "For purposes of finding manifest injustice under this section, the court's inquiry shall be limited to determining why the prisoner failed to file the motion within the one-year time limitation or whether the prisoner makes a colorable claim of actual innocence." § 60-1507(f)(2)(A).

Because the district court denied this claim without an evidentiary hearing, the question now is whether taking Mr. Nelson's allegations not refuted by the record as true, he established this claim. *Holmes*, 278 Kan. at 629. If so, he is entitled to an evidentiary hearing. *Id.*

This claim plainly meets this standard. The only reason Mr. Nelson did not raise it earlier was the prosecution did not disclose Mr. Hewitt's charges to Mr. Ariagno, and Mr. Nelson had no knowledge of it until his counsel discovered it in 2018. Nothing about it appears in Mr. Ariagno's file or in discovery. Mr. Whalen had never seen it before, either (R3 at 99-100). And more than just Mr. Hewitt being charged with a crime of dishonesty that could be used to impeach his credibility, the fact that one of Mr. Nelson's prosecutors dismissed the charge shortly after Mr. Hewitt's testimony against Mr. Nelson strongly implies an agreement for his testimony. That, too, would have to have been disclosed to the defense, and was not.

Taken as true, these facts establish manifest injustice under § 60-1507(f)(2). They also establish a *Brady* violation in not disclosing evidence favorable to the defense that could have been used to impeach Mr. Hewitt. And this prejudiced Mr. Nelson, as Mr. Hewitt's testimony that Mr. Nelson offered him money to injure Mr. Swartz was the only evidence of this, and the prosecution used it to negate any claims of self-defense or lesser intent.

Under these circumstances, Mr. Nelson is entitled to an evidentiary hearing on this *Brady* claim.

Conclusion

This Court should reverse the district court's judgment and remand this case for a full evidentiary hearing on all claims in Mr. Nelson's 2018 § 60-1507 motion.

Respectfully submitted,

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Certificate of Service

I certify that on February 2, 2022, I electronically filed a true and accurate Adobe PDF copy of the foregoing with the Clerk of the Court by using the electronic filing system, which will send notice of electronic filing to the following:

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Appendix

Amended Decision of the Court (Mar. 27, 2020) (R1 at 160-70) A1

Jacques v. State, No. 89,805, 2004 WL 117331
(Kan. App. Jan. 23, 2004) (unpublished) A12

Ludlow v. State, No. 105,303, 2011 WL 5833609
(Kan. App. Nov. 18, 2011) (unpublished) A17

Nelson v. State, No. 114,435, 2017 WL 462403 (Kan. App. Feb. 3, 2017)
(unpublished) A21

Pouncil v. State, No. 98,276, 2008 WL 2251221
(Kan. App. May 30, 2008) (unpublished) A36

Powell v. State, No. 120,679, 2020 WL 7636297
(Kan. App. Dec. 23, 2020) (unpublished) A41

State v. Stamps, No. 113,071, 2016 WL 2809208
(Kan. App. May 13, 2016) (unpublished) A49

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2020 Mar 27 PM 1:31
CLERK OF THE MCPHERSON COUNTY DISTRICT COURT
CASE NUMBER: 2018-CV-000052

IN THE DISTRICT COURT OF MCPHERSON COUNTY, KANSAS

Jeffrey Dale Nelson

v. Case No. 18 CV 52

State of Kansas

AMENDED DECISION OF THE COURT

FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case were detailed in the first appellate decision, under State v. Nelson, 291 Kan. 475 (2010). However, it is helpful to summarize these facts. The events occurred over a three day period.

- On August 24, 2007, Nelson went to the house of his stepfather, Swartz, just as Swartz was getting ready to leave for work. Nelson returned while Swartz was at work and broke into the garage. Nelson used a ladder to crawl through an attic space connecting the garage to the house because the garage did not have direct access to the house. Once inside the attic space, the ceiling buckled and Nelson fell through, creating a hole. When Swartz returned home after work, Nelson was gone. Swartz reported the break-in to police and said his checkbook was missing.

- At 9:38 p.m. that same day, Nelson used an ATM to deposit a $5,000 forged check from Swartz's account. Nelson then picked up his friend, Keith Hewitt. They drove to Wal-Mart, and Nelson bought a baseball bat. As they were leaving the parking lot, Nelson asked Hewitt if he would help beat up Swartz. Hewitt testified at trial that he talked Nelson out of this. The two then went to a club.

Nelson took Hewitt home at 2 a.m., but Nelson returned at 3 a.m. and offered Hewitt $500 to help him "take care of" Swartz. Hewitt refused.

- The next day, April 25, 2007, Nelson and Swartz had a chance encounter at Wal-Mart that became heated, but not physical. Sometime later that day Nelson deposited a $100 forged check from Swartz's account into his friend, Misty Sander's account. At around 10:00 p.m., Nelson asked Amber Moore, a girl he was dating, if she wanted to watch a movie. Moore picked Nelson up at his grandparents' house; he asked her if she would think poorly of him if he beat someone up; and then he asked her to drive him by Swartz's employer to see if his truck was in the parking lot. The truck was parked in the lot. Nelson then asked Moore to drive him back to his grandparent's house where he retrieved the bat. He told Moore he needed the bat for protection because he was going to beat up Swartz.

- Moore and Nelson drove by Swartz's workplace again to make sure Swartz's truck was still there, and then Moore dropped Nelson off at Swartz's house. He told Moore to tell him when Swartz was driving home. Swartz returned home around 11 p.m. Moore believed Nelson was hiding in the bushes. She drove around until 1 a.m., when she told Nelson she was going home. She testified Nelson told her he "could not do it", and they went back to Moore's house. At around 2:30 a.m., Nelson borrowed Moore's car, took the baseball bat and said he was returning to Swartz's home.

- Nelson disputed what happened next. The State contended Nelson entered the home, discovered Swartz sleeping in his bed, and hit him on the back of the head while he slept. The coroner testified Swartz's death was caused by a blunt force trauma to the head, and there were no defensive wounds. A detective testified there was no evidence of a struggle in the home. Nelson's defense theory was that Swartz let him in the house, they fought, Nelson tried to leave, and Swartz pulled

him back into a fight. Finally, Nelson grabbed the bat, Swartz reached for it, Nelson hit him with it. This defense theory is based on varying statements Nelson gave the police. Nelson did not testify at trial.

- Initially, Nelson told a detective he got into a fight with Swartz between 11:30 and 11:45 p.m., on April 25th. He said they fought over the bat and he hit Swartz with it. He said Swartz was fine when he left. Nelson later added greater and sometimes conflicting details about the physical altercation. This portion of the interview was more difficult to follow, but began with Nelson saying that he went into a room in Swartz's house and found the bat. Swartz was standing in the room's doorway. Nelson chopped at Swartz with the bat, and Swartz backed into his bedroom. Swartz antagonized Nelson by saying he had better hit him hard, and Nelson told Swartz not to give him an excuse. Nelson then approached Swartz and Swartz reached for the bat, eventually catching it. Nelson pushed Swartz and he "finally" hit Swartz several times with the bat. He said Swartz ended up on the bed, lying on his back and side. Nelson told the detective he went to Swartz's house to "fucking end the animosity and all the bullshit and all the shit (Swartz) was doing."

- Later in the same interview, Nelson said he was going to tell the truth about what happened. Nelson admitted he brought the bat with him and did not find it in a room in Swartz's house. At some point, Nelson told a detective it was kind of hard to walk around the corner, look in the bathroom and close the door while holding the bat without looking obvious. Nelson said Swartz asked if he was hiding something and Nelson tried to "play it off like I wasn't doing anything". Nelson grabbed the door handle and pulled it. Swartz pushed him twice and slapped him on the head. Then Nelson said he pushed him back, pulled out the bat and hit him. Nelson continually stated there was no blood when he left.

- Moore testified at trial that Nelson returned to her house around 6:30 a.m. that morning, April 26th. She said Nelson was pale and told her he thought he killed Swartz. Later that day, Swartz was discovered on his couch by a co-worker when Swartz did not show up for work. Swartz was alive but unresponsive. There were pools of blood on Swartz's bed, pillow and in the master bedroom; blood was found going from the bedroom, down the hallway and in the bathroom. There were sheets that trailed blood through the house to the couch.

- That same day, Nelson deposited a $400 forged check from Swartz's account. Nelson then dropped off an apartment rental application and test drove a BMW at a dealership. Nelson told Moore he was going to sell Swartz's vehicles for a down payment. While Nelson was occupied with the car, Moore received a phone call that Swartz had been taken to the hospital and everyone suspected Nelson beat him. Moore and Nelson left the dealership. Moore testified that she and Nelson retrieved the clothes Nelson was wearing at the time he hit Swartz with the bat, retrieved the bat out of dumpster where Nelson had stashed it, drove to the country, and discarded the items. Moore later led police to retrieve those items.

- On May 19, 2007, Swartz died from complications arising from head injuries. Nelson was charged with premeditated first degree murder in Case No. 07CR86. He also was charged with burglary and three counts of forgery for the checks drawn on Swartz's account in the amount of $5,000, $100 and $400, in Case No. 07CR125. These cases were consolidated for trial.

- Nelson was convicted of all offenses.

His convictions were affirmed by the Supreme Court. However, the Court remanded the case for resentencing to determine whether aggravating circumstances existed under the preponderance of the evidence standard to support the 50 year (Hard 50) sentence.

On remand, Judge Anderson found three aggravating factors outweighed the mitigating factors, and reimposed the Hard 50 sentence.

This decision was then the subject of a second appeal in State v. Nelson, 296 Kan. 692 (2013). The Kansas Supreme Court affirmed the Hard 50 sentence imposed.

On December 24, 2013, in McPherson County Case No. 2013 CV 139, Mr. Nelson filed his first KSA 60-1507 motion. He alleged several deficiencies by both his trial counsel, Steve Ariagno, and by his appellate counsel, Meryl Carver-Allmond. Michael Whalen was appointed to represent Nelson on his pro se motion.

With respect to his trial counsel, Nelson contended that (1) there was a failure by counsel to communicate and consult with Nelson prior to trial, and (2) that defense counsel failed to interview and investigate witnesses prior to trial.

With respect to appellate counsel, Nelson alleged his counsel (1) failed to argue on direct appeal that Ariagno's actions were ineffective as trial counsel; (2) failed to argue that jury instruction 22 was erroneous, and (3) failed to file for a Writ of Certiorari with the United States Supreme Court on the issue of the Hard 50 sentence.

An evidentiary hearing was held on September 8, 2014. Nelson presented his own testimony as well as the testimony of Doris Nelson and Meryl Carver-Allmond. The State presented the testimony of Steve Ariagno.

Nelson alleged Ariagno failed to properly prepare for his trial. He alleged Ariagno did not interview enough of his suggested witnesses and failed to call them at trial. He also contended Ariagno did not mount a proper defense for him at the time of trial.

Judge Richard Walker found these allegations lacked merit. He noted Ariagno's time records indicated he spent over 100 hours in Court or preparing to defend Nelson. Ariagno

conducted numerous interviews of potential defense witnesses. Ariagno testified he made decisions about whether to call a witness based upon whether the potential witness had anything helpful to offer and whether there was some chance they could be damaging to Nelson's case.

Judge Walker applied the two-prong test i.e., deficiency and performance announced in Strickland v. Washington, 466 U.S. 668 (1984). He found that Ariagno's representation of Nelson was not deficient and Nelson was not entitled to relief. He also found Ms. Carver-Allmond's conduct in representing Nelson did not fall below the objective standards of competence expected of appellate counsel.

The Court of Appeals affirmed Judge Walker's decision on February 3, 2017. The Kansas Supreme Court denied review on December 22, 2017.

On June 15, 2018, Nelson filed this second motion pursuant to KSA 60-1507. This motion alleges ineffective assistance of habeas counsel, Michael Whalen. This motion was timely filed. The Court ordered a limited evidentiary hearing to allow petitioner to present testimony of Michael Whalen, regarding petitioner's claims of ineffective assistance of counsel in petitioner's first KSA 60-1507 proceeding.

Nelson's initial pro se motion identified four specific allegations against Ariagno and Carver-Allmond. As noted above, the Court overruled and denied this motion. In Nelson's present motion he now raises 11 issues alleging ineffective assistance of habeas counsel, Whalen, by failing to raise additional issues not raised in Nelson's original pro se motion. These are stated as follows:

(a) Petitioner was denied his statutory right to the effective assistance of habeas counsel when Attorney Whalen failed to raise the issue that Attorney Araigno was ineffective in failing to raise hearsay and Confrontation Clause objections to the testimonial statements made by Stanley Swartz to law enforcement officers.

(b) Petitioner was denied his statutory right to the effective assistance of habeas counsel when Attorney Whalen failed to raise the issue that Attorney Arigno was ineffective in failing to investigate and put on a mental disease or defect defense at trial, and as mitigating evidence at sentencing.

(c) Petitioner was denied his statutory right to the effective assistance of habeas counsel when Attorney Whalen failed to raise the issue that Attorney Araigno was ineffective in failing to object to the testimony of Amber Moore on the basis that her testimony, pursuant to an agreement with the county attorney, was improper under State v. Dixon, 279 Kan. 563, 608-613, 112 P.3d 883 (2005).

(d) Petitioner was denied his statutory right to the effective assistance of habeas counsel when Attorney Whalen failed to raise the issue that Attorney Ariagno was ineffective in failing to file a motion to suppress the involuntary statements of Amber Moore to law enforcement.

(e) Petitioner was denied his statutory right to the effective assistance of habeas counsel when Attorney Whalen failed to raise the issue that Attorney Araigno was ineffective in failing to file a motion to suppress the petitioner's confession to law enforcement.

(f) Petitioner was denied his statutory right to the effective assistance of habeas counsel when Attorney Whalen failed to raise the issue that Attorney Araigno was ineffective in failing to move for a mistrial when Amber Moore testified that the petitioner "sent two men after her" presumably to intimidate her from testifying.

(g) Petitioner was denied his statutory right to the effective assistance of habeas counsel when Attorney Whalen failed to raise the issue that Attorney Araigno was ineffective in failing to investigate and impeach the testimony of Amber Moore.

(h) Petitioner was denied his statutory right to the effective assistance of habeas counsel when Attorney Whalen failed to raise the issue that Attorney Araigno was ineffective in failing to investigate and impeach the testimony of Keith Hewitt.

(i) Petitioner was denied his statutory right to the effective assistance of habeas counsel when Attorney Whalen failed to raise the issue that Attorney Loeffler was ineffective for failing to investigate and put on evidence of the petitioner's significant mental health history as mitigating evidence during the resentencing hearing.

(j) Petitioner was denied his statutory right to the effective assistance of habeas counsel when Attorney Whalen failed to thoroughly investigate the case, interview witnesses, and adequately prepare for the 1507 hearing in order to properly preserve all issues of Attorney Araigno's ineffectiveness.

(k) Petitioner was denied his statutory right to effective assistance of habeas counsel by the cumulative effect of the errors and omissions made by Attorney Whalen because he incompetently asserted or failed to assert petitioner's meritorious Sixth Amendment ineffective claims against Ariagno and Loeffler.

The Court ordered a limited evidentiary hearing to allow petitioner to present testimony of Michael Whalen, regarding petitioner's claims of ineffective assistance of counsel related to the first KSA 60-1507 proceeding. This hearing was held on February 18, 2020.

Mr. Whalen testified he had over twenty-five years of experience in criminal defense work. For the last fifteen years this work was predominantly appellate work; and he had handled more than forty 60-1507 cases. He also testified as an expert in 60-1507 cases.

In January of 2014, Mr. Whalen was appointed as 60-1507 counsel for petitioner by Judge Walker. Once appointed, Mr. Whalen reviewed the original petition filed by petitioner along with a memorandum of law in support of his petition prepared by the Paul Lawsun

Defender Project. Mr. Whalen noted the statute of limitations would have expired March 11, 2014.

On January 26, 2014, petitioner sent a letter to Mr. Whalen indicating he wanted several witnesses to testify, complained about his trial counsel, and raised many other issues. He then sent a letter dated March 3, 2014, raising concerns about Mr. Whalen and witness issues. Another letter was sent, dated June 24, 2014. Mr. Whalen responded on June 25, 2014, and assured Mr. Nelson he was working on his case and tried to explain his strategy in addressing his issues. He explained that if an issue was not raised in the pro se petition it could not be addressed. Mr. Nelson continued to send correspondence.

Mr. Whalen explained the evidence against Mr. Nelson was overwhelming. He therefore made a strategic decision to concentrate on the Hard 50 sentence to see if he could get it reduced. He further clarified he was not appointed to file a new petition. He was appointed to represent Nelson on the petition that was filed.

Mr. Whalen informed the petitioner of the issues, and made strategic decisions about what needed to be presented and how it would be presented. This reasoning was based on the overwhelming evidence at trial. Mr. Whalen noted that what the witnesses had to say would not have made a difference in the outcome of the case. He further believed the petitioner's claims were not supported by the evidence and therefore, lacked merit for filing a new petition under "manifest injustice".

ANALYSIS

Once the Court appoints 60-1507 counsel, appointed counsel has a duty to provide effective representation. Murck v. State, 307 Kan. 280 (2018). It was clear from the evidence that Whalen vigorously represented the petitioner on the pertinent issues raised in his pro se motion.

When a movant files a motion pursuant to KSA 60-1507, he is "presumed to have listed all of the grounds upon which he is relying". Smith v. State, 195 Kan. 745 (1965). New claims that do not relate back to the original claims are not permitted. Pabst v. State, 287 Kan. 1 (2008). Untimely new claims of ineffective assistance of trial counsel cannot be bootstrapped onto timely raised claims of ineffective assistance of trial counsel.

Petitioner claims in the current motion, that Whalen's failure to investigate other potential remote issues somehow created errors so serious that his performance was less than that guaranteed by the 6th Amendment; and this deficient performance somehow deprived the petitioner of a fair trial. That was not the case based upon the previous findings of facts.

It appears to the Court that each claim which is the basis for ineffective assistance of counsel could have been raised in Nelson's original pro se motion. The Court agrees that Whalen had no duty to raise additional issues not raised in Nelson's initial motion. There is no claim in Nelson's current motion that Whalen acted ineffectively on any of the issues raised in Nelson's pro se motion. Absent a duty to expand Nelson's pro se motion, Nelson has stated no legal claim for relief.

An attorney's representation must be judged by the totality of the representation, not "by fragmentary segments analyzed in isolated cells". Schoonover v. State, 2 Kan. App. 2nd 481 (1978).

A district court is not required to entertain successive KSA 60-1507 motions on behalf of the same movant unless there are exceptional circumstances. The exceptional circumstances must explain or justify the failure to assert a claim in the prior 60-1507 motion. Toney v. State, 39 Kan. App. 2d 944 (2008). Nelson's prior 60-1507 motion included claims of ineffective assistance of counsel, involving Ariagno and Loeffler. The claims he raises in this motion were known to him during, or immediately following his trial and sentencing.

DECISION OF THE COURT

1. After review of the file and for reasons stated above, the Court finds that habeas counsel, Michael Whalen, was not ineffective in his representation of Nelson in his pro se motion; this current motion is a successive motion; and there has been no showing of exceptional circumstances.

2. For purposes of appeal, this decision shall be considered final on the date it is filed with the clerk of the McPherson District Court. No further journal entry is required.

3. Mr. Miller's motion to withdraw as counsel of record filed with the Court on March 10, 2020, is granted.

IT IS BY THE COURT SO ORDERED.

John B. Klenda
District Judge

82 P.3d 875 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Mark A. JACQUES, Appellant,
v.
STATE of Kansas; Carla Stovall, Kansas Attorney General; Charles E. Simmons, Secretary, Kansas Department of Corrections; and, Robert D. Hannigan, Warden, Hutchinson Correctional Facility, Appellees.

No. 89,805.
|
Jan. 23, 2004.

Synopsis
Background: After conviction for possession of cocaine and felony murder was affirmed on appeal, 270 Kan. 173, 14 P.3d 409, motion was filed for postconviction relief.

Holdings: The Sedgewick District Court, Paul Buchanan, J., held that:

[1] movant was entitled to evidentiary hearing on claim that trial counsel was ineffective for failing to move for mistrial based on members of victim's family speaking with members of jury prior to deliberations, and

[2] defendant could not claim self-defense on felony-murder charge.

Affirmed in part, reversed in part, and remanded for evidentiary hearing.

West Headnotes (2)

[1] **Criminal Law** Counsel

Postconviction movant was entitled to evidentiary hearing on claim that trial counsel was ineffective for failing to move for mistrial based on members of victim's family speaking with members of jury prior to deliberations, where movant set forth factual issues and named witnesses. U.S.C.A. Const.Amend. 6; K.S.A. 60-1507.

1 Cases that cite this headnote

[2] **Homicide** Conduct or Circumstances Provoking Use of Force

Possession of cocaine was a forcible felony, and thus, defendant could not claim self-defense on felony-murder charge. K.S.A. 21-3110(8), 21-3214(1).

Appeal from Sedgwick District Court; Paul Buchanan, judge. Opinion filed January 23, 2004. Affirmed in part, reversed in part, and remanded with directions.

Attorneys and Law Firms

Michael S. Holland and Michael S. Holland, II, of Holland and Holland, of Wichita, for appellant.

Matt J. Maloney, assistant district attorney, Nola Foulston, district attorney, and Phill Kline, attorney general, for appellees.

Before RULON, C.J., GREEN, J., and STEPHEN D. HILL, District Judge, assigned.

MEMORANDUM OPINION

PER CURIAM.

***1** Mark Jacques appeals the dismissal of his K.S.A. 60-1507 motion following a nonevidentiary hearing. We affirm in part, reverse in part, and remand with directions.

Jacques was convicted of felony murder and two counts of possession of cocaine. A complete recitation of the underlying facts of the crimes is not necessary for proper resolution

of the issues now on appeal. The facts were well stated in Jacques' direct appeal and can be found at *State v. Jacques,* 270 Kan. 173, 175-77, 14 P.3d 409 (2000). His convictions stemmed from an altercation in which Jacques stabbed another man with a steak knife. The man later died from the knife wound. Jacques was sentenced to life imprisonment for the felony-murder charge and 26 months' imprisonment for the drug charges, with the sentences to run consecutively. His convictions were affirmed by our Supreme Court.

Jacques filed a K.S.A. 60-1507 motion, which included, *inter alia,* numerous claims of ineffective assistance of trial counsel. The trial court held a nonevidentiary hearing in which both counsel for Jacques and counsel for the State presented arguments on the motion. Following the hearing, the trial court found that nothing about the ineffective assistance of counsel claims was sufficient to grant Jacques the relief sought; additionally, the motion, files, and records of the case conclusively established Jacques received effective assistance of counsel.

On appeal, Jacques claims he was denied a fair trial and due process of law by his trial counsel's failure to: (1) move for a mistrial based on members of the decedent's family speaking with members of the jury prior to deliberations; (2) object to a jury instruction because it incorrectly stated the law; and (3) object to the same instruction because said instruction did not require the State to prove possession of cocaine was a forcible felony, thereby depriving Jacques of his Sixth Amendment right to trial by jury. These claims were properly set forth in Jacques' 1507 motion.

K.S.A. 60-1507 requires the trial court to hold an evidentiary hearing on such a motion and make findings of fact and conclusions of law with respect thereto, unless the motion and the files and records of the case conclusively show the prisoner is not entitled to relief. K.S.A. 60-1507(b); Supreme Court Rule 183(f), (g), and (j) (2003 Kan. Ct. R. Annot. 213); *Doolin v. State,* 24 Kan.App.2d 500, 501, 947 P.2d 454 (1997). A trial court's decision on whether to hold an evidentiary hearing on a K.S.A. 60-1507 motion is reviewed for an abuse of discretion. *Lujan v. State,* 270 Kan. 163, 169, 14 P.3d 424 (2000).

Guidelines for granting an evidentiary hearing were discussed by this court in *Wright v. State,* 5 Kan.App.2d 494, 619 P.2d 155 (1980). Corroboration of factual allegations is not a formal requirement but is desirable. The petition should set forth a factual background and name witnesses or other sources of evidence demonstrating petitioner's entitlement to relief. If a petition alleges facts not in the original record that would, if true, entitle petitioner to relief, and if readily available witnesses are identified whose testimony would support such facts or other sources of evidence, "it is error to deny the motion without an evidentiary hearing" even if the factual issues raised seem improbable. 5 Kan.App.2d at 495-96, 619 P.2d 155.

***2** Jacques' claims on appeal all pertain to ineffective assistance of trial counsel. Before counsel's assistance is determined to be so defective as to require reversal, a defendant must establish that: (1) counsel's performance was deficient, which means counsel made errors so serious that counsel's performance was less than that guaranteed by the Sixth Amendment to the United States Constitution, and (2) the deficient performance prejudiced the defense, which requires a showing of a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Sperry,* 267 Kan. 287, 297-98, 978 P.2d 933 (1999). The performance and prejudice requirements of the inquiry are mixed questions of law and fact requiring de novo review. *Easterwood v. State,* 273 Kan. 361, 370, 44 P.3d 1209, *cert. denied* 537 U.S. 951, 123 S.Ct. 416, 154 L.Ed.2d 297 (2002).

The reasonableness of counsel's challenged conduct must be judged by the court on the facts of the particular case viewed at the time of counsel's conduct. A claim of ineffective assistance of counsel must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must determine whether, in light of all the circumstances, the identified acts or omissions were within the range of professionally competent assistance. In making that determination, the court should bear in mind that counsel's function is to make the adversarial testing process work in the particular case. "At the same time, the court should recognize counsel is strongly presumed to have rendered adequate assistance." *Graham v. State,* 263 Kan. 742, 754, 952 P.2d 1266 (1998) (quoting *Strickland v. Washington,* 466 U.S. 668, 690, 80 L.Ed.2d 674, 104 S.Ct. 2052 [1984]).

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Giving deference to these maxims, we now turn to the merits of Jacques' claims.

Failure to Move for a Mistrial

[1] Jacques' motion alleges that members of the decedent's family were talking with members of the jury prior to deliberations. The motion also states that the woman who observed the conversation reported such to Jama Mitchell, Jacques' trial counsel. Mitchell is listed as a witness upon whose testimony Jacques intended to rely to prove his allegations. Further, attached to the motion is an affidavit from Tiffany Holdt which states she attended Jacques' trial, observed members of the victim's family talking with members of the jury prior to deliberations, and reported such to Jacques' counsel.

Juror misconduct includes communications with jurors from outsiders, witnesses, bailiffs, or judges. *State v. Fenton,* 228 Kan. 658, 664, 620 P.2d 813 (1980). Clearly, the communication between jurors and members of the victim's family, if true, constituted juror misconduct. However, juror misconduct is not a ground for reversal, new trial, or mistrial unless it is shown by the party claiming error to have substantially prejudiced his or her rights. *State v. Fulton,* 269 Kan. 835, 840, 9 P.3d 18 (2002).

