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

REPLY BRIEF OF THE APPELLANT

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Reply Argument and Authorities

Rule 6.05 Statement

This reply brief is made necessary by new material in the appellee's brief. Specifically, that new material is the appellee's arguments:

(1) That appointed K.S.A. § 60-1507 counsel Michael Whalen had no duty to investigate and raise claims outside those in Mr. Nelson's *pro se* 60-1507 motion (Aple.Br. 19-21);

(2) That Mr. Nelson's 2018 § 60-1507 motion is an untimely "successive" motion the district court could simply elect not to hear for that reason (Aple.Br. 22-26);

(3) That Mr. Nelson's claims of Mr. Whalen's ineffective assistance are made harmless by overwhelming evidence at trial (Aple.Br. 28-30);

(4) That even if Mr. Whalen had investigated and raised the claims Mr. Nelson argued he should have in his 2018 § 60-1507 motion, they did not show deficient performance by either trial counsel or re-sentencing counsel (Aple.Br. 30-44); and

(5) Mr. Nelson cannot show prejudice from his *Brady* claim (Aple.Br. 45-47).

A. Summary of Mr. Nelson's opening brief

Jeffrey Nelson appeals from the denial of a 2018 motion for K.S.A. § 60-1507 relief brought within one year of the finality of a decision denying his prior timely § 60-1507 motion after his direct appeal. The 2018 motion challenged the ineffective assistance of Mr. Nelson's prior appointed § 60-1507 counsel, Michael Whalen, and the court denied the motion after only a limited evidentiary hearing at which only Mr. Whalen testified. Not reaching the substance of any of Mr. Nelson's ineffective-assistance claims, the court instead held only that Mr. Whalen "had no duty to raise additional issues not raised in [Mr.] Nelson's original pro se motion" (R1 at 169).

In his opening brief, Mr. Nelson first explained the district court's holding that Mr. Whalen had no duty to investigate and raise claims not in his original *pro se* motion was error, requiring a full evidentiary hearing on his claims that Mr. Whalen rendered ineffective assistance (Brief of the Appellant ["Aplt.Br."] 28-44). A *pro se* § 60-1507 movant who is appointed counsel has the right to fully effective assistance of that counsel under the *Strickland* framework, which includes engaging in a reasonable investigation of the movant's case to determine whether to amend the *pro se* motion (Aplt.Br. 29-34). And a defendant alleging ineffective assistance of § 60-1507 counsel can file another § 60-1507 motion alleging so (Aplt.Br. 42-44).

Here, with nearly two months available to file an amended motion and the ability thereafter to seek to do so for manifest injustice, Mr. Whalen engaged in no investigation of any claims outside Mr. Nelson's *pro se* motion at all (Aplt.Br. 35-39). And taking Mr. Nelson's allegations not refuted by the

record as true, Mr. Whalen's deficient performance prejudiced him, requiring a full evidentiary hearing (Aplt.Br. 39-42).

Second, Mr. Nelson explained his 2018 motion also brought a *Brady* claim that Mr. Nelson did not discover until 2018, which was timely and proper regardless of his claims about Mr. Whalen's performance and had to proceed to a full evidentiary hearing (Aplt.Br. 45-48).

This is because while investigating the 2018 motion, Mr. Nelson's counsel discovered that one of the prosecution's key witnesses at trial, Keith Hewitt, had been charged with a crime of dishonesty at the time of the trial, which was dismissed after Mr. Nelson's trial by one of the prosecutors in Mr. Nelson's case (Aplt.Br. 46-47). But this was never disclosed to Mr. Nelson's defense (Aplt.Br. 47). This strongly implied an agreement for his testimony not disclosed to the defense, meeting the *Brady* standard, which prejudiced Mr. Nelson because 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 (Aplt.Br. 47-48).

B. Once appointed, Mr. Nelson's K.S.A. § 60-1507 counsel Michael Whalen had a duty to represent Mr. Nelson fully in pursuing § 60-1507 relief, including by investigating and amending Mr. Nelson's *pro se* § 60-1507 motion so as to state meritorious claims, even outside the matters in the *pro se* motion.

