

NOT DESIGNATED FOR PUBLICATION

No. 124,186

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

RAYMOND B. BUBERWA,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; SETH L. RUNDLE, judge. Opinion filed June 10, 2022.
Affirmed.

Raymond B. Buberwa, appellant pro se.

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

Before HILL, P.J., MALONE, J., and PATRICK D. MCANANY, S.J.

PER CURIAM: Raymond B. Buberwa appeals the district court's decision denying his K.S.A. 60-1507 motion following an evidentiary hearing. Buberwa raises three issues on appeal. First, he claims the district court erred in finding that the record in his underlying criminal case had not been altered. Second, he claims his trial counsel labored under an active conflict of interest which deprived Buberwa of his statutory speedy trial rights. Third, he claims his appellate counsel was ineffective for failing to raise the speedy trial issue in his direct appeal. After thoroughly reviewing the record, we find no error and affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Buberwa was convicted of two counts of aggravated indecent liberties with a child in August 2014. His convictions were affirmed on direct appeal. *State v. Buberwa*, No. 112,771, 2016 WL 757574 (Kan. App. 2016) (unpublished opinion).

In January 2018, Buberwa filed a K.S.A. 60-1507 motion as well as an extensive memorandum in support. Relevant to this appeal, Buberwa claimed that the record in his underlying criminal case had been deliberately tampered with, stating that there were "numerous alterations and omissions of material evidence which was deliberately done to conceal misconduct by both the defense counsel and the prosecutorial team." He also alleged that the preliminary hearing transcript must have been fabricated because he waived his right to a preliminary hearing and the hearing did not occur.

Buberwa also asserted that his statutory speedy trial rights were violated. Buberwa filed several pro se motions raising the speedy trial issue while his criminal charges were pending, but because the district court did not conduct a hearing on the motions Buberwa alleged that the State and court deliberately ignored his motions.

Buberwa also asserted that he received ineffective assistance of trial counsel. More specifically, he asserted that his trial counsel, Christine Jones, had a personal conflict of interest with him that prevented her from effectively representing him. In support of this claim, he alleged that Jones was dishonest with him about the preliminary hearing, she agreed to continuances without his consent, and she ignored his claim that his speedy trial rights were being violated. Buberwa also claimed that Jones approached him in his holding cell on the first day of trial "and she threatened him, saying she would stand up and walk out of that courtroom right in the middle of trial if Buberwa even 'dared' to attempt to bring up any of those pro se motions to the attention of the judge." Buberwa

also claimed that while Jones was talking to his wife, Jones "threaten[ed] she was going to 'kill' [Buberwa] because of his motions exposing her misconduct to the Court."

Finally, Buberwa moved to amend his original filing alleging for the first time that his appellate counsel was ineffective for failing to raise a statutory speedy trial argument. At a status conference, the district court held as a matter of law that appellate counsel was not ineffective because appellate counsel could not have raised the statutory speedy trial issue unless it had been raised in the district court.

The district court held an evidentiary hearing on Buberwa's motion in April 2021. Five witnesses testified: (1) Jones, (2) Gina Page, Buberwa's ex-wife, (3) a doctor who performed a psychological evaluation of Buberwa in 2019, (4) Buberwa, and (5) Monika Hoyt, an assistant district attorney assigned to Buberwa's underlying case. Buberwa also presented several exhibits including a transcript of his preliminary hearing listing David Dahl as presiding judge, Hoyt as the prosecutor, and Jones as defense counsel.

Buberwa questioned Jones about the January 2014 preliminary hearing. Jones testified that the preliminary hearing occurred as recorded in the transcript and that Buberwa was present. She denied asking Buberwa to waive his right to a preliminary hearing. Instead, she testified that she advised Buberwa on his right to have a preliminary hearing and let him decide.

Buberwa also asked Jones about his pro se speedy trial motions, and he admitted those motions as exhibits. Jones remembered that Buberwa filed several motions on speedy trial issues. Jones denied Buberwa's accusation that she threatened him not to bring up the speedy trial motions and that she told Page that she would kill Buberwa if he kept filing motions. Jones explained that she did not pursue the motions because the case was being brought to trial within the speedy trial limits. She also denied Buberwa's accusation that she withdrew the motions, explaining that the district court did not set his

pro se motions for hearing because Buberwa was represented by counsel. Jones acknowledged that some of the continuances in the criminal case were at her request so that she could prepare for trial.

