NOT DESIGNATED FOR PUBLICATION

No. 115,899

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

EDGAR I. SHERWOOD,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JAMES R. FLEETWOOD, judge. Opinion filed September 29, 2017. Affirmed.

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

Matt J. Maloney, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

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

PER CURIAM: This is an appeal of the district court's summary denial of a K.S.A. 60-1507 motion filed by Edgar I. Sherwood. The motion was filed almost 15 years after the Kansas Supreme Court denied Sherwood's petition for review on his direct appeal. Upon our review, we conclude the district court did not err in summarily denying the motion because it was not timely filed, and there was no showing of a manifest injustice to warrant extension of the one-year time limitation. See K.S.A. 2016 Supp. 60-1507(f). Accordingly, we affirm the district court's summary denial of Sherwood's K.S.A. 60-1507 motion.

FACTUAL AND PROCEDURAL BACKGROUND

In 1996, the State charged Sherwood with rape and aggravated sodomy of a five-year old child. Upon being found guilty after entering no contest pleas, Sherwood was sentenced to a prison term of 404 months. Our court affirmed the convictions and sentences in an unpublished opinion filed on January 21, 2000. See *State v. Sherwood*, No. 79,794, unpublished opinion filed January 21, 2000. Our Supreme Court denied Sherwood's petition for review on March 21, 2000.

Almost 15 years later, on January 22, 2015, Sherwood filed a pro se "Motion to Correct Illegal Sentence Pursuant to K.S.A. 60-1507." At the same time, he also sought transcripts of the proceedings and a copy of the plea agreement in his criminal case. Sherwood's K.S.A. 60-1507 motion alleged, among other claims, ineffective assistance of trial and appellate counsel and a variety of sentencing errors.

The State filed a response to Sherwood's motion on September 18, 2015, in which it argued, among other points, that the K.S.A. 60-1507 motion was untimely and Sherwood had not acknowledged this untimeliness. The State also asserted that Sherwood had failed to seek an extension of the time period for filing his motion and that he failed to allege or show manifest injustice if his motion was not heard.

In a memorandum order dated September 21, 2015, the district court summarily denied Sherwood's motion, stating:

> "Petitioner's demands are based on conclusory statements without any sufficient evidentiary references to support such. Further, the petition is time barred due to a 10 year delay in filing this action with no argument suggesting or supporting the existence of manifest injustice to overcome the statutory time limit in filing."

Nine days *after* the district court issued its order summarily denying the K.S.A. 60-1507 motion, on September 30, 2015, Sherwood filed a reply to the State's response. In response to the State's assertion that his motion did not acknowledge that it was untimely, and an extension of time was necessary to avoid a manifest injustice, Sherwood countered that he "hereby and specifically acknowledges the [K.S.A. 60-1507](f)(2) time bar and requests an extension be granted." Sherwood claimed that he had a learning disability that prevents him from "reading or learning enough to enable him to pro se file this 1507, himself, ever." Sherwood explained that another prisoner was preparing his pleadings, and after prison legal aid workers declined to assist him, "ten years had gone by" before he "finally found another prisoner to help him."

Sherwood also filed a motion to alter or amend the district court's judgment. In this motion, Sherwood contested the district court's findings and argued that "[t]he Court ignores the assertions of facts . . . in the K.S.A. 60-1507 Motion . . . which raise arguable or colorable questions of fact and law which the Court should have convened an evidentiary hearing, to reach the merits of, before dismissing this action." Sherwood argued that his mental disability prevented him from "learning to litigate, and he exhausted all legal assistance available to him but never gave up trying to find someone to help him, pro bono." The district court denied the motion to alter or amend with no additional findings.

Sherwood appeals.

SHERWOOD DID NOT HAVE A DUE PROCESS RIGHT TO COUNSEL BECAUSE THE STATE FILED A RESPONSE TO HIS K.S.A. 60-1507 MOTION

For the first time on appeal, Sherwood contends the district court deprived him of his due process right to counsel "when it allowed a written response from the State's attorney, but failed to appoint counsel for [him]." Sherwood notes "[t]he issue here is not

whether [he] should prevail on his K.S.A. 60-1507 petition but whether he ought to be given an evidentiary hearing to make his case for relief."

Whether due process has been properly afforded to a defendant is a question of law over which appellate courts exercise unlimited review. *State v. Robinson*, 281 Kan. 538, 540, 132 P.3d 934 (2006). Generally, 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).