In response, the State initially argues Mr. Whalen could not have been ineffective for failing to investigate the case and amend Mr. Nelson's *pro se* § 60-1507 motion because Mr. "Nelson is presumed to have listed all grounds for relief in" his original § 60-1507 motion, and there was "no evidence [Mr.] Nelson presented [Mr.] Whalen with these new claims" (Aple.Br. 19-21).

The State argues Mr. Nelson "had 5½ years to contemplate [trial counsel] Ariagno's perceived mistakes, and more than 2½ years to ponder [re-sentencing counsel] Loeffler's legal efforts," Mr. Nelson improperly blames Mr. Whalen, and, citing no record, it argues Mr. Nelson "could easily have included the additional 9 grounds that he made in his [2018] 60-1507 motion and now makes on appeal" (Aple.Br. 19). Citing no authority, the State argues Mr. Whalen "was not obligated to … devise additional claims in order to supplement 'all of the grounds' on which [Mr.] Nelson had already based his allegation that he was unlawfully being held in custody" (Aple.Br. 20).

The State cites no authority for this statement that, once appointed, § 60-1507 counsel has no duty to investigate and raise additional claims when a defendant uses the Judicial Council form to prepare a *pro se* motion (Aple.Br. 20). This is because the law of Kansas does not support this.

In his opening brief, Mr. Nelson cited numerous authorities holding a *pro se* § 60-1507 movant who is appointed counsel has the statutory right to fully effective assistance of that counsel under the *Strickland* framework, just as if counsel had been privately hired (Aplt.Br. 29-34) (citing, among other things, K.S.A. § 22-4506(b) and (c); KRPC 6.2 cmt. 3; *Robertson v. State*, 288 Kan. 217, 227, 201 P.3d 691 (2009); *Skaggs v. State*, 59 Kan. App. 2d 121, 132, 479 P.3d 499 (2020); *McIntyre v. State*, 54 Kan. App. 2d 632, 638-43, 403 P.3d 1231 (2017)). And this includes the duty to engage in a reasonable investigation of the movant's case to determine whether to amend the *pro se* motion (Aplt.Br. 30-34) (citing, among other things, *Mundy v. State*, 307 Kan.

280, 294-96, 408 P.3d 965 (2018); *Powell v. State*, No. 120,679, 2020 WL 7636297 at *7-8 (Kan. App. Dec. 23, 2020) (unpublished)).

Therefore, when a § 60-1507 movant alleges after the denial of § 60-1507 relief a claim that prior § 60-1507 counsel was ineffective, including failure to investigate his case and amend his *pro se* motion, the movant may seek § 60-1507 relief on that ground (Aplt.Br. 42-44) (citing *Ludlow v. State*, No. 105,303, 2011 WL 5833609 at *2 (Kan. App. Nov. 18, 2011) (unpublished); *Pouncil v. State*, No. 98,276, 2008 WL 2251221 at *5 (Kan. App. May 30, 2008) (unpublished)).

With the exception of *Mundy*, which the State cites twice, once in reference to Mr. Whalen's understanding of it (Aple.Br. 30) and once for the requirement that allegations have evidentiary support (Aple.Br. 46), the State does not even mention any of these authorities, let alone address them. Instead, with no support, it argues that as appointed § 60-1507 counsel, Mr. Whalen *did not* have a duty to investigate Mr. Nelson's case at all and amend his *pro se* § 60-1507 as necessary. The Supreme Court expressly rejected this in *Mundy*, as did this Court in *Powell* (Aple.Br. 30-34). Mr. Nelson explained so in his opening brief, but the State gives no response.

While it was the fact that Mr. Nelson's claims in his *pro se* motion required a hearing that required the appointment of counsel, as the district court found (R4 at 96), *see* K.S.A. § 22-4506(b) and Supreme Court Rule 183(i), nothing in § 22-4506(b) or Rule 183(i) puts blinders over counsel's eyes or limits his duty to provide effective assistance as to the entire case. To the contrary, once Mr. Whalen was appointed, he had the full duty to provide

effective assistance just as if he were privately hired, which included investigating the whole case to determine whether to amend the *pro se* to cure deficiencies and possibly add claims (Aplt.Br. 30-34).

