NOT DESIGNATED FOR PUBLICATION

No. 112,556

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

DANNY E. BEAUCLAIR,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Shawnee District Court; EVELYN Z. WILSON, judge. Opinion filed March 4, 2016. Affirmed.

Jonathan B. Phelps, Phelps-Chartered, of Topeka, for appellant.

Jodi Litfin, assistant district attorney, *Chadwick J. Taylor*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before BUSER, P.J., ATCHESON and SCHROEDER, JJ.

Per Curiam: The Shawnee County District Court denied as untimely Danny E. Beauclair's habeas corpus motion attacking his convictions for sex crimes against his stepdaughter because it was filed nearly a decade after the direct criminal case became final. Beauclair has failed to demonstrate any "manifest injustice" that would exempt him from the 1-year time limit for habeas corpus relief under K.S.A. 60-1507. We, therefore, affirm the district court.

In March 1999, Beauclair's stepdaughter informed a school friend that Beauclair had been sexually abusing her. The revelation prompted an investigation. During the investigation, a detective with the Topeka Police Department questioned Beauclair. Beauclair made highly incriminating statements to the detective. The State removed the child and her two siblings from the home and began child-in-need-of-care proceedings.

In November 1999, the State charged Beauclair with one count of rape of a child under 14 years of age and one count of aggravated criminal sodomy with a child under 14 years of age. A little over a year later, the State added another charge of rape. Based on an agreement with the State, Beauclair entered pleas of no contest to the original charges and was adjudicated guilty of those crimes. The district court denied Beauclair's motion for a dispositional departure and sentenced him to a controlling prison term of 184 months with postrelease supervision for 36 months. The record indicates there was some confusion about which version of the sentencing guidelines applied. The district court ultimately used the correct guidelines. The district court, however, incorrectly pronounced the sentence as 148 months—inverting the last two digits of the proper sentence. The error was later corrected.

Beauclair filed a direct appeal challenging his sentence, based in part on the district court's erroneous pronouncement at the sentencing hearing. This court denied Beauclair any relief, and the mandate issued on July 1, 2003. See *State v. Beauclair*, No. 88,885 (Kan. App. 2003) (unpublished opinion).

In the 15 years since his direct appeal became final, Beauclair has filed dozens of motions in the Kansas courts and the federal courts asserting various challenges to his convictions and sentence. We need not recount the facts of the underlying crimes nor explore in detail Beauclair's litigation history, so we go into those matters only as necessary to explain our decision.

In August 2012, Beauclair filed the 60-1507 motion that is the subject of this appeal. The district court denied the motion without a hearing, finding both that it was untimely and that Beauclair either had raised and lost the issues in his earlier filings or the issues could have been asserted on direct appeal, effectively rendering the motion successive. Beauclair has appealed the denial of his 60-1507 motion.

Upon receiving a 60-1507 motion, a district court has three options. The district court can dismiss the motion after reviewing it and the record in the criminal case. *Bellamy v. State*, 285 Kan. 346, 353, 172 P.3d 10 (2007). But when "a motion . . . presents a substantial question of law or triable issue of fact, the court must appoint" a lawyer to represent the petitioner. Supreme Court Rule 183(i) (2015 Kan. Ct. R. Annot. 273). After appointing a lawyer, the district court then has two choices. It may conduct a preliminary hearing during which lawyers for the State and for the petitioner present legal argument and otherwise address whether the circumstances call for a full evidentiary hearing. *Bellamy*, 285 Kan. at 354. If a district court dismisses a 60-1507 motion on the papers without a hearing, as happened here, the appellate courts review that determination anew and without any deference. 285 Kan. at 354.

Basically, a person subject to a criminal sentence may challenge the legal sufficiency of that punishment through a 60-1507 motion after exhausting appeals in the direct criminal case. K.S.A. 60-1507(a). There are, however, procedural limitations on relief available under K.S.A. 60-1507. First, the motion cannot be used as a substitute for a direct appeal, so issues that were or could have been presented during that process typically cannot be raised in a 60-1507 motion absent exceptional circumstances. *State v. Kelly*, 291 Kan. 868, 872, 248 P.3d 1282 (2011). Constitutionally inadequate legal representation may provide such a circumstance. See *Bledsoe v. State*, 283 Kan. 81, 88-89, 150 P.3d 868 (2007). Generally, a convicted criminal is expected to raise all of his or her claims in a single 60-1507 motion. The courts, then, need not deal with serial or successive challenges addressing different aspects of the same criminal prosecution.