***3** In Kansas, juror misconduct is trial error, correctable only on direct appeal. *Roy v. State,* 213 Kan. 30, 32, 514 P.2d 832 (1973). "[W]here alleged juror misconduct claimed as prejudicial is known by the party or his counsel prior to rendition of a verdict, and no objection is made, nor the matter brought to the court's attention, that party cannot later assert the misconduct as grounds for a new trial. [Citation omitted.]" 213 Kan. at 32, 514 P.2d 832. The reasons for the rule are clear:

> "If the alleged misconduct is brought to the court's attention a hearing may be held and the situation remedied, if that is possible. If not, a mistrial may be declared immediately without wasting the time and expense required to complete the trial. The rule is a corollary of the contemporaneous objection rule as to evidence (K.S.A. 60-404; *State v. Estes,* 216 Kan. 382, 532 P.2d 1283) and the requirement of an objection to erroneous instructions (K.S.A. 60-251[b]; *Apperson v. Security State Bank,* 215 Kan. 724, 528 P.2d 1211). A party is not permitted to remain silent in the face of known error, gamble on the verdict, and show his hole card only if he loses." *State v. Buggs,* 219 Kan. 203, 208, 547 P.2d 720 (1976).

The instant action, however, is a collateral attack on Jacques' conviction on the basis of ineffective assistance of counsel. The issue presented for our consideration is not whether the trial court should have granted a mistrial, nor is it incumbent upon this court to determine whether Jacques' trial counsel was ineffective for failing to move for a mistrial. The question now before this court is whether Jacques' K.S.A. 60-1507 motion alleged sufficient facts to warrant an evidentiary hearing. See *Wright,* 5 Kan.App.2d at 495-96, 619 P.2d 155.

As previously stated, Jacques' 1507 motion listed witnesses and was supported by an affidavit. If the allegations contained in the motion are true, counsel's failure to at least apprise the court of the alleged juror misconduct potentially deprived Jacques of a fair trial. The trial court did not have the opportunity to question the jurors about their misconduct and give additional instructions protecting Jacques' right to a trial by jury. When juror misconduct relates to a material issue, the only way for a trial court to ascertain whether the misconduct improperly influenced the jury's verdict is to recall the jury and inquire. *Saucedo v. Winger,* 252 Kan. 718, 732, 850 P.2d 908 (1993).

Under the specific facts of the case, an evidentiary hearing is needed to determine whether Jacques' allegations are true, and whether Jacques was prejudiced by trial counsel's failure to inform the court of the misconduct or by trial counsel's failure to move for a mistrial. The issues that need to be determined are whether the communications occurred, whether counsel knew of the communications, whether the jurors knew they were speaking with a member of the victim's family, if and how the communication influenced the verdict, and why trial counsel did not inform the trial court of the alleged misconduct. More importantly, a hearing is needed to determine the substance of the conversation. The substance of the communication between the juror and the outsider is important and more likely to be prejudicial to the defendant if it relates to the case. *State v. Macomber,* 244 Kan. 396, 407, 769 P.2d 621, *cert. denied* 493 U.S. 842, 110 S.Ct. 130, 107 L.Ed.2d 90 (1989), *overruled on other grounds* *State v. Rinck,* 260 Kan. 634, 923 P.2d 67 (1996).

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***4** In sum, without an evidentiary hearing, neither this court nor the trial court can properly determine whether counsel's performance was deficient and, if so, whether that deficient performance prejudiced the defense. See *Sperry,* 267 Kan. at 297-98, 978 P.2d 933. The trial court erred in failing to hold an evidentiary hearing on this limited issue.

Failure to Object to a Jury Instruction

[2] Jacques' remaining issues are based on the contention that trial counsel was ineffective for failing to object to jury instruction No. 19. The instruction stated in relevant part:

> "A person is not justified in using force in defense of himself if he is committing or attempting to commit possession of cocaine, an inherently dangerous felony."
>
> "If you find from the evidence that the defendant was not committing or attempting to commit possession of cocaine at the time of the killing, then you may consider that the defendant was justified in using force to defend himself."

Jacques' argument is two-fold. First, he contends the instruction improperly prevented the jury from considering self-defense on the felony-murder charge as the instruction misstated the law. Second, Jacques claims the jury instruction failed to require the State to prove possession of cocaine was a forcible felony, thereby depriving him of his right to a jury trial. Because these issues are closely related, they will be addressed simultaneously.

K.S.A. 21-3214(1) prohibits a person from using the defense of self-defense if that person is "attempting to commit, committing, or escaping from the commission of a forcible felony." There is no similar prohibition against the use of self-defense if the person is committing or attempting to commit an inherently dangerous felony. K .S.A.2002 Supp. 21-3436(a)(14) defines possession of cocaine as an inherently dangerous felony. K.S.A. 21-3110(8) provides that a forcible felony "includes any treason, murder, voluntary manslaughter, rape, robbery, burglary, arson, kidnapping, aggravated battery, aggravated sodomy and *any other felony which involves the use of threat of physical force or violence against any person."* (Emphasis added.)

In his direct appeal, Jacques argued that the trial court erred when it refused to give an instruction on self-defense for the felony-murder charge. Jacques asserted that possession of cocaine was not a "forcible felony" pursuant to K.S.A. 21-3110(8) and that it could not, therefore, serve as a barrier to asserting self-defense pursuant to K.S.A. 21-3214(1). *Jacques,* 270 Kan. at 177, 14 P.3d 409. Although our Supreme Court concluded there was a real possibility the jury would have returned a different verdict had it been allowed to consider self-defense, the court also considered whether it would have been legally proper to instruct the jury on self-defense, given the prohibition set forth in K.S.A. 21-3214(1). 270 Kan. at 178, 14 P.3d 409. The court explained:

> "The question becomes whether possession of cocaine is a 'forcible felony' as contemplated by the legislature. If it is, regardless of what standard of review we apply, it would have been inappropriate for the trial court to give the instruction requested by Jacques." 270 Kan. at 179, 14 P.3d 409.

***5** Following a discussion of the issue, the court held that, under the specific facts of the case, possession of cocaine was a forcible felony as contemplated by K.S.A. 21-3110(8), and the trial court did not err in refusing to allow the jury to consider self-defense on the felony-murder charge. 270 Kan. at 181, 14 P.3d 409.

The propriety of the ruling in Jacques' direct appeal is not an issue. In Kansas, when an appeal is taken from the sentence imposed and/or conviction, the judgment of the reviewing court is res judicata as to all issues actually raised. Those issues that could have been presented, but were not presented, are deemed waived. *State v. Neer,* 247 Kan. 137, 140-41, 795 P.2d 362 (1990). Accordingly, the jury instruction, although improperly worded, was a correct statement of the law, and Jacques cannot now complain that his trial counsel was ineffective for failing to object to the instruction.

Affirmed in part, reversed in part, and remanded for an evidentiary hearing in accordance with this opinion.

All Citations

82 P.3d 875 (Table), 2004 WL 117331

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263 P.3d 223 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

James P. LUDLOW, Appellant,
v.
STATE of Kansas, Appellee.

Nos. 105,303, 105,304.
|
Nov. 18, 2011.
|
Review Denied May 21, 2012.

Appeal from Douglas District Court; Michael J. Malone and Jack A. Murphy Judges.

Attorneys and Law Firms

Adam M. Hall, of Collister & Kampschroeder, of Lawrence, for appellant.

Kristafer R. Ailslieger, deputy solicitor general, for appellee.

Before BUSER, P.J., MARQUARDT and LEBEN, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** James P. Ludlow was convicted of second-degree murder, attempted first-degree murder, and theft. The Kansas Supreme Court affirmed his convictions in 1994. With the assistance of retained counsel, David Brown, Ludlow filed a K.S.A. 60–1507 motion in 2004 alleging ineffective assistance of trial and appellate counsel. The motion was denied by the district court. This court affirmed the district court's decision in 2007. In 2008, Ludlow filed a motion to allow him to file for review by the Kansas Supreme Court claiming that Brown was ineffective for failing to file the petition for review. His motion was denied for lack of jurisdiction. He appealed the dismissal and filed another 60–1507 motion claiming ineffective assistance of counsel by Brown. The Court of Appeals consolidated all of his motions for appeal. We affirm.

After drinking heavily at a bar, Ludlow shot and killed Tracy Robbins in the home they shared. He also shot Valerie Hartley as she tried to flee. He then took money and a car belonging to Robbins and Hartley and fled to South Dakota. Ludlow claimed that he suffered an alcoholic blackout and remembered nothing between drinking at the bar and waking up on an airplane. A jury found Ludlow guilty of second-degree murder of Robbins, attempted first-degree murder of Hartley, and theft. The Kansas Supreme Court affirmed his conviction in his direct appeal in 1994.

In June of 2004, Ludlow hired David Brown to represent him. Brown filed a K.S.A. 60–1507 motion alleging ineffective assistance of trial and appellate counsel. The district court conducted an evidentiary hearing on April 1, 2005. In a 26–page memorandum decision, the district court made extensive findings of fact and conclusions of law stating that neither trial nor appellate counsel was ineffective. A panel of this court affirmed the district court's decision on April 20, 2007.

Following the 2007 decision, Ludlow asked Brown to file a petition for review with the Kansas Supreme Court. Brown advised Ludlow additional funds were needed before a petition could be filed. Ludlow told Brown he was unable to pay. Ludlow alleges Brown never contacted him again, and Brown did not file the petition for review.

Over a year later, on April 22, 2008, Ludlow filed a "Motion to Allow Review by the Supreme Court Out of Time Due to Ineffective Assistance of Counsel." Ludlow alleged in his motion that Brown was ineffective for failing to file the petition for review. Kari Nelson was appointed to represent Ludlow. However, Nelson withdrew as counsel during a June 16, 2008, motion hearing because she had previously worked with Brown. The district court dismissed Ludlow's motion during the hearing for lack of jurisdiction. Ludlow appealed the dismissal on June 25, 2008. The dismissal was affirmed. Nelson and the court advised Ludlow to file another 60–1507 motion with a claim of ineffective assistance against Brown.

Ludlow filed a second 60–1507 motion on September 22, 2008. The district court summarily dismissed that motion as untimely. Ludlow then filed a motion to reconsider, and a different judge ruled that the original summary dismissal implicitly found Ludlow had failed to establish that

the K.S.A. 60–1507(f)(1) time bar should be extended to prevent manifest injustice. Ludlow also appealed that decision. The district court consolidated all the denied motions and appointed counsel for the appeal.

***2** Ludlow concedes that his second 60–1507 motion was untimely but argues that the district court should allow the Kansas Supreme Court to review his first 60–1507 motion because of "acts of ineffective assistance of counsel in the representation performed by Brown in Case No. 04C386." The district court summarily denied his motion on October 16, 2008. Ludlow's notice of appeal was filed on October 28, 2008. On October 31, 2008, Ludlow filed a motion to reconsider and a motion to disqualify. On July 13, 2010, the motion for reconsideration was denied and the motion to disqualify Judge Murphy was found to be moot. Ludlow filed a notice of appeal on August 19, 2010.

SUMMARY DENIAL OF FIRST K.S.A. 60–1507 MOTION AS UNTIMELY

When the district court summarily dismisses a 60–1507 motion by determining that the record, files, and motions entitle the movant to no relief, the appellate court reviews the decision de novo. *Trotter v. State,* 288 Kan. 112, 132, 200 P.3d 1236 (2009). Also, questions of statutory interpretation are reviewed de novo. *State v. Arnett,* 290 Kan. 41, 47, 223 P.3d 780 (2010).

Ludlow claims the district court subjected him to manifest injustice by dismissing his motion to petition the Kansas Supreme Court out of time and dismissing his second 60–1507 motion as untimely. A 60–1507 motion must be filed within 1–year from the decision of the last appellate court to exercise jurisdiction in a defendant's *direct appeal,* however, the time limit can be extended to prevent manifest injustice. K.S.A. 60–1507(f)(1)–(2). The movant bears the burden of establishing manifest injustice. *State v. Mitchelle,* 284 Kan. 374, 379, 162 P.3d 18 (2007).

Ludlow's direct appeal was final on October 28, 1994, when the Kansas Supreme Court denied relief. *State v. Ludlow,* 256 Kan. 139, 883 P.2d 1144 (1994). Because the Kansas Supreme Court affirmed Ludlow's conviction before the 601507 time limit was enacted by the legislature, Ludlow had until June 30, 2004, to file a timely motion. See *Hayes v. State,* 34 Kan.App.2d 157, 161–62. 115 P.3d 162 (2005). Ludlow concedes that the 1–year limit has run for his second 60–1507 motion but argues his claim should be heard to prevent manifest injustice on his first 60–1507 motion.

Manifest injustice is something " 'obviously unfair' or 'shocking to the conscience.' " *Ludlow v. State,* 37 Kan.App.2d 676, 686, 157 P.3d 631 (2007). Ludlow argues that Brown was ineffective for failing to file a petition for review with the Kansas Supreme Court. Ludlow argues on appeal that it was obviously unfair and a manifest injustice to hold him to the statutory limit because Brown's alleged ineffective assistance of counsel did not occur until after the 1–year limitation period had ended.

"Barring a claim before it arose clearly would constitute a manifest injustice warranting an extension of the 1–year limitation period." *Pouncil v. State,* No. 98,276, 2008 WL 2251221, at *5 (Kan.App.), *rev. denied* 286 Kan. 1179 (2008). In *Albright v. State,* 292 Kan. 193, 211, 251 P.3d 52 (2011), the Kansas Supreme Court held that indigent 60–1507 movants have a statutory right to effective assistance of counsel that outside of the statutory time limit results in manifest injustice because it becomes temporally impossible for the claims ever to be reviewed. *Pouncil,* 2008 WL 2251221, at *6.

***3** Providing a right without a method to vindicate it is obviously unfair and shocking to the conscience. The conduct supporting Ludlow's claim, that Brown was ineffective for failing to the petition for review, did not occur until after Ludlow as already statutorily barred from filing a timely 60–1507 motion. The district court erred in summarily dismissing Ludlow's 60–1507 motion without considering whether the time limit should be extended to prevent manifest injustice.

While the district court should have considered the merits of Ludlow's ineffective assistance of counsel claim to prevent manifest injustice, an appellate court can consider whether counsel's performance in a 60–1507 proceeding was so ineffective that it was obviously unfair or shocking to the conscience even if the district court failed to address the issue. Ludlow presented this issue to the district court; however, the record in this case is sufficient for us to determine whether Brown's failure to file a petition for review with the Kansas Supreme Court amounted to ineffective assistance of counsel.

FAILURE TO FILE A PETITION FOR REVIEW WITH THE KANSAS SUPREME COURT

"Allegations of ineffective assistance of counsel ... involve mixed questions of fact and law. [An appellate court] therefore reviews the underlying factual findings for substantial competent evidence and the legal conclusions based on those facts de novo." *Boldridge v. State,* 289 Kan. 618, 622, 215 P.3d 585 (2009).

The State argues that the statutory right to effective assistance of counsel only applies to indigents with appointed counsel, and thus Ludlow has no colorable claim because he had retained counsel. Given the Kansas Supreme Court's recent decision in *Albright,* Ludlow did have a statutory right to counsel. "60–1507 movants who have counsel are entitled to effective assistance of that counsel." *Albright,* 292 Kan. at 207. The court in *Albright* determined that K.S.A. 22–4506(b) requires a district court to appoint counsel in a 60–1507 proceeding when a movant is indigent and the petition presents ' "substantial questions of law or triable issues of fact." ' 292 Kan. at 199. Where a movant can show that his or her 60–1507 motion involves substantial issues of law or fact, the legislature has determined that counsel is necessary and should be appointed if a movant cannot afford it. See K.S.A. 22–4506(b).

The requirement for effective assistance of counsel in *Albright* depends on the factual and legal issues raised in the 60–1507 motion, and not on the movant's indigent status. 292 Kan. at 199. To hold, as the State argues, that appointed counsel for an indigent must be effective whereas retained counsel for a nonindigent does not have to be effective, is illogical. Appointed and retained counsel must be effective when there are "substantial questions of law or triable issues of fact." K.S.A. 22–4506(b). Ludlow had a right to effective assistance of counsel.

***4** When a district court is presented with a 60–1507 motion, it can (1) summarily dismiss the case if the record conclusively shows the movant is entitled to no relief, (2) appoint counsel and conduct a preliminary hearing to determine if the issues of law and fact are substantial, or (3) hold a full evidentiary hearing if the record shows a substantial issue. *Albright,* 292 Kan. at 197. In Ludlow's first 60–1507 motion, the district court conducted a full evidentiary hearing. The district court did not appoint counsel for Ludlow because he had retained Brown. However, because the district court proceeded with the third option, it implicitly determined that there were substantial questions of law or triable issues of fact in Ludlow's motion. The substantial questions of law and fact gave Ludlow the statutory right to effective assistance of counsel. See *Albright,* 292 Kan. at 207.

Moreover, even if a movant fails to meet the requirements for appointed counsel at the district court level, the statutory right to counsel attaches after the notice of appeal is filed. *Albright,* 292 Kan. at 203; see Rule 183(m) (2010 Kan. Ct. R. Annot. 255). Brown's alleged ineffective assistance occurred after the Court of Appeals decision and after the notice of appeal had been filed. Even if the statutory right to effective assistance of counsel did not attach at the district court level, the right had attached at the time of Brown's alleged failure to file a petition for review with the Kansas Supreme Court.

The failure of 60–1507 counsel to file a petition for review with the Kansas Supreme Court under some facts could be ineffective assistance. *Albright,* 292 Kan. at 207–08, 211 (discussing cases holding that counsel's failure to petition for review with the Kansas Supreme Court in direct review was ineffective assistance, and incorporating the reasoning in the context of 1507 proceedings). Two standards may apply to Ludlow's 1507 proceeding:

> "[I]f it is alleged that *appointed counsel's* deficiencies resulted in the loss of the ability to pursue a procedure, the *Flores–Ortega* standard is to be applied. Under that standard, as modified for a 60–1507 proceeding: (1) If the movant requested that an appeal be filed and it was either not filed at all or was not timely filed, *appointed counsel* was ineffective and the untimely appeal should be allowed ...; or (3) in other situations, such as where *appointed counsel* has not consulted with the movant or the movant's direction are unclear, the movant must demonstrate a reasonable probability that, but for *appointed counsel's* deficient failure to either consult with the movant or act on the movant's wishes, [the petition] would have been filed. The movant need not show that a different result would have been achieved but for *appointed counsel's* performance." (Emphasis added.) 292 Kan. at 211–12.

The first standard does not apply here because the rationale behind it does not fit squarely with Ludlow's case. When appointed counsel for an indigent movant fails to file for review after a direct request from the movant, the representation is per se ineffective because the movant justifiably relied on counsel to file, and the failure to file clearly prejudiced the movant. *Albright,* 292 Kan. at 211; *Kargus v. State,* 284 Kan. 908, 918, 169 P.3d 307 (2007). In these cases, the movant is allowed to file for review out of time. Here, Ludlow did request that Brown file a petition for review. However, the key is whether the movant justifiably relied on counsel. See *Roe v. Flores–Ortega,* 528 U.S. 470, 477, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). Ludlow could not have reasonably relied on Brown to file the petition for review because Brown specifically told Ludlow that he needed more funds before the petition would be filed.

***5** Because it is questionable whether Ludlow's reliance on Brown was justified, the second standard is more applicable to this case and Ludlow "must demonstrate a reasonable probability that, but for appointed counsel's deficient failure to ... consult with [Ludlow] ..., an appeal would have been filed." *Albright,* 292 Kan. at 211–12. In *Brown v. State,* 278 Kan. 481, 484–85, 101 P.3d 1201 (2004), the movant demonstrated that he would have filed a timely appeal of his unsuccessful 60–1507 motion but for his counsel's failure to advise him of the proceeding's outcome and of his right to appeal. Here, Ludlow requested the petition to be filed, which indicated that he knew about the Court of Appeals decision and about his right to petition the Kansas Supreme Court. However, Ludlow waited over a year after the Court of Appeals decision to file his "Motion to Allow Review by Supreme Court Out of Time Due to Ineffective Assistance of Counsel."

Because Ludlow's retained counsel was not ineffective for refusing to file the petition for review, Ludlow has not shown any manifest injustice excusing his failure to timely appeal the denial of his 60–1507 motion.

In the alternative, Ludlow unpersuasively argues that his second 60–1507 motion should be considered timely filed. "Kansas courts will look past the form of an action to its substance in situations where circumstances show K.S.A. 60–1507 would provide the appropriate remedy." *State v. Mejia,* 20 Kan.App.2d 890, 893, 894 P.2d 202 (1995). Ludlow conceded that he filed the second motion out of time, but argues that if the court determines that the 1–year limit ran from the last appellate review of his *collateral* appeal and considers the prisoner mailbox rule, his motion could be considered timely. K.S.A. 60–1507(f) clearly indicates that the 1–year limit runs from final appellate review of the *direct* appeal.

The district court did not err in dismissing both of Ludlow's 60–1507 motions. Affirmed.

All Citations

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Unpublished Disposition
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

Jeffrey NELSON, Appellant,
v.
STATE of Kansas, Appellee.

No. 114,435
|
Opinion filed February 3, 2017
|
Review Denied December 22, 2017

Appeal from McPherson District Court; RICHARD B. WALKER, judge.

Attorneys and Law Firms

Michael P. Whalen, of Law Office of Michael P. Whalen, of Wichita, for appellant.

Jamie L. Karasek, deputy county attorney, and Derek Schmidt, county attorney, for appellee.

Before Powell, P.J., Pierron and Hill, JJ.

MEMORANDUM OPINION

Pierron, J.:

***1** Jeffrey Nelson was convicted of first-degree premeditated murder, burglary, and three counts of forgery. The district court sentenced him to a mandatory minimum of 50 years in prison (hard 50). Ninety-six days after the Kansas Supreme Court upheld his hard 50 sentence, the United States Supreme Court issued *Alleyne v. United States*, 570 U.S. ——, 133 S.Ct. 2151, 186 L.Ed. 2d 314 (2013), which ruled sentences such as Kansas' hard 50 sentencing scheme were unconstitutional. Nelson filed a motion pursuant to K.S.A. 60–1507 claiming his trial counsel was ineffective and his appellate counsel was ineffective for failing to file a writ of certiorari to the United States Supreme Court which he claims would have secured him relief under *Alleyne*. The district court denied his motion after an evidentiary ruling. Nelson appeals.

On April 25, 2008, a jury convicted Nelson of first-degree murder, burglary, and three counts of forgery. Our Supreme Court affirmed his convictions on appeal in *State v. Nelson*, 291 Kan. 475, 476, 243 P.3d 343 (2010) (*Nelson I*). The following facts are taken directly from the Supreme Court's opinion in *Nelson I*:

> "The relevant events occurred over a 3–day time span. On August 24, 2007, Nelson went to the house of his stepfather Swartz, just as Swartz was getting ready to leave for work. Swartz indicated Nelson was not welcome and waited for Nelson to leave before going to work. Nelson returned while Swartz was at work and broke into the garage. Nelson used a ladder to crawl through an attic space connecting the garage to the house because the garage did not have direct access to the house. Once inside the attic space, the ceiling buckled and Nelson fell through, creating a hole. When Swartz returned home after work, Nelson was gone. Swartz reported the break-in to police and said his checkbook was missing.
>
> "At 9:38 p.m. that same day, Nelson used an ATM to deposit a $5,000 forged check from Swartz' account. Nelson then picked up his friend, Keith Hewitt. They drove to Wal-Mart, and Nelson bought a baseball bat. As they were leaving the parking lot, Nelson asked Hewitt if he would help him beat up Swartz. Hewitt testified at trial that he talked Nelson out of this. The two then went to a club. Nelson took Hewitt home at 2 a.m., but Nelson returned at 3 a.m. and offered Hewitt $500 to help him 'take care of' Swartz. Hewitt refused.
>
> "The next day, April 25, 2007, Nelson and Swartz had a chance encounter at Wal–Mart that became heated, but not physical. Sometime later that day Nelson deposited a $100 forged check from Swartz' account into his friend Misty Sauder's account. At around 10 p.m. Nelson asked Amber Moore, a girl he was dating, if she wanted to watch a movie. Moore picked Nelson up at his grandparents' house; he asked her if she would think poorly of him if he beat someone up; and then he asked her to drive him by Swartz' employer to see if his truck was in the parking lot. It was. Nelson then asked Moore to drive him back to his grandparents' house where he retrieved the bat. He told Moore he needed the bat for protection because he was going to beat up Swartz.

***2** "Moore and Nelson drove by Swartz' workplace again to make sure Swartz' truck was still there, and then Moore dropped Nelson off at Swartz' house. He told Moore to tell him when Swartz was driving home. Swartz returned home around 11 p.m. Moore believed Nelson was hiding in the bushes. She drove around until 1 a.m., when she told Nelson she was going home. She testified Nelson told her he 'could not do it,' and they went back to Moore's house. At around 2:30 a.m., Nelson borrowed Moore's car, took the baseball bat, and said he was returning to Swartz' home.

"Nelson disputes what happened next. The State contends Nelson entered the home, discovered Swartz sleeping in his bed, and hit him on the back of the head while he slept. The coroner testified Swartz' death was caused by a blunt force trauma to the head, and there were no defensive wounds. A detective testified there was no evidence of a struggle in the home. Nelson's defense theory was that Swartz let him into his house, they fought, Nelson tried to leave, and Swartz pulled him back into a fight. Finally, Nelson grabbed the bat, Swartz reached for it, and Nelson hit him with it. This defense theory is based on varying statements Nelson gave the police. Nelson did not testify at trial.

"Initially, Nelson told a detective he got into a fight with Swartz between 11:30 and 11:45 p.m. on April 25. He said they fought over the bat and he hit Swartz with it. He said Swartz was fine when he left. Nelson later added greater and sometimes conflicting details about the physical altercation. This portion of the interview is more difficult to follow, but begins with Nelson saying that he went into a room in Swartz' house and found the bat. Swartz was standing in the room's doorway. Nelson chopped at Swartz with the bat, and Swartz backed into his bedroom. Swartz antagonized Nelson by saying he had better hit him hard, and Nelson told Swartz not to give him an excuse. Nelson then approached Swartz, and Swartz reached for the bat, eventually catching it. Nelson pushed Swartz, and he 'finally' hit Swartz several times with the bat. He said Swartz ended up on the bed, lying on his back and side. Nelson told the detective he went to Swartz' house to 'fucking end the animosity and all the bullshit and all the shit [Swartz] was doing.'

"Later in the same interview, after additional prodding from the detective, Nelson said he was going to tell the truth about what happened. Nelson admitted he brought the bat with him and did not find it in a room in Swartz' house. At some point, Nelson told a detective it was kind of hard to walk around the corner, look in the bathroom, and close the door while holding the bat without it being obvious. Then Nelson said Swartz asked if he was hiding something, and Nelson tried to 'play it off like I wasn't doing anything.' Nelson grabbed the door handle and pulled it. Swartz pushed him twice and slapped him on the head. Then Nelson said he pushed him back, pulled out the bat, and hit him. Nelson continually stated there was no blood when he left.

"Moore testified at trial that Nelson returned to her house around 6:30 a.m. that morning, April 26. She said Nelson was pale and told her he thought he killed Swartz. Later that day, Swartz was discovered on his couch by a coworker when Swartz did not show up for work. Swartz was alive but unresponsive. There were pools of blood on Swartz' bed, pillow, and in the master bedroom; blood was found going from the bedroom, down the hallway, and in the bathroom; and there were sheets that trailed blood through the house to the couch.

