

NOT DESIGNATED FOR PUBLICATION

No. 120,630

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Interest of JASON WADE SCHAFFER.

MEMORANDUM OPINION

Appeal from Clark District Court; SIDNEY R. THOMAS, judge. Opinion filed August 30, 2019.
Reversed and remanded with directions.

Jason W. Schaffer, appellant pro se.

Allison D. Kuhns, county attorney, and *Clay A. Kuhns*, special assistant county attorney, for appellee.

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

PER CURIAM: Jason Wade Schaffer appeals the district court's summary denial of his motion to appoint counsel and his untimely motion to appeal his 1989 adjudication as a juvenile offender. Schaffer argues that the district court should have appointed counsel to represent him and it should have held a hearing to determine whether the exceptions in *State v. Ortiz*, 230 Kan. 733, 640 P.2d 1255 (1982), allow him to pursue his untimely appeal. For the reasons stated in this opinion, we agree that the district court erred in summarily denying Schaffer's motions and we remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

On January 19, 1989, the State filed a petition in Clark County seeking to have Schaffer adjudicated a child in need of care (CINC). The Clark County District Court did so on March 9, 1989, finding that Schaffer was "without the care or control necessary for

[his] physical, mental, or emotional health." The case number for the Clark County CINC proceedings was 89JC1.

Between May 24, 1989, and July 7, 1989, the State filed juvenile offender cases against Schaffer in Kiowa County, Ford County, and Hodgeman County. The Kiowa County complaint alleged acts that, if Schaffer were an adult, would constitute eluding law enforcement officers and obstructing legal process; the Ford County complaint alleged acts that would constitute felony theft; and the Hodgeman County complaint alleged acts that would constitute misdemeanor theft and felony theft. The Kiowa County District Court appointed attorney Linda Eckelman to represent Schaffer.

On August 11, 1989, Schaffer and Eckelman appeared in the district courts of Ford County and Kiowa County, where Schaffer admitted that he had committed the acts alleged in the respective complaints. Each district court adjudicated him to be a juvenile offender and ordered its case "transferred to the District Court of Clark County, Kansas" because "Clark County would be a more appropriate jurisdiction for disposition of this matter." Similarly, on August 22, 1989, Schaffer and Eckelman appeared in Hodgeman County District Court where, under a plea agreement, Schaffer admitted to acts that would constitute misdemeanor theft. The Hodgeman County District Court adjudicated him to be a juvenile offender, dismissed the remaining felony theft charge, and transferred the case to Clark County for disposition.

The record now before us does not make clear the steps taken once the juvenile offender cases were transferred to Clark County. The Clark County "ROA Report" in the record on appeal reflects that documents from the Ford and Hodgeman County juvenile offender cases were filed in the Clark County CINC case—89JC1—but that the Kiowa County juvenile offender case was "transfer[red] . . . to Clark County Case 1989-JV-1." The reference to 1989-JV-1 may be a mere typographical error, but the record is unclear. In any event, the Ford County, Hodgeman County, and Kiowa County juvenile offender

cases were at some point consolidated with or absorbed into the Clark County CINC case, with all future Clark County proceedings—whether they were related to the CINC proceedings or the juvenile offender proceedings—conducted in case number 89JC1. The merging of Schaffer's juvenile offender cases with his CINC case led to much confusion when Schaffer filed his current motions in district court, as we will discuss below.

On September 6, 1989, the Clark County District Court held a dispositional hearing. It noted the Ford County juvenile offender adjudication and ordered that Schaffer "remain in the custody of the Kansas Department of Social and Rehabilitation Services [(SRS)] for placement in a Youth Center or other appropriate placement," that Schaffer receive individual counseling while in that placement, and that there be periodic review hearings. Eckelman was not present at this hearing, but Schaffer was represented by Jay Tedford, the guardian ad litem the district court had appointed in the CINC proceedings. The district court's journal entry memorializing the dispositional hearing was filed on September 8, 1989.