In this case, the district court followed the first course of action in summarily denying Sherwood's K.S.A. 60-1507 motion.

There is no constitutional right to counsel in a K.S.A. 60-1507 proceeding because such actions are civil—rather than criminal—in nature. *Brown v. State*, 278 Kan. 481, 483, 101 P.3d 1201 (2004) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990, 95 L. Ed. 2d 539 [1987]). Movants do, however, enjoy a conditional right to counsel under K.S.A. 22-4506(b) "[i]f the court finds that the petition or motion presents substantial questions of law or triable issues of fact and if the petitioner or movant has been or is thereafter determined to be an indigent person." *Robertson v. State*, 288 Kan. 217, 228, 201 P.3d 691 (2009); see Supreme Court Rule 183(f) and (i) (2017 S. Ct. R. 222).

Sherwood acknowledges these rules "only [require] the appointment of counsel when a hearing has been ordered," but argues "the filing of a response by the State, being represented by counsel, should trigger the appointment of counsel for [an] indigent, pro se petitioner." In support of this proposition Sherwood cites, *State v. Hemphill*, 286 Kan. 583, 186 P.3d 777 (2008); *Oliver v. State*, No. 113,035, 2016 WL 1391757 (Kan. App. 2016) (unpublished opinion); and *Stevenson v. State*, No. 96,082, 2007 WL 438745 (Kan. App. 2007) (unpublished opinion).

In *Hemphill*, our Supreme Court emphasized its "previous holdings that even though a court need not automatically hold a hearing or appoint counsel in all post-conviction matters, when a hearing is held 'at which the State will be represented, then due process of law does require that the defendant be represented. . . .' [Citations omitted.]" 286 Kan. at 596. In *Oliver*, this court remanded the case to the district court because it was unclear whether the district court conducted a hearing on Oliver's K.S.A. 60-1507 motion at which he was unrepresented. 2016 WL 1391757, at *4. And, in *Stevenson*, this court reversed the denial of Stevenson's K.S.A. 60-1507 motion because a hearing on his motion was held before he was appointed counsel. 2007 WL 438745, at *2.

The law from *Hemphill* controls this issue. But *Oliver* and *Stevenson* are factually distinguishable from this case because those cases involved a hearing, whereas in the present case, neither party alleges the district court conducted a hearing. Nevertheless, Sherwood argues the district court's receipt of a "formal written response from the State's attorney" and its subsequent dismissal of his K.S.A. 60-1507 motion "had the same effect as a preliminary hearing in district court where the State was represented, yet no counsel was appointed to represent [him]."

Several panels of our court have recently rejected the very same argument posited by Sherwood. See *Noyce v. State*, No. 114,971, 2017 WL 3112821 (Kan. App. 2017)

(unpublished opinion), *petition for rev. filed* August 18, 2017; *Littlejohn v. State*, No. 115,904, 2017 WL 2833312 (Kan. App. 2017) (unpublished opinion), *petition for rev. filed* July 31, 2017; *Hill v. State*, No. 115,723, 2017 WL 2001615 (Kan. App. 2017) (unpublished opinion), *petition for rev. filed* June 9, 2017; *State v. Roberts*, No. 114,726, 2016 WL 6829472 (Kan. App. 2016) (unpublished opinion), *petition for rev. filed* December 19, 2016.

Our court's holding from *Roberts* is relevant here:

> "Supreme Court Rule 183(i) and Kansas caselaw make it perfectly clear that if a hearing is held on a postconviction motion and the State appears through counsel, then due process of law requires that the movant be represented. Here, Roberts would have this court equate the State's written response to a movant's K.S.A. 60-1507 motion with a formal hearing. The circumstances surrounding Roberts' case do not support this assertion. Thus, we determine that Roberts was not denied due process of law when he was not provided with counsel after the State filed a response to his K.S.A. 60-1507 motion. [Citations omitted.]" 2016 WL 6829472, at *5.

The rationale expressed in *Roberts* also applies to this case. Here, like *Roberts*, the district court did not hold a hearing on Sherwood's K.S.A. 60-1507 motion, but instead summarily denied it. Under these circumstances, Sherwood was not entitled to appointment of counsel and his due process rights were not violated.