K.S.A. 60-1507(c); *Kelly*, 291 at 872. Finally, and most pertinent here, K.S.A. 60-1507(f)(1) requires a convicted criminal to file a motion no later than 1 year after appellate jurisdiction over any actual or potential direct appeal ends. A petitioner may avoid the time bar if doing so will "prevent a manifest injustice." K.S.A. 60-1507(f)(2).

The Kansas Supreme Court recently outlined relevant factors for determining whether claims made in an untimely 60-1507 proceeding establish manifest injustice to include: (1) persuasive reasons for failing to file a timely motion; (2) substantial legal or factual grounds indicative of a claim "deserving of the district court's consideration" on the merits; and (3) a "colorable claim" of actual innocence. *Vontress v. State*, 299 Kan. 607, 616, 325 P.3d 1114 (2014). The ultimate determination of manifest injustice depends upon the totality of the circumstances of a given 60-1507 proceeding, and no one consideration controls the outcome. 299 Kan. at 616-17. We consider those factors.

As to the first, Beauclair has offered no particularly persuasive reason for not filing a timely motion. He has claimed that a lawyer representing him on a 2003 motion to withdraw his pleas advised him not to pursue a 60-1507 challenge. But Beauclair waited another 9 years before filing this 60-1507 motion. He has suggested no reason justifying that delay. We see none, especially since Beauclair filed all kinds of other motions attacking his convictions and sentence.

As to the last, Beauclair has not presented a colorable claim of actual innocence in light of the evidence against him, especially his confession. Beauclair has pointed out the record contains a declaration under penalty of perjury purportedly signed by his stepdaughter, the victim of the sexual abuse, in 2007 that states her allegations were false. The declaration recites that she told the investigating police officers that "nothing was going on" between her and Beauclair and that she later said otherwise because she "finely [*sic*] got tired of them asking me over and over," so she "said what they clearly wanted to hear." The declaration appears to have been drafted to support a submission in federal

court and refers to two earlier declarations signed in 2003. An affidavit or declaration purportedly from a crime victim exonerating a defendant because the charged offense never happened commonly might tilt in favor of an evidentiary hearing even on an untimely 60-1507 motion, since it bears on actual innocence and, if true, presents a factual ground for relief worthy of further consideration. See *Neer v. State*, No. 111,230, 2015 WL 1310815, at *6-7 (Kan. App. 2015) (unpublished opinion). But—and this is a particularly significant but—Beauclair told the Topeka police detective that he sexually abused his stepdaughter in ways that factually and legally supported the charges to which he later pleaded no contest.

At the preliminary hearing in the criminal case, the detective testified to what Beauclair had told him. The testimony outlined fairly detailed admissions from Beauclair. Significantly for our purposes, Beauclair has not, so far as we can tell, disputed his confession to the detective. That is, he has not argued his statements were untruthful or inaccurate. At the preliminary hearing, Beauclair's then 16-year-old stepdaughter testified. The transcript suggests she was in tears and emotionally frayed during at least part of her testimony. Much of her account was given in response to leading questions. The girl, however, did confirm Beauclair sexually abused her in ways consistent with the charges against him. Nothing at the preliminary hearing suggested the girl falsely accused Beauclair to cut short police questioning or for any other reason.

Taken as a whole, the record does not sufficiently advance a claim that Beauclair is actually innocent and, thus, to suggest there might be manifest injustice in applying the time bar of K.S.A. 60-1507(f) to his motion.

Finally, on appeal, Beauclair emphasizes a claim that the lawyer representing him in the district court in the criminal case had a conflict of interest. Beauclair wants the claim to do double duty. First, he contends it is an unadjudicated claim that was asserted in an earlier motion and, therefore, ought to be treated as timely under K.S.A. 60-1507(f).

Even if that were incorrect, he argues it is the sort of substantial claim contemplated in *Vontress* that ought to be considered on the merits notwithstanding the 1-year time limit. We disagree in both respects and take up those points in reverse order.