***3** "Also that day, Nelson deposited a $400 forged check from Swartz' account. Nelson then dropped off an apartment rental application and test drove a BMW at a dealership. Nelson told Moore he was going to sell Swartz' vehicles for a down payment. While Nelson was occupied with the car, Moore received a phone call that Swartz had been taken to the hospital, and everyone suspected Nelson beat him. Moore and Nelson left the dealership. Moore testified that she and Nelson retrieved the clothes Nelson was wearing at the time he hit Swartz with the bat, got the bat out of a dumpster where Nelson had stashed it, drove to the country, and discarded the items. Moore later led police back to retrieve these items.

"On May 19, 2007, Swartz died from complications arising from the head injuries. Nelson was charged with premeditated first-degree murder in case No. 07CR86. He also was charged with burglary and three counts of forgery for the checks drawn on Swartz' account in the amounts of $5,000, $100, and $400 in case No. 07CR125. The cases were consolidated for trial." 291 Kan. at 476–79.

Prior to the State charging him with premeditated murder, Nelson had retained Stephen Ariagno regarding several other cases he had pending. After his murder charge, the district court appointed Ariagno to represent Nelson in his first-degree murder case. A jury trial commenced in the present case on January 28, 2008. The next day, the court declared a mistrial at the request of Ariagno after four different jurors

reported they knew witnesses in the case, but they were not aware of it at the time of jury selection. The district court rescheduled the jury trial for April 21, 2008. On April 25, 2008, the jury found Nelson guilty on all charges.

On June 30, 2008, the district court sentenced Nelson to life in prison with mandatory minimum sentence of 50 years (hard 50) for his first-degree murder conviction. The court ordered the burglary and forgery sentences to run consecutive to Nelson's hard 50 sentence, but concurrent with each other, for an additional term of 32 months' imprisonment. Nelson appealed his sentence to the Kansas Supreme Court, arguing, among other things, that the district court imposed the wrong standard when finding aggravating factors supported his hard 50 sentence. Our Supreme Court agreed, and remanded Nelson's hard 50 sentence to the district court to determine whether aggravating circumstances existed under a preponderance of the evidence standard. 291 Kan. at 488.

In February 2011, Ariagno informed the district court that Nelson had expressed concerns regarding his representation of Nelson during the jury trial. Ariagno believed a conflict existed based on Nelson's assertion that he was ineffective. The court granted Arigano's request to withdraw and appointed another attorney to represent Nelson at his resentencing hearing. At his resentencing hearing, the district court again sentenced Nelson to a hard 50 sentence. Nelson appealed his sentence, arguing the court abused its discretion in imposing the hard 50 sentence. *State v. Nelson*, 296 Kan. 692, 294 P.3d 323 (2013) (*Nelson II*).

After both parties had filed briefs in Nelson's second appeal, the United States Supreme Court granted certiorari in *Alleyne v. United States*, 570 U.S. ——, 133 S.Ct. 2151, 186 L.Ed. 2d 314 (2013), on October 5, 2012. The Kansas Supreme Court issued an opinion affirming Nelson's sentence on February 15, 2013. *Nelson II*, 296 Kan. 692. A mandate was issued finalizing the decision on March 11, 2013. The United States Supreme Court decided *Alleyne* 96 days later on June 17, 2013.

On December 24, 2013, Nelson filed a K.S.A. 60–1507 motion alleging that both his trial counsel, Ariagno, and his appellate counsel, Meryl Carver–Allmond were ineffective. After reviewing the motion, the district court ordered an evidentiary hearing on the matter. Additionally, on February 18, 2014, the Paul E. Wilson Project for Innocence & Post–Conviction Remedies submitted a supplemental brief supporting Nelson's claim that his appellate counsel was ineffective. Attached to this brief were an affidavit from Carver–Allmond and two blog posts regarding *Alleyne* that she claimed she had read before the Kansas Supreme Court issued its ruling in *Nelson II*. On September 8, 2014, the district court held an evidentiary hearing on Nelson's 60–1507 motion. On June 8, 2015, the court filed a journal entry finding that neither Ariagno nor Carver–Allmond were ineffective. The court later filed a corrected journal entry to correct grammatical and spelling mistakes, but the substance of the decision was the same. Nelson appeals.

***4** Carver–Allmond represented Nelson on his initial appeal and the appeal of his resentencing, and she testified at the evidentiary hearing. Carver–Allmond did not raise the hard 50 sentencing issue on Nelson's first appeal. She said she believed the hard 50 sentencing issue was "effectively dead" at the time of Nelson's appeal because the Kansas Supreme Court had routinely denied the issue for years. On the appeal of Nelson's resentencing, she believed she could not raise the issue because the appeal was limited to issues regarding Nelson's resentencing. Additionally, the United States Supreme Court had not granted certiorari for *Alleyne* at that time.

Carver–Allmond testified that the decision in *Alleyne* came down after the Kansas Supreme Court issued the mandate in Nelson's second appeal. The *Alleyne* decision also came down after the 90 days Nelson had to file his writ of certiorari. Another attorney at the appellate defender's office, Randall Hodgkinson, told Carver–Allmond that the United States Supreme Court had granted certiorari in the *Alleyne* case, and he thought the law was likely to change. She also read blog posts by Hodgkinson regarding the grant of certiorari in *Alleyne*. At the time, though, Carver–Allmond had just started a position as a public defender for capital cases and was overwhelmed with her new workload. She also suspected Hodgkinson's enthusiasm may have been more because he was hoping the law would change and not because the law was actually likely to change.

Carver–Allmond testified she did not discuss filing a writ of certiorari with Nelson. Carver–Allmond stated she does not commonly discuss filing writs of certiorari with her clients. She felt in this case, however, she was ineffective for failing to file for a writ. She also testified she made a mistake by not investigating the issue more, and her failure to do so was not a strategic call.

Nelson testified he did not discuss filing a writ of certiorari to the United States Supreme Court with Carver–Allmond. He said that if he had known that was a possibility, he would have wanted to file one.

The district court concluded that Carver–Allmond had not provided ineffective assistance of appellate counsel. The court noted that if *Alleyne* had been decided at the time of Nelson's jury trial, the decision of whether a hard 50 sentence should be imposed would certainly have been an issue for the jury and not the district court. The court found, however, that United States Supreme Court and other federal caselaw clearly established there was no constitutional right to counsel to file a writ of certiorari.

The district court also noted that in *Kargus v. State*, 284 Kan. 908, 916, 169 P.3d 307 (2007), the Kansas Supreme Court held there was a statutory right to effective assistance of counsel in discretionary appeals to the Kansas Supreme Court. The district court added, however, that this holding was limited to the state appellate process. Unless Kansas courts decided to extend that right to filing for certiorari, the prior cases finding no constitutional right to effective assistance of counsel at that stage controlled. The court further found that because *Alleyne* had not been decided at the time of Nelson's appeals, Carver–Allmond could not be faulted for failing to raise the issue of the constitutionality of Nelson's Hard 50 sentence.

Standard of Review

After a full evidentiary hearing on a K.S.A. 60–1507 motion, the district court must issue findings of fact and conclusions of law concerning all issues presented. Supreme Court Rule 183(j) (2015 Kan. Ct. R. Annot. 271). An appellate court reviews the court's findings of fact to determine whether they are supported by substantial competent evidence and are sufficient to support the court's conclusions of law. Appellate review of the district court's ultimate conclusions of law is de novo. *State v. Adams*, 297 Kan. 665, 669, 304 P.3d 311 (2013).

Overview of Hard 50 Sentencing Issue

***5** The district court sentenced Nelson under Kansas' hard 50 sentencing scheme. As explained in *Nelson I*,

> "Premeditated first-degree murder carries a life sentence with a mandatory minimum of 25 years before the defendant becomes eligible for parole unless the court finds the defendant should be subject to an enhanced minimum sentence. For crimes committed after July 1, 1999, this requires a mandatory hard 50 term. K.S.A. 21–4635; see K.S.A. 22–3717(b)(1). To impose the hard 50 sentence, the district court must find one or more of the aggravated circumstances enumerated in K.S.A. 21–4636 exist and that the aggravating factors are not outweighed by any mitigating factors. K.S.A. 21–4635(d)." 291 Kan. at 486.

As the Kansas Supreme Court pointed out in *State v. Soto*, 299 Kan. 102, 119, 322 P.3d 334 (2014):

> "[B]efore *Alleyne*, the United States Supreme Court held that any additional facts necessary to increase the punishment for a crime beyond the maximum punishment a judge could impose based solely on the facts reflected in the jury verdict or admitted by the defendant must be submitted to a jury and proven beyond a reasonable doubt. In contrast, additional facts necessary to increase the mandatory minimum sentence were merely sentencing factors that could be found by a judge rather than a jury."

Based on this distinction, the *Soto* court upheld the constitutionality of the hard 40 sentencing scheme (later amended to a hard 50 scheme) even in light of the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000). See 299 Kan. at 119.

In *Alleyne*, however, the United States Supreme Court changed course and held because "[m]andatory minimum sentences increase the penalty for a crime ... any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury," explicitly overruling prior precedent that held otherwise. 133 S.Ct. at 2155. In *Soto*, the Kansas Supreme Court applied *Alleyne* to the hard 50 sentencing scheme and found it unconstitutional. 299 Kan. at 124. Several defendants who had cases pending on appeal had their hard 50 sentences ruled unconstitutional. See, *e.g.*, *State v. Lloyd,* 299 Kan. 620, 626, 641, 325 P.3d 1122 (2014); *State v. DeAnda*, 299 Kan. 594, 600, 324 P.3d 1115 (2014); *State v. Hilt*, 299 Kan. 176, 201–04, 322 P.3d 367 (2014). This court has held, however, that *Alleyne* does not apply retroactively. *Verge v. State*, 50 Kan. App. 2d 591, 598, 335 P.3d 679 (2014).

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Right to Counsel for a Writ of Certiorari

In order to find that Carver–Allmond was ineffective for failing to file a petition for certiorari with the United States Supreme Court, Nelson must first have had a right to effective assistance of counsel at this stage of the proceedings. See, *e.g.*, *Wainwright v. Torna*, 455 U.S. 586, 587–88, 102 S.Ct. 1300, 71 L.Ed. 2d 475 (1982) (since defendant had no constitutional right to counsel to file a discretionary appeal with state supreme court, defendant could not be deprived of effective assistance of counsel by his counsel's failure to timely file a petition for review). Nelson argues that both the Kansas Constitution and Kansas statutes provide a right to effective assistance of counsel in filing a writ of certiorari to the United States Supreme Court.

Constitutional Right

***6** The Sixth Amendment provides a right to counsel at trial in criminal prosecutions. U.S. Const. amend. VI. The United States Supreme Court has further held that under the Due Process and Equal Protection clauses of the Fourteenth Amendment defendants are entitled to effective assistance of counsel for their first appeal. See *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed. 2d 821 (1985) (finding defendant must be provided with effective assistance of counsel on first appeal to comply with due process of law); *Douglas v. California*, 372 U.S. 353, 357–58, 83 S.Ct. 814, 9 L.Ed. 2d 811 (1963) (finding under equal protection clause that State must provide counsel to indigent defendants on first appeal); *Griffin v. Illinois*, 351 U.S. 12, 18–19, 76 S.Ct. 585, 100 L.Ed. 891 (1956) (finding under due process and equal protection clauses that State which has created appellate review system must provide meaningful means of review to all defendants). As Nelson admits in his brief, the United States Supreme Court does not recognize a federal constitutional right to counsel for discretionary appeals at the state level or to file a writ of certiorari to the United States Supreme Court. See *Wainwright*, 455 U.S. at 587–88; *Ross v. Moffitt*, 417 U.S. 600, 616–18, 94 S.Ct. 2437, 41 L.Ed. 2d 341 (1974). In *Foy v. State*, 17 Kan. App. 2d 775, 844 P.2d 744 (1993), another panel of this court adopted the ruling in *Wainwright* to find there was no constitutional right to state discretionary appeals in Kansas. 17 Kan. App. 2d. at 776.

Nelson argues that section 10 and section 18 of the Kansas Constitution Bill of Rights provide a right to counsel for writs of certiorari to the United States Supreme Court. Section 10 provides:

> "In all prosecutions, the accused shall be allowed to appear and defend in person, or by counsel; to demand the nature and cause of the accusation against him; to meet the witness face to face, and to have compulsory process to compel the attendance of the witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. No person shall be a witness against himself, or be twice put in jeopardy for the same offense."

Section 18 provides: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."

Nelson's argument regarding this point is not entirely clear. He argues that "[t]he Kansas legislature has in essence constitutionalized the scope of a criminal prosecution under Section 10 and defined 'due course of law' under Section 18 by granting appellate review of criminal proceedings." He states that a defendant has a right to a direct appeal and a discretionary appeal to the Kansas Supreme Court. He then notes that "[w]hether the Kansas Supreme Court reviews the case is discretionary with the Court. At that point, *the criminal proceedings against the individual have concluded*." (Emphasis added.) He then goes on to explain that Kansas recognizes a general right to effective assistance of counsel and argues this includes discretionary appeals to the Kansas Supreme Court. At no point, though, does Nelson explain how these rights demonstrate a right to effective assistance of counsel for a writ of certiorari to the United States Supreme Court. In fact, he concedes that criminal proceedings against a defendant finish after review by the Kansas Supreme Court.

Regardless of Nelson's argument, the Kansas Constitution does not appear to recognize a right to effective assistance of counsel for writs of certiorari. Kansas courts generally interpret the Kansas Bill of Rights as providing the same or similar protections as the Bill of Rights in the United States Constitution. See *State v. Schoonover*, 281 Kan. 453, 493, 133 P.3d 48 (2006) ("Generally, provisions of the Kansas Constitution which are similar to the Constitution of the United States have been applied in a similar manner."). The Kansas Supreme Court has interpreted section 10 of the

Kansas Constitution Bill of Rights as providing the same protections as the Fifth and Sixth Amendments to the United States Constitution. See, *e.g.*, *Schoonover*, 281 Kan. at 474 (section 10 and Fifth Amendment provide same protections against double jeopardy); *State v. Davis*, 277 Kan. 309, 334, 85 P.3d 1164 (2004) (interpreting Sixth Amendment and section 10 as providing same guarantees to speedy trial); *State v. Morris*, 255 Kan. 964, 979–81, 880 P.2d 1244 (1994) (section 10 provides no greater protection against self-incrimination than Fifth Amendment). Kansas courts also interpret sections 1 and 2 of the Kansas Constitution Bill of Rights as providing similar protections as the Due Process Clause and Equal Protection Clauses of the United States Constitution. See *Hodes & Nauser, MDs v. Schmidt*, 52 Kan. App. 2d 274, 275, 368 P.3d 667, *rev. granted* 304 Kan. 1017 (2016). As the United States Supreme Court has held there is no right to effective assistance of counsel for filing a writ of certiorari under the Sixth Amendment or Due Process and Equal Protection Clauses, there is likely no right under the Kansas Constitution. See *Kargus*, 284 Kan. at 912 (noting no constitutional right to discretionary state appeals).

***7** Additionally, there is little caselaw interpreting section 18 of the Kansas Constitution Bill of Rights. In *Ware v. State*, 198 Kan. 523, 426 P.2d 78 (1967), however, our Supreme Court held that Art. 3 of the Kansas Constitution and sections 5, 10, and 18 of the Kansas Constitution Bill of Rights do not give rise to a right to appeal. 198 Kan. at 525. Thus, section 18 is unlikely to have "constitutionalized the scope of a criminal proceeding" and given rise to a constitutional right to counsel in filing a writ of certiorari, as Nelson argues.

Statutory Right

Next, Nelson contends there is a statutory right to effective assistance of counsel for writs of certiorari. The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. *State v. Jordan,* 303 Kan. 1017, 1019, 370 P.3d 417 (2016). An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. *State v. Barlow*, 303 Kan. 804, 813, 368 P.3d 331 (2016). When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. 303 Kan. at 813. Where there is no ambiguity, the court need not resort to statutory construction. Only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history to construe the legislature's intent. 303 Kan. at 813.

Nelson's argument that there is a statutory right to counsel for writs of certiorari is based solely on the language of K.S.A. 22–4505(a)-(c), which provides:

> "(a) When a defendant has been convicted in the district court of any felony, the court shall inform the defendant of such defendant's right to appeal the conviction to the appellate court having jurisdiction and that if the defendant is financially unable to pay the costs of such appeal such defendant may request the court to appoint an attorney to represent the defendant on appeal and to direct that the defendant be supplied with a transcript of the trial record.
>
> "(b) If the defendant files an affidavit stating that the defendant intends to take an appeal in the case and if the court determines, as provided in K.S.A. 22–4504, and amendments thereto, that the defendant is not financially able to employ counsel, the court shall appoint counsel from the panel for indigents' defense services or otherwise in accordance with the applicable system for providing legal defense services for indigent persons prescribed by the state board of indigents' defense services, to represent the defendant and to perfect and handle the appeal. If the defendant files a verified motion for transcript stating that a transcript of the trial record is necessary to enable the defendant to prosecute the appeal and that the defendant is not financially able to pay the cost of procuring such transcript, and if the court finds that the statements contained therein are true, the court shall order that such transcript be supplied to the defendant as provided in K.S.A. 22–4509, and amendments thereto and paid for by the state board of indigents' defense services pursuant to claims submitted therefor.
>
> ***8** "(c) Upon an appeal or petition for certiorari addressed to the supreme court of the United States, if the defendant is without means to pay the cost of making and forwarding the necessary records, the supreme court of Kansas may by order provide for the furnishing of necessary records."

Nelson argues that because this statute contains no restrictions on the scope of the appeal, the legislature clearly intended to include writs of certiorari to the United States Supreme Court

Of particular relevance on this point is *Kargus*, in which the court found a statutory right to discretionary appeals to the Kansas Supreme Court. 284 Kan. at 916. Kargus filed a K.S.A. 60–1507 motion alleging his attorney had provided ineffective assistance of counsel because his counsel failed to file a petition for review with the Kansas Supreme Court despite Kargus' request that he do so. In determining whether Kargus' counsel was ineffective, the court first considered whether Kargus had a right to effective assistance of counsel in filing a petition for review. The court noted that precedent established there was no constitutional right to counsel for discretionary state appeals. 284 Kan. at 911–13 (citing *Foy*, 17 Kan. App. 2d at 775–76). The court added, however, that even if there was no constitutional right to counsel, there could be a statutory right to counsel at this stage of the proceedings. *Kargus*, 284 Kan. at 913.

The *Kargus* court considered several statutes governing the criminal appeals process: K.S.A. 20–3018, K.S.A. 22–4503, K.S.A. 22–4505, K.S.A. 22–3424, and K.S.A. 22–3602. As the court stated:

> "First, K.S.A. 2006 Supp. 22–4503(a) provides that a defendant charged with a felony 'is entitled to have assistance of counsel at *every stage* of the proceedings against such defendant.' (Emphasis added.) K.S.A. 2006 Supp. 22–4505(b) makes it clear that this reference includes the right of indigent defendants to have the assistance of appointed counsel during a direct appeal. That statute directs that, after determining a felony defendant is not financially able to employ counsel, 'the court shall appoint counsel from the panel for indigents' defense services or otherwise in accordance with the applicable system for providing legal defense services for indigent persons prescribed by the state board of indigents' defense services, to represent the defendant *and to perfect and handle the appeal*.' (Emphasis added.) K.S.A. 2006 Supp. 22–4505(b). Several other statutory provisions reference a defendant's right to appeal and the right to have appointed counsel, some in the context of imposing a duty upon the trial court to inform the defendant of those rights. See, *e.g.*, K.S.A. 22–3424(f) ('After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal and of the right of a person who is unable to pay the costs of an appeal to appeal in *forma pauperis* '); K.S.A. 2006 Supp. 22–4505(a) (trial court 'shall inform the defendant of such defendant's right to appeal the conviction to the appellate court having jurisdiction and that if the defendant is financially unable to pay the costs of such appeal,' the defendant may request appointed counsel)." 284 Kan. at 914–15.

The *Kargus* court noted these provisions did not explicitly mention petitions for review, so a question still remained whether the legislature intended to provide a right to counsel for petitions for review "when it granted the right to counsel during 'every stage of the proceedings,' ... and required judges to appoint counsel to 'handle the appeal' for indigent defendants." 284 Kan. at 915. To answer this question, the court next looked to K.S.A. 20–3018(b) "which states that, when the Court of Appeals has initial jurisdiction, '[a]ny party aggrieved by a decision' of that court 'may petition the supreme court for review within thirty (30) days after the date of such decision.' " 284 Kan. at 915. The court noted that while the grant of a petition for review was discretionary with the court, this statute demonstrated the right to *file* a petition was unqualified, and it is a right which is a part of the appeal and one of the stages of the proceedings to which the right to counsel attaches. 284 Kan. at 915.

***9** The *Kargus* court further noted that construing these statutes to find there was no right to counsel in filing a petition for review would lead to unreasonable results. For one, an indigent defendant would be left to pursue his or her case pro se in the Kansas Supreme Court. If the State sought review in the Supreme Court, the defendant would again be left to argue pro se before the court. "Clearly, however, the State's continuation of the appellate process would be a continuation of proceedings against the defendant." 284 Kan. at 915. The court also noted the legislature also intended indigent defendants to have a right to counsel when the Kansas Supreme Court *grants* a petition for review, so it would be illogical for the legislature not to provide a right to counsel to *file* for a petition for review. 284 Kan. at 916.

The holding in *Kargus* was limited to the state appellate process. 284 Kan. at 916. Nevertheless, the reasoning employed in *Kargus* to find a statutory right to counsel to file a petition for review with the Kansas Supreme Court could be extended to filing writs of certiorari in the United States Supreme Court. K.S.A. 22–4503 and K.S.A. 22–4505 provide that a defendant charged with a felony has a right to counsel at

every stage of the proceedings against him or her, and requires judges to appoint counsel to handle the defendant's appeal. As provided in 28 U.S.C. § 1257 (2012), the United States Supreme Court may review the final judgment of a state's highest court as long as it presents a question of federal law. While the grant of review is discretionary, the right to request review is unqualified as long as the case at issue presents a question of federal law. Additionally, if defendants pursuing or defending their case pro se before the Kansas Supreme Court is unreasonable, requiring them to do so before the United States Supreme Court seems even less reasonable. In fact, pro se defendants can no longer present oral argument before the United States Supreme Court. U.S. Sup. Ct. R. 28.

On the other hand, there are notable differences between analyzing the statutory right to counsel to file a petition for review in the Kansas Supreme Court and a writ of certiorari with the United States Supreme Court. State statute provides the right to file a petition for review with the Kansas Supreme Court, so the state created this right. In contrast, federal statute created the right to file a writ of certiorari with the United States Supreme Court. In analyzing the constitutional right to counsel for discretionary appeals, the United States Supreme Court noted the "significant difference between the source" of these rights, adding "[t]he suggestion that a State is responsible for providing counsel to one petitioning [the United States Supreme Court] simply because it initiated the prosecution which led to the judgment sought to be reviewed is unsupported by either reason or authority." *Ross*, 417 U.S. at 617.

Nelson argues in his brief that K.S.A. 22–4505(c) recognizes the right of a defendant to pursue his appeal in the United States Supreme Court. K.S.A. 22–4505(c) provides: "Upon an appeal or petition for certiorari addressed to the supreme court of the United States, if the defendant is without means to pay the cost of making and forwarding the necessary records, the supreme court of Kansas may by order provide for the furnishing of necessary records." While Nelson is correct that this subsection recognizes this right, it does not create the right. Furthermore, this subsection also indicates the Kansas Legislature distinguishes between appeals and petitions for certiorari, as they are listed separately in the statute. Subsection (c) uses the word "appeal," and the rest of K.S.A. 22–4505 does not include writs of certiorari. Therefore, even if K.S.A. 22–4505 does provide a right to effective counsel in appeals, this language does not include writs of certiorari.

***10** Other than a brief mention of *Kargus,* the State primarily argues there is no federal constitutional right to effective assistance of counsel to file a writ of certiorari. This point is, of course, clearly established by United States Supreme Court precedent, and Nelson himself concedes it. The State does not address the Kansas constitutional argument at all.

In support of its argument that Nelson does not have a constitutional or statutory right to counsel, the State does discuss an Eighth Circuit case, *Walker v. United States*, 810 F.3d 568 (8th Cir. 2016). In a federal habeas petition, Walker argued her counsel was ineffective for failing to raise *Alleyne* issues in her petition for certiorari to the United States Supreme Court. Walker claimed she had a constitutional right to effective assistance of counsel for filing her writ of certiorari. The Eighth Circuit rejected her argument, noting it was contrary to Supreme Court precedent. 810 F.3d at 576. The court also rejected Walker's claim that Federal Rule of Criminal Procedure 44(a), 18 U.S.C. § 3006A (2012) and the Eighth Circuit Plan to Implement the Criminal Justice Act of 1964 established a statutory right to counsel at this stage of the proceedings. 810 F.3d at 577.

While the Eighth Circuit has held that federal law does not create a statutory right to counsel to file a writ of certiorari, this is at best only persuasive authority. The case only deals with federal statutes. See Fed. R. Crim. Pro. 44(a); 18 U.S.C. § 3006A. Furthermore, the Seventh Circuit has held Fed. R. Crim. Pro. 44(a) and 18 U.S.C. § 3006A "make it clear that the defendant in a direct criminal appeal has the right to have the continued representation of appointed counsel throughout the course of the appeal, including the filing of post-opinion pleadings in the court of appeals and the filing of a petition for certiorari in the Supreme Court of the United States." *United States v. Howell,* 37 F.3d 1207, 1209 (7th Cir. 1994); see also *United States v. Price*, 491 F.3d 613, 615 (7th Cir. 2007) (finding defendant did not have constitutional right to seek certiorari, but did have statutory right under 18 U.S.C. § 3006A). Thus, federal courts provide no clear direction on the possibility of a statutory right to counsel for filing writs of certiorari.

On the other hand, this court has addressed this issue in *Adams v. State*, No. 104,758, 2011 WL 5833481 (Kan. App. 2011) (unpublished opinion). The *Adams* court held that:

> "The Kansas Supreme Court distinguished the statutory right to counsel from the constitutional right to counsel and held that the statutory right " 'extends to all levels of the *state* appellate process, including the filing of the petition for review' ".... While the statutory right to counsel in Kansas extends to petitioning the Kansas Supreme Court for review, a petition to the United States Supreme Court is outside of the State's appellate process. Thus, Adams cannot rely on his Kansas statutory right to counsel for his claim that Cornwell was ineffective for failing to petition the United States Supreme Court for certiorari." 2011 WL 5833481, at *4.

Additionally, research did not uncover other states that provide a statutory right to counsel for writs of certiorari to the United States Supreme Court. Given the different source of the right to appeal between state discretionary appeals and writs of certiorari and the general lack of recognition of the right to effective assistance of counsel in filing writs, Nelson likely did not have a statutory right to effective assistance of counsel at this stage of the proceedings. Because Nelson did not have a right to effective assistance of counsel in filing a writ of certiorari to the United States Supreme Court, Carver–Allmond cannot be in violation of that right for failing to file a writ.

Regulatory Right

***11** Nelson also argues there is a regulatory right to effective assistance of counsel. He cites to K.A.R. 105–1–1, which regulates the Kansas Board of Indigent Services. While Nelson cites authority that regulations can have the same force and effect as laws, he does not provide any support for his argument that a regulation can give rise to the right to effective assistance of counsel in criminal proceedings. Some federal cases recognize the regulatory right to counsel, but this right appears to only be recognized in administrative proceedings. See, *e.g.*, *Lamay v. Commissioner of Social Security*, 562 F.3d 503, 507 (2d Cir. 2009) (recognizing statutory and regulatory right to counsel in social security disability hearings); *Campos v. Nail*, 43 F.3d 1285, 1289 (9th Cir. 1994) (aliens have statutory and regulatory right to counsel in immigration proceedings).