On July 9, 1990, the State filed a complaint in Shawnee County District Court alleging that Schaffer committed acts that, if he were an adult, would constitute misdemeanor theft. The next day, Schaffer and court-appointed counsel Rene Netherton appeared in Shawnee County District Court and Schaffer stipulated to committing the acts alleged in the complaint. The Shawnee County District Court adjudicated him to be a juvenile offender and transferred the case to Saline County—Schaffer's county of residence at the time, as he had been placed on conditional release at some point—for disposition. At some point that is unclear from the record on appeal, the case was transferred to Clark County and the complaint, journal entry, "and other documents" were filed under the Clark County CINC case number 89JC1.

The Clark County District Court held a second dispositional hearing on July 27, 1990, at which it noted Schaffer's CINC status and his adjudications as a juvenile

offender in Shawnee County, Hodgeman County, Ford County, and Kiowa County. Schaffer appeared at that hearing only through Tedford, "who waive[d] the appearance of said child." The district court terminated Schaffer's conditional release and ordered "direct commitment to the Youth Center at Atchison." Over the next few years, the district court held periodic review hearings and ordered custody changes as needed.

On March 17, 1993, the Clark County District Court held a review hearing at which it noted that the Shawnee County District Court had certified Schaffer, who was still a minor, to stand trial as an adult on a murder charge and he was in custody pending trial. Schaffer eventually pled guilty in the Shawnee County criminal case and was convicted of first-degree murder, aggravated kidnapping, aggravated robbery, and a weapons violation. *State v. Schaeffer*, 295 Kan. 872, 872, 286 P.3d 889 (2012). He was sentenced to life in prison. 295 Kan. at 872. Schaffer was allowed to pursue an untimely direct appeal of his sentences in the adult criminal matter, and the Kansas Supreme Court affirmed his sentences on October 19, 2012. 295 Kan. at 872, 878.

Meanwhile, at a review hearing on February 3, 1994, the Clark County District Court noted Schaffer's convictions in the adult criminal justice system. The district court ordered "SRS [to] relinquish custody of Jason Schaffer and that this matter shall be and is hereby dismissed."

Current motions filed in district court

On May 29, 2018—24 years after the Clark County District Court dismissed 89JC1 and nearly 29 years after it entered disposition for the Ford County juvenile offender adjudication—Schaffer filed in Clark County District Court a pro se "affidavit in support of notice of appeal out of time." The caption on the affidavit designated the case number as 89JV51—the case number of the Ford County juvenile offender case—but an unknown person altered it to read 89JC1. Schaffer's motion stated:

"On August 11th, 1989, I plead[ed] guilty to theft of property. At the hearing I don't recall the Court advising me of my right to appeal my sentence nor the time limit that I had to [appeal]. My attorney never advised or assisted me on an appeal of my sentence either. I've done my best to appeal this matter with the assistance of another inmate. I want this case appealed for a few reasons. First, I was not notified of all my rights under K.S.A. 38-1633(b) and I never waived all those rights as the law requires under K.S.A. 38-1633(c). Secondly, I was never given the right to a jury trial and no one told me I had a right to trial by jury. I believe these are appealable issues. I believe there may be other issues and therefore I need counsel to help me. The only help I've got to appeal was just recently. Until that point I had no knowledge of any such rights."

On June 11, 2018, Schaffer filed a letter to the Clark County district court clerk, stating that he had "filed a motion to appeal out of time and a motion for counsel in Clark County under 89-JV-51." Schaffer explained that he had "just [become] aware that the case [number] was changed to 89-JC-1 after the venue changed." He asked the clerk to tell him if he needed to refile the motion "under the new case [number] 89-JC-1."