Hoyt also testified that the January 2014 preliminary hearing occurred and that Buberwa was present. Hoyt also testified that another assistant district attorney, Justin Edwards, assisted her with the preliminary hearing to explain why the transcript showed Edwards answering a question from the judge even though Edwards' name was not listed on the front of the transcript as officially appearing at the hearing.

The district court filed a memorandum opinion denying Buberwa's K.S.A. 60-1507 motion. Relevant to this appeal, the district court first found that credible evidence established that the district court held an evidentiary preliminary hearing in January 2014. The district court also rejected Buberwa's other contentions that the record had been altered. Second, the district court found that the evidence showed that Buberwa was brought to trial within the applicable statutory time limit. Based on this finding, the district court also rejected Buberwa's claims that his trial and appellate counsel were ineffective for failing to pursue statutory speedy trial arguments. The district court also found that credible evidence did not support Buberwa's claim that his trial counsel had a conflict of interest in representing Buberwa.

Buberwa filed a motion for reconsideration which the district court denied. He timely appealed the district court's judgment. Buberwa's notice of appeal explicitly waived counsel and expressed his intention to proceed pro se in his appeal.

On appeal, Buberwa first claims the district court erred in finding that the record in his underlying criminal case had not been altered. Second, he claims his trial counsel labored under an active conflict of interest which deprived Buberwa of his statutory speedy trial rights. Third, he claims his appellate counsel was ineffective for failing to

raise the speedy trial issue in his direct appeal. Other claims Buberwa raised in district court but not briefed on appeal are considered abandoned. *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021). The State responds that the district court did not err in denying Buberwa's motion because his claims were inconsistent with the record and were refuted by the prosecutor and defense counsel at the evidentiary hearing.

After a full evidentiary hearing on a K.S.A. 60-1507 motion, the district court must issue findings of fact and conclusions of law on all issues presented. Supreme Court Rule 183(j) (2022 Kan. S. Ct. R. at 242). An appellate court reviews the district court's findings of fact to determine whether they are supported by substantial competent evidence and are sufficient to support the court's conclusions of law. Appellate review of the district court's ultimate conclusions of law is *de novo*. *Balbirnie v. State*, 311 Kan. 893, 897-98, 468 P.3d 334 (2020).

CLAIMS THAT THE RECORDS WERE ALTERED

Buberwa first claims the district court erred in finding that the records and transcripts in his underlying case were not altered. He asserts that he presented sufficient evidence to support his claim and reviews that evidence. He also argues that the district court erred by failing to explain why the State's evidence was more credible.

There is substantial competent evidence in the record to support the district court's ruling on this point. Buberwa does not argue that the district court lacked substantial competent evidence to support its decision. Rather, Buberwa argues that the district court should have found his evidence more credible. But "appellate courts do not reweigh evidence, pass on the credibility of witnesses, or resolve conflicts in the evidence." *Bellamy v. State*, 285 Kan. 346, 353, 172 P.3d 10 (2007). Buberwa also complains that the district court did not explain why it found the State's evidence more credible. But he cites no authority for the proposition that a district court must make such an explanation.

Failure to support a point with pertinent authority is like failing to brief the issue, and an issue not briefed is considered waived or abandoned. *In re Adoption of T.M.M.H.*, 307 Kan. 902, 912, 416 P.3d 999 (2018).

Buberwa also mischaracterizes or makes conclusory assertions about the evidence. One example is his focus on Edwards' "magical appearance" at the preliminary hearing. Hoyt explained at the K.S.A. 60-1507 hearing that Edwards assisted her with the preliminary hearing even though Edwards' name was not listed on the front of the transcript as officially appearing at the hearing. Buberwa asserts on appeal that Jones and Hoyt gave contradictory testimony on whether Edwards was at the preliminary hearing, with Jones swearing "under [oath] that Mr. Edwards wasn't there" and Hoyt saying that he was, and that this contradiction shows that the transcript was fabricated. But Jones testified that she did not recall Edwards being at the preliminary hearing. Not recalling someone's presence is different than testifying that a person was not present.