On a related matter, Sherwood raises another new issue for the first time on appeal. He notes the K.S.A. 60-1507 motion he filed was patterned after a form provided by the Kansas Judicial Counsel. According to Sherwood, this form is "completely deficient" because it fails to reference either the one-year time period for filing a K.S.A. 60-1507 motion or other "legal standards." Sherwood mentions the purported deficiencies of this form in support of his argument that a movant has a due process right to counsel early in the litigation.

In response, the State highlights cases in which Kansas appellate courts have held "a pro se K.S.A. 60-1507 movant is in the same position as all other pro se civil litigants, and is required to be aware of and follow the rules of procedure that apply to all civil litigants, pro se or represented by counsel." *Guillory v. State*, 285 Kan. 223, 229, 170 P.3d 403 (2007); *Clemons v. State*, 39 Kan. App. 2d 561, 567, 182 P.3d 730 (2008) (same). Indeed, our Supreme Court has also found that "[t]he legislature's adoption of a 1-year time limit for filing motions under K.S.A. 60-1507 put all persons, including inmates . . . on constructive notice of the new provision. [Citations omitted.]" *Tolen v. State*, 285 Kan. 672, 676, 176 P.3d 170 (2008). Regardless of whether the form used by Sherwood mentioned the applicable time limit for filing a K.S.A. 60-1507 motion, Sherwood was on notice of the one-year time limit and was required to comply with it unless he could show manifest injustice.

THE DISTRICT COURT'S JOURNAL ENTRY SUMMARILY DENYING SHERWOOD'S K.S.A. 60-1507 MOTION COMPLIED WITH SUPREME COURT RULE 183(j)

Next, Sherwood contends the district court violated Supreme Court Rule 183(j) "because the district court's orders lack[ed] specific findings and [preclude] meaningful appellate review." As a result, he seeks a remand to the district court. Whether the district court's findings of fact and conclusions of law comply with Supreme Court Rule 183 (j), is a question of law that is reviewed by our court de novo. *Robertson*, 288 Kan. at 232.

A plain reading of the district court's order denying Sherwood's K.S.A. 60-1507 motion makes clear the district court found the motion was filed 10 years too late to comply with the time limitation for filing under K.S.A. 2016 Supp. 60-1507(f)(1). Additionally, the district court found the motion did not contain any argument asserting the existence of manifest injustice under K.S.A. 2016 Supp. 60-1507(f)(2) to justify extending the time limitation in this case. Finally, the district court found Sherwood's claims were conclusory and without sufficient reference to facts in support of his motion.

Although the district court's order was brief, for purposes of appellate review it is clear enough to explain the district court's legal basis for summarily denying Sherwood's motion. Quite simply, the district court found that Sherwood's K.S.A. 60-1507 motion was untimely and did not show a manifest injustice would occur if the time period was not extended. As stated, this legal conclusion derived from the time limitation set forth in K.S.A. 2016 Supp. 60-1507(f). We are not persuaded that Sherwood has shown a remand for additional findings is required in this case.

THE DISTRICT COURT'S SUMMARY DENIAL OF THE K.S.A. 60-1507 MOTION WAS NOT ERROR

Although not set forth as a separate issue on appeal, in his appellate brief Sherwood contests the propriety of the district court's denial of his K.S.A. 60-1507 motion. As noted earlier, only *after* the district court summarily denied his K.S.A. 60-1507 motion, and ruled that Sherwood had failed to assert or prove manifest injustice, did he address manifest injustice in his later pleadings. On appeal, based on arguments he first made in reply to the State's response and in his motion to alter or amend, Sherwood claims that although his K.S.A. 60-1507 motion was untimely, he proved that manifest injustice would occur if the time limitation was not extended.

Preliminarily, we address a procedural matter. The conclusion to Sherwood's appellant's brief states: "The district court erred in . . . 'denial' of Mr. Sherwood's well documented and argued Motion to Amend." Apart from passing references in the factual statement portion of Sherwood's appellant's brief, however, this is the first explicit reference in his brief to any claimed error by the district court in denying Sherwood's motion to alter or amend.

The State correctly notes that a point raised incidentally in a brief and not argued therein is deemed abandoned. *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan.