On June 28, 2018, Schaffer filed a pro se "notice of appeal out of time" in Clark County District Court under case number 89JC1. In it, he sought to "appeal his imposed sentence and conviction out of time in the above named case 89-JC-1." He argued that the exceptions in *Ortiz* allowed his untimely appeal. Schaffer claimed that the district court did not inform him "of his right to appeal his sentence or conviction" and the court also failed to inform him "of the time limits necessary to appeal." Schaffer also claimed that he "was provided an attorney, Jay Tedford, who failed to perfect or complete an appeal of his sentence and conviction" and that it was his "right and desire . . . to appeal his sentence and conviction." Also, on June 28, 2018, Schaffer filed a pro se "motion for appointment of appellant [*sic*] counsel.

On July 12, 2018, the State moved to quash Schaffer's untimely notice of appeal and his motion for the appointment of counsel. The State argued that Schaffer's appeal

was time-barred and, in any event, the CINC proceedings were dismissed in 1994, so any appeal would be moot. Finally, the State argued that Schaffer's notice of appeal stated his intent to appeal his "sentence and conviction," and Schaffer had been neither sentenced nor convicted in the CINC proceedings. The State asked the district court to deny Schaffer's motions without holding a hearing.

On July 23, 2018, Schaffer responded to the State's motion to quash, arguing again that the *Ortiz* exceptions allowed him to pursue his untimely appeal. He asserted that although he knew of his right to appeal his adult convictions by 2000, he remained unaware of his appellate rights related to juvenile adjudications. He further explained that by the phrase "conviction and sentence" in his initial untimely notice of appeal, he meant "adjudication and disposition"; he was "just recently learning that juvenile cases are a civil matter and not a criminal matter."

On August 29, 2018, the Clark County District Court issued an order finding that a hearing was unnecessary and summarily denying Schaffer's untimely appeal and his request for counsel. The journal entry stated:

"Mr. [Schaffer] must establish this Court has jurisdiction to hear this matter. He has not done so. Furthermore, pursuant to K.S.A. 38-2203(c) it appears this Court would not have jurisdiction as Mr. [Schaffer] turned 18 many years ago. Moreover, the Journal entry filed February 4, 1994, notes this case was dismissed because Mr. [Schaffer] had been certified as an adult in Shawnee County District Court on very serious criminal charges.

"In addition, the Kansas Appellate Courts have been clear that only specific matters, as allowed by statute, are appealable under the Child in Need of Care (CINC) Code. See [*In re D.M.M.*, 38 Kan. App. 2d 394, 166 P.3d 431 (2007)]. Whether [the] current statute, K.S.A. 38-2273(a) or the one in effect at the time this matter was dismissed, K.S.A. 38-1591(a), is considered, the CINC Code requires any appeal must be from 'any order of temporary custody, adjudication, disposition, finding of unfitness or termination of parental rights.' Mr. [Schaffer] is requesting an appeal from his 'sentence

and conviction.' As a result, it is clear he has not alleged any facts that would show this case is one of the appealable issues allowed by the CINC appeals statute.

"Alternatively, the Court will also find this case is time barred. The final order, dismissing this case, was filed February 7, 1994. Pursuant to K.S.A. 38-1591(b) (1994) an appeal was required to be within 30 days (see also, K.S.A. 38-1591(c) and K.S.A. 21-2102(b)). Since the appeal at issue was not filed until June 28, 2018, it is many years late. Mr. [Schaffer] does argue 'Ortiz violations apply to civil and juvenile matters.' The only case cited for such assertion [is] an unpublished opinion, [*In re S.H.*, No. 109,324, 2013 WL 5925981 (Kan. App. 2013) (unpublished opinion)]. That case is [*sic*] involves a Juvenile Offender matter and has no application to a civil case such at [*sic*] the one before the Court. As a result, Mr. [Schaffer] has not shown excusable neglect for the delay and his appeal is out of time.

"THEREFORE, the Court finds Mr. [Schaffer's] Appeal must be summarily denied."

Schaffer timely appealed. He requested that the district court appoint appellate counsel, but the district court denied his request.