The State's arguments about the time available to Mr. Nelson are irrelevant. Mr. Nelson was in prison during his direct appeal and never had Mr. Ariagno's or Loeffler's files (R3 at 41, 74, 82, 102). Only from those files were the claims Mr. Whalen failed to uncover discernable (Aplt.Br. 37-38). And while the case was on direct appeal, § 60-1507 relief did not lie. *See* § 60-1507(f). Mr. Nelson filed his motion timely within the year thereafter, and Mr. Whalen was appointed with time to spare. And nowhere in the record is there any evidence that, in prison and without his prior counsel's files, Mr. Nelson "could easily have included the additional 9 grounds that he made in his [2018] 60-1507 motion" (Aple.Br. 19).

Moreover, as the State concedes (Aple.Br. 21-22), not even Mr. Whalen limited himself to the issues in the *pro se* motion, showing he knew his duties went further than that. On Mr. Nelson's request, Mr. "Whalen presented evidence at the 1507 hearing concerning the number of [Mr.] Ariagno's pre-trial visits with [Mr.] Nelson, whether [Mr.] Nelson was prepared to testify, and whether he interviewed potential defense witnesses" (Aple.Br. 22). But the State does not dispute that Mr. Whalen never obtained trial counsel's files or the underlying record, he engaged in no *investigation* of any claims outside Mr. Nelson's *pro se* motion at all, and this was not subject to a strategic decision, but only because – again, citing no authority – "Mr. Whalen 'was not obligated to … devise additional claims'" (Aple.Br. 20).

The few authorities the State cites in this part of its brief do not help it. Unlike the authorities on which Mr. Nelson relied, *State v. Trotter*, 296 Kan. 898, Syl. ¶ 2, 295 P.3d 1039 (2013), did not involve an allegation of ineffective assistance of appointed § 60-1507 counsel in failing to investigate and raise claims. Nor did *Toney v. State*, 39 Kan. App. 2d 944, 947-49, 187 P.3d 122 (2008). Instead, both decisions stated that *absent* something else, a prior § 60-1507 motion is presumed conclusive as to claims raised. As Mr. Nelson explained in his opening brief, and the courts held in *Mundy*, *Powell*, *Ludlow*, *Pouncil*, and the other decisions Mr. Nelson cited but the State ignores, a showing that appointed § 60-1507 counsel was ineffective for failing to investigate and raise claims *is* that something else.

C. Mr. Nelson's 2018 § 60-1507 motion was timely and proper.

The State next argues Mr. Nelson's 2018 § 60-1507 motion was a "successive" motion that the district court could elect not to hear simply for that reason, and that a recent decision, *State v. Mitchell*, 315 Kan. 156, 505 P.3d 739 (2022), controls this issue (Aple.Br. 22-26).

The State again ignores authorities Mr. Nelson cited in his opening brief, instead citing inapposite and irrelevant authority that has nothing to do with the issue in this case. Not a single decision the State cites in this part of its brief involved a subsequent § 60-1507 motion brought within one year of the finality of the denial of a prior one *that challenged prior § 60-1507 counsel's ineffective assistance*. *See Trotter*, 269 Kan. at 904 (successive § 60-1507 motion sought to challenge defect in complaint); *Nguyen v. State*, 309 Kan. 96, 107, 431 P.3d 862 (2018) (successive § 60-1507 exceptional

circumstances found for non-English-speaking defendant); *Beauclair v. State*, 308 Kan. 284, 304, 419 P.3d 1180 (2018) (exceptional circumstances found for actual innocence claim); *Dunlap v. State*, 221 Kan. 268, 269-70, 559 P.2d 788 (1977) (successive § 60-1507 motion sought to challenge admission of evidence of prior crimes); *Toney*, 39 Kan. App. 2d at 948 (successive § 60-1507 motion sought to raise claim of ineffective assistance of trial counsel); *Thuko v. State*, 310 Kan. 74, 84, 80, 444 P.3d 927 (2019) (successive § 60-1507 motion sought to raise claim of ineffective assistance of direct-appeal counsel); *Mitchell*, 315 Kan. at 161-62 (successive § 60-1507 motion sought to raise claim of ineffective assistance of trial and direct-appeal counsel).

