NOT DESIGNATED FOR PUBLICATION

No. 115,129

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

ALCENA M. DAWSON,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JAMES R. FLEETWOOD, judge. Opinion filed January 20, 2017. Affirmed.

Krystle M.S. Dalke and *Michael P. Whalen*, of Law Office of Michael P. Whalen, of Wichita, for appellant.

Julie A. Koon, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before HILL, P.J., GREEN, J., and BURGESS, S.J.

Per Curiam: Alcena M. Dawson is serving a sentence for rape. In 2015, after finding Dawson's K.S.A. 60-1507 motion was untimely, the district court held that Dawson had failed to show any circumstances that would allow him to file such a motion out of time. The court summarily dismissed his motion without a hearing and without appointing him counsel. The court did appoint appellate counsel for Dawson. In this appeal, Dawson complains about the summary dismissal of his motion and the failure of his trial counsel to obtain DNA testing. We will address the issues in that order.

Dawson was not denied due process when the court failed to appoint counsel.

Dawson contends that the district court violated his due process rights when it failed to appoint counsel to represent him after the court requested the State to respond.

A district court has three options when handling a K.S.A. 60-1507 motion:

> "'(1) The court may determine that the motion, files, and case records conclusively show the prisoner is entitled to no relief and deny the motion summarily; (2) the court may determine from the motion, files, and records that a potentially substantial issue exists, in which case a preliminary hearing may be held. If the court then determines there is no substantial issue, the court may deny the motion; or (3) the court may determine from the motion, files, records, or preliminary hearing that a substantial issue is presented requiring a full hearing.' [Citation omitted.]" *Sola-Morales v. State*, 300 Kan. 875, 881, 335 P.3d 1162 (2014).

When the district court summarily denies a K.S.A. 60-1507 motion, the appellate court conducts a de novo review to determine whether the motion, files, and records of the case conclusively establish that the movant is not entitled to relief. *Sola-Morales*, 300 Kan. at 881.

Dawson contends that the summary dismissal option contemplates review by the district court only when there is no written response from the State. He contends the court was unfair when it requested a written response from the State.

But Kansas Supreme Court Rule 183(a)(4) (2015 Kan. Ct. R. Annot. 272) states that "[w]hen a motion is filed, the clerk must serve a copy of the motion on the county or district attorney." The procedure on the motion is governed by the rules of civil procedure, to the extent the rules are applicable. Kansas Supreme Court Rule 183(a)(2)

(2015 Kan. Ct. R. Annot. 271). The State is a party to the action and is permitted to file a response. See Kansas Supreme Court Rule 133(b) (2015 Kan. Ct. R. Annot. 234).

Dawson cites no authority for his complaint that the court created an unfair disadvantage by requesting a written response from the State. Regardless, any error by the court was harmless because a review of the motion, files, and case records conclusively shows that Dawson is entitled to no relief.

Dawson cites the rule that when a hearing is held "'at which the State will be represented, then due process of law does require that the defendant be represented unless the defendant waives the right to counsel.' [Citations omitted.]" *State v. Hemphill*, 286 Kan. 583, 596, 186 P.3d 777 (2008); *Oliver v. State*, No. 113,035, 2016 WL 1391757, *3 (Kan. App. 2016) (unpublished opinion); *Stevenson v. State*, No. 96,082, 2007 WL 438745, *2 (Kan. App. 2007) (unpublished opinion). But this rule is only applicable if a hearing was actually held and the State was represented. See *State v. Nunn*, 247 Kan. 576, 587, 802 P.2d 547 (1990); *Miller v. State*, 28 Kan. App. 2d 39, 41-42, 13 P.3d 13 (2000). In such a case, there is a due process violation because, for example, the State is permitted to argue that the defendant's motion is time-barred, but the movant is not permitted to argue for an extension of time to prevent manifest injustice. *Stevenson*, 2007 WL 438745, at *2. But here, the record is clear that no hearing was held. Dawson filed a written motion and the State filed a written response. The court reviewed the written pleadings and dismissed the motion. Dawson was not entitled to be represented because the district court determined the motion, files, and case records conclusively showed Dawson was entitled to no relief and denied the motion summarily. See *Sola-Morales*, 300 Kan. at 881.

The court did not err by summarily dismissing Dawson's motion.

To be entitled to relief under K.S.A. 60-1507, the movant must establish by a preponderance of the evidence either:

- the judgment was rendered without jurisdiction;
- the sentence imposed was not authorized by law or is otherwise open to collateral attack; or
- there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack. K.S.A. 60-1507(b) (grounds for relief); Supreme Court Rule 183(g).

To avoid summary denial of a motion brought under K.S.A. 60-1507, a movant bears the burden of establishing entitlement to an evidentiary hearing. To meet this burden, a movant's contentions must be more than conclusory, and either the movant must set forth an evidentiary basis to support those contentions or the basis must be evident from the record. If such a showing is made, the court is required to hold a hearing unless the motion is a "second" or "successive" motion seeking similar relief. *Sola-Morales*, 300 Kan. at 881.

Manifest injustice cannot be determined on the record before the court.