636, 645, 294 P.3d 287 (2013). Moreover, failure to support a point with pertinent authority or show why it is sound despite a lack of supporting authority is akin to failing to brief the issue. *University of Kan. Hosp. Auth. v. Board of Comm'rs of Unified Gov't*, 301 Kan. 993, 1001, 348 P.3d 602 (2015). Other than the one sentence contained in the conclusion of his brief, Sherwood fails to present any argument challenging the district court's denial of his motion to alter or amend and fails to assert any legal authority mentioning or applying K.S.A. 60-260 to the facts of this case. As a result, we are persuaded that any claim of error relating to the district court's denial of Sherwood's motion to alter or amend has been waived or abandoned.

Nevertheless, on appeal Sherwood reprises some of the arguments he made in his reply and motion to alter or amend claiming the district court erred in its summary denial of his K.S.A. 60-1507 motion. The State responded to these arguments in their appellee's brief. As a result, we will consider these arguments as they relate to the manifest injustice inquiry of K.S.A. 2016 Supp. 60-1507(f)(2).

A K.S.A. 60-1507 motion

> "must be brought within one year of:
>
> (A) 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
>
> (B) the denial of a petition for writ of certiorari to the United States Supreme Court or issuance of such court's final order following granting such petition." K.S.A. 2016 Supp. 60-1507(f)(1).

This one-year limitation period may be extended by the district court to prevent manifest injustice. K.S.A. 2016 Supp. 60-1507(f)(2).

As candidly conceded by Sherwood, his K.S.A. 60-1507 motion was not timely filed. The final order of our Supreme Court denying Sherwood's petition for review of his

direct appeal was filed on March 21, 2000. Since Sherwood's case was concluded prior to July 1, 2013—the effective date of the amendment to K.S.A. 60-1507(f)(1) which established the one-year time limitation—Sherwood had until July 1, 2014, to file a timely K.S.A. 60-1507 motion in this case. See *Tolen*, 285 Kan. at 674. It is uncontroverted that Sherwood filed his motion on January 22, 2015, more than 10 years after the July 1, 2014, filing deadline in this case. Sherwood's K.S.A. 60-1507 motion was not filed in a timely manner.

Although Sherwood's K.S.A. 60-1507 motion did not refer to manifest injustice or the legal standard by which it is analyzed, the State's response filed in the district court cited *Vontress v. State*, 299 Kan. 607, Syl. ¶ 7, 325 P.3d 1114 (2014), as the appropriate legal standard to be applied in this case. In his reply and in his motion to alter or amend, Sherwood did not contest that *Vontress* set forth the appropriate standard. Rather, Sherwood sought to show that he had met the *Vontress* standard for manifest injustice. Of note, at the time the district court issued its order summarily denying Sherwood's K.S.A. 60-1507 motion on September 21, 2015, *Vontress* was the leading Kansas appellate case addressing the legal standard to be applied in determining whether an untimely K.S.A. 60-1507 motion established a manifest injustice to justify extension of the deadline.

The appellate briefs prepared by Sherwood and the State were filed in 2017. On appeal, Sherwood applies the *Vontress* standard in arguing that he has shown manifest injustice to extend the one-year limitation period. The State, however, changes course from its district court pleading, and submits that, after the legislature's July 1, 2016, amendment to K.S.A. 60-1507(f)(2), *Vontress* is no longer the valid standard. As a result, we next consider the appropriate legal standard to be applied in resolving the manifest injustice question.

Prior to July 1, 2016, appellate review of the manifest injustice issue was analyzed by considering three factors in light of the totality of circumstances of the case:

> "(1) whether the prisoner provides persuasive reasons or circumstances that prevented him or her from filing the K.S.A. 60-1507 motion within the 1-year time limitation; (2) whether the merits of the prisoner's claim raise substantial issues of law or fact deserving of the district court's consideration; and (3) whether the prisoner sets forth a colorable claim of actual innocence." 299 Kan. 607, Syl. ¶ 8.

On July 1, 2016, however, our legislature amended K.S.A. 60-1507 by adding, in part, the following language to subsection (f)(2):

> "(A) For purposes of finding manifest injustice under this section, *the court's inquiry shall be limited to determining why the prisoner failed to file the motion within the one-year time limitation or whether the prisoner makes a colorable claim of actual innocence*. 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." (Emphasis added.) L. 2016, ch. 58, § 2.

As is readily apparent, the essence of the legislature's amendment was to statutorily incorporate the first and third *Vontress* factors while eliminating the second factor—whether the merits of the movant's claims raise substantial issues of law or fact deserving the district court's consideration.