To support his argument that the case records were altered, Buberwa asserts that Judge Dahl's signatures on the journal entry of the preliminary hearing and a nunc pro tunc order correcting the journal entry do not match. He presented no evidence on this point at trial. And the district court found the testimony of Jones and Hoyt that Judge Dahl presided over the preliminary hearing to be more credible than Buberwa's testimony, and we do not reweigh the evidence on appeal. *Bellamy*, 285 Kan. at 353.

Buberwa also argues that at his trial one of the victims testified that she was probably dreaming but that this statement was omitted from the transcript. He says that Jones corroborated this statement in her testimony at the evidentiary hearing on the K.S.A. 60-1507 motion. This is another mischaracterization of the evidence. Jones said she could not recall whether she asked the victim whether she was dreaming.

In the end, Buberwa asks this court to reweigh the evidence and reassess witness credibility, which we will not do on appeal. *Bellamy*, 285 Kan. at 353. There is substantial competent evidence in the record to support the district court's finding that the record in the criminal case had not been altered.

CLAIMS AGAINST TRIAL COUNSEL

Buberwa next contends that the district court erred when it found that he failed to establish that his trial counsel was ineffective. More specifically, he claims his trial counsel labored under an active conflict of interest which deprived Buberwa of his statutory speedy trial rights. Buberwa's arguments in this section of his brief are somewhat scattered and disjointed, but we will try to address his claims.

There are three categories of ineffective assistance of counsel claims. One of these categories "includes situations in which the attorney actively represented conflicting interests." *Fuller v. State*, 303 Kan. 478, Syl. ¶ 1, 363 P.3d 373 (2015). There are several subcategories of conflicting interest claims, including instances of concurrent representation, conflict between the defendant and a former client, or conflict between the defendant and the attorney. 303 Kan. 478, Syl. ¶ 1. Relevant to this analysis is the *Mickens* reservation subcategory, which "is relevant where a conflict is "rooted in counsel's obligations to former clients" or "counsel's personal or financial interests.""*Fuller*, 303 Kan. at 487 (quoting *State v. Galaviz*, 296 Kan. 168, 183, 291 P.3d 62 [2012], and *Mickens v. Taylor*, 535 U.S. 162, 176, 122 S. Ct. 1237, 152 L. Ed. 2d 291 [2002]).

Buberwa makes several claims to try to support his argument that Jones had a conflict of interest. He first asserts that Jones was dishonest with him about the preliminary hearing. He recognizes that the district court found Jones and Hoyt's testimony more credible than Buberwa's. But he asserts that the district court's finding is not sound because the court did not explain why it found Jones more credible. He states

that Jones and Hoyt had "every motive to lie in order to cover the truth that there was never a preliminary evidentiary hearing in the underlying criminal case." This argument was rejected in the last section—the district court is not required to explain its credibility determinations. This court cannot reassess witness credibility.

Next, Buberwa asserts that Jones withdrew his speedy trial motions. Again, this is a point on which there was conflicting evidence. Buberwa testified that Jones withdrew his motions; Jones testified that she did not. The criminal case record does not show that the motions were withdrawn. Similarly, Buberwa asserts that Jones made threats to him and Page. The district court did not find this testimony credible. This court cannot substitute its judgment for that of the district court.

Finally, Buberwa complains that Jones had a conflict with him because she requested continuances without Buberwa's permission. Jones testified that she could not recall discussing the continuances with Buberwa but she thought that she had done so. She testified that she had no reason to believe that Buberwa objected to her asking for continuances. The district court did not make any specific findings on this point, but after generally discussing Buberwa's speedy trial rights the district court held that the credible evidence did not support a finding that Jones had a conflict of interest in representing Buberwa. Buberwa provides no basis for this court to reverse the district court's decision.

Buberwa contends that his case is like *Sola-Morales v. State*, 300 Kan. 875, 335 P.3d 1162 (2014). There, Santiago Sola-Morales alleged that his trial counsel told him that the State was requesting continuances, when really his trial counsel was requesting the continuances. Sola-Morales filed a pro se motion to dismiss based on his belief that the State was violating his speedy trial rights, but his trial counsel withdrew the motion without his consent. Sola-Morales also alleged that his trial counsel told him that the court dismissed his motion, not that counsel had voluntarily withdrawn the motion. In his K.S.A. 60-1507 motion, Sola-Morales asserted that trial counsel's failure to be honest

about who requested the pretrial continuances effectively denied him the statutory right to a speedy trial. The district court denied Sola-Morales' motion without holding an evidentiary hearing. 300 Kan. at 880.