A defendant has 1 year from when a conviction becomes final to file a motion under K.S.A. 60-1507(a). The 1-year time limitation for bringing an action under K.S.A. 60-1507(f)(1) may be extended by the district court only to prevent a manifest injustice. K.S.A. 60-1507(f)(2). Manifest injustice must be determined from the totality of the circumstances. *Vontress v. State*, 299 Kan. 607, 616, 325 P.3d 1114 (2014). The Kansas Supreme Court has held that in determining whether manifest injustice exists, the court should consider this nonexhaustive list of factors: (1) whether the movant provides

persuasive reasons or circumstances that prevented him or her from filing the 60-1507 motion within the time limitation; (2) whether the merits of the movant's claims raise substantial issues of law or fact deserving the district court's consideration; and (3) whether the movant sets forth a colorable claim of actual innocence, *i.e.*, factual, not legal, innocence. See *Vontress*, 299 Kan. 607, Syl. ¶ 8.

The Kansas Legislature amended K.S.A. 60-1507(f)(2) effective July 1, 2016, and limited the court's inquiry to

> "determining why the prisoner failed to file the motion within the one-year time limitation or whether the prisoner makes a colorable claim of actual innocence. As used herein, the term actual innocence requires the prisoner to show it is more likely than not that no reasonable juror would have convicted the prisoner in light of new evidence." L. 2016, ch. 58, sec. 2.

But the parties did not have the benefit of the amended statute when arguing at the district court level and the amendment became effective after Dawson's brief was filed on appeal.

Dawson next contends that manifest injustice exists because his trial counsel was ineffective for failing to preserve DNA evidence, have it tested, investigate, or object to testimony about the rape kit swab. He claims that forensic testing of the evidence would have proved his innocence.

Dawson does not provide us any reason or circumstance that prevented him from raising this issue within the 1-year timeframe for bringing a K.S.A. 60-1507 motion. The fact that the test kit material was later destroyed by the State does not now make his motion timely. Dawson knew of the existence of the rape kit at trial.

During the trial, Ann Flores, a sexual assault nurse examiner, testified that she "found some debris that was visible with the colposcope that I tried to pick up with a swab for the sexual assault kit." When asked what she meant by "debris," she testified:

"A. With a colposcope magnifying 15 times, sometimes we can see lint off of clothing, minute pubic hairs or dirt or something like that, and if we see anything that does not belong in that area or doesn't grow there, we try to collect it with a damp swab in order to send it with a kit for examination.

"Q. Were you able to collect any of the debris that you observed?

"A. Yes.

"Q. And that would have been on the tip of the Q-tip, correct?

"A. Yes.

"Q. Regarding—And you are unable to tell what kind of debris we're talking about, whether it would be hair versus dirt in that particular case?

"A. That's up to the crime lab to determine."

The record does not indicate whether the Q-tip was tested by the crime lab. The merits of Dawson's ineffective assistance of counsel claim cannot be determined on the record provided. But Dawson was still not entitled to a hearing because his motion was successive and an abuse of remedy.

Dawson's motion is barred because it is successive and an abuse of remedy.

Supreme Court Rule 183(c)(3) (2015 Kan. Ct. R. Annot. 272) provides:

"A proceeding under K.S.A. 60-1507 ordinarily may not be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal. Mere trial errors must be corrected by direct appeal, but trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal, provided exceptional circumstances excuse the failure to appeal."

The term "exceptional circumstances" has been defined to include "'unusual events or intervening changes in the law which prevent a movant from reasonably being able to raise all of the trial errors in the first post-conviction proceeding.'" *State v. Mitchell*, 297 Kan. 118, 123, 298 P.3d 349 (2013). Exceptional circumstances can include ineffective assistance of counsel. *Rowland v. State*, 289 Kan. 1076, 1087, 219 P.3d 1212 (2009).

In a K.S.A. 60-1507 proceeding, the sentencing court is not required to entertain a second or successive motion for similar relief on behalf of the same prisoner. *State v. Trotter*, 296 Kan. 898, 904, 295 P.3d 1039 (2013) (citing K.S.A. 60-1507[c]). "A movant in a K.S.A. 60-1507 motion is presumed to have listed all grounds for relief, and a subsequent motion need not be considered in the absence of a showing of circumstances justifying the original failure to list a ground." *Trotter*, 296 Kan. 898, Syl. ¶ 2; see Supreme Court Rule 183(d).

Here, Dawson complains of the ineffectiveness of his trial counsel. He does not state any exceptional circumstances that prevented him from raising this issue on direct appeal or in one of the previous K.S.A. 60-1507 motions he has filed. In fact, Dawson did raise issues regarding ineffective assistance of counsel and DNA testing on direct appeal and in previous K.S.A. 60-1507 motions. See *Dawson v. State*, No. 94,720, 2006 WL 3877559, *1-3 (Kan. App. 2006) (unpublished opinion). Claims that were actually raised or could have been raised in a prior K.S.A. 60-1507 motion and successive motions are barred and may be denied as an abuse of remedy under K.S.A. 60-1507(c). The rationale for this rule is the necessity for some finality in the criminal appeal process and to prevent endless piecemeal litigation. *Toney v. State*, 39 Kan. App. 2d 944, 948, 187 P.3d 122 (2008). There is no reason why Dawson could not have raised this specific permutation of his ineffective assistance of counsel claim and DNA evidence claim previously.

Affirmed.