Ineffective Assistance

Even if Nelson did have a statutory right to effective assistance of counsel in filing a writ of certiorari to the United States Supreme Court, he would still need to demonstrate that Carver–Allmond's performance was ineffective. A claim alleging ineffective assistance of counsel presents mixed questions of fact and law. When the district court conducts a full evidentiary hearing on such claims, this court determines whether substantial competent evidence supports the district court's findings and whether the factual findings support the court's legal conclusions; we apply a de novo standard to the district court's conclusions of law. *Fuller v. State*, 303 Kan. 478, 485, 363 P.3d 373 (2015).

Failing to File Writ of Certiorari

Normally, a defendant alleging ineffective assistance of appellate counsel must show that (1) counsel's performance, based upon the totality of the circumstances, was deficient in that it fell below an objective standard of reasonableness, and (2) the defendant was prejudiced to the extent that there is a reasonable probability that, but for counsel's deficient performance, the appeal would have been successful. *Miller v. State*, 298 Kan. 921, 930–31, 934, 318 P.3d 155 (2014).The failure to file a notice of appeal presents a unique situation with a unique standard.

In *Roe v. Flores–Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed. 2d 985 (2000), the United States Supreme Court addressed the proper standard for ineffective assistance of counsel in cases where counsel failed to file a notice of appeal. The court declined to adopt a standard establishing failure to file a notice of appeal as *per se* deficient performance. Rather, the court held "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal ... or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." 528 U.S. at 480. The Court then addressed whether a showing of prejudice was necessary as under the *Strickland* test. 528 U.S. at 481–84. The Court noted that failing to file an appeal presents a unique circumstance because in such cases "counsel's alleged deficient performance led not to a judicial proceedings of disputed reliability, but rather to the forfeiture of the proceeding itself." 528 U.S. at 483. Thus, in these cases, to show prejudice "a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." 528 U.S. at 484.

In *Kargus*, the Kansas Supreme Court explicitly adopted the standard established in *Flores–Ortega*. *Kargus*, 284 Kan. at 928. Specifically, the *Kargus* court recognized when a defendant claims counsel was ineffective for failing to file a discretionary appeal, Kansas courts should apply one of three standards based on the factual circumstances:

> ***12** "(1) If a defendant has requested that a petition for review be filed and the petition was not filed, the appellate attorney provided ineffective assistance; (2) a defendant who explicitly tells his or her attorney not to file a petition for review cannot later complain that, by following instructions, counsel performed deficiently; (3) in other situations, such as where counsel has not consulted with a defendant or a defendant's directions are unclear, the defendant must show (a) counsel's representation fell below an objective standard of reasonableness, considering all the circumstances; and (b) the defendant would have directed the filing of the petition for review. A defendant need not show that a different result would have been achieved but for counsel's performance." 284 Kan. at 928.

In the present case, the district court did not make a fact finding regarding whether Nelson requested Carver–Allmond to file a writ of certiorari or Carver–Allmond consulted with Nelson regarding filing one. Carver–Allmond testified, however, that she did not discuss filing a writ with Nelson. Nelson also testified that he did not know he could file a writ, and if he had known, he would have asked Carver–Allmond to file one.

Based on the testimony at the evidentiary hearing, however, Nelson would fall into the third category in *Kargus*; therefore, he would have to show that Carver–Allmond's representation was objectively unreasonable. Nelson is arguably unable to do this.

First, Carver–Allmond did not raise the issue of the constitutionality of Nelson's hard 50 sentence on either his first or second appeal. This means if she had filed a writ of certiorari to the United States Supreme Court, she would have been raising the issue for the first time in the writ. The United States Supreme Court has noted, however, that with few exceptions it will not address a federal claim when reviewing a state judgment unless that claim "was either addressed by, or properly presented to, the state court that rendered the decision [it has] been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86, 117 S.Ct. 1028, 137 L.Ed. 2d 203 (1997). Under this rule, Nelson's writ of certiorari would have been denied. Carver–Allmond is arguably not objectively unreasonable for not consulting with her client regarding filing a writ of certiorari which almost certainly would have been denied.

In his brief, Nelson does not appear to assert a standard of review by which to determine if Carver–Allmond's representation was, in fact, ineffective. He does, however, claim she was ineffective for failing to file a writ that was being pursued by her colleagues and that would have secured relief for Nelson. Whether Nelson would have obtained relief is speculative, though. Several defendants were granted relief by the Kansas Supreme Court because their cases were pending *on appeal* when the decision in *Alleyne* came down. *State v. Lloyd*, 299 Kan. at 626; *State v. Deanda*, 299 Kan. at 600; *State v. Hilt*, 299 Kan. at 201–04. In another case, *State v. Astorga*, 299 Kan. 395, 324 P.3d 1046 (2014), the defendant did obtain relief by filing a writ of certiorari. 299 Kan. at 396. After the decision in *Alleyne*, however, the Supreme Court granted the defendant's petition for writ of certiorari, vacated the Kansas Supreme Court's judgment, and remanded the case for reconsideration. As noted, however, the only way the United States Supreme Court would have granted Nelson certiorari is if it went against its well-established rule against considering federal claims raised for the first time in a writ. His claim for relief thus requires speculation, which this court has disfavored. See *Tomlin v. State*, 35 Kan. App. 2d 398, 406, 130 P.3d 1229 (2006) ("In Tomlin's case, ... he asks us to engage in multiple exercises in speculation to arrive at a conclusion of prejudice. This we are not prepared to do.").

***13** Nelson also argues it was unreasonable for Carver–Allmond not to foresee the coming change of law in *Alleyne*. In support of his argument, Nelson relies on *Laymon v. State*, 280 Kan. 430, 122 P.3d 326 (2005). In *Laymon*, the Kansas Supreme Court held that appellate counsel, a member of the Appellate Defender's Office (ADO), was ineffective for failing to foresee a change in the law created by *State v. McAdam*, 277 Kan. 136, 83 P.3d 161 (2004), and raising a sentencing issue on direct appeal. 280 Kan. at 444. The *Laymon* court held that appellate counsel's performance was objectively unreasonable for failing to preserve the *McAdam* argument when "the state of the developing Kansas law counseled in favoring of preserving the line of argument." 280 Kan. at 444. Additionally, the court noted that appellate counsel's colleagues at the ADO were heavily involved in the development of the *McAdam* issue, thus,

knowledge of the issue could fairly be imputed to him. 280 Kan. at 442.

As the *Laymon* court acknowledged, the failure of appellate counsel to raise an issue on appeal is not, per se, ineffective assistance of counsel. However, the failure of direct appeal counsel "to foresee a change in the law may lead to 60–1507 relief if the failure was not objectively reasonable." 280 Kan. at 439–40; see also *State v. Shelly*, 303 Kan. 1027, 1045, 371 P.3d 820 (2016). Nelson's case is distinguishable from *Laymon*, though. In *Laymon*, the *McAdam* argument was a new sentencing rule developing in Kansas courts at the time of Laymon's appeal, and the Kansas Supreme Court had never ruled on it. In contrast, at the time of Nelson's appeal, the United States Supreme Court had upheld sentencing schemes similar to Kansas' hard 50 scheme, and the Kansas Supreme Court had ruled the hard 50 scheme was constitutional. Additionally, while Carver–Allmond's colleagues at the ADO were aware of the grant of certiorari in *Alleyne*, and some were recommending attorneys preserve the issue of the constitutionality of the hard 50 scheme, the Kansas ADO was not intimately involved in the *Alleyne* case.

Unlike *Laymon*, *Alleyne* was not a new sentencing rule developing in Kansas courts at the time of Nelson's appeal. In fact, it did not even address a new sentencing rule at all. In order to find Carver–Allmond ineffective in this case, we would have to hold it is objectively unreasonable for an attorney not to anticipate that the United States Supreme Court was going to overturn itself. While attorneys may be expected to foresee changes in the law, they certainly are not required to be prescient. See *Tomlin*, 35 Kan. App. 2d at 404 (an attorney need not be prescient or omniscient in anticipating changes in the law).

Fundamental Fairness

Nelson also argues that even if there is no right to effective assistance of counsel when filing a writ of certiorari to the United States Supreme Court, he should still get relief based on fundamental fairness. He raised this issue in a memorandum to the district court. In support of his argument, Nelson cites to *State v. Layton*, No. 98,725, 2009 WL 1859918 (Kan. 2009). *Layton* is an unpublished Kansas Supreme Court case in which the court granted relief to a criminal defendant based on the principles of "equity and fundamental fairness." 2009 WL 1859918, at *12. The case is based on a very unique set of circumstances that are not present in Nelson's case, including a "long and arduous" procedural history with errors on both the part of the defendant's attorneys and the Kansas courts. 2009 WL 1859918, at *1, 8–11. The case appears to be without precedent and has not been relied on since it was issued. Thus, it is unlikely to provide a basis for relief in Nelson's case.

At the evidentiary hearing, Nelson testified he originally hired Ariagno regarding another criminal case, but the court appointed Ariagno to represent Nelson in the present case because Nelson could no longer afford an attorney. Nelson's testimony is a little unclear on this point, but he seems to testify he only meet with Ariagno a total of three times. He met with Ariagno only two times before his first trial—once at the McPherson County jail and once at the courthouse. He met with Ariagno once before his second trial at the courthouse. At one of these meetings, Ariagno presented a plea bargain to Nelson, but Nelson rejected the offer. Nelson said Ariagno reacted by yelling and cursing at him and calling him names before leaving. Nelson said Ariagno presented Nelson with a second plea bargain, which Nelson also rejected. After rejecting the second offer, he stated Ariagno told him he would spend the rest of his life in jail.

***14** Nelson stated he brought his concerns about Ariagno to the district court in a letter, but the court never discussed the issue with him. In the letter, he also mentioned he had restrictions on his phone privileges. According to Nelson, McPherson County jail placed restrictions on his phone and mail privileges while he was awaiting trial. Nelson was unable to make outgoing phone calls or purchase stamps and paper to send mail. All of his materials regarding the case was also taken from him.

Nelson told the court that Ariagno never met with him to discuss defense strategy before trial started, he did not do any outside investigation of the case, and he did not present a defense.

Nelson said that he wanted to testify and "the night that I found out the State was going to rest, I was told that I would ... be allowed to." Ariagno was supposed to come talk to him on a Wednesday night, and Nelson would testify on Thursday. Nelson said Ariagno did not show up on Wednesday night. The next morning before trial, Nelson met with Ariagno. He asked Ariagno why he did not show up and according to Nelson Ariagno replied he had nonrefundable concert tickets. Nelson and Ariagno discussed testifying that morning. According to Nelson, Ariagno "said that he didn't

have time to coach me, was his words, and he said that the State would, in so many words, tear me up up here, so....”

Nelson testified Ariagno had prevented him from testifying. He did not recall if the district court had asked him if he wanted to testify, but he said if the court had asked him if he wanted to testify he would have said yes. He also said if the court asked him if he had discussed the matter with his attorney, he would have said “we discussed it but as far as what I was going to testify to, we never discussed.” When asked to clarify this comment, Nelson said that though he discussed testifying with Ariagno,

> “I didn't know what he was going to ask, what type of—you know. I didn't know what I was supposed to say here. All I knew was he was going to come and speak to me about taking the stand on Thursday and that was as far as the conversation went.”

Nelson testified that Ariagno had presented a self-defense theory at trial but did not call any witnesses. He stated that he had never discussed possible witnesses with Ariagno. He wished Ariagno had called his grandmother, Doris Nelson, and his sister, Darcy Holub, who could testify about the volatile relationship between Nelson and Swartz. According to Nelson, another witness could have testified Nelson never asked Hewitt to help him beat up Swartz or offered him money to do so. According to Nelson, Ariagno did not present any evidence at his initial sentencing, either.

Doris Nelson, Nelson's grandmother, testified she met with Ariagno before trial to discuss Nelson's case. She said they talked for “a long time” and she told Ariagno about Nelson's relationship with Swartz, but most of her information was based on what Nelson's mother had told her. According to Doris, Ariagno told her she did not have anything helpful to Nelson's case. Doris also testified she was with Nelson and Ariagno at the McPherson County jail when Ariagno presented the plea bargain to Nelson. She stated that when Nelson rejected the offer, Ariagno told Nelson he was “stupid,” and the plea was the best Ariagno could do for him. According to Doris, Ariagno also said, “If you want fifty years, I'll get you fifty years.”

Ariagno testified that he “absolutely” met with Nelson more than three times prior to his first trial. He could not remember for sure, but he estimated they met between “half a dozen to a dozen times.” He also was not sure how many times he met with Nelson before his second trial but he again estimated they met about a half dozen times. He admitted he may not have met with Nelson as often as Nelson might have liked, but at some point the information covered in their meetings became repetitive.

***15** Ariagno told the court that he had regular contact with Nelson. He talked to Nelson by phone, and Nelson also sent him letters. According to Ariagno, the McPherson County jail was “very accommodating,” and it would set up phone conferences so the two could talk.

Ariagno testified that in preparation for trial he did legal research and reviewed evidence and discovery materials. He also investigated potential witnesses. Ariagno spoke with Doris, “Nelson's girlfriend,” and Holub as potential witnesses but did not believe they had any helpful information. He chose not to call any character witnesses because he did not want to open up any character issues at trial. He believed the theory of defense at trial was self-defense, but he did not remember much about the case or how it proceeded.

Ariagno also testified he discussed the case and possible defenses with Nelson. He said he discussed whether Nelson should testify. He advised Nelson that he did not believe it was a good idea but told him he would help Nelson prepare if he did decide to testify.

Ariagno testified he discussed the matter with Nelson and advised him against testifying. He said he told Nelson “it was his decision and his decision alone and he could make whatever decision he wanted, but I told him I didn't think he'd make a very good witness and that he would subject himself to cross examination that I didn't think was a good idea.” Ariagno said he would not have said he would “coach” Nelson, but he did offer to help prepare Nelson if Nelson wanted the help. Ariagno did not recall whether he made a meeting on a Wednesday to discuss Nelson's possible testimony. He stated he was “sure [he] had that meeting, probably on more than one occasion” but he could not say when. Ariagno testified he did not prevent Nelson from testifying at either of his trials. He also specifically denied missing any meetings due to nonrefundable concert tickets.

According to Ariagno, he had encouraged Nelson to take the plea agreement because he believed it was a favorable agreement, and Nelson had a good chance of losing at trial. He did not remember discussing waiving a jury trial with Nelson. Ariagno testified he believed jury trials were better for his clients, and he would not do a bench trial, particularly for a case as serious as Nelson's. He did not remember

discussing an appeal with Nelson, but his standard practice is to encourage his clients to appeal.

The district court found Ariagno's performance was not deficient. It noted Ariagno spent a great deal of time and effort preparing and trying Nelson's case. There were clearly some points of disagreement between Nelson and Ariagno, but in a case such as Nelson's, defense counsel often must deliver unwelcome news and professional advice. The court found, however, that Ariagno's performance fell within the bounds of competent counsel.

The district court went on to note that because Ariagno's performance was not deficient, it need not address the element of prejudice. The court did point out, however, that the State's evidence was strong and compelling. Thus, even if Ariagno's performance had been deficient, it is unlikely that it led to prejudice in Nelson's case.

Standard of Review

A claim alleging ineffective assistance of counsel presents mixed questions of fact and law. When the district court conducts a full evidentiary hearing on such claims, the appellate courts determine whether substantial competent evidence supports the district court's findings and determine whether the factual findings support the court's legal conclusions; the appellate courts apply a de novo standard to the district court's conclusions of law. *Fuller v. State*, 303 Kan. 478, 485, 363 P.3d 373 (2015).

Ineffective Assistance of Counsel

***16** To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish (1) that the performance of defense counsel was deficient under the totality of the circumstances, and (2) prejudice, *i.e.*, that there is a reasonable probability the jury would have reached a different result absent the deficient performance. *Sola–Morales v. State*, 300 Kan. 875, 882–83, 335 P.3d 1162 (2014) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed. 2d 674, *reh. denied* 467 U.S. 1267 [1984]). If counsel has made a strategic decision after making a thorough investigation of the law and the facts relevant to the realistically available options, then counsel's decision is virtually unchallengeable. Strategic decisions made after a less than comprehensive investigation are reasonable exactly to the extent a reasonable professional judgment supports the limitations on the investigation. *State v. Cheatham*, 296 Kan. 417, 437, 292 P.3d 318 (2013) (quoting *Strickland*, 466 U.S. at 690–91).

Deficient Performance

Nelson claims Ariagno's performance was deficient because he failed to communicate with Nelson, and he failed to investigate and provide a defense at trial. Judicial scrutiny of counsel's performance in a claim of ineffective assistance of counsel is highly deferential and requires consideration of all the evidence before the judge or jury. The reviewing court must strongly presume that counsel's conduct fell within the broad range of reasonable professional assistance. *State v. Kelly*, 298 Kan. 965, 970, 318 P.3d 987 (2014).

Nelson and Ariagno provided conflicting testimony at the evidentiary hearing. Nelson testified that he only met with Ariagno a few times before his trial. His testimony is somewhat inconsistent on this point, ranging from two to four meetings not including telephone calls or court appearances.

Ariagno testified he met with Nelson at least a half dozen times before his mistrial and another half dozen times before his second trial. He also stated that he had regular contact with Nelson by phone and through the mail. He admitted he may not have met with Nelson as often as Nelson would have liked, but he found the meetings became repetitive and did not result in new information.

Nelson also claims Ariagno failed to investigate witnesses and did not present enough evidence supporting Nelson's defense theory. Ariagno, however, testified that he did legal research and reviewed evidence and discovery materials in preparation for trial. He also investigated all three of Nelson's proposed witnesses. Doris even confirmed that she talked with Ariagno for a long time, including about her possible testimony. After speaking with the proposed witnesses, Ariagno concluded they did not have any helpful information. The witnesses would only be able to testify to the volatile relationship between Nelson and Swartz, which could bolster Nelson's defense but could just as easily provide a motive for premeditation.

Because Nelson and Ariagno presented conflicting testimony, the resolution of this matter ultimately came down to a credibility determination between the two. The district court apparently found Ariagno's testimony more credible, and his testimony supports a finding that his performance passed constitutional muster. While he did not call Nelson's

proposed witnesses, this was a strategic decision made after investigation of both law and fact and is thus virtually unchallengeable. See *Cheatham*, 296 Kan. at 437. Moreover, we do not reweigh the evidence, pass on the credibility of witnesses, or resolve conflicts in the evidence. *Flynn v. State*, 281 Kan. 1154, 1163, 136 P.3d 909 (2006). Therefore, the district court's finding on the first prong of the *Strickland* standard stands.

***17** Nelson asserts that the district court failed to consider other evidence he presented in a memorandum to the court of Ariagno's deficient performance. The first piece of evidence is a letter to the district court file-stamped December 18, 2007. In the letter, Nelson complained to the judge that he was unable to communicate with his attorney because his phone privileges had been taken away. This letter conflicts with Nelson's testimony at the evidentiary hearing, because Nelson testified that he wrote a letter regarding his concerns about Ariagno, and only tangentially mentioned the issue with his phone privileges.

The second piece of evidence is the transcript from a hearing on January 24, 2008. At the hearing, Ariagno informed the district court that he was unable to communicate with his client due to the phone privileges issue. He requested that the court order the jail to allow him to be able to communicate with his client. As the State points out, this evidence demonstrates that Ariagno not only brought these restrictions to the attention of the district court, he also requested the court take action so that Ariagno and Nelson would be able to communicate.

Finally, Nelson argues the district court erred by applying the wrong burden of proof in reaching its conclusion. In its journal entry, the court cited the *Strickland* standard, then added that "[a] claimant, such as Mr. Nelson, 'bears the heavy burden of showing no competent counsel would have taken the action that counsel did take.' See *Gissendaner v. Seaboldt*, 735 F.3d 1311 (11th Cir. 2013), *cert. denied* 135 S.Ct. 159 (2014)." Even assuming this was an elevated standard and Ariagno's performance was deficient, it would not change the outcome in this case because Nelson cannot demonstrate prejudice.

Prejudice

Even if Nelson were able to demonstrate Ariagno performed deficiently, he would be unable to show that Ariagno's performance prejudiced him. To establish prejudice, the defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different, with a reasonable probability meaning a probability sufficient to undermine confidence in the outcome. *State v. Sprague*, 303 Kan. 418, 426, 362 P.3d 828 (2015).

The evidence against Nelson at trial was overwhelming. Nelson and Swartz had a volatile relationship. Nelson offered his friend money to help him "take care of" Swartz. He waited outside Swartz' home on the night of the attack with a bat before losing his nerve. He then returned to Swartz' home in the early morning hours, again with a bat. Nelson told police he and Swartz got in a fight, and he hit Swartz in self-defense. The coroner testified, however, that Swartz had no defensive wounds. There were also no signs of struggle in the home.

After the attack, Nelson returned to Moore's home and told her he thought he had killed Swartz. The next day, Nelson put in an application for a new apartment, and test drove a BMW. He planned to pay for the BMW by selling Swartz' vehicles.

Nelson wished Ariagno had done more investigation and put on more evidence at trial of his self-defense theory. Based on Nelson's testimony at the evidentiary hearing, He does not have any evidence which could have significantly bolstered his defense. Nelson provided several conflicting stories to police regarding his self-defense story, and apparently the jury did not believe any of them Nelson's proposed witnesses also could only testify to the volatile relationship between Nelson and Swartz. Based on the strength of the State's evidence, any of Ariagno's claimed deficiencies did not result in prejudice. Therefore, Nelson is not entitled to relief.

***18** Affirmed.

Powell, J., concurring:

I join the well written and comprehensive majority opinion both in its result and rationale but must write separately to object to its reliance on *Hodes & Nauser, MDs v. Schmidt*, 52 Kan. App. 2d 274, 275, 368 P.3d 667, *rev. granted* 304 Kan. 1017 (2016), for the proposition that "Kansas courts also interpret sections 1 and 2 of the Kansas Constitution Bill of Rights as providing similar protections as the Due Process Clause and Equal Protection Clause of the United States Constitution." Slip op. at 12. Normally, one would not trifle with a mere citation, but given the significance of *Hodes*, I could not let it pass.

I object to citing *Hodes* because it holds that the Kansas Constitution recognizes a right to an abortion, not that sections 1 and 2 of the Kansas Constitution Bill of Rights provide similar protections to the Due Process and Equal Protection Clauses of the United States Constitution. 52 Kan. App. 2d at 288. Moreover, it is not worthy of citation because our court, sitting en banc, was equally divided on the matter, rendering it lacking in precedential effect. See *Moore v. City of Creedmoor*, 345 N.C. 356, 372, 481 S.E.2d 14 (1997) (where court equally divided, holding has no precedential value); 5 Am. Jur. 2d, Appellate Practice § 779 (same). More importantly, only a *minority* of our court agreed with the proposition that sections 1 and 2 of the Kansas Constitution provide similar protections to the Due Process and Equal Protection Clauses of the United States Constitution. See *Hodes*, 52 Kan. App. 2d at 320–21 (Atcheson, J., concurring) (Section 1 of Kansas Constitution different from Due Process and Equal Protection Clauses of the United States Constitution); 52 Kan. App. 2d at 339 (Malone, C.J., dissenting) ("We conclude that the plain language of §§ 1 and 2 of the Kansas Constitution Bill of Rights is not similar enough to the language of the Fourteenth Amendment to find that the corresponding provisions must be applied in the same manner.").

Because *Hodes* cannot be cited to support the proposition relied upon and because a citation to *Hodes* is an unnecessary addition to the string cite in support of the point that "Kansas courts generally interpret the Kansas Bill of Rights as providing the same or similar protections as the Bill of Rights in the United States Constitution," slip op. at 12, I would have not included the citation to *Hodes* in the opinion.

All Citations

388 P.3d 627 (Table), 2017 WL 462403

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184 P.3d 286 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Arthur A. POUNCIL, Jr., Appellant,
v.
STATE of Kansas, Appellee.

No. 98,276.
|
May 30, 2008.

West KeySummary

1 **Criminal Law** Time for Proceedings

Applying a statute of limitations to a motion attacking sentence did not constitute a manifest injustice. Defendant, convicted of rape, was informed of his counsel's failure to file a timely petition for review. He had nearly four years in which to file his second motion to claim ineffective assistance of appellate counsel before the limitations period operated to bar his claim. Defendant brought his claim after 5 1/2 years. He failed to provide a reasonable explanation for failing to bring his ineffective assistance of counsel claim before the statutory deadline and his claim was, therefore, barred. K.S.A. 60-1507.

Appeal from Sedgwick District Court; Paul W. Clark, judge.

Attorneys and Law Firms

Michael P. Whalen, of Law Office of Michael P. Whalen, of Wichita, for appellant.

Boyd K. Isherwood, assistant district attorney, Nola Tedesco Foulston, district attorney, and Paul J. Morrison, attorney general, for appellee.

Before MARQUARDT, P.J., CAPLINGER and LEBEN, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Arthur A. Pouncil, Jr., appeals the district court's summary denial of his K.S.A. 60–1507 motion. We affirm.

In December 1995, the State charged Pouncil with two counts of rape in violation of K.S.A. 21–3502(a)(2)(Furse) for having sexual intercourse with D.S. and A.S., two minors under the age of 14, between July 23, 1995, and August 13, 1995. The State charged Ronda Barrett with two counts of aggravated intimidation of a victim for threatening to shoot the father of the victims if they reported the rape. Pouncil and Barrett were tried together. The jury convicted Pouncil of both counts but acquitted Barrett.

At Pouncil's sentencing, the district court imposed consecutive upward departure sentences of 388 and 127 months' imprisonment. Pouncil appealed the convictions, which were affirmed by this court. See *State v. Pouncil,* No. 76,876, unpublished opinion filed August 14, 1998, *rev. denied* 266 Kan. 1114(1998).

Pouncil filed a 60–1507 motion for relief from his convictions and sentences, arguing ineffective assistance of trial and appellate counsel. Pouncil claimed that his trial counsel was ineffective for failing to call witnesses for the defense and failing to provide a defense expert to counter the State's medical expert. He claimed that his appellate attorney was ineffective for failing to argue that the admission of the expert's demonstrative evidence was inadmissible and prejudicial. This court affirmed the district court's summary dismissal of Pouncil's motion. See *Pouncil v. State,* No. 83,565, unpublished opinion filed July 14,2000.

After the district court's denial of the 60–1507 motion was affirmed by this court, Pouncil's appointed counsel attempted to file a petition for review out of time, but the Kansas Supreme Court denied the motion. Therefore, the mandate of this court's decision was issued on August 22, 2000.

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On February 16, 2006, Pouncil filed the 60–1507 motion which is the subject of this appeal. The State's response requested that the district court dismiss the motion as untimely and successive or, in the alternative, find that Pouncil provided no basis for relief.

On December 21, 2006, the district court summarily denied Pouncil's 60–1507 motion, finding it untimely.