As Mr. Nelson explained in his opening brief, a § 60-1507 motion alleging ineffective assistance of prior § 60-1507 counsel brought within one year of the finality of the prior denial of § 60-1507 relief *is not* a successive motion, because it necessarily cannot be brought before finality of the prior § 60-1507 motion (Aplt.Br. 42-43). In *Rowell v. State*, 60 Kan. App. 2d 235, 239-41, 490 P.3d 78 (2021), this Court squarely agreed and, reversing a district court holding otherwise, held that under § 60-1507(f), the one-year period for a movant to file a second motion for § 60-1507 relief *claiming counsel representing him in connection with his first § 60-1507 motion had provided ineffective assistance* began to run when this Court issued its mandate affirming summary dismissal of the first § 60-1507 motion, *rather than the mandate on direct appeal*. "To do otherwise would deprive a movant of any way to raise a claim of ineffectiveness of 60-1507 counsel." *Id.* at 241.

The State concedes "[t]his court has decades of caselaw holding

that K.S.A. 60-1507's prohibition on successive motions is subject to exceptions" (Aple.Br. 22) (quoting *Nguyen*, 309 Kan. at 107). It concedes the movant need merely show "[e]xceptional circumstances," meaning "unusual events or intervening changes in the law that prevented the defendant from raising the issue in a preceding K.S.A. 60-1507 motion" (Aple.Br. 22). But it plainly is wrong that "[t]here are no exceptional circumstances to explain or justify Nelson's failure to assert th[e] claims [in his 2018 § 60-1507 motion] in his first 60-1507 motion" (Aple.Br. 22-23). By definition, claims that prior § 60-1507 counsel was ineffective cannot have been raised in a prior § 60-1507 motion. *Rowell*, 60 Kan. App. 2d at 239-41.

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).

D. 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.

The State then criticizes each of Mr. Nelson's underlying claims about Mr. Ariagno or Mr. Loeffler that Mr. Nelson's 2018 motion argues Mr. Whalen rendered ineffective assistance by not investigating and discovering (Aple.Br. 28-44). It purports to address each one under the *Strickland* test, first for "prejudice" and then for "performance."

At the outset, the State ignores that Mr. Nelson's claims in his 2018 motion are about *Mr. Whalen*'s performance in failing to *raise* claims about

Mr. Ariagno and Mr. Loeffler's performance. So, in his opening brief, Mr. Nelson addressed this first by showing that Mr. Whalen *did* render deficient performance when he engaged in no investigation of any claims outside Mr. Nelson's *pro se* motion at all (Aplt.Br. 35-39). The State offers no refutation that Mr. Whalen *was* deficient in any of those regards other than, as addressed above, erroneously suggesting he had no duty to investigate at all. As to Mr. Whalen's performance, plainly the first *Strickland* prong is met.

So, for the claims about Mr. Ariagno's and Mr. Loeffler's performance that Mr. Whalen did not uncover due to his deficient performance, as Mr. Nelson did in his opening brief those are properly discussed in the context of how Mr. Whalen's failure prejudiced Mr. Nelson (Aplt.Br. 39-42). That is, "had Mr. Whalen engaged in that investigation, he would have uncovered [these] claims warranting § 60-1507 relief" (Aplt.Br. 39).

Therefore, all the State's arguments in this part of its brief, concerning the claims about Mr. Ariagno's and Mr. Loeffler's performance that Mr. Whalen was deficient for not investigating and then stating, actually go to the *prejudice* prong of Mr. Nelson's claims as to *Mr. Whalen*'s performance.

1. The strength of the evidence against Mr. Nelson in the underlying case as to the volatility of his relationship with Mr. Swartz does not render any of his claims that Mr. Whalen was ineffective harmless.

Pointing to this Court's decision in *Nelson v. State*, No. 114,435, 2017 WL 462403 at *3 (Kan. App. Feb. 3, 2017) (unpublished) ("*Nelson III*"), the State argues the strength of its evidence at trial meant none of the claims of deficient performance could be prejudicial (Aple.Br. 28-30).

In arguing this, the State fails to adhere to the standard for claims that have not yet been subject to an evidentiary hearing: that is, if taking those claims not refuted by the record as true, the movant "potentially" would be entitled to relief, a hearing is required (Aplt.Br. 40) (quoting *Jacques v. State*, No. 89,805, 2004 WL 117331 at *3-4 (Kan. App. Jan. 23, 2004) (unpublished)). But as the district court denied Mr. Nelson a full evidentiary hearing, this is the standard the Court must use (Aplt.Br. 39-40).

