

MODIFIED OPINION¹

NOT DESIGNATED FOR PUBLICATION

No. 123,043

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

ROGER LEE NICHOLS,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Leavenworth District Court; MICHAEL D. GIBBENS, judge. Original opinion filed July 9, 2021. Modified opinion filed August 20, 2021. Reversed and remanded with directions.

Joseph A. Desch, of Law Office of Joseph A. Desch, of Topeka, for appellant.

Meredith D. Mazza, assistant county attorney, *Todd Thompson*, county attorney, *Natalie Chalmers*, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., HILL, J., and MCANANY, S.J.

PER CURIAM: The State has moved for rehearing or for modification of our opinion in this appeal. We grant the State's motion for modification. The following is our modified opinion in this appeal.

¹**REPORTER'S NOTE:** Opinion No. 123,043 was modified by the Court of Appeals on August 20, 2021, in response to State's Motion for Rehearing or Modification filed July 14, 2021.

Roger Lee Nichols is an inmate at the Ellsworth Correctional Facility. He moved for relief under K.S.A. 60-1507 after the district court denied relief on his first K.S.A. 60-1507 motion. In his second motion, Nichols contended that the attorney who represented him in his first K.S.A. 60-1507 motion was ineffective; that his convictions were the product of falsified, tainted, and unreliable evidence, as well as perjured testimony and prosecutorial error; and that he was actually innocent of the charges for which he was convicted. The district court summarily found that this second motion was successive and that Nichols had failed to establish exceptional circumstances to justify the court considering his claims on the merits.

We conclude that Nichols' claims of ineffective assistance of his counsel in his first K.S.A. 60-1507 proceedings are not successive and require further consideration by the district court in line with the steps outlined in *Fischer v. State*, 296 Kan. 808, Syl. ¶ 3, 295 P.3d 560 (2013).

FACTUAL AND PROCEDURAL HISTORY

In 2010, Nichols was charged with rape, aggravated criminal sodomy, and two counts of aggravated indecent liberties with a child involving M.G. and T.H. At trial in May 2011, Nichols was convicted of aggravated criminal sodomy and two counts of aggravated indecent liberties with a child. He was sentenced to three hard 25 life sentences, two of which were ordered to run consecutively. A panel of this court affirmed Nichols' convictions and sentences. *State v. Nichols*, No. 106,974, 2012 WL 6217199 (Kan. App. 2012) (unpublished opinion). The following abstract of the Court of Appeals opinion on the substantive issue raised in Nichols' direct appeal may be helpful at this point.

The credibility of the sisters, T.H. and M.G., the victims in this case, was a central issue at trial. There was no physical evidence to support the allegations of abuse these

children made. Helen Swan, who conducted forensic interviews of the children, was an important witness for the State.

T.H. was born in 1998; M.G. was born in 2001. The children's mother had dated Nichols from 2003 to 2008, but Nichols continued to have contact with the girls thereafter. In 2010, M.G. told their mother that Nichols had sexually abused them. M.G. testified that the abuse started when she was 7 or 8 years old and continued until she was 11 or 12 years old. T.H. also testified about being sexually abused. Nichols presented testimony of several of his family members that the girls had admitted lying about the abuse. The girls denied making these admissions.

The girls' mother testified that M.G. had been in counseling for depression since early 2010 before mother was aware of the sexual abuse. Nichols moved for a mistrial because of a claimed *Brady* violation—the failure to disclose these counseling records. The State acknowledged that it was aware of M.G. receiving counselling but was unaware of the contents of the records. It did not obtain the records because it did not believe they were necessary. The district court denied a mistrial, and in his direct appeal Nichols claimed it was error to do so. In affirming the district court on this mistrial issue, the appellate court made the following observations about Nichols' trial counsel:

"Nichols relies only on speculation to claim that the counseling records might show that M.G. was lying about the abuse.

". . . Here, Nichols hired an investigator who spoke to some of the State's witnesses. During the investigation, Nichols could have discovered that M.G. was in counseling and then he could have subpoenaed the records. Nichols could have obtained this information through reasonable diligence—the State certainly did not prevent Nichols from uncovering this evidence.

. . . .

". . . Without knowing what information the counseling records contained, Nichols has no way to show that the records could have influenced the outcome of the trial.

". . . Hypothetically, M.G.'s counseling records could have bolstered Nichols' defense that M.G. and T.H. admitted to lying about the sexual abuse." *Nichols*, 2012 WL 6217199, at *3-4.

The Kansas Supreme Court denied Nichols' petition for review, and the mandate was issued.