When a district court is presented with a 60–1507 motion, it may determine that: (1) the record conclusively demonstrates that none of the movant's claims entitle the movant to relief and then deny the motion without appointing counsel or holding a hearing; (2) the motion raises potentially valid claims, requiring a full evidentiary hearing with the presence of the petitioner; or (3) the motion presents substantial fact issues and then appoint counsel for a preliminary hearing to determine whether in fact the issues in the motion are substantial. *Bellamy v. State,* 285 Kan. 346, 353, 172 P.3d 10 (2007).

Where, as here, the district court summarily denies the motion without appointing counsel and without holding a hearing, an appellate court has unlimited review of the evidence presented to the district court. *Bellamy,* 285 Kan. at 354, 172 P.3d 10.

***2** The district court dismissed Pouncil's motion because it was filed beyond the 1–year limitation of K.S.A. 60–1507(f), which provides:

> "(1) Any action under this section must be brought within one year of: (i) The final order of the last appellate court in this state to exercise jurisdiction on a direct appeal or the termination of such appellate jurisdiction; or (ii) the denial of a petition for writ of certiorari to the United States supreme court or issuance of such court's final order following such petition.
>
> "(2) The time limitation herein may be extended by the court only to prevent a manifest injustice."

The final order of the last appellate court to exercise jurisdiction over Pouncil's direct criminal proceedings was issued on November 12, 1998, after the Kansas Supreme Court denied Pouncil's petition for review. Therefore, the time period for filing a motion under K.S.A. 60–1507 would have lapsed on November 12, 1999.

K.S.A. 60–1507(f) became effective on July 1, 2003. See L.2003, ch. 65, § 1. Because K.S.A. 60–1507(0 affects a prisoner's substantive rights, the newly enacted provision may be given prospective application only. Consequently, if a movant's direct criminal proceedings terminated prior to the effective date of K.S.A. 60–1507(f), the limitations period operates from the effective date of the amendment rather than from the date the movant's direct criminal proceedings ended. Therefore, any 60–1507 motion filed on or before June 30, 2004, would be timely. See *Hayes v. State,* 34 Kan.App.2d 157, 161–62, 115P.3d 162 (2005).

Under either theory, Pouncil's current motion, filed on February 16, 2006, is untimely unless the court concludes that an extension of the time to file the motion is necessary to prevent a manifest injustice. See K.S.A. 60–1507(f)(2). The term "manifest injustice" has been interpreted to mean "obviously unfair" or "shocking to the conscience." *Ludlow v. State,* 37 Kan.App.2d 676, 686, 157 P.3d 631 (2007).

On appeal, Pouncil contends that his motion alleged that "exceptional circumstances" warranted the district court's consideration of his motion, despite its untimeliness. However, Pouncil's motion stated, "Mr. Pouncil has exhausted his Initial appeals process and is now petitioning for his second K.S.A. 60–1507 in a timely manner according to the 1 year Requirement, His last plea was denied February 17, 2005."

The record on appeal fails to support a finding that any proceeding before the district court or an appellate court terminated on February 17, 2005. While a movant is not required to specifically plead "manifest injustice," he or she bears the burden of alleging facts which, if true, would make apparent to any reviewing court that application of the 1–year limitation would constitute an unfair result. See *Moncla v. State,* 285 Kan. 826, 830, 176 P.3d 954 (2008).

A. Sufficiency of the Evidence

Pouncil's motion concerning the sufficiency of the evidence is nothing more than a request for a new trial based upon an allegation that his convictions were not supported by

sufficient evidence. Pouncil requests that the district court reevaluate the evidence presented at trial.

***3** A 60–1507 motion may not be used as a substitute for a second direct criminal appeal. See Supreme Court Rule 183(c)(3) (2007 Kan. Ct. R. Annot. 243). "Under Kansas law, where an appeal is taken from the sentence imposed and/or a conviction, the judgment of the reviewing court is res judicata as to all issues actually raised, and those issues that could have been presented, but were not presented, are deemed waived." *State v. Neer,* 247 Kan. 137, 140–41, 795 P.2d 362 (1990).

Rule 183(c)(3) provides an exception for trial errors affecting constitutional rights, but, before a court may consider such claims in a 60–1507 motion, the movant must demonstrate that exceptional circumstances excuse the movant's failure to raise the issues in a direct appeal. Exceptional circumstances are "unusual events or intervening changes in the law" that excuse the failure to raise the issue in the direct criminal proceedings or a prior K.S.A. 60–1507 motion. See *State v. Mitchell,* 284 Kan. 374, 379, 162 P.3d 18 (2007). Primarily, Pouncil's current motion requested the district court to reevaluate the evidence presented at trial and to reconsider evidentiary rulings made by the trial court in light of evidence Pouncil suggests he will produce at an evidentiary hearing. None of these arguments present a constitutional question, nor has Pouncil demonstrated exceptional circumstances to justify consideration of the claims.

Pouncil alleges that the trial court erred in refusing to sever his trial from Barrett's. Without having a separate trial, he claims that he was prohibited from offering certain evidence. Pouncil does not articulate exceptional circumstances to explain why this issue was not litigated in his direct appeal.

In his motion, Pouncil requested DNA testing of blood samples taken from each of the victims in Texas so that they could be compared with Pouncil's medical record. However, Pouncil does not allege how any DNA testing would undermine the State's evidence. No physical evidence related to the crimes was collected in the direct criminal case. Therefore, any independent DNA testing of the victims and/or Pouncil could not affirm or disprove the victims' rape accusations.

Furthermore, to the extent that appellate counsel was ineffective in failing to raise any of these claims in Pouncil's direct criminal appeal, Pouncil had the opportunity to challenge appellate counsel's representation in his first 60–1507 proceeding. See *Pouncil v. State,* No. 83,565, slip op. at 6–8. Generally, a court cannot consider a successive motion under K.S.A. 60–1507 unless the movant demonstrates exceptional circumstances warranting consideration of the successive motion. *Mitchell,* 284 Kan. at 379, 162 P.3d 18. Pouncil has not requested this court to revisit his previous claim for ineffective assistance of appellate counsel, and the circumstances presented in this appeal do not establish exceptional circumstances justifying reconsideration of the claim.

B. New Evidence

***4** Pouncil suggests that new evidence undermines the evidence presented at trial. To establish a basis for a new trial due to newly discovered evidence, Pouncil must demonstrate that the evidence could not have been produced at trial with reasonable diligence and that the evidence is so material that its production likely would have changed the result of the trial. *State v. Cook,* 281 Kan. 961, 992, 135 P.3d 1147 (2006).

The only evidence that Pouncil alleges that was not available to him at the time of trial relates to divorce proceedings between Barrett and her ex-husband. The divorce hearing elicited testimony that, during the marriage, Barrett had cheated on her ex-husband with the ex-husband's best friend and the affair had resulted in Barrett's pregnancy.

Pouncil does not indicate when this hearing took place, but, even if this court assumes that the hearing took place after Pouncil's conviction, the proffered evidence is not material to any of the issues in Pouncil's trial. Pouncil's convictions involved raping two young girls. Both victims testified and were subject to cross-examination. Pouncil claims that the rape allegations were the product of vindictive divorce proceedings and if this evidence had been available at trial, the jury would not have believed the victims' allegations of rape. However, based on the victims' testimony and the corroborating expert opinion concerning the victims' physical injuries, Pouncil's proposed evidence, even if available at trial, would not likely have changed the outcome of his trial.

Consequently, none of Pouncil's claims related to his trial proceedings constitute a manifest injustice.

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C. Ineffective Assistance of Appellate 60–1507 Counsel

Pouncil alleged that counsel appointed to represent him in the appeal of his first 60–1507 proceeding was ineffective for failing to file a timely petition for review of this court's decision in *Pouncil v. State,* No. 83,565. This issue could not have been raised until Pouncil's former 60–1507 proceeding terminated with the Kansas Supreme Court's denial of appellate counsel's motion to file a petition for review out of time on August 21, 2000, and this court's mandate on August 22, 2000.

In *Penn v. State,* 38 Kan.App.2d 943, 173 P.3d 1172 (2008), this court considered a similar claim. Penn had been convicted of multiple offenses resulting in a life sentence plus 192 months, which was affirmed by the Kansas Supreme Court on direct appeal (*State v. Penn,* 271 Kan. 561, 23 P.3d 889 [2001]). 38 Kan.App.2d at 944, 173 P.3d 1172. Penn filed a 60–1507 motion but withdrew the motion before it was decided. In 2004, Penn filed a second 60–1507 motion, which was dismissed by the district court as successive. This court affirmed the dismissal in an unpublished opinion (*Penn v. State,* No. 94,231, unpublished opinion filed May 5, 2006), and appellate counsel failed to file a timely petition for review. Counsel later filed a motion to file a petition for review out of time, which the Kansas Supreme Court denied. The mandate of this court's decision was issued on June 8, 2006. Within a couple of months, Penn had filed another 60–1507 motion, alleging ineffective assistance of appellate counsel for failing to file a timely petition for review. The district court denied the motion, finding it lacked jurisdiction to order the Kansas Supreme Court to consider an untimely petition for review. 38 Kan.App.2d at 944–45, 173 P.3d 1172.

***5** On appeal, this court noted that Kansas law provides a statutory right to counsel in 60–1507 proceedings. 38 Kan.App.2d at 947, 173 P.3d 1172. This statutory right to counsel includes the right to competent counsel, and where, through counsel's errors, a movant is denied the statutory right to an appeal of an adverse decision, the movant has been denied this statutory right to competent counsel. See 38 Kan.App.2d at 947, 173 P.3d 1172 (citing *Brown v. State,* 278 Kan. 481, 484–85, 101 P.3d 1201 [2004]). *Penn* also noted that the right to competent counsel was extended to discretionary appeals in *Swenson v. State,* 284 Kan. 931, 169 P.3d 298 (2007). 38 Kan.App.2d at 947–48, 173 P.3d 1172. This court concluded that the holding in *Swenson,* which involved a direct criminal proceeding, was equally applicable in the context of a 60–1507 proceeding, and concluded that Penn was entitled to file his petition for review in his 60–1507 proceeding out of time. 38 Kan.App.2d at 948, 173 P.3d 1172.

In the instant case, although the State did not cite *Penn,* it concedes that *Swenson* and *Brown* dictate the result implemented in *Penn.* However, this case raises a legal question not relevant in *Penn.* In *Penn,* the movant filed his motion alleging ineffective assistance of appellate counsel in his prior 60–1507 proceeding within 2 months of the Kansas Supreme Court's denial of the motion to file a petition for review out of time. 38 Kan.App.2d at 944, 173 P.3d 1172. Here, despite receiving a letter from his appointed counsel in late August or early September 2000, Pouncil did not file the current motion alleging ineffective assistance of appellate counsel in his previous 60–1507 proceeding until February 16, 2006.

Therefore, the question presented by Pouncil's appeal is whether the limitation provisions of K.S.A. 60–1507(f) apply to a collateral attack upon counsel's representation in a prior 60–1507 proceeding. *Penn,* the only published decision to consider a claim for ineffective assistance of appellate counsel in a prior 60–1507 proceeding, did not specifically address the question, even though Penn's second motion under K.S.A. 60–1507 was clearly filed 1 year after Penn's direct criminal proceedings had terminated in 1999. 38 Kan.App.2d at 944, 173 P.3d 1172.

Nevertheless, application of the 1–year limitation period in *Penn* clearly would have constituted a manifest injustice based upon the reasoning of *Swenson* and *Brown.* Any attempt by Penn to challenge the representation of appellate counsel in a collateral proceeding would have occurred after the limitation period of K.S.A. 60–1507(f)(1) had run since Penn's prior 60–1507 proceeding did not terminate until the mandate was issued on June 8, 2006. Barring a claim before it arose clearly would constitute a manifest injustice warranting an extension of the 1–year limitation period in which to file a second motion under K.S.A. 60–1507 for the purpose of challenging appellate representation in the preceding 60–1507 proceeding.

***6** The principle undergirding the decisions in *Penn* and *Swenson,* as well as other cases involving the right to appeal, is that it is fundamentally unfair to impose a procedural bar against an indigent criminal defendant or a movant in a 60–1507 proceeding when the defendant or movant was not informed of the limited statutory right to appeal or when appointed counsel incompetently failed to preserve a limited statutory right. *State v. Phinney,* 280 Kan. 394, 401, 122 P.3d 356 (2005) (citing *State v. Ortiz,* 230 Kan. 733, 735–36, 640 P.2d 1255 [1982]; *Brizendine v. State,* 210 Kan. 241, 242–44, 499 P.2d 525 [1972]).

> "A limited exception to the general rule requiring a timely appeal from sentencing is recognized in the interest of fundamental fairness only in those cases where an indigent defendant was either: (1) not informed of the rights to appeal; (2) was not furnished an attorney to perfect an appeal; or (3) was furnished an attorney for that purpose who failed to perfect and complete an appeal." *Phinney,* 280 Kan. at 401, 122 P.3d 356.

Where a timely pursuit of statutory appeal rights has been frustrated by the incompetent representation of counsel, a manifest injustice would result from the application of a procedural bar to a subsequent attempt to remedy the lost appeal right. Consequently, although the case law has not analyzed *Ortiz* claims in the context of K.S.A. 60–1507(f)(1), the cases permitting an out-of-time appeal are consistent with a finding of manifest injustice warranting an extension of the 1–year limitation period where K.S.A. 60–1507(f)(l) is applicable. Conversely, an appeal right which is not exercised by a defendant adequately informed of the right does not warrant an extension of the limitation period.

> "Whether the defendant made a knowing and intelligent decision to forego an appeal is subjective in nature. The courts only can be expected and required to show on the record that a defendant was advised on the right to appeal and that an attorney was or would have been appointed to assist the defendant in such an appeal. If the defendant lacks the ability to speak or comprehend the English language, an interpreter should be present, as he was in this case, to assist the court and the defendant in communicating and understanding the rights guaranteed. However, when that is done, there is no further requirement that will enable a defendant to obtain a right of appeal out of time merely because he or she asserts that no knowing and intelligent decision not to appeal was made." *Ortiz,* 230 Kan. at 736, 640 P.2d 1255.

In this case, Pouncil was notified shortly after the missed deadline that his appointed appellate counsel in the first 60–1507 proceeding had failed to file a timely petition for review. If Pouncil had filed his second motion under K.S.A. 60–1507 within a reasonable time after receiving notification that counsel had missed the filing deadline, Pouncil's second motion would have been filed before July 1, 2004, and the limitations period of K.S.A. 60–1507(f)(1) would not have applied to bar his claim. Instead, Pouncil did nothing about his ineffective assistance of counsel claim for 5 1/2 years.

***7** In *State v. Barahona,* 35 Kan.App.2d 605, 609, 132 P.3d 959, *rev. denied* 282 Kan. 791 (2006), this court noted that in the context of a motion to withdraw a plea, which also applies a "manifest injustice" standard, courts have considered the timeliness of the request to withdraw a plea.

Because Pouncil was informed of his counsel's failure to file a timely petition for review in *Pouncil v. State,* No. 83,565, on or near August 25, 2000, he had nearly 4 years in which to file his second 60–1507 motion to claim ineffective assistance of appellate counsel in his first 60–1507 proceeding before the limitations period of K.S.A. 60–1507(f)(1) would operate to bar his claim. See *Hayes,* 34 Kan.App.2d at 161–62, 115 P.3d 162. Pouncil has failed to provide a reasonable explanation for failing to bring this ineffective assistance of counsel claim before July 1, 2004. Therefore, the claim is barred by operation of K.S.A. 60–1507 as interpreted by *Hayes.*

The district court properly dismissed the motion as untimely.

Affirmed.

All Citations

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478 P.3d 337 (Table)
Unpublished Disposition
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

Richard T. POWELL, Appellant,
v.
STATE of Kansas, Appellee.

No. 120,679
|
Opinion filed December 23, 2020.

Appeal from Wyandotte District Court; JENNIFER ORTH MYERS, judge.

Attorneys and Law Firms

Meryl Carver-Allmond, of Capital Appellate Defender Office, for appellant.

Christopher L. Schneider, assistant district attorney, Mark A. Dupree Sr., district attorney, and Derek Schmidt, attorney general, for appellee.

Before Arnold-Burger, C.J., Hill and Schroeder, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** Richard Powell appeals the dismissal of his K.S.A. 60-1507 motion, contending his attorney at the hearing of his motion provided ineffective assistance of counsel because she presented no evidence. He also claims that the court erred by denying his motion for new counsel. After our careful review of the record, we affirm the court's dismissal.

Powell was convicted of the murders of Mark and Melvin Mims in 1999 and sentenced to life in prison. Based on an affidavit from one witness who testified at trial, Powell, in 2016, filed a successive, out-of-time 60-1507 motion. In the affidavit that Powell relies on, Kenton Williams purports to recant his trial testimony. At the evidentiary hearing on this motion, Powell's attorney told the court that she would not be calling Kenton to testify. After speaking with him, she did not believe he would help Powell's defense. At this point, Powell asked for a new attorney. The court refused. Without taking any testimony from Kenton, the court denied Powell's 60-1507 motion.

Powell makes two arguments in this appeal. He first contends that his 60-1507 counsel was ineffective because she presented no evidence for him in support of his motion at the hearing. Powell also contends the court erred when it refused to appoint him a new attorney. We will address the issues in that order.

The case history provides a context for our opinion.
Some of the facts of the crime are useful in understanding the significance of the affidavit that Powell presented to the 60-1507 court. The Kansas Supreme Court affirmed Powell's convictions on direct appeal in *State v. Powell*, 274 Kan. 618, 56 P.3d 189 (2002). More details of his crime can be found in that opinion.

On February 6, 1998, Mark and Melvin Mims were found dead in a car from gunshot wounds.

Kenton Williams—the man who later signed the affidavit recanting his testimony—and Marcus Henderson testified at trial that they were riding around in a car doing drugs the previous night with Powell and the Mims brothers. Kenton and Henderson both testified Melvin was angry at Powell and that Powell was carrying a gun. But Kenton and Henderson went home before the killings and did not know what happened after they left. Henderson testified he left Powell alone with the Mims brothers.

Other witnesses saw those men together that night. Donte Jones also testified he had seen Powell with a gun before the killings that night.

Brandy McCullough, Mylon Williams, and Jones testified that late on the night of February 5, 1998, or very early the next morning, Powell told them he had killed the Mims brothers. Mylon was Powell's nephew and lived with his girlfriend, McCullough. Mylon and McCullough testified that right after they heard gunshots Powell came into their house holding a gun. Mylon testified Powell was waving the gun around, ranting and raving, calling himself a serial killer, and claiming to have shot the Mims brothers.

McCullough described Powell as "all hyped up" and testified Powell had said, "I just smoked them. I just smoked them niggas." Jones testified that Powell told him to watch the news; that two brothers would be found dead in a car on 6th street. Jones testified Powell said he shot them because they were disrespecting him.

***2** A jury convicted Powell of capital murder of the Mims brothers and criminal possession of a firearm. The death penalty was not considered because of Powell's mental condition. He received a life sentence in prison with no possibility of parole for 25 years for the murders and 23 months for the firearm charge.

In 2003, Powell filed a 60-1507 motion, which was denied. The denial was ultimately affirmed by this court in *Powell v. State*, No. 100,803, 2010 WL 3853069 (Kan. App. 2010) (unpublished opinion). Among other things, Powell had argued ineffective assistance of counsel concerning counsel's failure to find out whether Kenton or Mylon were given leniency for their testimony. Powell alleged Kenton later told him he got a deal. But this court noted:

> "On cross-examination, Powell admitted that he was not aware that part of the criminal charges and sentencing of both [Kenton] and Mylon had been completed before his crimes even occurred. Powell admitted he did not subpoena either witness even though Mylon was his nephew and [Kenton] was currently in jail facing his own capital murder charges." 2010 WL 3853069, at *5.

This court found that the record supported the State's assertion that there were no agreements for leniency in exchange for testimony and Powell failed to show ineffective assistance of counsel in Mylon's and Kenton's cross-examination at trial. 2010 WL 3853069, at *10-11.

In 2012, Powell filed a federal habeas petition in the United States District Court for the District of Kansas, again asserting that Kenton had received leniency in exchange for his testimony. That court denied his petition, and the 10th Circuit Court of Appeals dismissed his appeal. *Powell v. Heimgartner*, 640 Fed. Appx. 705, 710 (10th Cir. 2016) (unpublished opinion); *Powell v. Heimgartner*, No. 12-3119-SAC, 2015 WL 5439028, at *5 (D. Kan. 2015) (unpublished opinion). Powell had tried to stay the federal matter to return to state court to present an affidavit from Kenton recanting his testimony. The federal courts denied the stay and ruled the affidavit was not properly before them. Both courts questioned the reliability of the affidavit, noting that recanted testimony is " 'notoriously unreliable' " and viewed "with suspicion." 640 Fed. Appx. at 710; 2015 WL 5439028, at *1.

In 2016, Powell filed a second 60-1507 motion which is the subject of this appeal. He alleged newly discovered evidence in the form of the affidavit from Kenton recanting his testimony. Powell alleged he should be permitted a successive out-of-time 60-1507 motion because of the exceptional circumstance of newly discovered evidence and resulting manifest injustice. He claimed he was innocent of the crime. He sought an evidentiary hearing so the district court could make a credibility determination of the recanted testimony. He asserted the recanted testimony was of such materiality that a jury would have reached a different verdict if presented at trial.

In the affidavit, Kenton stated that his testimony—that Powell was in the car, Powell had a gun, and Melvin Mims was mad at Powell—was a lie. Kenton stated that the Mims family thought he had something to do with the murders, so he made up a story based on what Henderson told him. Kenton stated that he told District Attorney Jerome Gorman that he had lied to the detective, but Gorman told him he "had to go to court and [if] I didn't he would give me the max on my drug case." Kenton stated he was coming forward because it was the right thing to do and he needed to clear his conscience to move on with his life.

***3** Powell's motion was set for an evidentiary hearing. Powell's attorney, Debra Erickson, had tried to have an expert testify that Powell's case was not handled like a death penalty case should have been handled—with two attorneys and an investigator. But the court stopped Powell from arguing anything besides the newly discovered evidence because he had alleged ineffective assistance of counsel in his prior 60-1507 motion and could have raised other issues then.

Attorney Erickson then stated that she would not be calling Kenton to testify because after having an hour-long conversation with him she did not believe his testimony would help Powell "in any way." She also stated she could not make arguments based on what was in the affidavit because of her ethical obligations. Powell asked for a new attorney, which the court denied. The court found that any attorney would have the same ethical concerns.

Powell argued on his own behalf. He suggested that Kenton should be brought to testify, noting that he would be the one to bear the consequences of whatever Kenton said. Powell

argued that the prosecutor had given Kenton leniency to testify at trial. Powell stated that he did not ask Kenton to make the affidavit and, given that Kenton keeps changing his story, the only way to get to the truth was to get Kenton on the stand and have him cross-examined. Powell stated that he was doing time for a crime he did not commit.

The State offered evidence that showed Powell and Kenton had been housed at the same correctional facilities for a time in 2016 and 2017. Erickson responded that Powell advised her that even though they were in the same prison at certain times, they were not in the same area.

The court ruled without taking Kenton's testimony. It found that whether Kenton was granted leniency to testify for the State was resolved in Powell's first 60-1507 motion. The court noted that based on Erickson's statements at this hearing, it had to assume that if brought to testify, Kenton would not testify in a manner consistent with his affidavit. The court also found that even if Kenton did testify consistent with his affidavit, it would not change the outcome of the trial because Kenton had limited information on Powell's guilt, and several other witnesses testified at trial that they saw Powell with a gun.

And the court found that there would be questions about Kenton's credibility. Using the *Vontress* factors because the motion was brought out-of-time, the court ruled that Powell had provided a persuasive reason that he could not have filed this motion within the one-year time limitation because the affidavit was not made until 2014. See *Vontress v. State*, 299 Kan. 607, Syl. ¶ 8, 325 P.3d 1114 (2014). But the court then ruled that Powell did not make a colorable claim of actual innocence because Kenton was not the only witness who testified about Powell's guilt. The court dismissed Powell's motion.

It is often helpful to determine what is and is not being argued. We note that Powell is not arguing that the district court erred by precluding him from raising anything but the newly discovered evidence at the evidentiary hearing. And Powell is not arguing that the district court erred in refusing to bring Kenton to the court to testify after Powell personally addressed the court and made such a request. Instead, Powell is arguing:

- Erickson provided ineffective assistance of counsel at the 60-1507 hearing; and
- the court erred by refusing to allow Erickson to withdraw and appoint new counsel. He asks that the case be remanded for a new evidentiary hearing with conflict-free counsel.

Erickson did not provide ineffective assistance at the motion hearing.

***4** Powell argues that Erickson provided ineffective assistance of counsel at the evidentiary hearing when she chose not to present any evidence. He contends that Erickson failed to investigate and she should have called Kenton to testify at the hearing. He also argues that it was not Erickson's job to determine whether Kenton was being truthful; that it was for the judge to decide. He cites *State v. Smith*, 291 Kan. 751, 756, 247 P.3d 676 (2011). He contends Kenton's testimony should have been presented together with a proffer concerning the unreliability of the trial evidence, his trial attorney has since been disbarred, and the lead detective on his case has since been named in a civil suit among several other officers accused of misconduct that led to the reversal of another defendant's conviction.

Powell makes a new ineffective assistance of counsel argument that was not made before the district court. He contends the ineffectiveness of Erickson's representation was "obvious" from the record and can be heard by this court for the first time on appeal.

Appellate courts generally will not consider an allegation of ineffective assistance of counsel raised for the first time on appeal. *State v. Salary*, 309 Kan. 479, 483, 437 P.3d 953 (2019). The factual aspects of a claim of ineffective assistance of counsel generally require that the matter be resolved through a 60-1507 motion or through a request for remand to the district court for an evidentiary hearing under *State v. Van Cleave*, 239 Kan. 117, 119-21, 716 P.2d 580 (1986).

We may consider a claim of ineffective assistance of counsel for the first time on appeal only when there are no factual issues and the two-prong ineffective assistance of counsel test can be applied as a matter of law based upon the appellate record. *Salary*, 309 Kan. at 483. When the quality of representation provided by a movant's 60-1507 counsel is determinable on the transcript of a nonevidentiary hearing included in the record on appeal, this court can address the

issue without remand to the district court. *Robertson v. State*, 288 Kan. 217, 228, 201 P.3d 691 (2009).

Generally, to prevail on a claim of ineffective assistance of trial counsel, a criminal defendant must establish:

- That the performance of defense counsel was deficient under the circumstances; and
- prejudice: that there is a reasonable probability the jury would have reached a different result without the deficient performance.

Salary, 309 Kan. at 483 (relying on *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674(1984)).

There is an exception to the general *Strickland* rule known as the *Cronic* exception. The *Cronic* exception applies only when a defendant is denied the assistance of counsel or denied counsel at a critical stage of a proceeding. Under these circumstances, a court may presume the defendant was prejudiced. *Fuller v. State*, 303 Kan. 478, 486-87, 363 P.3d 373 (2015) (relying on *United States v. Cronic*, 466 U.S. 648, 658-59, 104 S. Ct. 2039, 80 L. Ed. 2d 657 [1984]). *Cronic* applies in rare circumstances:

> "This narrow exception, referred to as the *Cronic* exception, is 'reserved for situations in which counsel has entirely failed to function as the client's advocate.' The Supreme Court has stressed this last point, emphasizing 'the attorney's failure must be complete,' that is, the *Cronic*-type presumption applies only ' "if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing." ' [Citations omitted.]" *Edgar v. State*, 294 Kan. 828, 840, 283 P.3d 152 (2012).