The Kansas Supreme Court reversed and held that the facts as alleged by Sola-Morales showed that his trial counsel may have had a conflict of interest. 300 Kan. at 895. The court added that based on Sola-Morales' allegations, his trial "counsel may have sought to avoid disclosure of his purported lie by more lies—placing his own interests over his client's." 300 Kan. at 896. Thus, the court held that the district court erred in not holding an evidentiary hearing on Sola-Morales' claim. 300 Kan. at 900.

Buberwa is correct that the allegations he made against his trial counsel, Jones, are like the allegations Sola-Morales made in his case. But the fundamental difference in the two cases is that Sola-Morales' claims were denied without an evidentiary hearing while Buberwa received a full evidentiary hearing on his claims against Jones. The *Sola-Morales* court had to accept the allegation that trial counsel lied because the K.S.A. 60-1507 motion was denied without an evidentiary hearing. Here, the district court conducted an evidentiary hearing and made factual findings. This court is bound by the credibility decisions made by the district court. The district court found that Buberwa's allegation that Jones was dishonest with him was not credible. Because the district court conducted an evidentiary hearing, it did not have to accept Buberwa's allegations as true when there was conflicting evidence in the record.

Buberwa makes an alternative argument that his speedy trial rights were violated. He asserts that 91 days were attributable to the State before his trial and the statute requires the State to bring him to trial within 90 days of his arraignment. But the record shows this argument turns on a miscalculation, as only 88 days were attributable to the State. Buberwa waived arraignment on January 30, 2014. Time was charged against the State from January 30, 2014, through March 24, 2014 (54 days). On March 25, 2014,

Buberwa filed a continuance. He filed additional continuances on May 5 and May 19, 2014. Time was charged against Buberwa until July 6, 2014 (104 days). On July 7, 2014, the State requested a continuance. Time was charged against the State until July 27, 2014 (20 days). Buberwa requested another continuance July 28, 2014, which lasted until August 3, 2014 (6 days). The State requested the final continuance on August 4, 2014, and 14 days passed between that time and trial. This totals 88 days (54+20+14=88) attributable to the State and does not demonstrate a statutory speedy trial violation.

Finally, as the State points out, under K.S.A. 2013 Supp. 22-3402(g), if a trial delay was initially attributed to Buberwa but is later charged to the State for any reason, such delay will not be grounds for dismissing a case or for reversing a conviction unless not considering the delay would result in a violation of the constitutional right to a speedy trial or there is prosecutorial misconduct related to the delay. Buberwa has alleged neither. Thus, Buberwa cannot show that he is entitled to any relief on his claim that he was denied his statutory right to a speedy trial.

In sum, Buberwa's claims against his trial counsel involving the continuances and the alleged speedy trial violation come down to a credibility contest between Buberwa and Jones, and the district court found Buberwa's testimony on this subject not credible. We will not reweigh the district court's credibility findings on appeal. *Bellamy*, 285 Kan. at 353. Buberwa has no right to any relief based on his claims against his trial counsel and his claims that he was denied his statutory right to a speedy trial.

CLAIMS AGAINST APPELLATE COUNSEL

Buberwa's final claim is that his appellate counsel was ineffective for failing to raise the statutory speedy trial issue in his direct appeal. To prove ineffective assistance of appellate counsel, a movant must show that "(1) counsel's performance, based upon the totality of the circumstances, was deficient in that it fell below an objective standard of

reasonableness, and (2) the appellant was prejudiced to the extent that there is a reasonable probability that, but for counsel's deficient performance, the appeal would have been successful." *Baker v. State*, 243 Kan. 1, 7, 755 P.2d 493 (1988).

As discussed in the previous section, this argument fails because Buberwa was brought to trial within the statutory deadline and, even if he were not, he makes no argument about why a violation of his statutory speedy trial rights should have resulted in dismissal of his case or reversal of his convictions. Buberwa has no right to any relief based on his claims against his appellate counsel.

Affirmed.