Nichols filed a timely motion for relief under K.S.A. 60-1507, arguing that his trial counsel had provided him ineffective assistance. He claimed he was wrongfully convicted because of his counsel's ineffective performance at trial in not obtaining and using at trial medical and psychological records, Kansas Department for Children and Families records of the girls' prior accusation of abuse, Facebook messages sent by one of the girls, and Nichols' employment records; and in not retaining an expert child psychologist. Nichols' K.S.A. 60-1507 counsel did not include any claims of prosecutorial error or claims related to the testimony of forensic interviewer Swan.

Following a two-day hearing before the same judge who presided over Nichols' trial, the district court denied relief, adopting the arguments raised in the State's brief.

On appeal a panel of this court affirmed the district court's action. *Nichols v. State*, No. 116,116, 2017 WL 3327085 (Kan. App. 2017) (unpublished opinion). Our Supreme Court declined review.

In February 2019, 11 months after the mandate was issued following the appeal of the denial of his first K.S.A. 60-1507 motion, Nichols filed a second K.S.A. 60-1507 motion, which is the subject of this appeal. He made three claims: (1) ineffective

assistance of counsel; (2) his conviction was based on falsified, tainted, unreliable evidence, and perjured testimony, and prosecutorial error; and (3) actual innocence.

While Nichols again contended that his trial counsel was ineffective, he also contended that the attorney, whom he had retained to represent him on his first K.S.A. 60-1507 motion, provided ineffective assistance in those proceedings. As we understand them—and without comment on their potential merit—it appears from his rambling, often repetitive, and sometimes confusing supporting memorandum that Nichols claimed his 60-1507 counsel was ineffective in the following respects:

- Before trial, defense counsel obtained records from a psychologist and a private detective that showed deficiencies in the forensic interview by Helen Swan. Defense counsel should have retained an expert to testify and impeach Swan with this information. Nichols' original 60-1507 counsel had the same records "and he in turn did nothing with them. Including securing and hiring an expert witness to establish the ineffective assistance of counsel Mr. Nichols received from [counsel in his original K.S.A. 60-1507 proceeding]."
- At the evidentiary hearing on Nichols' motion, his counsel should have called various witnesses, whom Nichols claims lied at trial, to testify so that counsel could confront them with their perjured trial testimony.

Nichols also claimed the prosecutor made erroneous and prejudicial statements in his closing argument. Finally, Nichols claimed actual innocence, stating:

"I am an innocent man, falsely accused, wrongfully convicted. Conviction based upon multiple constitutional violations meaning that it is the constitutional violations that allowed the conviction to, occur, and/or to stand through the appellate process.

....

"I was convicted upon the basis of falsified perjured testimony in violation of my Fifth [and] Fourteenth Amendments to the United States Constitution being Due Process."

In December 2019, the district court summarily dismissed Nichols' second K.S.A. 60-1507 motion as successive. The court stated:

"On February [15], 2019 the petitioner filed another request for post-conviction relief. Once again petitioner alleges ineffective assistance of counsel as a claim. In addition, petitioner asserts that his convictions were based upon falsified evidence and perjured testimony. Petitioner asserts a claim of actual innocence based upon his claims of ineffective assistance of counsel and falsified evidence and perjured testimony.

"K.S.A. 60-1507(c) states that the District Court shall not be required to entertain a second motion for similar relief from the same petitioner. However, a colorable claim of actual innocence when coupled with an unusual event may excuse the procedural bar to successive motions pursuant to K.S.A. 60-1507. *Beauclair v. State*, 308 KAN. 284 (2018).

"In the instant case the assertion of falsified evidence and perjured testimony when coupled with the old claim of ineffective assistance of counsel does not in this Court's opinion reach the 'unusual event' threshold as stated in *Beauclair v. State*.

"Therefore, this case is dismissed."

This appeal followed.

ANALYSIS

K.S.A. 60-1507 provides the vehicle for prisoners in custody serving a court-imposed sentence to seek a writ of habeas corpus. Nichols based his claim for habeas relief on the ineffectiveness of his counsel in his initial K.S.A. 60-1507 proceedings, along with other claims which we noted earlier. When confronted with a K.S.A. 60-1507 motion, the district court has three options to resolve it:

"(a) determine that the motion, files, and case records conclusively show the prisoner is entitled to no relief and deny the motion summarily; (b) determine from the motion, files, and records that a potentially substantial issue exists, in which case a preliminary hearing may be held after appointment of counsel. If the court then determines there is no substantial issue, the court may deny the motion; or (c) determine from the motion, files, records, or preliminary hearing that there is a substantial issue requiring an evidentiary hearing." *Fischer*, 296 Kan. 808, Syl. ¶ 3.