In enacting this amendment, the legislature did not state whether it intended the statutory change to apply prospectively or retrospectively. As a general rule, a statute operates prospectively unless (1) the statutory language clearly indicates the legislature intended the statute to operate retrospectively, or (2) the change is procedural or remedial in nature. See *State v. Bernhardt*, 304 Kan. 460, 479, 372 P.3d 1161 (2016); *Norris v. Kansas Employment Security Bd. of Review*, 303 Kan. 834, 841, 367 P.3d 1252 (2016).

Our court recently applied the 2016 amendment retrospectively in one case. *Perry v. State*, No. 115,073, 2017 WL 462659, at * 3 (Kan. App. 2017) (unpublished opinion),

petition for rev. filed March 2, 2017. Still, another panel of this court has held that applying the amendment retrospectively when the trial court's ruling predates the amendment's effective date would result in prejudice to the movant. See *Noyce*, 2017 WL 3112821, at *7.

While, as the State asserts, the 2016 amendment to K.S.A. 60-1507(f)(2) may operate retrospectively because it is procedural in nature, the amendment did not go into effect until after the district court ruled in this case and after both parties, either in their district court pleadings and/or on appeal, discussed all three *Vontress* factors. We are aware that Kansas law provides that a statute may not be applied retrospectively if it would prejudicially affect a party's substantive or vested rights. *Bernhardt*, 304 Kan. at 479. In the unique procedural context of this case, we are concerned that Sherwood's rights may be adversely affected if the second *Vontress* factor is not considered on appeal. Accordingly, we will consider both the amended K.S.A. 2016 Supp. 60-1507(f)(2) two-factor standard and the *Vontress* three-factor standard in considering whether Sherwood has established manifest injustice.

1. Are there persuasive reasons or circumstances that prevented Sherwood from filing his K.S.A. 60-1507 motion within the time limitation?

On appeal, Sherwood complains that the 10-year delay in filing his K.S.A. 60-1507 motion was due to his lack of access to records and documents in his criminal case. He also maintains that he "suffers a mental instability" which prevented him from filing the motion until "he was able to get assistance from a fellow inmate." We will address these two arguments in order.

In the district court, the State acknowledged that on August 14, 2014, Sherwood filed a motion in the underlying criminal case requesting copies of case transcripts and the plea agreement to be provided without cost. The motion was denied on September 19,

2014, with the district court stating: "Transcripts provided to [defendant's] attorney on appeal. No right to [second] set at this time. *State v. McCloud*, 257 Kan. 1[, 891 P.2d 324] (1955)." Apparently there was no appeal of this ruling. As noted earlier, Sherwood also requested records when he filed a motion contemporaneously with the filing of his K.S.A. 60-1507 motion on January 22, 2015. See K.S.A. 22-4506; *State v. McKinney*, 10 Kan. App. 2d 459, 460, 701 P.2d 701 (1985) (K.S.A. 22-4506 requires a prisoner to file a K.S.A. 60-1507 motion and an affidavit of indigency before the court can determine whether a free transcript should be ordered.).

In his K.S.A. 60-1507 motion, other pleadings, and in his appellant's brief, Sherwood has not specified any other dates when he requested transcripts or records in order to prepare his K.S.A. 60-1507 motion. Based on the record, it appears that Sherwood unsuccessfully sought court assistance to obtain records and transcripts without cost in his criminal case only five months before he filed his untimely K.S.A. 60-1507 motion. This five-month delay obviously does not provide a persuasive reason, *Vontress*, 299 Kan. 607, Syl. ¶ 8, to explain Sherwood's ten-year delay in filing a timely K.S.A. 60-1507 motion.

With regard to Sherwood's claim of mental instability or learning disability, he does not specify the nature and extent of his condition. He also does not explain how in 2014—more than 10 years after the deadline to file his K.S.A. 60-1507 motion, and almost 15 years after the Kansas Supreme Court denied Sherwood's petition for review on his direct appeal—he was finally able to enlist the assistance of another inmate, yet he was unable to obtain assistance from that inmate or other inmates during the previous 15 years. Having reviewed both of Sherwood's arguments and their factual grounds, we find they do not justify the extremely long delay that occurred in filing his K.S.A. 60-1507 motion.

2. Do the merits of Sherwood's claims raise substantial issues of law or fact deserving the district court's consideration?