Powell contends that the *Cronic* ruling rather than the *Strickland* test applies here because Erickson completely abandoned Powell by failing to present any evidence on his behalf. By not offering evidence and failing to argue the *Vontress* factors, she, in fact, weakened his case. Thus, he contends he need not show prejudice.

***5** But he contends he can also meet the *Strickland* test anyway, because Erickson, in choosing to present no evidence, was objectively unreasonable and he can show prejudice because "the confluence of failures and misconduct in this case make the end result very fishy. And further investigation ... may have revealed more."

We hold the Cronic exception does not apply here.
Several cases offer us guidance in making this determination. The first is *Robertson*, 288 Kan. at 220. Robertson's appointed 60-1507 counsel stated he did not agree with the jury's verdict but told the court that many of Robertson's claims were trial errors that should have been raised on direct appeal. Counsel admitted he had not read the court's decision resolving Robertson's direct appeal. As for Robertson's claims that his trial counsel was ineffective, the 60-1507 counsel told the court that trial counsel's representation was "exceptional" and Robertson's claims lacked merit. 288 Kan. at 221. Counsel made no argument in favor of Robertson's 60-1507 motion. The court noted that within the limits of the lawyer's duty to be candid to the court and to obey our ethics rules, a lawyer's loyalty is to the client:

> "Once appointed, counsel for a K.S.A. 60-1507 motion must, within the stricture of required candor to the court and other ethical rules, pursue relief for the client. If this requires counsel to stand silent or merely to submit the case on the written arguments of that client, so be it. Counsel is simply not free to act merely as an objective assistant to the court or to argue against his or her client's position. That is, unfortunately, what counsel for Robertson did here." 288 Kan. at 229.

But after saying that, the *Robertson* court turned to the question of prejudice. The court clarified that the standard of prejudice to be applied when counsel is appointed under K.S.A. 60-1507 is the same standard applied when counsel is constitutionally required. The court found that Robertson had not shown prejudice because the motion, files, and records established that he was not entitled to K.S.A. 60-1507 relief. The court noted that there were no substantial legal issues or triable issues of fact when counsel was appointed to represent Robertson. The district court could have refused to appoint counsel initially and summarily denied the motion. 288 Kan. at 232. After that came the ruling in *Alford v. State*, 42 Kan. App. 2d 392, 404, 212 P.3d 250 (2009).

In *Alford,* this court noted that the prejudice standard applied in *Robertson*-controlled cases involving an allegation that appointed counsel was ineffective in representing a 60-1507 movant. 42 Kan. App. 2d at 399. Alford's appointed 60-1507 counsel acted as an objective assistance to the trial court, argued against Alford's position on some claims, and did nothing to represent Alford's interest. Therefore, his representation was deficient. 42 Kan. App. 2d at 398-99. But like in *Robertson*, there existed no substantial legal issues or triable issues of fact when counsel was appointed to represent Alford. Alford failed to demonstrate prejudice and was therefore not entitled to any relief. 42 Kan. App. 2d at 400-01, 404. From these rulings, we are convinced that a 60-1507 movant must show prejudice to obtain relief. We now move into the *Cronic* exception.

***6** In *Lingenfelter v. State*, No. 102,391, 2010 WL 4320356, at *2 (Kan. App. 2010) (unpublished opinion), in response to questioning by the court, Lingenfelter's 60-1507 counsel advised the court that Lingenfelter had only provided general rather specific information concerning his claims. On appeal, Lingenfelter argued that prejudice should be presumed under *Cronic*. But, citing *Robertson*, the panel held that a showing of prejudice was required when the performance of statutorily provided counsel on a 60-1507 motion was questioned. 2010 WL 4320356, at *5.

In *State v. Adams*, No. 109,673, 2014 WL 2402185, at *1 (Kan. App. 2014) (unpublished opinion), during a hearing on Adams' motion to correct illegal sentence, the court asked Adams' appointed counsel outright whether counsel believed Adams' sentence was illegal. Counsel said he did not believe so, but the court should review the authorities and make an independent ruling. On appeal, Adams argued his counsel completely abandoned his role as advocate and that *Cronic* applied. The panel noted that at first when asked whether Adams' sentence was illegal, counsel properly stated, " 'My client indicates that he feels the sentence is illegal.' " 2014 WL 2402185, at *1. It was only after the court placed counsel in an untenable position by asking counsel whether, as an officer of the court, he believed the sentence was illegal that counsel responded that he did not believe so. Under such circumstance, the panel held that Adams' counsel did not entirely fail to represent Adams and, therefore, *Cronic* did not control. 2014 WL 2402185, at *3.

But another panel of this court has identified a situation in which the *Cronic* exception did apply to a 60-1507 counsel's representation. In *State v. Samuels*, No. 116,758, 2017 WL 5184425, at *3 (Kan. App. 2017) (unpublished opinion), Samuels' appointed 60-1507 counsel revealed to the court that he had not spoken to Samuels or Samuels' trial counsel, had not read the transcripts of Samuels' plea or sentencing hearings, stated he did not know if he could answer whether Samuels met his burden to show excusable neglect, and knew that Samuels had mental health issues but did not investigate whether such issues would justify setting aside the time limitations on the filing of his motion. Counsel admitted he could not answer whether Samuels' mental health impaired his judgment at the time of his plea, whether Samuels' trial counsel misled him about his right to file a motion to withdraw his plea, or what effect his claim of actual innocence would have on the question of excusable neglect. Yet counsel said it was hard to imagine Samuels could show excusable neglect. Counsel stated he had "no doubt" the district court had done all that was required. The panel likened the situation to *Robertson*, but held that prejudice could be presumed because appointed counsel did not function as an advocate for Samuels; counsel advocated against Samuels. 2017 WL 5184425, at *3-4.

We cannot use a broad brush when we make this decision. When a defendant asks for new counsel, the existing counsel must "walk a delicate line" between recounting the basis of the alleged conflict of interest and advocating against his or her client's position. *State v. Pfannenstiel*, 302 Kan. 747, 766, 357 P.3d 877 (2015). In *Pfannenstiel*, upon inquiry into an alleged conflict of interest, counsel suggested she felt the witnesses Pfannenstiel wanted to call would not be helpful and might undermine his testimony. On appeal, the court held that comment merely recounted counsel's strategic decision —a generally appropriate area of inquiry when a conflict of interest is claimed. 302 Kan. at 767.

***7** After considering all of these cases, we hold that the *Cronic* exception does not apply here. Erickson said she was not going to call Kenton to testify because she did not believe he would provide helpful testimony. *Robertson* instructs that counsel should remain silent rather than argue against the client's position. But because Powell had asked for new counsel, Erickson could not just stand silent. It would have been error if no inquiry had been made into the alleged conflict between Powell and Erickson to determine whether new counsel should be appointed.

Erickson had to "walk a delicate line" between recounting the basis of the alleged conflict of interest and advocating against

Powell's position. See *Pfannenstiel*, 302 Kan. at 766. Here, Erickson made essentially the same comment as counsel in *Pfannenstiel*. She merely recounted her strategic decision not to call Kenton to testify. She did not get into the details of what Kenton had told her.

It is important to note that Erickson also told the court that she could not ethically advance arguments based on what was in Kenton's affidavit. But when arguing a motion for new counsel, an attorney may advise the court that his or her client wanted false evidence introduced. See *Smith*, 291 Kan. at 756. From these circumstances, we infer that Erickson would not advance arguments based on Kenton's affidavit because she believed the affidavit to be false.

This case is not like *Samuels* where counsel was completely unprepared yet argued against his client's position. In preparing for the hearing, Erickson interviewed Kenton, read the trial transcripts, discussed the case with Powell, and was prepared to hire an expert to show that Powell's case was not handled correctly, but she was precluded from doing so by the court. She did not argue that Powell's motion had no merit, as the attorney in *Robertson* did. After the State presented evidence that Powell and Kenton were housed at the same prisons, Erickson advanced Powell's argument that he and Kenton were not in the same area of the prison. Erickson also made a record of the court's ruling that she was precluded from arguing anything but Kenton's recantation. Erickson did not completely abandon Powell. Thus, Powell must show a deficiency of representation and prejudice to obtain relief.

We must follow certain rules at this point.

When analyzing a claim of ineffective assistance of counsel, judicial scrutiny of counsel's performance is highly deferential. The reviewing court must strongly presume that counsel's conduct fell within the broad range of reasonable professional assistance. *State v. Kelly*, 298 Kan. 965, 970, 318 P.3d 987 (2014). It is within the province of a lawyer to decide what witnesses to call, whether and how to conduct cross-examination, and other strategic and tactical decisions. But when counsel lacks the information to make an informed decision due to inadequacies of his or her investigation, any argument of strategy is inappropriate. *Thompson v. State*, 293 Kan. 704, 716, 270 P.3d 1089 (2011).

If counsel has made a strategic decision after making a thorough investigation of the law and the facts relevant to the realistically available options, then counsel's decision is virtually unchallengeable. *State v. Cheatham*, 296 Kan. 417, 437, 292 P.3d 318 (2013). But the failure to complete a thorough investigation is a ground for establishing ineffective assistance of counsel. *Wilson v. State*, 51 Kan. App. 2d 1, 14, 340 P.3d 1213 (2014). And "the strategy itself must still pass muster." *Bledsoe v. State*, 283 Kan. 81, 94, 150 P.3d 868 (2007). If no competent attorney would have adopted the strategy, it falls below minimum constitutional standards. *Wilson*, 51 Kan. App. 2d at 15.

We are unconvinced that counsel's performance was deficient.

***8** Based on this record, we are not persuaded that Erickson failed to investigate, as Powell contends on appeal. Powell's assertion is not supported by the record. Erickson interviewed Kenton and she was prepared to hire an expert to testify that Powell's trial was not handled as a capital murder trial should be conducted.

Powell's assertion that a more thorough investigation would have revealed misconduct by the lead detective, prosecutor, or trial counsel is too speculative. We are not saying that further investigation would not reveal deficiencies and misconduct, as seen in the Lamonte McIntyre case (a defendant whose conviction was reversed due to police officers' misconduct). But it is not apparent from this record. According to a newspaper article that is in the record, McIntyre presented more than 40 affidavits supporting his innocence. Specifically, there was a 17-page affidavit from a former police captain in the department that conducted the investigation—he gave an alternative theory of who committed the murders.

This record is very different. Powell's argument assumes there was something to find without showing us what it is. Without showing us that a more thorough investigation would have uncovered new evidence of Powell's innocence, Powell argues that Erickson was ineffective. He argues that she failed to investigate, yet we have no testimony from her about the extent of her investigation. We cannot grant relief based upon speculation.

Our misgivings about a lack of a record supporting an argument like this have been illustrated in a prior case. In *Mundy v. State*, 307 Kan. 280, 296-97, 408 P.3d 965 (2018), on a claim raised for the first time on appeal that Mundy's 60-1507 counsel was ineffective, the court held it could not determine from the record that her 60-1507 counsel was

ineffective, but it also could not determine Mundy's claim was without merit. Mundy did not request a remand, so the court declined to reach the issue. 307 Kan. at 299. That record was much sparser than what is before this court. See 307 Kan. at 296. But here, on Powell's claim that Erickson failed to investigate, this record does not show that Erickson was ineffective.

In his brief, Powell points to inconsistencies:

- In the trial witnesses' testimony;
- the time line given by the disinterested witnesses did not match the time line given by the other witnesses;
- McCullough had a motivation to lie;
- deficiencies in the crime scene investigation; and
- the lead detective did not testify.

All of these deficiencies were pointed out by his trial attorney at trial and thus considered by the jury that convicted Powell. Erickson was not ineffective for failing to argue these issues at the 60-1507 hearing.

We cannot rule that Erickson was ineffective because she did not call Kenton to testify. There is no record of what Kenton planned to say. Powell does not ask for a remand to determine this question. This court can only speculate. As stated above, this court is highly deferential to an attorney's strategic decision unless no competent attorney would adopt the strategy. *Wilson*, 51 Kan. App. 2d at 15.

These circumstances differ from those in *Smith.* In *Smith*, Smith was charged with robbery. Smith's attorney, James Rumsey, viewed a surveillance video of the robbery and determined that Smith was guilty. Before trial, the attorney told the court, " 'There is no doubt that it is the face of the defendant.' " 291 Kan. at 753. The attorney then refused to put on evidence that would tend to suggest Smith was physically infirm and unable to perform the robbery. At Smith's request, Rumsey moved to withdraw as Smith's counsel. The court denied the motion.

***9** The Supreme Court held that counsel could have presented truthful evidence even though that evidence might create an inference that Smith was not guilty because Rumsey's duty as defense counsel was to advocate for his client. It was the jury's duty to view all of the evidence and determine whether Smith was guilty. "[I]f [counsel's] refusal to introduce evidence on Smith's behalf was based upon Rumsey's out-of-bounds determination of guilt, rather than on the falsity of the evidence, Smith's dissatisfaction was justified." 291 Kan. at 756-57.

But here, unlike *Smith,* Powell argues Erickson had to present Kenton's truthful testimony even if that testimony would not have been beneficial to Powell in any way. This differs from *Smith*, where the facts that Smith wanted his attorney to introduce evidence that he had a physical infirmity would have helped his defense. The *Smith* court stated: "[Counsel's]duty as defense counsel was to advocate for his client including the presentation of any truthful, relevant evidence *that would assist in his client's defense*." (Emphasis added.) 291 Kan. at 757. Here, Erickson did not believe that Kenton's testimony would assist her client's defense.

And unlike *Smith*, Erickson made no comment that she believed Powell was guilty. In fact, she had tried to argue that Powell's case was not handled like a capital case should be handled. It was within Erickson's role as counsel for Powell to make the decision whether to call a witness to testify. A defense attorney does not provide ineffective assistance of counsel by failing to call a witness that will not provide beneficial testimony to his or her client. Powell essentially argues that the calculus here was different from a trial attorney determining which witnesses to call for trial because he was already convicted of the crime and therefore he had nothing to lose. But even if that were true and Erickson's representation was found deficient in that regard, Powell could not meet the prejudice prong of the ineffective assistance of counsel test with a "nothing to lose" calculus.

We also comment on the ethical considerations at play here. Erickson's refusal to make arguments based on Kenton's affidavit is controlled by Kansas Rule of Professional Responsibility (KRPC) 3.3(a)(3) (2020 Kan. S. Ct. R. 353). "A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false." Erickson presumably believed the affidavit was false based on her hour-long conversation with Kenton. Thus, she did not provide ineffective assistance by following KRPC 3.3(a).

Powell has not shown us prejudice.

The district court held that even if Kenton did testify to everything stated in his affidavit, it would not be enough for a new trial. Kenton's trial testimony was duplicative of other witnesses' testimony and was not that important to the question of Powell's guilt for the murders. Kenton was not the last one to see Powell with the Mims brothers the night of the murders—that was Henderson. Kenton testified that he did not know what happened after he left that night. Three other witnesses testified that they saw Powell shortly after the murders, Powell had a gun, and Powell confessed to the murders.

In response to this, Powell argues on appeal that his case is "very fishy. And further investigation ... may have revealed more." That is not a showing of prejudice. Powell is not entitled to relief on this point. We move on to the question of appointing new counsel.

The district court did not have to appoint new counsel for Powell.

***10** Powell contends that the district court abused its discretion by denying his motion for new counsel. Citing *Smith* as support, Powell argues that because Erickson refused to present Kenton's testimony, he was justifiably dissatisfied with Erickson's representation.

The rule on this is well established. A defendant who files a motion for new counsel must show "justifiable dissatisfaction" with appointed counsel, which can be demonstrated by showing a conflict of interest, an irreconcilable disagreement, or a complete breakdown in communication between counsel and the defendant. *Pfannenstiel*, 302 Kan. at 759-60. We review the district court's decision whether to substitute counsel for an abuse of discretion. 302 Kan. at 762.

A defendant's dissatisfaction that defense counsel refuses to call a witness that would not be beneficial to or advance the defendant's defense is not "justifiable dissatisfaction" that entitles the defendant to new counsel. It is not an irreconcilable conflict that can be remedied by the appointment of new counsel. Rather, it is really the defendant's dissatisfaction that counsel could not produce evidence that would exonerate the defendant. *State v. Burnett*, 300 Kan. 419, 450-51, 329 P.3d 1169 (2014). Further, if the dissatisfaction is an attorney's refusal to present false evidence, the district court does not abuse its discretion by denying the motion for new counsel. In such cases, the defendant's dissatisfaction is not justifiable because any later appointed attorney would be bound by the same ethical constraints. *Smith*, 291 Kan. at 755.

Erickson refused to call a witness that would not be beneficial to Powell and refused to present what she believed was false evidence. This is not a case in which defense counsel refused to present truthful evidence that would have tended to show her client was innocent because she believed her client was guilty, like in *Smith*. Here, there is no indication a different attorney would have done anything different. This was not a justifiable dissatisfaction that could be remedied with new counsel. The district court did not abuse its discretion in denying Powell's motion for new counsel.

Powell is not entitled to relief on this point.

Affirmed.

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Unpublished Disposition
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See Kan. Sup. Ct. Rules, Rule 7.04.
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Choncey Allen STAMPS, Appellant.

No. 113,071.
|
May 13, 2016.

Appeal from Wyandotte District Court; Michael A. Russell, Judge.

Attorneys and Law Firms

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Before ARNOLD–BURGER, P.J., GREEN and LEBEN, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Choncey Allen Stamps was convicted of interfering with law enforcement, being a felon in possession of a firearm, and possessing cocaine. On appeal, Stamps raises three issues for our consideration: (1) that the trial court erred by allowing inadmissible hearsay into evidence; (2) that the trial court erred by failing to suppress the cocaine evidence seized from his car; and (3) that the trial court erred by failing to find that the State violated the United States Supreme Court's holding in *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). As detailed below, the trial court erred by allowing inadmissible hearsay into evidence, by failing to suppress the cocaine evidence seized from his car, and by failing to find that the State committed a *Brady* violation. Accordingly, we reverse Stamps' convictions, remand with directions to suppress the cocaine evidence obtained during the search of Stamps' car, and remand for a new trial.

On July 7, 2013, Leshea Campbell called the police. Campbell reported that Stamps, her children's father, had pointed a gun at her before leaving her house in his white Lincoln with a blue ragtop. Officer Matthew Walterbach responded to the call. Upon arrival at Campbell's house located on Barnett Avenue, Walterbach radioed other police officers in the area about the incident.

Officer Justin Mohney and Officer Abigail Fithian received a call to be on the lookout for a black male in a white Lincoln with a ragtop. While heading towards Campbell's house, Mohney and Fithian saw a white Lincoln with a blue ragtop parked in a parking lot near the intersection of 82nd Street and Minnesota. Fithian, who was driving, turned on the car's emergency lights and pulled up next to the Lincoln. Both officers exited their police car and asked the man in the Lincoln to get out of his car with his hands in the air. The man in the Lincoln complied. Then, the man asked if there was "a problem," looked behind his shoulders, and started running. Neither of the officers were able to catch up with the man. Both officers reported that the man in the Lincoln was a black male wearing red shorts and no shirt.

When Mohney and Fithian returned to the Lincoln, they saw a silver gun on the driver's side floorboard. The officers called the crime scene investigation unit to recover the gun from the car. Other than removing the gun, the officers did not search the car. The officers then had the car towed away.

Later that evening, Stamps called the police to report that his car, a white Lincoln with a blue ragtop, had been stolen. Officer Christopher Blake came to Stamps' house to discuss his stolen car. Stamps told Blake that he had fallen asleep at a family party. Stamps told Blake that when he awoke, he realized that his car was missing. Stamps believed a man named Lance might have stolen his car. After investigating, Blake discovered that the police already had Stamps' car in a tow lot. Blake told Stamps he would have to go to the tow lot the next day to retrieve his car.

***2** The next day, July 8, 2013, Campbell told the police that she had lied about Stamps threatening her with a gun. The police ticketed Campbell for filing a false police report. Meanwhile, Stamps went to the tow lot to retrieve his car. A tow lot employee told Stamps that he could not retrieve his car until he spoke with the police. Stamps immediately called

the police to get his car out of the tow lot. Stamps called the police every day. Eventually, the police told Stamps to talk to Detective Stuart Littlefield about getting his car out of the tow lot. When Stamps finally spoke with Littlefield on July 15, 2013, Littlefield requested that the two meet in person to discuss who might have stolen his car.

On July 16, 2013, Stamps went to the police station to speak with Littlefield. Littlefield initially obtained Stamps' consent to search his car. After obtaining his consent, however, Littlefield began interrogating Stamps about whether he was positive he did not threaten Campbell with a gun, whether he owned a gun, and whether he fled from officers near Campbell's house on July 7, 2013. After Littlefield asked for consent to obtain Stamps' DNA, Stamps responded that "this is going further than what's supposed to go" and "I don't want to do none of that." Then, Stamps requested an attorney, and the interrogation ended.

The police immediately arrested Stamps and charged him with criminal possession of a firearm in violation of K.S.A.2013 Supp. 21–6304(a)(1) and interfering with law enforcement in violation of K .S.A.2013 Supp. 21–5904(a)(3). Next, Littlefield conducted a search of Stamps' car. During this search, Littlefield found Stamps' wallet, opened it up, and searched it. This search revealed a bag containing a white powdery substance, which field-tested positive for cocaine. Accordingly, Stamps was additionally charged with possession of cocaine in violation of K.S.A.2013 Supp. 21–5706(a).

In February 2014, Stamps moved to suppress "the bag of white powder supposedly taken from his wallet." In this motion, Stamps argued that the cocaine should be suppressed because: (1) any consent he may have given was withdrawn; and (2) any consent he may have given did not include consent to search his wallet. Stamps also argued that the cocaine should be suppressed because the police illegally seized his car, holding onto it for 9 days without ever obtaining a warrant, which ultimately tainted any consent he may have given. Stamps asserted that our Supreme Court's decision in *State v. Jefferson,* 297 Kan. 1151, 310 P.3d 331 (2013), was dispositive of this issue.

At the hearing on Stamps' suppression motion, the State called Littlefield to discuss how he had obtained Stamps' consent. Littlefield testified that although he never attempted to get a warrant to search Stamps' car, he believed the search was legal because Stamps gave him general consent. Littlefield additionally testified that he did not believe Stamps revoked his consent because Stamps became upset only after he asked him for consent to obtain his DNA. The trial court ultimately denied Stamps' motion, ruling that Stamps never revoked his consent and Littlefield had not exceeded the scope of Stamps' consent. Moreover, the trial court ruled that our Supreme Court's decision in *Jefferson* was distinguishable from Stamps' case.

***3** In April 2014, Stamps' jury trial was held. The State was unable to serve Campbell with a subpoena to appear at Stamps' trial, thus, she never testified. The first witness the State called was Walterbach. Walterbach testified that on July 7, 2013, he responded to a felony call on Barnett Avenue. Walterbach testified that he radioed to other police officers in the area that the felony suspect "was a black male by the name of Choncey wearing red shorts and no shirt."

Stamps' attorney objected and moved for a mistrial, arguing that Walterbach's statement was prejudicial hearsay given that Campbell was not available to testify. The State responded that Walterbach's statement was not hearsay because it showed why Fithian "respond[ed] the way that she [did]." The trial court agreed, overruling Stamps' objection and denying his motion for mistrial.

Next, Mohney and Fithian testified on behalf of the State. Both Mohney and Fithian testified about their interaction with the black male who fled from Stamps' Lincoln. Both Mohney and Fithian testified that they decided to investigate the car after hearing over the police radio that a felony suspect, who was a black male driving a white Lincoln with a ragtop, had just left a house on nearby Barnett Avenue. Fithian also testified: (1) that eventually somebody told her the suspect's name was Choncey, and she was able to identify him by looking at an old photo; (2) that she recognized Stamps as the black male that ran from the Lincoln town car based on his distinct tattoos; and (3) that she had been called to investigate an armed felony disturbance.

Littlefield and two other witnesses testified about the cocaine seized from Stamps' car.

At the beginning of the second day of trial, Stamps' attorney requested a mistrial because he had just learned that the police had charged Campbell with filing a false police report accusing Stamps of assaulting her with a gun. Stamps' attorney asserted that the State's failure to inform him about

the charge violated the United States Supreme Court's holding in *Brady.* The State responded that there was no *Brady* violation because whether Campbell had been charged with filing a false police report was irrelevant given that Stamps was not charged with the aggravated assault of Campbell. The trial court agreed and denied Stamps' motion.

Next, Stamps and his mother and father testified on behalf of the defense. Stamps testified that he was at a family gathering all day July 7, 2013. Stamps testified that he got drunk, fell asleep, and discovered his car was missing when he awoke. Stamps' testified that he believed a man named Lance had stolen his car. Stamps' mother and father both corroborated Stamps' testimony, testifying that Stamps spent all day at the family gathering.

During jury deliberations, the jury asked to hear a read-back of Walterbach's testimony twice. Specifically, the jury requested a read-back of the portion of Walterbach's testimony where he stated that he had radioed that the felony suspect went by the name of "Choncey." Stamps' attorney renewed his motion for mistrial. The trial court denied this motion. Although the trial court did not read back the portion of Walterbach's testimony where he mentioned Stamps' name upon the jury's first read-back request, the trial court read back this portion of Walterbach's testimony based upon the jury's second read-back request because the jury indicated that it was hung on two counts and this testimony would help it continue deliberating. Shortly thereafter, the jury found Stamps guilty of all three counts.

***4** Before sentencing, Stamps moved for a new trial because: (1) the State allowed inadmissible hearsay into evidence through Walterbach's testimony; and (2) the State failed to inform the defense of Campbell's false police report charge in violation of *Brady.* The trial court denied Stamps' motion, explaining that it stood by its original rulings.

In total, the trial court sentenced Stamps to a 38–month prison sentence followed by 12 months' postrelease supervision. Stamps timely appealed his convictions and sentences. Additional relevant facts will be discussed in each section below.

Did the Trial Court Commit Reversible Error by Admitting Walterbach's Hearsay Testimony?

Stamps argues that the trial court's admission of Walterbach's testimony that he radioed to other police officers that the felony suspect connected to the Barnett address "was a black male by the name of Choncey wearing red shorts and no shirt" was reversible error. First, Stamps argues that this testimony constituted inadmissible hearsay because it tended to prove that he was guilty of being a felon in possession of a firearm, interfering with law enforcement, and possessing cocaine. Second, Stamps argues that the admission of the hearsay constituted reversible error under the constitutional harmless error test. The State counters that the trial court did not err by admitting Walterbach's testimony. Moreover, the State asserts that even if the trial court erred, the error was harmless.

Standard of Review

"When an appellate court considers a challenge to the district court's admission of evidence, it must first consider whether the evidence is relevant." *State v. Barney,* 39 Kan.App.2d 540, 545, 185 P.3d 277 (2007). If the evidence is relevant, then the " 'evidentiary rules governing admission and exclusion may be applied either as a matter of law or in the exercise of the district judge's discretion, depending on the contours of the rule in question.' " *Barney,* 39 Kan.App.2d at 545 (quoting *State v. Gunby,* 282 Kan. 39, 47, 144 P.3d 647 [2006]). Still, an appellate court exercises de novo review when an appellant challenges "the adequacy of the legal basis on which the district court decided to admit or exclude evidence." *Barney,* 39 Kan.App.2d at 545.