ANALYSIS

On appeal, Schaffer argues that the district court erred by summarily denying his untimely notice of appeal and his request for appointed counsel. He asserts that the district court should have held a hearing to determine whether the *Ortiz* exceptions apply and that such a hearing would have shown that his appeal is not time barred. He also contends that the district court erred by finding that he had not alleged facts that would entitle him to an appeal under the CINC Code.

The State responds that *Ortiz* does not apply to an appeal from a CINC adjudication because a minor subject to CINC proceedings has no constitutional right to effective assistance of counsel. The State also argues that the district court correctly

denied Schaffer's motions because they are time barred and they raise issues that are moot because the CINC proceedings were dismissed.

The record on appeal and the parties' appellate arguments make clear that there has been a fundamental disconnect on what law controls this case and even on what order or orders Schaffer sought to appeal out of time through his 2018 district court filings. This court exercises unlimited review over questions of jurisdiction and statutory interpretation. See *In re D.M.-T.*, 292 Kan. 31, 33, 249 P.3d 418 (2011). Similarly, "[w]hether the district court correctly construed a pro se pleading is a question of law subject to unlimited review." [Citation omitted.] *Makthepharak v. State*, 298 Kan. 573, 578, 314 P.3d 876 (2013).

"Pro se pleadings are liberally construed, giving effect to the pleading's content rather than the labels and forms used to articulate the arguments." 298 Kan. 573, Syl. ¶ 10. The content of Schaffer's filings in the district court show that he sought to take an untimely appeal from his adjudication *as a juvenile offender* in Ford County and the resulting disposition. His "affidavit in support of notice of appeal out of time," which he originally submitted under the case number Ford County assigned to his juvenile offender proceedings, stated that he wanted to appeal the case in which he "[pled] guilty to theft of property" on August 11, 1989—the date Schaffer admitted in Ford County District Court to committing acts that would have constituted felony theft if he were an adult. Schaffer's subsequent letter to the Clark County district court clerk also referred to the Ford County case number. And his pro se "notice of appeal out of time" also showed his wish "to appeal his imposed sentence and conviction," which he later explained meant his "adjudication and disposition."

Despite all of these indications that Schaffer sought an untimely appeal from orders entered in a juvenile offender proceeding, the district court appears to have construed Schaffer's pro se filings as an attempt to appeal the CINC adjudication, even

noting that "this case was dismissed" in 1994 and calculating the time in which Schaffer could have pursued a timely appeal from the date of the order of dismissal. The contents of Schaffer's district court filings show that he seeks to appeal his Ford County adjudication as a juvenile offender and the later Clark County disposition of that juvenile offender matter. Thus, the district court erred as a matter of law by construing Schaffer's motions as seeking an untimely appeal of an order in his CINC proceedings.

Relatedly, the district court relied exclusively on law governing CINC proceedings to find that (1) it lacked jurisdiction over Schaffer; (2) Schaffer sought to appeal an order that was not appealable; and (3) Schaffer's appeal is time barred. The district court even distinguished the case that Schaffer cited for his assertion that *Ortiz* allows his untimely appeal by noting: "That case is [*sic*] involves a Juvenile Offender matter and has no application to a civil case such as [*sic*] the one before the Court." Thus, because Schaffer sought to appeal his juvenile offender adjudication, the district court erred as a matter of law by ruling on Schaffer's motions using law governing CINC proceedings.

The question then becomes how to remedy the district court's erroneous construction of Schaffer's arguments and its misapplication of the law. Schaffer had a right to appeal his juvenile offender adjudication and disposition provided that he filed a timely notice of appeal. See K.S.A. 38-1681 (Ensley 1986), now codified at K.S.A. 2018 Supp. 38-2380(b). But Schaffer failed to file a timely notice of appeal in this case. He now claims that he should be granted relief under the *Ortiz* exceptions. *Ortiz* allows untimely appeals when a defendant (1) was not informed of the right 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. 230 Kan. 733, Syl. ¶ 3.