As a threshold matter, we disagree with the State's contention that Nichols is barred from pursuing any claim of ineffective assistance of counsel because his counsel in his first K.S.A. 60-1506 proceeding was retained rather than appointed by the court. Nichols acknowledges there is no constitutional right to effective assistance of counsel in K.S.A. 60-1507 proceedings which are civil in nature. See *Robertson v. State*, 288 Kan. 217, 228, 201 P.3d 691 (2009); *Brown v. State*, 278 Kan. 481, 483, 101 P.3d 1201 (2004). But previous panels of this court have held that there is a conditional statutory right to the effective assistance of counsel in a K.S.A. 60-1507 proceeding. This statutory right applies regardless of whether counsel was appointed or retained. *Skaggs v. State*, 59 Kan. App. 2d 121, 132, 479 P.3d 499 (2020), *rev. denied* 313 Kan. ____ (April 23, 2021); see *McIntyre v. State*, 54 Kan. App. 2d 632, 638-43, 403 P.3d 1231 (2017). The right attaches once the court finds that the movant's K.S.A. 60-1507 motion presents substantial questions of law or triable issues of fact. Here, the court found that Nichols raised triable issues in his first K.S.A. 60-1507 motion and an evidentiary hearing was held. Once this statutory right attached, Nichols was entitled to effective assistance of counsel, whether retained or appointed. See *Robertson*, 288 Kan. at 228; *Brown*, 278 Kan. at 483-84.

One of the two principal impediments to the district court's consideration of the merits of a K.S.A. 60-1507 motion is successiveness. "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the

same prisoner." K.S.A. 2020 Supp. 60-1507(c). Here, the district court did not reach the merits of the issues raised in Nichols' motion because the court found it to be successive. When the district court summarily dismisses the motion, as was done here, our review on appeal is de novo. We will confine our review to the issue of whether Nichols' motion was successive—the grounds upon which the district court summarily denied relief.

Under Supreme Court Rule 183(d)(3) (2021 Kan. S. Ct. R. 240), the sentencing court may not consider successive motions by the same movant when the grounds for relief already have been determined on the merits against the movant in a prior motion and "justice would not be served by reaching the merits of the subsequent motion."

In *State v. Mitchell*, 284 Kan. 374, Syl. ¶ 5, 162 P.3d 18 (2007), the court declared that exceptional circumstances excuse a second K.S.A. 60-1507 motion: "Exceptional circumstances are *unusual events* or intervening changes in the law that prevent the defendant from raising the issue in a preceding 60-1507 motion." (Emphasis added.)

The district court cited *Beauclair v. State*, 308 Kan. 284, 419 P.3d 1180 (2018), in finding Nichols' second K.S.A. 60-1507 motion was successive. In *Beauclair*, the defendant's K.S.A. 60-1507 motion under review was prompted by the recantation of the victim of the crimes of which he was convicted. The *Beauclair* court stated:

"We have no hesitation in holding that a colorable claim of actual innocence based on a crime victim's recantation of the testimony that forms the basis for the charge against a defendant qualifies as 'an unusual event . . . that prevented the defendant [from] raising the issue' previously." 308 Kan. at 304.

There is no exclusive list of events that fit the definition of "unusual events" referred to in *Mitchell*. In *Logan v. State*, No. 122,215, 2020 WL 6108529 (Kan. App. 2020) (unpublished opinion), *rev. denied* 313 Kan. ____ (July 19, 2021), the defendant

filed a second K.S.A. 60-1507 motion, alleging in part that the judge who presided over the hearing on his first K.S.A. 60-1507 motion had a conflict of interests that should have barred the judge from presiding over the hearing on the motion. The defendant claimed his counsel in the first K.S.A. 60-1507 proceedings should have addressed the issue of the judge's alleged conflict but failed to do so. On appeal, the court stated: "Logan's allegations about judicial conflict during the K.S.A. 60-1507 hearing and ineffective assistance of counsel . . . during that hearing arose after Logan filed his original K.S.A. 60-1507 motion. Thus, the judicial conflict claims would not be considered successive under Rule 183(d)." 2020 WL 6108529, at *4.

We conclude that Nichols' second motion is not successive because the grounds for relief—the claimed ineffectiveness of Nichols' counsel in his first K.S.A. 60-1507 motion—have not already "been determined on the merits against the movant in a prior motion." The category of "unusual events" described in *Mitchell* is sufficiently broad to include claimed ineffective assistance of counsel in a prior K.S.A. 60-1507 proceeding. Moreover, we cannot conclude that "justice would not be served by reaching the merits of the subsequent motion." Supreme Court Rule 183(d)(3) (2021 Kan. S. Ct. R. 240). Nichols' convictions turned on the uncorroborated testimony of the two girls and the testimony of their forensic interviewer, whose interview is claimed to have been tainted, and the claimed failure of Nichols' K.S.A. 60-1507 counsel to raise trial counsel's claimed inadequacies in Nichols' original K.S.A. 60-1507 proceedings. Accordingly, we reverse and remand to the district court for further proceedings as outlined in *Fischer*, 296 Kan. 808, Syl. ¶ 3.

Reversed and remanded with directions.