On appeal, Sherwood briefly summarizes the issues of law or fact in his K.S.A. 60-1507 motion that he believes are substantial and worthy of consideration:

> "Mr. Sherwood pointed out that in his petition he argued that he was not informed by the court nor counsel what his total sentence could be. He stated he argued he was not given time to prepare a defense in his case; that a prior conviction was counted against him twice at sentencing; that a jury should have been empaneled to consider his upward departure and that he had repeatedly requested the assistance of counsel."

As noted earlier, the district court found Sherwood's claims were "based on conclusory statements without any sufficient evidentiary references to support" those claims.

The cursory nature of the claims in Sherwood's most recent motion is apparent. At the outset, most of Sherwood's claims in his K.S.A. 60-1507 motion relate to his trial and appellate counsel's purported ineffectiveness. For example, in his motion, Sherwood asserts ineffective assistance of counsel "when trial counsel failed to object to inadequate [n]otice from the trial court and the State, of the factors relied upon in departing upward on the sentence." On appeal, however, Sherwood does not articulate what was inadequate about the notice, how he was prejudiced by any claimed lack of notice, or apply the well-known two-prong test for addressing constitutional ineffective assistance of counsel violations. See *Sola-Morales v. State*, 300 Kan. at 882 (relying on *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 [1984]). Without these basic facts and rudimentary legal authority, the district court's finding that the claim was conclusory seems appropriate.

It should also be noted that Sherwood was aware of and raised ineffective assistance of counsel claims on direct appeal which our court rejected in 2000. In

affirming Sherwood's convictions and sentences our court observed: "We find nothing in the record to indicate that defendant raised the issue of ineffective assistance of counsel at trial." *Sherwood*, No. 79,794, slip op. at 5. Nevertheless, our court considered the merits of the claim on appeal and held: "We see no evidence in the record to indicate that [Sherwood] would have insisted on going to trial but for counsel's alleged errors. . . . There is no merit in [Sherwood's] claim of ineffective assistance of counsel." Slip op. at 6.

Moreover, in his direct appeal, Sherwood claimed error in the trial court's denial of his motion to withdraw his plea of nolo contendere prior to sentencing. In that appeal, Sherwood argued that "the trial court erred in failing to consider ineffective assistance of counsel." Slip op. at 7. Although our court noted that this particular issue was not presented to the trial court and, therefore, need not be considered for the first time on appeal, our court determined: "We have searched the record and find the trial court did not abuse its discretion in denying defendant's motion to withdraw his plea of nolo contendere." Slip op. at 7.

Inexplicably, despite the conclusory nature of Sherwood's cursory claims in his K.S.A. 60-1507 motion filed in 2014, the record is clear that Sherwood articulated other alleged ineffective assistance of counsel claims almost 15 years previously in 2000. Moreover, Sherwood does not articulate any reason why the purported ineffectiveness of his counsel of which he complains in this K.S.A. 60-1507 motion was not apparent in 2000.

Regarding another claim in his K.S.A. 60-1507 motion, Sherwood argues that the district court, rather than a jury, found that upward departure factors existed which resulted in his enhanced sentences. Sherwood correctly observes that in *State v. Gould*, 271 Kan. 394, Syl. ¶ 3, 23 P.3d 801 (2001), our Supreme Court held that "[a]n upward departure sentence imposed on a defendant by a judge under K.S.A. 2000 Supp. 21-4716

is a violation of the defendant's Sixth Amendment rights and Fourteenth Amendment Due Process rights and, thus, is unconstitutional." This holding was mandated by *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

Sherwood acknowledges *Gould*'s holding which provides that the ruling

> "has no retroactive application to cases final as of June 26, 2000, the date *Apprendi* was decided. However, the new constitutional sentencing rule established by *Apprendi* must be applied here and in all cases pending on direct appeal or which are not yet final or which arose after June 26, 2000." 271 Kan. 394, Syl. ¶ 6.

Sherwood's criminal case concluded on March 21, 2000—before the effective date of the ruling in *Gould*—when our Supreme Court denied Sherwood's petition for review. Sherwood makes no claim that he filed a motion for a writ of certiorari to the United States Supreme Court.

Sherwood's claim of ineffective assistance of counsel is that the appellate defender never replied to his request for help to file "federal appeals" after his direct appeal. Sherwood speculates that if his appointed counsel had responded to his request for assistance in these federal appeals that his criminal case would have been pending as of June 26, 2000, and he could have obtained relief from the district court's sentence enhancement.