In *Nelson III*, the only issues the Court addressed were direct-appeal counsel's failure to raise an *Alleyne* claim related to Mr. Nelson's "hard 50" sentence and Mr. Ariagno's failure to interview and investigate witnesses who would have provided testimony to past abuse of Mr. Nelson by the alleged victim, Mr. Swartz. 2017 WL 462403 at *5-17. The Court held that as to that second claim, *the evidence Mr. Nelson argued was missing* would not have made a difference, due to the overwhelming evidence of Mr. Nelson's and Mr. Swartz's "volatile relationship." *Id.* at *17. As the State notes, the facts to which the Court pointed included "Mr. Nelson's 12-page written statement, which was admitted at trial" (Aple.Br. 29).

The State's attempt to take the Court's observation about the evidence of Mr. Nelson's relationship with Mr. Swartz and turn it into a sword against all his claims in his 2018 motion is in error. Mr. Nelson's claims include numerous ones to which the great deal of evidence about his and Mr. Swartz's volatile relationship would not hobble, including:

- Mr. Ariagno's failure to raise objection to Stanley Swartz's statements to law enforcement officers (R1 at 47-49), which far beyond just their

relationship, provided evidence of the earlier break-in, without which the jury may not have found the intent for first-degree murder.

- Mr. Ariagno's failure to investigate and put on a mental disease or defect defense *at trial* (R1 at 49-53), not just that he failed to do so as mitigating evidence at sentencing, as the State argues (Aple.Br. 43-44), which, taken as true, obviously would change the calculus as to what the jury was considering in the first place.
- Mr. Ariagno's failure to object to, investigate, or impeach Amber Moore's testimony on several grounds (R1 at 53-59, 62-64), who was the only witness to the interactions on April 25, 2007 between herself and Mr. Nelson as to Mr. Swartz that the prosecution used to prove intent.
- Mr. Ariagno's failure to move to suppress Mr. Nelson's statement to law enforcement (R1 at 59-61), which was one of the pieces of evidence the Court in *Nelson III* found "overwhelming" in the first place.
- Mr. Ariagno's failure to investigate and impeach Keith Hewitt's testimony (R1 at 64-67). Mr. Hewitt's testimony that Mr. Nelson offered him money to injure Mr. Swartz was the only evidence of this, which the prosecution used to negate Mr. Nelson's claims of self-defense or lesser intent.

None of these issues are in any way impacted by the overwhelming evidence *of Mr. Swartz's and Mr. Nelson's volatile relationship* to which the Court pointed in *Nelson III*. Per the Supreme Court's observations in *State v. Nelson*, 291 Kan. 475, 476-79, 243 P.3d 343 (2010) ("*Nelson I*"), it was hotly disputed what actually happened at Mr. Swartz's home early in the morning

of April 25, 2007, and therefore whether Mr. Nelson was guilty of first-degree murder, some lesser form of homicide, self-defense, or – if Mr. Ariagno had investigated or raised it properly – not guilty due to mental disease or defect.

Taking Mr. Nelson's allegations in his 2018 § 60-1507 motion not refuted by the record as true, without Mr. Swartz's statements to law enforcement, Ms. Moore's testimony, Mr. Nelson's statement to law enforcement, or Mr. Hewitt's testimony, and with a properly supported mental-disease-or-defect defense, it far from *overwhelming* that Mr. Nelson would have been convicted of first-degree murder and sentenced to a "hard 50." Therefore, had Mr. Whalen investigated and raised these claims, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

2. Taking Mr. Nelson's allegations not refuted by the record as true, Mr. Whalen's failed to investigate and raise claims that trial and sentencing counsel rendered deficient performance.

The State then spends the rest of its brief purporting to go through each of Mr. Nelson's claims and show that even if Mr. Whalen had investigated and raised them, they did not show deficient performance by either Mr. Ariagno or Mr. Loeffler (Aple.Br. 30-44). For each, the State again violates the standard this Court must use to determine whether an evidentiary hearing is warranted: whether, taking those claims not refuted by the record as true, Mr. Nelson "potentially" would be entitled to relief (Aplt.Br. 40) (quoting *Jacques*, 2004 WL 117331 at *3-4). The State instead

prefers statements by Mr. Whalen and Mr. Ariagno. But that dispute of fact alone means an evidentiary hearing is required. *Bellamy v. State*, 285 Kan. 346, 357, 172 P.3d 10 (2007).