Based on Schaffer's pro se pleadings filed in district court, he is trying to file an untimely notice of appeal of his Ford County juvenile offender adjudication of felony theft on two grounds. First, Schaffer claims that the district court did not inform him "of

his right to appeal his sentence or conviction" and the court also failed to inform him "of the time limits necessary to appeal." This claim is similar to the first *Ortiz* exception. See *Ortiz*, 230 Kan. 733, Syl. ¶ 3. Second, Schaffer claims that he "was provided an attorney, Jay Tedford, who failed to perfect or complete an appeal of his sentence and conviction" and that it was his "right and desire . . . to appeal his sentence and conviction." This claim is similar to the third *Ortiz* exception.

The Kansas Supreme Court has not ruled on the application of *Ortiz* to juvenile offender appeals, but our court has recently issued an opinion addressing the application of the first *Ortiz* exception to juvenile offender cases. In *In re I.A.*, ___ Kan. App. 2d ___, ___ P.3d ___ (No. 118,802, filed on August 16, 2019), this court held that the first *Ortiz* exception does not apply to an appeal of a juvenile offender proceeding because there is no statutory requirement in the juvenile offender code that a court advise a juvenile offender that he or she has the right to appeal from an order of adjudication or sentencing. Slip op. at 8, 11. We adopt the sound reasoning of that opinion. Thus, there is no reason to remand Schaffer's case to the district court to hold a hearing on whether the first *Ortiz* exception should allow him to file an untimely notice of appeal.

But Schaffer is also claiming that he had appointed counsel to file an appeal but his counsel failed to do so. In *Albright v. State*, 292 Kan. 193, 251 P.3d 52 (2011), Albright tried to file an untimely notice of appeal following the denial of his K.S.A. 60-1507 motion. The parties stipulated that "(a) Albright was furnished an attorney for the purpose of an appeal, (b) the attorney failed to perform, and (c) but for [appointed] counsel's failure, Albright would have taken a timely appeal." 292 Kan. at 196. Under those facts, our Supreme Court held that Albright should be allowed to file his untimely appeal "because appointed counsel's performance was deficient and the appropriate remedy is to exercise jurisdiction over Albright's appeal." 292 Kan. at 194. The court set forth these rules for determining whether a K.S.A. 60-1507 movant received ineffective assistance of counsel when appointed counsel failed to file a timely appeal:

"(1) If the movant requested that an appeal be filed and it was either not filed at all or not timely filed, appointed counsel was ineffective; (2) a movant who explicitly told his or her appointed counsel not to file an appeal cannot later complain that, by following instructions, counsel performed deficiently; or (3) in other situations, such as where appointed counsel has not consulted with the movant or the movant's directions 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, an appeal would have been filed. The movant need not show that a different result would have been achieved but for counsel's performance. If the movant establishes that counsel's performance was deficient as tested in the first or third prong of this test, the movant will be allowed to file an appeal out of time." 292 Kan. 193, Syl. ¶ 5.

Albright involved an untimely appeal from the denial of a K.S.A. 60-1507 motion. But we find that the holding in *Albright* should also apply to an appeal of a juvenile offender proceeding under Chapter 38, which is civil in nature and is governed by Article 21 of Chapter 60 of the Kansas Statutes Annotated. See K.S.A. 2018 Supp. 38-2382(c). So if Schaffer can show that his failure to file a timely notice of appeal in his juvenile offender proceeding was caused by ineffective assistance of counsel, the appropriate remedy would be to allow Schaffer to file an appeal out of time.

Thus, we conclude the district court erred in summarily denying Schaffer's motions and we remand for further proceedings. The district court should begin by appointing counsel to represent Schaffer in district court. The only issue on remand is whether the district court should allow Schaffer to file an untimely notice of appeal of his Ford County juvenile offender adjudication of theft, based on ineffective assistance of counsel. The district court should apply the rules set forth in *Albright*, and the burden will be on Schaffer to establish that he should be allowed to file an appeal out of time.

Reversed and remanded with directions.