We question whether this claim raises a substantial issue of law or fact. In his motion and in his appellate brief Sherwood never asserts that he intended to seek a writ of certiorari from the United States Supreme Court. Moreover, Sherwood does not explain what federal appeals he was contemplating and whether, if such appeals were possible, they would have affected the finality of the state court judgment in his criminal case. Additionally, once again, Sherwood does not assert or brief the prejudice prong of the

ineffective assistance of counsel standard. See *Sola-Morales*, 300 Kan. at 882. Finally, the speculative and vague assertion of this claim is heightened given Sherwood's delay in raising this claim—almost 15 years after the conclusion of his criminal case and the filing of the *Gould* decision.

Apart from the ineffective assistance of counsel claims in his K.S.A. 60-1507 motion and in his appellate brief, Sherwood also asserts a prior conviction was used twice, which resulted in an increase in his sentence. Yet, Sherwood does not identify the crime of conviction or explain how it was used twice in the calculation of his sentence. Without an assertion of basic information to support this claim there is no showing that this allegation implicates a substantial issue of law or fact.

To meet his burden of showing entitlement to an evidentiary hearing, Sherwood was tasked with setting forth an evidentiary basis to support his contentions or the basis must have been evident from the record. 300 Kan. at 881 (citing *Holt v. State*, 290 Kan. 491, 495, 232 P.3d 848 [2010]); see *State v. Sprague*, 303 Kan. 418, 425, 362 P.3d 828 (2015). In this case, the district court was not presented with sufficient facts to warrant ordering an evidentiary hearing. In summarily denying Sherwood's K.S.A. 60-1507 motion, the district court found that his claims were merely conclusory statements without any reference to evidence in support. As discussed in this section, the district court did not err in making this finding.

3. Has Sherwood set forth a colorable claim of actual innocence?

On appeal, Sherwood refers to the reply he filed in the district court and states he "also claimed innocence in that he argued that he wished to withdraw the plea, enter a plea of not guilty and have a proper trial." According to the State, this argument falls far short of being a colorable claim of actual innocence. We agree. Although it is clear that Sherwood now wishes to contest the charges he pled no contest to in 1999, that claim

relates to his assertion of being not guilty of the crimes, not a colorable claim of innocence that Sherwood did not, in fact, sexually assault the five-year old victim.

Moreover, we have reviewed the transcript of the plea hearing in Sherwood's criminal case. The factual basis for the plea, provided by the prosecutor, establishes that the victim in this case and another young girl, three to five years of age, reported that in separate incidents Sherwood sexually assaulted them in a variety of ways. Shortly after the victim was assaulted in this case at Sherwood's residence, her mother found her wearing different panties and a dress. The other young girl reported that Sherwood would provide her with dresses and toys and showed her a doll. (Sherwood was not charged with any crimes related to this other young girl.) Subsequently, a search warrant was executed on Sherwood's home where police officers discovered a large quantity of pictures and reading materials about young girls, baby dolls, children's toys, and young girls' clothing, including underwear and dresses.

According to the prosecutor, as part of the State's evidence in this criminal case, Detective Reginald Ford would also testify that in 1990 he interviewed Sherwood in a prior criminal case and Sherwood told the detective that he engaged in sex acts with two other girls four or five years of age. According to Detective Ford, Sherwood stated that the two girls asked Sherwood to engage in sex acts with them. This investigation resulted in Sherwood's conviction for indecent solicitation of a child in 1990.

On direct appeal, our court stated: "We do not hesitate to conclude that evidence which indicates [Sherwood] had been molesting young children for nearly 30 years was substantial and compelling." *Sherwood*, No, 79,794, slip op. at 8. Upon our review of Sherwood's motion, brief, and the record on appeal, we are convinced that Sherwood has not asserted or shown a colorable claim of innocence in this particular case.

We conclude that under either the two-factor standard set forth in K.S.A. 2016 Supp. 60-1507(f)(2), or the three-factor standard established by *Vontress*, Sherwood has failed to meet his burden of showing manifest injustice under the totality of the circumstances to extend the one-year time limitation of K.S.A. 2016 Supp. 60-1507(f)(1). Accordingly, Sherwood's motion is time-barred and the district court did not err in summarily denying it.

Affirmed.