Mr. Nelson will not belabor these issues, as they are fully explained in his 2018 § 60-1507 motion (R1 at 47-69, 103-48). And as the responses the State gives now were never made below (R1 at 84-85), because an evidentiary hearing was denied on the incorrect legal basis that Mr. Whalen had no duty to investigate and raise these claims, the State's arguments are premature. But a few points deserve mention in response.

As to Mr. Nelson's claim that Mr. Whalen should have raised a claim that Mr. Ariagno was ineffective in failing to raise hearsay and Confrontation Clause objections to testimonial statements Stanley Swartz made to law enforcement officers, the State argues *Giles v. California*, 554 U.S. 353 (2008) was released after Mr. Nelson's trial, so Mr. Ariagno had no reason to predict it. But at the time of the hearing on January 24, 2008, at which the court ruled Mr. Swartz's hearsay statements were admissible, the U.S. Supreme Court already had granted a writ of *certiorari* to decide this issue in *Giles*. *See Giles v. California*, 128 S.Ct. 976 (Jan. 11, 2008). *Giles* was then pending argument in April 2008, while Mr. Nelson's case was being tried. Taking Mr. Nelson's allegations as true, Mr. Ariagno should have known this and prepared for the issue by at least raising the appropriate objections.

As to Mr. Ariagno's failure to investigate and put on a mental disease or defect defense at trial, the State relies entirely on self-serving portions of Mr. Whalen's testimony (Aple.Br. 32-33). But that fails to take as true the

allegations in the 2018 § 60-1507 motion, on which Mr. Nelson has had no opportunity to introduce evidence. Per his allegations, not refuted by the record, Mr. Whalen's failure to obtain Mr. Ariagno's file meant he would not have seen the evidence supporting this claim.

As to Mr. Ariagno's failure to object to Ms. Moore's testimony on several grounds (not all of which the State addresses), the State argues this was a trial objection that should have been raised on direct appeal (Aple.Br. 33-35). But taking Mr. Nelson's allegations as true, Mr. Ariagno's failure to *make* a trial objection is the issue.

As to Mr. Ariagno's failure to move to suppress Mr. Nelson's statement, the State argues that under its version of the events, Mr. Nelson was not yet represented by counsel (Aple.Br. 35-38). That fails to take Mr. Nelson's allegations as true, none of which are conclusively refuted by the record, and which instead show he never made a waiver of the right to counsel. Taking them as true, Mr. Ariagno should have moved to suppress the statements.

As to Mr. Ariagno's failure to investigate and impeach Mr. Hewitt's testimony, as well as Mr. Nelson's *Brady* claim concerning it, the State argues this was reasonable trial strategy, and there was no prejudice from the failure (Aple.Br. 41-43, 45-47). Again, that fails to take Mr. Nelson's allegations as true, under which the plain inference is Mr. Hewitt testified under an undisclosed agreement with the prosecution.

Conclusion

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

Respectfully submitted,

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Appendix

Jacques v. State, No. 89,805, 2004 WL 117331
(Kan. App. Jan. 23, 2004) (unpublished) A1

Ludlow v. State, No. 105,303, 2011 WL 5833609
(Kan. App. Nov. 18, 2011) (unpublished) A6

Nelson v. State, No. 114,435, 2017 WL 462403
(Kan. App. Feb. 3, 2017) (unpublished) A10

Pouncil v. State, No. 98,276, 2008 WL 2251221
(Kan. App. May 30, 2008) (unpublished) A25

Powell v. State, No. 120,679, 2020 WL 7636297
(Kan. App. Dec. 23, 2020) (unpublished) A30

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]).

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).

***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

End of Document

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

263 P.3d 223 (Table), 2011 WL 5833609

End of Document

388 P.3d 627 (Table)
Unpublished Disposition
This decision without published opinion
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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.
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> "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.
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> "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).

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.
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> "(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.
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> ***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

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.

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.

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

184 P.3d 286 (Table), 2008 WL 2251221

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.

All Citations

478 P.3d 337 (Table), 2020 WL 7636297

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