If an appellate court determines that the trial court erred in admitting hearsay evidence in violation of the defendant's Sixth Amendment right under the United States Constitution to confront witnesses against him, an appellate court applies the constitutional harmless error test. *State v. Kelley,* 42 Kan.App.2d 782, 793, 217 P.3d 56 (2009). "Under the federal constitutional harmless error test, an error may not be held to be harmless unless the appellate court is willing to declare a belief that it was harmless beyond a reasonable doubt." *Kelley,* 42 Kan.App.2d at 793. Thus, an appellate court "must be able to declare beyond a reasonable doubt that the error had little, if any, likelihood of having changed the result of the trial." *Kelley,* 42 Kan.App.2d at 794.

Applicable Law

***5** Under K.S.A.2013 Supp. 60–460, any "[e]vidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated, is hearsay evidence and inadmissible" unless that statement fits within an exception to this general rule.

Testimony that is not offered to prove the truth of the matter asserted is not hearsay. *Barney,* 39 Kan.App.2d at 545.

Our Supreme Court and this court have consistently held that a police officer's testimony regarding secondhand suspect descriptions reported over police radio do not constitute inadmissible hearsay when: (1) the description was limited to what the suspect looked like and where the suspect was located; and (2) the description was admitted to explain why police officers took certain actions. See *State v. Laubach,* 220 Kan. 679, 682–83, 556 P.2d 405 (1976); *State v. Hall,* 220 Kan. 712, 717, 556 P.2d 413 (1976); *State v.. Hollaway,* 214 Kan. 636, 638–39, 522 P.2d 364 (1974); *State v. Ritson,* 215 Kan. 742, 748, 529 P.2d 90 (1974); *State v. Trotter,* 203 Kan. 31, 36–37, 453 P.2d 93 (1969); *Barney,* 39 Kan.App.2d at 547–58. In *Barney,* for instance, the police received an anonymous call that a " 'white male, possibly balding, wearing a white tank top and blue [jean] shorts' " was acting suspiciously, peeping in windows, and ringing doorbells in a certain Topeka neighborhood. 39 Kan.App.2d at 542. Police repeated this information over their radio. *Barney,* 39 Kan.App.2d at 542. This led to police officers apprehending and arresting Barney for burglary, criminal damage to property, and theft. At Barney's trial, the arresting police officer repeated what he had heard over the police radio regarding the anonymous tip.

On appeal, Barney argued that this testimony constituted inadmissible hearsay given that he could not confront the anonymous tipster. This court rejected Barney's argument. The *Barney* court held that the testimony was admitted to explain why the police officers reacted when they saw Barney. 39 Kan.App.2d at 547. The *Barney* court also held that the testimony was admissible because the anonymous caller "merely provided a description of a man who was acting suspiciously in a certain neighborhood" and "did not identify Barney by name and did not establish his guilt of any crime ." 39 Kan.App.2d at 547.

This final distinction is important because when the suspect description at issue identifies the accused and tends to establish the accused's guilt, an officer's testimony regarding the declarant's tip necessarily points to the defendant's guilt; as a result, such testimony constitutes inadmissible hearsay. See *State v. Jamison,* 269 Kan. 564, 570, 7 P.3d 1204 (2000); *State v. Thompson,* 221 Kan. 176, 178–79, 558 P.2d 93 (1976). For example, in *Jamison,* witness testimony that an anonymous tipster called and said the shooter's name was "E-bud" constituted inadmissible hearsay because it identified Jamison, whose gang name was E-bud, as the murderer. 269 Kan. at 570. In *Thompson,* the court affirmed the rule that a police officer may testify as to his conduct or that he received certain information without violating the hearsay rule on the theory that this testimony is not admitted to assert the truth of the matter but only to explain his actions. Nevertheless, where the officer received an anonymous phone call advising that a crime under investigation was committed by a man called " 'Crazy John,' " this constituted inadmissible hearsay because it identified "John Thompson" as the robber and established his guilt. 221 Kan. at 178–79.

Additional Facts

***6** At Stamps' trial, Walterbach testified that after he responded to the Barnett address, he radioed that the suspect "was a black male by the name of Choncey wearing red shorts and no shirt." Stamps' attorney immediately objected and requested a mistrial, asserting that Walterbach's testimony was prejudicial hearsay because Campbell was unavailable to testify.

The State responded that Walterbach's statement was not hearsay because the State was not offering it for the truth of the matter asserted but to show why Fithian "respond[ed]" the way she did. The State argued that Fithian used this knowledge, the fact that the suspect's name was Choncey, to look up Stamps' old photo. Stamps' attorney refuted this argument, emphasizing that the name " 'Choncey' [was] completely unnecessary to explain why ... Fithian would investigate the Lincoln parked on 82nd and Minnesota." Moreover, Stamps' attorney pointed out that he was fairly certain Walterbach never radioed that the felony suspect's name was "Choncey."

The trial court overruled Stamps' objection and motion for mistrial. The trial court explained: (1) that Walterbach's statement did not establish Stamps' guilt in anyway; and (2) that Walterbach's statement showed that "[t]hey were just responding and looking for a black male named Choncey." When the State continued its questioning, Walterbach again stated that he radioed that the felony suspect "was a black male named Choncey wearing red shorts and no shirt."

During Mohney's testimony, Mohney testified that the only information he heard over the police radio regarding the felony suspect was that the felony suspect was a black male in a "white Lincoln town car with a ragtop of some sort." Fithian also testified that the only information she heard over the police radio regarding the felony suspect was that the felony suspect was a black male driving a white Lincoln with a ragtop. Both Mohney and Fithian explicitly testified that they were never told the black male suspect was wearing red shorts and no shirt. During Fithian's testimony, Fithian explained that she identified the black male as Choncey Stamps by looking up an old photo only after someone eventually told her that he was a potential suspect. Moreover, Fithian testified that the black male was suspected of committing an armed felony disturbance.

During jury deliberations, the jury asked the following question: " 'First testimony of the first officer regarding why they were called out to the 8524 Barnett or the whole testimony as it wasn't very long. The one that said Choncey's name over the radio.' " Stamps' attorney argued that the jury question bolstered his argument for a mistrial because the jury was clearly focusing on "the totally unnecessary injection of Choncey's name," which "ha[d] poisoned the entire trial." In the alternative, Stamps' attorney requested a curative instruction telling the jury that it could not consider "the mention of Choncey's name as any evidence of guilt in this trial." The State reargued that Walterbach's testimony was not offered for the truth of the matter asserted but to show why Fithian looked up Stamps' old photo.

***7** The trial court agreed with the State, denying Stamps' motions. The trial court explained that because Stamps did not request a curative instruction during trial, it would not give a curative instruction to the jury now. The trial court ultimately decided to grant the jury's read-back request but only to a limited portion of Walterbach's testimony. Specifically, the following testimony was read back to the jury:

> "[State]: Did you respond to 8521 Barnett?
>
> "[Walterbach]: Yes, sir.
>
> "[State]: And was that on a felony call?
>
> "[Walterbach]: Yes, sir."

After hearing this testimony, the jury resumed deliberations. Then, the jury came back with two more questions. First, the jury asked:

> " 'Some of us know what we heard. One of the first officers mention Choncey's name in regards to the radio call on the witness stand. Then there was an objection. Are we allowed to consider the testimony or was it stricken? That's the testimony that we want to hear. Testimony from the police officer who responded to the original armed felony criminal action at 8521 Barnett. Specifically when the name Choncey was mentioned on the radio. What exactly did he say?' "

Second, the jury asked, " 'If we have come to a verdict on one count but [are] hung on the other two, what do we do?' "

Again, Stamps' attorney requested a mistrial, reiterating his previous arguments. The trial court denied this request. The trial court decided to ask the jury if the read-back would help them decide the two hung counts. The trial court explained that if the jury answered yes, it would read back Walterbach's testimony regarding the suspect being "a black male by the name of Choncey wearing red shorts and no shirt."

The trial court ultimately asked the jury if a "read-back of Officer Walterbach's testimony, the portion ... '[s]pecifically when the name Choncey was mentioned on the radio, what exactly did he say?' would [ ] assist [them] further ... with regard to [their] deliberations?" The presiding juror responded, "Yes." Then, the trial court read back this portion of Walterbach's testimony. Soon after, the jury returned the guilty verdicts on all counts.

The Trial Court Erred by Admitting Walterbach's Testimony. To summarize, in this case, Walterbach testified: (1) that he was investigating a felony call; (2) that the suspect was a black male wearing red shorts and no shirt; and (3) that the suspect went by the name of Choncey. Thus, through Walterbach's testimony, jurors were told that Choncey was suspected of committing some felony offense.

There is no question that Walterbach's testimony was relevant, as it identified Stamps as a suspect in a felony that occurred a little over half a mile from where Mohney and Fithian

encountered a black male in Stamps' car. Moreover, there is no question that Walterbach's testimony was based on information that Campbell had told him about Stamps. Yet, the parties dispute whether Walterbach's testimony constituted inadmissible hearsay.

***8** Citing *Jamison,* Stamps argues that Walterbach's testimony constituted inadmissible hearsay because it tended to establish his guilt. On the other hand, the State contends that Walterbach's testimony is distinguishable from the testimony at issue in *Jamison* because Stamps "was being investigated for a felony," *i.e.,* the aggravated assault of Campbell, but Stamps was not on trial for the aggravated assault of Campbell. Instead, Stamps was on trial for being a felon in possession of a firearm, interfering with law enforcement, and possessing cocaine. Moreover, the State argues that Walterbach's testimony was not hearsay because it was not being offered for the truth of the matter asserted. Nevertheless, the State is incorrect.

Jamison *is Indistinguishable.*

In arguing that *Jamison* is distinguishable, the State ignores: (1) that the trial testimony established that Stamps was being investigated for committing an armed felony; and (2) that Stamps was charged with being a felon in possession of a firearm. Although Walterbach never testified as to what felony Stamps was suspected of committing, Fithian testified that she was investigating an armed felony. Consequently, Walterbach's testimony and Fithian's testimony, together, identified "Choncey" as possessing a firearm. Since Stamps' criminal record was not in dispute, Walterbach's testimony and Fithian's testimony identified "Choncey" as a felon in possession of a firearm. Of note, the jury clearly picked up on Fithian's testimony that Stamps was suspected of committing an armed felony because the jury mentioned this in their second read-back request where they asked for " '[t]estimony from the police officer who responded to the original *armed felony* criminal action at 8521 Barnett.' " (Emphasis added.)

Accordingly, the facts of this case are not truly distinct from the facts of *Jamison.* In fact, the ultimate result is the same: a witness' testimony regarding a nontestifying declarant's description of a named suspect tended to prove that the named suspect was guilty as charged.

Furthermore, because Walterbach's statement identified Stamps as the felony suspect, his statement also tended to prove that Stamps was guilty of interfering with law enforcement and possessing cocaine. Just like Walterbach, Mohney and Fithian both testified that the man in the white Lincoln with a ragtop was a black male wearing red shorts and no shirt. As a result, Walterbach's statement that the felony suspect named Choncey was a black male wearing red shorts and no shirt tended to prove that Stamps was the man Mohney and Fithian encountered around the corner from the Barnett address, *i.e.,* the man who ran from them, abandoning Stamps' car with cocaine in it. Moreover, the fact that Stamps allegedly committed an armed felony around the corner and the fact that police found a gun in Stamps' car also tend to prove that, in all likelihood, Stamps was the black male who ran from police while abandoning the car with cocaine in it. All in all, Walterbach's statement taken together with Mohney's testimony and Fithian's testimony, reinforced that Stamps was guilty of interfering with law enforcement and possessing cocaine. Accordingly, both the trial court's and the State's argument that Stamps' case is distinguishable from *Jamison* is unpersuasive because Walterbach's testimony tended to prove that Stamps was guilty as charged.

Walterbach's Testimony Constitutes Hearsay.

***9** The argument that this court should reject Stamps' hearsay argument because Walterbach's testimony was not offered for the truth of the matter asserted is also unpersuasive. Again, the State asserts that it offered Walterbach's statement for "the sole purpose of [showing] why [the] officers acted the way they did." The State also contends that Walterbach's testimony explains why Fithian knew Stamps' name to look up the old photo. The trial court allowed Walterbach's testimony based on this explanation. Nevertheless, both the trial court's ruling and the State's argument runs counter to reason.

First, unless both Mohney and Fithian were mistaken regarding the felony suspect information they heard over the police radio, it seems Walterbach testified incorrectly about what he radioed. Both Mohney and Fithian testified that the only information they received over police radio was that the suspect was a black male in a white Lincoln with a ragtop. Both testified that outside of the fact that the suspect was a black male driving a white Lincoln, they received no other information about the suspect. Accordingly, there is serious doubt as to whether Walterbach's testimony that he radioed that the felony suspect was a black male wearing red shorts and no shirt named Choncey is even accurate.

Second, given that neither Mohney nor Fithian were familiar with Stamps before this encounter, whether the armed felony suspect's name was Choncey was irrelevant. Obviously, as

the officers testified, both decided to investigate the black male in the white Lincoln with a ragtop because he matched the suspect description they had heard over the police radio. Neither officer stopped the black male in the white Lincoln because his name was Choncey.

Moreover, Fithian testified that she looked up Stamps' old photo only after somebody eventually gave her Stamps' name as a potential suspect. Nothing in the record establishes that Walterbach gave her this information. More importantly, according to Fithian, she most certainly did not get this information from Walterbach when he allegedly radioed that the suspect's name was Choncey. The State asserts that "[i]t would have been unbelievable for a jury to hear that the police miraculously pulled up a photo of [Stamps] and identified him." To be fair, the State's assertion ignores two important things: (1) that however Fithian came to know Stamps' name, it was not via Walterbach's alleged radio call; and (2) that a police officer's testimony about a nontestifying declarant's suspect description is inadmissible hearsay if it tends to prove the defendant's guilt.

In summary, Walterbach's statement tended to prove that Stamps was guilty of being a felon in possession of a firearm, interfering with law enforcement, and possessing cocaine. Consequently, the trial court erred by overruling Stamps' objections. As a result, this court must reverse Stamps' convictions and remand unless the trial court committed harmless error.

The Trial Court's Error Is Reversible Error

***10** The jury's questions to the trial court clearly proves that the trial court's error was not harmless. To recap, the jury asked for Walterbach's testimony concerning when he "mention[ed] Choncey's name" twice. When the trial court failed to give the jury a read-back of Walterbach's testimony mentioning "Choncey's name" in response to its first question, the jury submitted a second question because "[s]ome of [the jurors] knew what [they had] heard." Along with this second read-back request, the jury asked what it should do if it was hung on two counts. When questioned by the trial court, the presiding juror told the trial court: (1) that the jury was hung on two counts; and (2) that the read-back of Walterbach's testimony when he mentioned Stamps' name on the radio would help them continue their deliberations.

Clearly, given the jury's questions, this court cannot "declare beyond a reasonable doubt that the error had little, if any, likelihood of having changed the result of the trial." *Kelley,* 42 Kan.App.2d at 794. The jury's questions prove that Walterbach's inadmissible hearsay played an incredibly important role in their deliberations. In fact, Walterbach's inadmissible hearsay was so key that the jury indicated that it would be hung on two counts unless it got to hear the testimony again. Thus, if anything, the jury's questions prove beyond a reasonable doubt that the inadmissible hearsay changed the result of the trial.

The State, however, counters that if there was error, the error was harmless for two reasons. First, the State asserts that other evidence proved that Stamps was guilty of being a felon in possession of a firearm, interfering with law enforcement, and possessing cocaine. Specifically, the State hones in on Fithian's identification testimony at Stamps' trial. The State contends that because Fithian testified that she recognized the man who ran from her as Stamps based on his numerous tattoos, the weight of Walterbach's inadmissible hearsay testimony "could not have had an impact on the trial beyond a reasonable doubt."

Obviously, this contention is unfounded. If Walterbach's testimony had such an insignificant influence on the trial, why did the jury request a read-back of this testimony twice? Why did the jury indicate it would be hung on two counts unless it heard his inadmissible hearsay testimony again? We can safely say that if Fithian's identification testimony was so overwhelming, then the jury would not have requested the read-backs.

The State's second argument regarding why the trial court's error was harmless turns on what, if anything, a court may consider regarding jury deliberations. Citing *Yeager v. United States,* 557 U.S. 110, 121, 129 S.Ct. 2360, 174 L.Ed.2d 78 (2009), the State argues that "[t]his court should not speculate as to what the jurors were trying to decide when asking the questions they asked." Nevertheless, *Yeager* is distinguishable.

In *Yeager,* a case which dealt with double jeopardy, the United States Supreme Court explained:

> ***11** "Unlike the pleadings, the jury charge, or the evidence introduced by the parties, there is no way to decipher what a hung count represents. Even in the usual sense of 'relevance,' a hung count hardly 'make[s] the existence of any fact ... more probable or less probable.' Fed. Rule Evid. 401. A host of reasons—sharp disagreement, confusion about the issues, exhaustion after

> a long trial, to name but a few—could work alone or in tandem to cause a jury to hang. To ascribe meaning to a hung count would presume an ability to identify which factor was at play in the jury room. But that is not reasoned analysis; it is guesswork. Such conjecture about possible reasons for a jury's failure to reach a decision should play no part in assessing the legal consequences of a unanimous verdict that the jurors did return." 557 U.S. at 121–22.

Despite this strongly worded ban against deciphering the inner workings of a jury, *Yeager* is plainly distinguishable from Stamps' case. Unlike *Yeager,* Stamps does not ask this court to decipher the meaning of a jury's hung verdict. See 557 U.S. at 116. In this case, the jury convicted Stamps of all three counts. Thus, Stamps is not asking this court to find meaning behind the jury's hung verdicts. Instead, Stamps simply requests that this court look at the jury's questions to understand the prejudicial effect of Walterbach's testimony. This request does not involve speculation or guesswork because the jury questions are a part of the record. Moreover, the jury's questions convey a simple and easily discernable message: The jury was hung but believed Walterbach's inadmissible hearsay would help them reach a verdict. Accordingly, *Yeager* is distinguishable, and the State's argument fails.

Conclusion

Walterbach's testimony that he radioed other police officers that the felony suspect "was a black male by the name of Choncey wearing red shorts and no shirt" was inadmissible hearsay. Because Walterbach's testimony directly incriminated Stamps of being a felon in possession of a firearm, interfering with law enforcement, and possessing cocaine, the testimony was inadmissible. Additionally, given the jury's questions, the error that resulted from the admission of this inadmissible hearsay was not harmless. Consequently, we reverse Stamps' convictions and remand to the trial court for a new trial.

Did the Trial Court Err by Denying Stamps' Motion to Supress?

Next, Stamps argues that the trial court erred when it denied his motion to suppress the cocaine evidence seized from his car. Stamps asserts that the police violated his Fourth Amendment right against unreasonable searches and seizures: (1) by illegally seizing his car after they had already removed the gun that was in plain view; and (2) by illegally holding onto his car after Campbell recanted. Stamps further asserts that because the police illegally seized his car, his later consent was tainted by the illegal seizure. Moreover, Stamps argues that even if the police officers legally seized his car, the ultimate search of his car was illegal because: (1) he revoked his consent; and (2) he limited the scope of his consent, and the police exceeded this scope.

***12** The State concedes that Stamps properly preserved his arguments regarding consent. Nonetheless, the State argues that Stamps failed to properly preserve his arguments regarding the illegal seizure of his car. Moreover, the State asserts that Stamps' arguments regarding consent are unfounded because Stamps never revoked his consent and the police never exceeded the scope of his consent. Thus, the State asks this court to affirm the trial court's denial of Stamps' motion to suppress.

Standard of Review

When reviewing the trial court's decision on a motion to suppress, an appellate court uses a bifurcated standard. *State v. Reiss,* 299 Kan. 291, 296, 326 P.3d 367 (2014). First, an appellate court will review the trial court's factual findings to determine if those findings are supported by substantial competent evidence. Then, an appellate court will review the trial court's ultimate legal conclusion de novo. In conducting this review, an appellate court will "not weigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact." *Reiss,* 299 Kan. at 296. " " 'The State bears the burden to demonstrate that a challenged search or seizure was lawful." ' " *Reiss,* 299 Kan. at 296 (quoting *State v. McGinnis,* 290 Kan. 547, 551, 233 P.3d 246 [2010]).

Applicable Law

Both the Fourth Amendment to the United States Constitution and Section 15 of the Kansas Constitution Bill of Rights provide protection against unreasonable searches and seizures. Warrantless searches and seizures are unreasonable unless the search or seizure fits within one of the exceptions to the Fourth Amendment warrant requirement. *State v. Jefferson,* 297 Kan. 1151, 1159, 310 P.3d 331 (2013). Two exceptions to the constitutional warrant requirement are consent and probable cause plus exigent circumstances. *State v. Richard,* 300 Kan. 715, 726, 333 P.3d 179 (2014);

Jefferson, 297 Kan. at 1159. The automobile exception is a subclass of the probable-cause-plus-exigent-circumstances exception, which allows officers to search a car without a warrant " '[i]f a vehicle is readily mobile and probable cause exists to believe the vehicle contains contraband or evidence of a crime.' " *Jefferson,* 297 Kan. at 1159 (quoting *State v. Sanchez–Loredo,* 294 Kan. 50, Syl. ¶ 4, 272 P.3d 34 [2012]).

Probable cause exists when " 'the totality of the circumstances indicates there is a "fair probability" that the vehicle contains contraband or evidence [of a crime].' " *Jefferson,* 297 Kan. at 1159 (quoting *Sanchez–Loredo,* 294 Kan. at 55). If probable cause exists at the scene, then police officers have probable cause to seize the car and search it at a later time. *Jefferson,* 297 Kan. at 1159.

Under the exclusionary rule, if the State fails to establish the lawfulness of a search or seizure, then all the evidence obtained through the illegal search or seizure may be suppressed. *Jefferson,* 297 Kan. at 1161. "The fruit of the poisonous tree doctrine is 'one facet of the exclusionary rule' and 'extend[s] the scope of the exclusionary rule to bar' admission of evidence directly or indirectly obtained as a result of unlawful police conduct." *Jefferson,* 297 Kan. at 1161–62 (quoting *State v. Deffenbaugh,* 216 Kan. 593, 598, 533 P.2d 1328 [1975]). The State bears the burden to establish that the unlawfully seized evidence is admissible under an exception to the exclusionary rule. See *Jefferson,* 297 Kan. at 1162.

Additional Facts

***13** When Stamps finally got in contact with Littlefield so he could retrieve his car, Littlefield asked Stamps to come down to the police station so they could discuss who stole his car. On July 16, 2013, at 8:30 a.m., Stamps went to the police station and spoke with Littlefield. During the interrogation, Littlefield told Stamps that he had spoken with Campbell the day before, and she had told him that she lied about the aggravated assault. Then, Littlefield *Mirandized* Stamps. Stamps told Littlefield that his car was stolen, possibly by a man named Lance, while he was attending a party at his father's house. Stamps told Littlefield that his wallet and watch were still in his car. Then, the following exchange occurred:

"[Littlefield]: Okay is there any chance, I mean I'm worried that they might have left some *contraband in your car,* do you have a problem with us going down and looking thorough it *with you?*

"[Stamps]: That's fine.

"[Littlefield]: Okay this is a consent to search, I am going to read this to you. I Choncey Stamps at this time give permission to the Police Officers of the Kansas City, Kansas Police Department to conduct a search of, and this is your *Lincoln Town Car,* here's the tag 715 Frank, Frank David, I put the VIN, it's a 94 right?

"[Stamps]: Yeah.

"[Littlefield]: Um, and it says here, I understand that I have the right of refusing consent to search of the previously described property or location, I also have the right to refuse to sign this document, I furthermore declare that I have not been forced, promised, nor threatened previously to sign this document. It means that we can look at it at your own free will, *recover anything that's contraband, anything that belongs to you obviously we'll give back to you.* I now give my authorization that the police officers present take from this property any article of proof of any infraction of the law and the time is 0841 hours and if you could sign that right there, just use that pen right there.

"[Stamps]: I hope ...

"[Littlefield]: The last time you saw [Campbell] was the 23rd?

"[Stamps]: Yeah." (Emphasis added.)

It seems Stamps signed the consent form immediately after Littlefield stated, "just use that pen right there," because the consent form states that it was signed at "0841 [hours]." After signing the consent form, Littlefield continued to question Stamps about his relationship with Campbell. Next, Littlefield started questioning Stamps about whether he was positive he did not threaten Campbell with a gun, whether he owns a gun, and whether he fled from police officers near Campbell's house on July 7, 2013. Littlefield asked Stamps if his DNA would be on the gun. Stamps responded that it would not be on the gun. Then, the following exchange occurred:

"[Littlefield]: Do you mind, because we are going to DNA that gun, do you mind us collecting your DNA to compare?

"[Stamps]: That's fine, that's fine.

***14** "[Littlefield]: I am going to get the consent out again. I'll get, if you don't mind we'll collect your DNA, you're sure you never touched that gun?

....

"[Littlefield]: You're DNA won't ever be on it?

"[Stamps]: No, never, nowhere.

"[Littlefield]: You didn't run from the police?

"[Stamps]: No, no I have no reason to run from the police, I have no warrants.

"[Littlefield]: Okay this your consent again, okay and I'm going to read this to you because we will collect your DNA, just a mouth swab. I Choncey Stamps at this time give permission to the Police Officer of the Kansas City, Kansas Police Department to conduct a search of, and one side we've written your Lincoln.

"[Stamps]: Uh-huh.

"[Littlefield]: Because we are going to go through that and the other side I'm going to write DNA, the same form, and it says I understand that I have the right of refusing to the search of previously described property or location and I have the right to refuse ...

"[Stamps]: Well why do I have to do *all that.*

"[Littlefield]: Well ...

"[Stamps]: See now this is going *further than what's supposed to go* ...

"[Littlefield]: I know ...

"[Stamps]: I would rather have a lawyer [ ] present.

"[Littlefield]: Oh you want a lawyer?

"[Stamps]: Yes sir.

"[Littlefield]: Okay that's not a problem.

"[Stamps]: Before I ...

"[Littlefield]: (inaudible) sign it.

"[Stamps]: Yeah.

"[Littlefield]: So I am going to cross out DNA he would rather talk to his lawyer?

"[Stamps]: Yeah because this is going further then ...

"[Littlefield]: I understand.

"[Stamps]: Yeah.

"[Littlefield]: You actually have the right to an attorney?

"[Stamps]: Yeah I don't want to do *none of that.*

"[Littlefield]: That's not a problem.

"[Stamps]: Yeah.

"[Littlefield]: So we won't ask you no more questions.

"[Stamps]: Because this is going further [than] my car being stolen.

"[Littlefield]: Okay[,] no you're right.

"[Stamps]: I don't want to get involved in *all that.*

"[Littlefield]: Okay[,] give me a second here, give me five minute[s][.] I'm going to go talk to my Captain.

"[Stamps]: All right." (Emphasis added.)

At this point, the interrogation ended, and Stamps was arrested.

Next, Littlefield conducted a search of Stamps' car outside of Stamps' presence. During this search, Littlefield found a wallet inside the "cubbyhole" underneath the driver's side armrest. Littlefield opened up the wallet, found Stamps' driver's license, and also found a bag containing cocaine.