The conflict is this: For about 6 weeks in mid-1999, the lawyer who was then representing Beauclair in the criminal investigation of his stepdaughter's accusations was also representing the girl's mother— Beauclair's wife—in the ongoing CINC case. During that time, another lawyer represented Beauclair in the CINC case. As best we can tell from the record on appeal in this case, the district court judge handling the CINC case simply allowed the lawyers in that proceeding to switch clients. So the lawyer representing Beauclair in the criminal investigation also represented him in the CINC case from that point. All of that took place months before the State filed criminal charges against Beauclair.

For purposes of addressing the issue, we suppose the same lawyer could not have represented both Beauclair and his wife in the CINC case. The circumstances on their face certainly raise the very distinct possibility the two would have had differing, if not antagonistic, interests in that case. And we don't particularly see how the lawyers could have switched clients in the CINC case without creating a substantial conflict of interest entailing both ongoing representation and preservation of client confidentiality in *that* case. But those issues appear to be beside the point with respect to the criminal prosecution of Beauclair.

We fail to see anything more than a potential or technical conflict with respect to the criminal case. First, Beauclair had already confessed to the police before the lawyer began representing him. During the ongoing police investigation into the accusations, the lawyer represented Beauclair and briefly represented his wife in the CINC case. Criminal charges weren't filed until much later in 1999, well after the lawyer stopped representing Beauclair's wife. The lawyer represented Beauclair through his plea about 2 years later.

Beauclair then retained an additional lawyer who served as lead counsel for his sentencing.

In the face of the evidence in the criminal case, the decision to plead hardly seems unreasonable or the product of some purported conflict arising from the CINC proceedings. Beauclair, of course, was aware that his lawyer in the criminal matter had briefly represented his wife in the CINC case. He did not seek to withdraw his plea before sentencing for that reason, although he had a new lawyer by then. Perhaps just as significantly, Beauclair has offered no explanation of how his representation in the criminal case was in any way actually compromised as the result of the purported conflict. That is, he has not shown material prejudice.

At this juncture, in keeping with the test outlined in *Vontress*, the issue simply does not establish a claim worthy of review in a collateral attack on a conviction launched years after the fact.

As we indicated, Beauclair argues on appeal that the purported conflict was actually timely raised. He says he included a claim based on his trial lawyer's conflict in a motion he filed in August 2007 to correct an illegal sentence. The 2007 motion doesn't really raise the issue in a clear way. But we will assume it was sufficiently stated. The district court did not address the conflict claim and simply dismissed the motion as repetitive of earlier submissions from Beauclair. Beauclair appealed that ruling, and this court affirmed. See *State v. Beauclair*, No. 100,161, 2010 WL 596992 (Kan. App. 2010) (unpublished opinion). Beauclair contends the 2007 motion should have been treated then and should be treated now as a 60-1507 motion. Again, for the sake of argument, we make that assumption.

In turn, Beauclair claims the 2007 motion was timely under K.S.A. 60-1507(f) because it was filed within 1 year after the mandate disposing of his appeal of the 2003

motion to withdraw his plea—a motion that itself had been filed after the completion of his direct appeal. The mandate on the 2003 motion was entered in April 2007. Beauclair filed the motion to correct an illegal sentence a couple of months later.

Beauclair's argument fails. The 1-year limitation for filing 60-1507 motions runs from the conclusion of the direct appeal, not later challenges to a conviction or sentence. The language of K.S.A. 60-1507(c) is quite clear in that respect. This court recently held that the time limitation in K.S.A. 60-1507(c) is triggered by the direct appeal of the underlying criminal action. *Overton v. State*, No. 111,181, 2015 WL 1636732 at *2-3 (Kan. App.) (unpublished opinion), *rev. denied* 302 Kan. ___ (October 7, 2015). Beauclair's 2003 motion to withdraw his plea, coming after the direct appeal, did not extend the time limit in K.S.A. 60-1507(f).

In short, Beauclair's claim that his trial lawyer labored under a conflict of interest that impaired his legal representation in the criminal case was not timely asserted for purpose of relief under K.S.A. 60-1507. Nor does it present an issue of sufficient magnitude to warrant consideration outside of the statutory time limit for those motions.

Beauclair had advanced no valid basis for upsetting the district court's ruling denying his 60-1507 motion as untimely. That is a sufficient basis to affirm. We need not and do not consider the district court's alternative basis that the motion was successive.

Affirmed.