When Stamps' moved to suppress the cocaine evidence seized from his car, Stamps argued: (1) any consent he may have given was withdrawn; and (2) any consent he may have given did not include consent to search his wallet. Moreover, Stamps argued that the police illegally detained his car 9 days without probable cause because there was not a fair probability that anything left inside the car would help prove that he was guilty of assault, criminal possession of a firearm, or interference with law enforcement. Citing our Supreme Court's decision in *Jefferson,* Stamps asserted that this illegal seizure tainted any consent he may have later given.

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***15** At the motion hearing, Littlefield's testimony revealed: (1) that he never attempted to get a warrant to search Stamps' car; (2) that he waited to talk to Stamps until after he spoke to Campbell; (3) that when he spoke with Stamps over the phone, he told Stamps something along the lines of, " '[L]et me talk to you and we'll get you your car back' "; (4) that he thought he had Stamps' consent to search his car; and (5) that he was hoping to find ammunition, a holster, or a gun receipt when he searched the car.

The trial court denied Stamps' motion to suppress, ruling:

> "[T]he Court finds first that the defendant did not revoke his consent to search ... this vehicle. Moreover, the Court finds under a totality of circumstances that the defendant's consent to search was voluntarily, intelligently, and freely given. There's no evidence that he was coerced or threatened in this case.... He was informed of his rights, as shown through his statement that was admitted, including his right to refuse. In what he was read to by the detective, the detective specifically said that they would recover anything that was contraband and anything that belonged to the defendant because they would return it to him. So it was clear that the scope of the search was not only going to be for contraband, but it was also going to be anything that belonged to the defendant.
>
> "... Moreover, under Kansas Law, police have the right to search, including—a right to search under consent includes any personal effects. In this case it would make sense that when they found his wallet, given that the defendant had claimed that persons had stolen his vehicle, that they were going to check his wallet to determine if it belonged to either the defendant or it belonged to the persons who allegedly stole his vehicle, according to the defendant."

The trial court further ruled that *Jefferson* was distinguishable because: (1) the police in *Jefferson* "had no probable cause to seize [the car] in the first place"; and (2) the police in *Jefferson* left a note that his car would not be returned unless he was interviewed. The trial court explained that in Stamps' case, his car was lawfully seized because Stamps had "reported [it] stolen and it was recovered."

Stamps Revoked His Consent.

Stamps concedes that he initially gave Littlefield consent to search his car. Nevertheless, Stamps argues that he revoked his consent when he told Littlefield that the interrogation was going further than he thought it would and that he did not "want to do *none* of that." In denying Stamps' motion to suppress, the trial court explained that Stamps denied consent to search his DNA alone because Stamps brought up that he had an issue with giving his consent only when Littlefield "asked [him] to sign a consent to search for his DNA." Nevertheless, the police interrogation transcript reveals that the trial court erred.

The Context of Stamps' Statements and Plain Meaning of Stamps' Word Choice Proves He Revoked His Consent.

***16** After Stamps signed the consent form, Littlefield put the consent form away. This is evidenced by Littlefield's statement that he would get Stamps' "consent out again" when he started asking Stamps for his DNA. Then, Littlefield wrote "DNA" on the consent form Stamps had already signed. After Littlefield amended the form, Stamps made the following statements:

- "Well why do I have to do *all* that[?]"
- "[T]his is going further than what's [*sic*] supposed to go."
- "Yeah I don't want to do *none* of that."
- "I don't want to get involved in *all* that." (Emphasis added.)

Then, Littlefield honored Stamps request for an attorney and crossed out the word DNA on the consent form.

This sequence of events shows that Stamps revoked his consent. First, the context of Stamps' statements proves that he was revoking his consent to search his car. When Stamps stated he did not want to do "all that" or "none of that," Stamps was not looking at a consent form specifically for DNA. Instead, Stamps made those statements while looking at the single consent form, which included the consent to search his car and the consent to obtain his DNA. This means that his comments were not limited specifically to Littlefield's request for DNA as the trial court found.

Looking at Stamps' statements in context, it is readily apparent that Stamps eventually realized that Littlefield was not simply investigating the theft of his car but investigating him for aggravated assault, felon in possession of a firearm, and interfering with law enforcement. Once he made this realization, he decided that he was not going to consent to anything and wanted to speak with an attorney. Given this context, the trial court's finding that Stamps' merely

told Littlefield he refused to consent to DNA testing is unreasonable.

Second, Stamps' word choice further proves that he revoked his consent in its entirety. During the interview, Stamps never told Littlefield, "I don't want you to take my DNA." Instead, Stamps stated that he did not want to "do *none* of that" or "get involved in *all* that." (Emphasis added.) The word "none" means "[n]o part: not any." Webster's II New Riverside University Dictionary 800 (1988). Thus, when Stamps told Littlefield that he did not want to "do none of that," Stamps meant that he no longer wanted to do any of the things listed on the consent form. The word "all" means "[t]he total entirety or extent of." Webster's II New Riverside University Dictionary 93 (1988). Thus, when Stamps told Littlefield that he did not want to "get involved in all that," he meant that he no longer wanted to consent to the total entirety of the search. Given Stamps' word choice, it was unreasonable for the trial court to conclude that Stamps' statements were limited to the DNA consent only.

The State's Arguments Why Stamps Never Revoked His Consent Are Baseless.

Despite the preceding evidence to the contrary, the State asserts that Stamps never revoked his consent. The State explains that because Stamps asked Littlefield about whether he found his watch in his car about a week after the interview, Stamps must have given his consent. The State also argues that this court must affirm the trial court given that this court cannot "reweigh evidence or resolve conflicts in questions of fact." Yet, both arguments are baseless.

***17** First, it should be noted that the only evidence supporting that Stamps inquired about his watch is Littlefield's testimony at the motion hearing. More importantly, however, the State's argument is flawed. Even if Stamps inquired about his watch, his inquiry does not mean Stamps never revoked his consent. The State's argument is the logical fallacy of affirming the consequent, which can be broken down in the following syllogism: (1) If a person consented to the search, then that person knows about the search being conducted; (2) Stamps knew about the search being conducted; (3) Therefore, Stamps consented to the search. Clearly, the conclusion that Stamps consented to the search is repugnant to reason because consenting to a search is not the only reason why a person might know about a search being conducted. In this case, there are an infinite number of reasons why Stamps knew about Littlefield's search.

Regarding the State's argument about reweighing evidence and redetermining questions of fact, although the State correctly asserts that this court cannot reweigh evidence or redetermine questions of facts, this does not mean that this court is bound to accept a trial court's unreasonable factual findings. When reviewing motions to suppress, this court must determine if the trial court's factual findings are supported by substantial competent evidence. " 'Substantial competent evidence is legal and relevant evidence a reasonable person could accept to support a conclusion.' " *State v. Talkington,* 301 Kan. 453, 461, 345 P.3d 258 (2015) (quoting *State v. Bird,* 298 Kan. 393, 399, 312 P .3d 1265 [2013]). Therefore, if the trial court reaches a conclusion that a reasonable person could not accept, this court is not bound by the trial court's ruling simply because this court does not reweigh evidence or redetermine questions of facts. Moreover, as previously detailed, the trial court's factual findings were inconsistent.

To conclude, the trial court's interpretation of the facts regarding Stamps' alleged consent were unreasonable given both the context of Stamps' statements and the plain meaning of Stamps' word choice. Because Stamps' statements prove that he revoked his consent, the trial court's finding is not supported by substantial competent evidence. Moreover, it is important to note that the State never argues that one of the exceptions to the exclusionary rule saves the cocaine evidence seized from Stamps' car. Accordingly, if the State had any such argument, it has abandoned it by failing to raise it on appeal. *State v. Boleyn,* 297 Kan. 610, 633, 303 P.3d 680 (2013) (holding an issue not briefed is abandoned). Because we determine that Stamps revoked his consent when he declared to Littlefield—"I don't want to do none of that"—the trial court erred by failing to suppress the cocaine evidence seized from Stamps' car.

Even If Stamps Had Not Revoked His Consent, Littlefield's Search Exceeded the Scope of His Consent.

***18** Next, Stamps asserts that assuming arguendo there was no revocation, the trial court still erred by failing to suppress the cocaine evidence because Littlefield exceeded the scope of his consent. In his brief, Stamps argues that he limited the scope of his consent in three ways. First, Stamps argues that his consent was limited to the search of his car alone. Second, Stamps argues that his consent was limited to the search for contraband left by the person who stole his car. Third, Stamps argues that his consent was limited to a search that was to be conducted in his presence. Stamps argues that Littlefield

violated his Fourth Amendment rights by failing to comply with these limitations.

To review, in denying Stamps' motion to suppress, the trial court found that Littlefield did not exceed the scope of Stamps' consent because: (1) Stamps gave a general consent to the search of his car that included both contraband and his personal items; and (2) Stamps is not entitled to relief under Kansas aw, which allows police to search any "personal effects" after they have obtained consent. On appeal, the State requests that this court affirm the trial court's ruling based upon these same arguments, *i.e.,* Stamps gave Littlefield general consent to search his car and Stamps is not entitled to relief under Kansas law.

Stamps Did Not Give a General Consent.

First, the trial court erred by finding that Stamps gave a general consent to the search of his car. " '[A] suspect may of course delimit as he chooses the scope of the search to which he consents.' " *State v. Ryce,* 303 Kan. 899, 2016 WL 756686, at *22 (February 26, 2016) (quoting *Florida v. Jimeno,* 500 U.S. 248, 252, 111 S.Ct. 1801, 114 L.Ed.2d 297 [1991]) (mandate not yet issued). To determine the scope of a defendant's consent, a court must determine what a reasonable person would have understood by the exchange between the police officer and the defendant. *State v. Richmond,* 30 Kan.App.2d 1008, 1012, 52 P.3d 915 (2002). A general consent is broad and open-ended. For example, in *State v. Moore,* 283 Kan. 344, Syl. ¶ 11, 347, 154 P.3d 1 (2007), our Supreme Court held that Moore gave a police officer general consent to search his car when he told the police officer he "could look wherever he wanted."

In this case, Littlefield made the following oral promises to Stamps: (1) that the search would be of the car alone; (2) that the search would be solely for contraband connected to the theft of Stamps' car; (3) that the police would return anything that belonged to him, including his wallet and his watch; and (4) that the police search would be conducted in his presence. Obviously, a consent containing these qualifications is far narrower than a consent allowing an officer to "look wherever he wanted." Each promise Littlefield made narrowed the scope of what the police could search for and how the search was to be conducted. Thus, Stamps' consent was not a general consent.

***19** Moreover, the trial court's finding that Stamps gave a general consent is particularly problematic because courts must take care to narrowly construe a defendant's consent in cases where a defendant's consent is obtained by a ruse. See *State v. Johnson,* 253 Kan. 356, 365, 856 P.2d 134 (1993). In *Johnson,* for example, our Supreme Court held that if a police officer has a reasonable basis to suspect criminal activity, that police officer may use a ruse to obtain consent to conduct a search. Nevertheless, when a ruse is used, the defendant's permission to conduct a search must "be construed narrowly." *Johnson,* 253 Kan. at 365.

Here, Stamps' consent was clearly obtained by use of a ruse given: (1) that Littlefield needed to talk to Stamps before Stamps could retrieve his car; (2) that Littlefield's primary purpose for conducting the interrogation and obtaining Stamps' consent was to see if he could tie Stamps to the crimes that would later be filed against Stamps; and (3) that Littlefield explicitly testified that he never believed somebody stole Stamps' car. Most importantly, when Littlefield obtained Stamps' consent, he did so by leading Stamps to believe that he was worried that the people who had stolen his car "might have left some contraband in [his] car." Littlefield used this ruse to reassure Stamps that he was not in trouble and that police would only be looking for contraband while Stamps oversaw the search. In turn, however, this narrowed or limited the scope of Stamps' consent to illegal contraband left in his car. Consequently, we reject the trial court's finding that Stamps gave a general consent to search his car given that a defendant's consent must "be construed narrowly" when the consent is obtained by a ruse.

Consent Does Not Give Police Unlimited Power to Search Personal Effects

Second, the trial court incorrectly held that Kansas law gave police unlimited power to search "personal effects" after obtaining consent. As the State points out in its brief, when an officer has obtained general consent to search a car, that officer may "search *all readily opened* containers and compartments within the vehicle." *Moore,* 283 Kan. 344, Syl. ¶ 11. (Emphasis added.) This does not mean that the police can tear a car apart searching for evidence. See *Moore,* 283 Kan. at 361–62. Furthermore, when a defendant's consent is somehow limited, police must conduct their search within the limited scope of the defendant's consent. For example, in *State v. Richmond,* 30 Kan.App.2d 1008, 1012, 52 P.3d 915 (2002), the police

violated Richmond's Fourth Amendment rights when it searched her purse against the "expressly and narrowly limited [ ] scope of her consent to search." Thus, the trial court's generalized ruling that Kansas law allows police to search personal effects after obtaining consent is too broad an interpretation of Kansas law.

Littlefield Exceeded the Scope of Stamps' Consent.

***20** Third, in this case, Littlefield clearly exceeded the scope of Stamps' limited consent to search his car. A search conducted under consent may not exceed the scope of the consent sought and given. See *Jimeno,* 500 U.S. at 251–52. A police officer violates a defendant's Fourth Amendment rights if the officer exceeds the scope of his or her invitation obtained by use of a ruse because that officer is conducting the search without probable cause or a warrant. See *Johnson,* 253 Kan. at 367 (quoting *United States v. Scherer,* 673 F.2d 176, 182 [7th Cir.], *cert. denied* 457 U.S. 1120 [1982]) (noting that an important factor supporting that the police conducted a reasonable search within the confines of Johnson's consent obtained by a ruse was because "[t]he officers did not exceed the scope of the search"). In addition, a federal court has held that in order to admit evidence based on consent, the trial court must consider from the totality of the circumstances that (1) the consent was voluntary and (2) the search did not exceed the scope of the consent. *United States v. Price,* 925 F.2d 1268, 1270 (10th Cir.1991).

Here, as previously discussed, Stamps' gave Littlefield consent to search his car for the limited purpose of finding illegal contraband connected with the theft of his car while he was physically present. Nevertheless, during the search, Littlefield combed not only through Stamps' car, but also through Stamps' wallet. Littlefield knew that Stamps' wallet would be in the car because Stamps told Littlefield that is where he had left it. Therefore, Littlefield should have known that he could not search the wallet because it was not illegal contraband connected to the theft of Stamps' car. At the very least, Littlefield should not have continued to search Stamps' wallet once he found Stamps' driver's license. Furthermore, Stamps was not present during the search even though Littlefield told Stamps that he would look through the car "with [him]." If Stamps had been present during the search as Littlefield promised, Stamps would have been able to tell Littlefield that was his wallet and not illegal contraband connected with the theft of his car before Littlefield had the opportunity to search the wallet. As a result, Littlefield exceeded the limited scope of Stamps' consent.

Because Littlefield's search of Stamps' car was wholly unrelated to the expressed object of the search—illegal contraband connected with the theft of Stamps' car—the cocaine evidence retrieved from Stamps' wallet must be suppressed. Moreover, even if Stamps never revoked his consent, the cocaine evidence seized from his car must be suppressed because Littlefield violated his Fourth Amendment rights by exceeding the scope of his limited consent. Because we have determined that Stamps had revoked his consent or, in the alternative, the search exceeded the scope of Stamps' limited consent, it is not necessary that we address Stamps' contention that the police used the illegal seizure of his car to coerce him into consenting.

Did the Trial Court Err When It Rejected Stamps' Brady Violation Argument?

***21** Finally, Stamps argues that the State committed a *Brady* violation when it failed to disclose that Campbell had been charged with filing a false police report. Accordingly, Stamps argues that the trial court erred when it rejected his *Brady* violation argument while denying his motion for mistrial and motion for new trial. The State counters that it did not commit a *Brady* violation. Moreover, the State asserts that even if it erred by failing to turn over this evidence, Stamps is not entitled to relief because he has failed to establish that he was prejudiced by this error.

Standard of Review

While deferring to the trial court's factual findings, an appellate court reviews a trial court's ruling on a *Brady* violation de novo. *State v. Warrior,* 294 Kan. 484, 510, 277 P.3d 1111 (2012). An appellate court reviews a trial court's ruling on a motion for mistrial and a motion for new trial for an abuse of discretion. See *State v. Soto,* 301 Kan. 969, 977, 349 P.3d 1256 (2015); *Warrior,* 294 Kan. at 505, 510. A trial court abuses its discretion when an action is " '(1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact.' " *Soto,* 301 Kan. at 977 (quoting *State v. Clay,* 300 Kan. 401, 414, 329 P.3d 484 [2014]).

Applicable Law

When a prosecutor suppresses evidence favorable to the accused, that prosecutor violates a defendant's due process rights under the Fourteenth Amendment to the United

States Constitution. *Soto,* 301 Kan. at 978. "The three components of a *Brady* violation claim are: '(1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be material so as to establish prejudice.' " *Soto,* 301 Kan. at 978.

"Under the first prong, '[e]vidence that is favorable to the accused encompasses both exculpatory and impeachment evidence.' " *Soto,* 301 Kan. at 978. Under the third prong, " 'evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Soto,* 301 Kan. at 980 (quoting *Warrior,* 294 Kan. 484, Syl. ¶ 11). Accordingly, under the third prong, defendants need not show that they would have been acquitted but for the *Brady* violation. Instead, defendants merely need to show that " ' "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." [Citation omitted.]' " *Warrior,* 294 Kan. at 508 (quoting *Youngblood v. West Virginia,* 547 U.S. 867, 870, 126 S.Ct. 2188, 165 L.Ed.2d 269 [2006]).

Additional Facts

At the beginning of the second day of trial, Stamps' attorney requested a mistrial because he had just learned that the police had ticketed Campbell for filing a false police report for lying about Stamps assaulting her with a gun. Stamps' attorney argued that this constituted *Brady* material. To support his argument, Stamps' attorney brought documents showing that Campbell had been ticketed for filing a false police report on July 8, 2013. Stamps' attorney brought in another document showing that Campbell's case was settled as part of a plea agreement, where Campbell's false police report charge was dismissed in exchange for her guilty plea on two traffic offenses. The trial court denied Stamps' motion for mistrial because: (1) Campbell was not convicted of filing a false police report given that the charge was dismissed; and (2) Campbell was not testifying in this case, meaning Campbell's charge would be irrelevant for impeachment purposes.

***22** As part of his motion for new trial, Stamps reiterated his arguments concerning the State's alleged *Brady* violation. To support this argument, Stamps called Campbell as a witness. Campbell testified that she lied about Stamps assaulting her and was found guilty of filing a false police report and two traffic violations. The trial court denied Stamps' motion, ruling: (1) that the evidence of Campbell's charge was irrelevant given that Campbell did not testify; and (2) that the evidence of Campbell's charge did not constitute *Brady* material.

The Trial Court Erred by Denying Stamps' Motions Because the State Committed a Brady Violation.

The State concedes that if Campbell's charge constituted *Brady* material, it failed to turn over this material before trial. Consequently, the parties' dispute turns on whether this evidence was favorable under the first prong of the *Brady* violation test and whether this evidence was so material as to prejudice Stamps under the third prong of the *Brady* violation test. As detailed below, Stamps meets his burden under both prongs of the test.

The Evidence Was Favorable.

The evidence of Campbell's charge was clearly favorable. As Stamps points out in his brief, he could have used this evidence to impeach Walterbach's testimony and Fithian's testimony regarding their investigation of the felony suspect. By impeaching the officers, Stamps would have been able to establish that the whole reason the police began investigating him was based on Campbell's false report that he assaulted her with a gun. Moreover, as Stamps points out in his brief, this evidence was highly exculpatory because it helped corroborate his alibi and weaken his connection to the gun found in the car.

It is important to note that the difference between simply knowing Campbell recanted and knowing that the police charged Campbell with filing a false police report is a major one. The fact that police charged Campbell with filing a false police report implies that the State recognized that Campbell lied. It implies that the State believed Campbell was not simply recanting to protect Stamps but actually made the whole story up. Because the State charged Campbell with filing a false police report, at trial, the State would be bound by this charge. That is, the State could not argue that Campbell recanted to protect Stamps unless it was willing to also divulge that it charged Campbell with a crime it did not believe she was guilty of committing. In summary, if Stamps had known about this information, it could have been incredibly beneficial to his defense.

Nevertheless, the State attacks Stamps' arguments regarding the favorability of this evidence. The State argues that the evidence of Campbell's charge was not favorable because it was unusable at trial. Citing K.S.A. 60–447, K.S.A. 60–420, K.S.A. 60–421, and K.S.A. 60–422, the State contends: (1) because Campbell was never convicted of filing a false police report since the charge was dismissed as part of a plea deal, Stamps would not have been able to get this evidence into trial given that "[s]pecific instances of conduct tending to prove a trait bad, for example truthfulness, can only be proved by evidence of a criminal conviction"; and (2) because Campbell never testified at trial, Stamps would never be able to get in evidence of her charge. The State additionally argues that evidence of Campbell's charge was not favorable because her charge "had no bearing" on whether Stamps was guilty of interfering with a police officer, being a felon in possession of a firearm, or possessing cocaine. There are several problems with the State's arguments, however.

***23** First, the fact that Campbell was never convicted does not mean that Stamps could not get this evidence in at trial. Under K.S.A. 60–420 and K.S.A. 60–422, for example, a party may examine a witness and bring up extrinsic evidence on a relevant matter concerning that witness' credibility. Neither provision requires that the witness be convicted of a crime involving dishonesty before a party can attack that witness' credibility. As a result, Stamps could have raised the fact that Campbell was charged with filing a false police report through these provisions.

Moreover, K.S.A. 60–447 and K.S.A. 60–421 do not prevent a party from attacking a witness' credibility just because that witness was never convicted of a crime involving dishonesty. K.S.A. 60–447 involves what evidence a party may use when the party is attempting to use a witness' character trait as proof of conduct. K.S.A. 60–421 simply prevents a party from using a witness' prior convictions unrelated to dishonesty or false statements for the purpose of attacking that witness' credibility. Consequently, the State has misinterpreted the Kansas rules of evidence in making this argument.

Second, although Campbell never testified, this does not mean that her statements were not admitted into evidence. The State seems to ignore that even though Campbell never testified, her statements came in through Walterbach's testimony and Fithian's testimony. Again, between the two officers' testimonies, the jury heard that Stamps was suspected of committing an armed felony which occurred around the corner from the place where the black male in Stamps' car was found minutes later. Clearly, whatever information Walterbach knew about the felony suspect, he learned it from Campbell.

Third, because Campbell's statements were admitted into evidence, fairness required that Stamps could respond to the accuracy of those statements. As detailed in the section on hearsay, the trial court erred by allowing Walterbach's hearsay testimony. The trial court erroneously ruled that Walterbach's testimony was not hearsay because it was not offered for the truth of the matter asserted. If the trial court had ruled correctly, this evidence would never have been before the jury.

Since it was put before the jury, however, Stamps should have been able to respond by putting forth evidence of Campbell's false police report charge. K.S.A. 60462 supports this conclusion. K.S.A. 60–462 states:

> "Evidence of a statement or other conduct by a declarant inconsistent with a statement received in evidence under an exception to K.S.A. 60–460, is admissible for the purpose of discrediting the declarant, though he or she had no opportunity to deny or explain such inconsistent statement. Any other evidence tending to impair or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness."

Thus, K.S.A. 60–462 recognizes that fairness requires that a party should have some way to attack the credibility of a nontestifying declarant's statement. As a result, the State's argument that Stamps was banned from raising evidence of Campbell's charge because Campbell never testified only emphasizes that the trial court's erroneous rulings resulted in a fundamentally unfair trial. Moreover, hypothetically speaking, if Walterbach's hearsay testimony was properly admitted into evidence, it would have been properly admitted under one of the K.S.A 2013 Supp. 60–460 hearsay exceptions. If that were the case, then Stamps would have had the opportunity to discredit Walterbach's testimony under K.S.A. 60–462.

***24** Fourth, the State's assertion that Campbell's false police report charge "had no bearing as to [Stamps'] guilt" is absolutely incorrect. If Campbell had not called the police, the police would not have been on the lookout for the black male in the white Lincoln with a blue ragtop. As discussed in the section on hearsay, the fact that Campbell accused Stamps of assaulting her with a gun tends to prove that he was guilty of being a felon in possession of a firearm. Additionally, the fact that a man matching Stamps' description in Stamps' car turns up around the corner from Campbell's address shortly after she called the police tends to prove that Stamps was the person who interfered with law enforcement by fleeing from the police and was the person who abandoned the cocaine in his car. Thus, the veracity of Campbell's accusation was vitally important in proving Stamps' guilt. Accordingly, the State's argument that Campbell's charge had no bearing on Stamps' guilt is repugnant to reason.

To conclude, the evidence of Campbell's false police report charge was favorable. As a result, Stamps has met his burden under the first prong to establish a *Brady* violation.

The Evidence Was So Material as to Prejudice Stamps' Defense.

After establishing favorability, it is easy to understand why evidence of Campbell's charge was so material as to prejudice Stamps' defense under the third prong. As Stamps' asserts in his brief, if the State had turned over this evidence, Stamps could have impeached Walterbach's testimony and Fithian's testimony about responding to an armed felony call. Stamps would have had the ability to strengthen his alibi defense and weaken his connection to the gun.

Moreover, it is readily apparent how important a role Campbell's false report played in his trial given the jury's two read-back requests for Walterbach's hearsay testimony. During the second read-back request, the jury even indicated that it was hung on two counts. As a result, it is reasonable to conclude that if Stamps had known about Campbell's charge in time to attack Walterbach's testimony, the jury might have discredited Walterbach's testimony and reached a different verdict.

The State counters that Stamps was not prejudiced for two reasons. First, the State repeats its arguments why the charge was not favorable, arguing that Stamps could not have been prejudiced given that he could not have brought in evidence of Campbell's charge at trial. As discussed in the preceding section, however, this argument fails.

Second, the State argues that because Stamps learned about Campbell's charge on the second day of trial and the trial court ruled that this evidence could not come in for evidentiary reasons, Stamps could not have been prejudiced. Nevertheless, this court has held that " '[e]vidence not disclosed to the defendant before trial is not suppressed or withheld by the State if the defendant has personal knowledge thereof, or if the facts become available to him during trial and *he is not prejudiced in defending against these new facts*. [Citations omitted.]' " (Emphasis added.) *State v.. Stevens,* 36 Kan.App.2d 323, 332, 138 P.3d 1262 (2006), *aff'd* 285 Kan. 307, 172 P.3d 570 (2007) (quoting *State v. Barncord,* 240 Kan. 35, 43, 726 P.2d 1322 [1986]). Here, although Stamps learned about the evidence during trial, Stamps was clearly prejudiced in defending against the new facts because he was unable to impeach Walterbach or Fithian or to use the charge to strengthen his defense. Consequently, both of the State's arguments regarding prejudice fail.

***25** Because Stamps successfully established that evidence of Campbell's charge was so material as to prejudice his defense, he has successfully established that the State violated the third prong of the *Brady* violation test. Thus, the trial court erred by ruling that the State did not commit a *Brady* violation. In turn, because the trial court made an error of law, the trial court abused its discretion when it denied Stamps' motion for mistrial and motion for new trial.

Convictions reversed, remanded with directions to suppress the cocaine evidence obtained during the search of Stamps' car, and remanded for a new trial.

All Citations

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