

NOT DESIGNATED FOR PUBLICATION

Nos. 124,302  
125,034

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

JOSEPH DONALDSON,  
*Appellant,*

v.

STATE OF KANSAS,  
*Appellee.*

MEMORANDUM OPINION

Appeal from Sedgwick District Court; STEPHEN J. TERNES, judge. Submitted without oral argument. Opinion filed December 8, 2023. Affirmed.

*Sam S. Kepfield*, of Hutchinson, for appellant.

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

Before WARNER, P.J., ATCHESON, J., and MARY E. CHRISTOPHER, S.J.

WARNER, J.: After Joseph Donaldson was convicted of several crimes, he challenged his convictions through two K.S.A. 60-1507 motions. The district court summarily denied many of the claims in his first motion and denied the rest after an evidentiary hearing. The court then found that the second motion was filed outside the time frame permitted by K.S.A. 60-1507 and thus dismissed it. Donaldson now appeals the court's rulings on both motions. We affirm the district court's judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

Donaldson was convicted of aggravated kidnapping, aggravated battery, and criminal threat and received a controlling sentence of 592 months in prison. This court upheld his convictions and sentence on direct appeal. *State v. Donaldson*, No. 109,671, 2014 WL 4080074, at \*1-3 (Kan. App. 2014) (unpublished opinion), *aff'd* 306 Kan. 998, 399 P.3d 870 (2017). The facts giving rise to those convictions, which involved domestic violence against Donaldson's pregnant wife, were discussed at length in this court's opinion.

In November 2016, while his direct appeal was pending, Donaldson filed a K.S.A. 60-1507 motion, challenging several aspects of the jury trial and other proceedings leading to his convictions. This motion included 38 claims—27 allegations of ineffective assistance of counsel, three claims of prosecutorial error, five claims alleging error by the district court at trial, and three challenges to jury instructions. The district court appointed counsel to represent Donaldson on this motion. At a hearing in July 2019, the parties conferred and agreed that only four of these claims, all alleging ineffective assistance of counsel, involved conflicting factual contentions and thus required an evidentiary hearing.

In September 2019, Donaldson filed a second K.S.A. 60-1507 motion. This motion argued the evidence at trial was insufficient to support his aggravated kidnapping conviction. It also alleged defects in the aggravated-kidnapping charge within the charging information and challenged the district court's jurisdiction over that charge.

Consistent with the parties' earlier agreement, the district court held an evidentiary hearing in April 2021 on the four claims in Donaldson's first K.S.A. 60-1507 motion that required factual resolution. These claims asserted that Donaldson's trial attorney, Jason Smartt, provided constitutionally deficient representation because he did not file a timely

notice of an alibi witness, request a medical evaluation of Donaldson, use voluntary intoxication as a defense, or adequately explain potential plea offers to Donaldson as the case progressed.

On the morning of the evidentiary hearing, Donaldson attempted to include a fifth claim—that Smartt could not have represented Donaldson at trial because Donaldson had filed a disciplinary complaint against Smartt one week before trial. The State objected because this was the first time Donaldson had raised the disciplinary-complaint issue, meaning it was untimely and was not one of the matters the parties had agreed to discuss at the evidentiary hearing. The State told the court that, for efficiency's sake, it did not object to Donaldson putting on this evidence at the hearing, but that it would argue that this claim was untimely and meritless.

After the evidentiary hearing, the district court denied both K.S.A. 60-1507 motions. The court denied the four claims discussed at the hearing, weighing the evidence and finding that Donaldson had not demonstrated he was entitled to relief. The court also summarily denied the claims in Donaldson's first motion that had not been discussed at the hearing. And it dismissed Donaldson's second motion along with the disciplinary-complaint issue raised the morning of the evidentiary hearing because those claims had been filed outside the time frame permitted by Kansas law. Donaldson appeals.

## DISCUSSION

K.S.A. 60-1507 provides a collateral vehicle for those convicted of crimes to challenge the fairness of the underlying proceedings. See K.S.A. 2022 Supp. 60-1507(a). When someone files a motion under K.S.A. 60-1507, the district court generally must "grant a prompt hearing" to "determine the issues and make findings of fact and conclusions of law" necessary to resolve the allegations raised. K.S.A. 2022 Supp. 60-

1507(b). A district court may bypass a hearing only when "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." K.S.A. 2022 Supp. 60-1507(b).

As a general rule, Kansas law requires a person to file a K.S.A. 60-1507 motion within one year after the conclusion of their direct appeal. K.S.A. 2022 Supp. 60-1507(f)(1)(A). A court may only consider a K.S.A. 60-1507 motion filed outside the one-year period if the movant shows that consideration is necessary "to prevent a manifest injustice." K.S.A. 2022 Supp. 60-1507(f)(2). This exception is a narrow one. K.S.A. 2022 Supp. 60-1507(f)(2)(A) limits the scope of "manifest injustice" to two considerations—whether the movant has explained why they "failed to file the motion within the one-year time limitation" and whether the person "makes a colorable claim of actual innocence." If the movant has not shown that dismissal will result in manifest injustice under either of these considerations, the court must dismiss an untimely motion. K.S.A. 2022 Supp. 60-1507(f)(3).

Donaldson challenges the district court court's rulings on his K.S.A. 60-1507 motions in two ways. He argues that the court did not give appropriate consideration to some of the evidence presented at the evidentiary hearing, broadly asserting the court should have weighed the evidence in his favor and ruled differently on the four claims in his first motion. And he argues that the court improperly dismissed his second motion as untimely without any discussion as to whether dismissal would result in a manifest injustice. We find neither argument persuasive.

1. *Donaldson has not apprised us of any error in the district court's rulings on the claims in his first K.S.A. 60-1507 motion.*

Donaldson asserts that the district court erred when it denied his claims for relief on his first K.S.A. 60-1507 motion. He does not challenge the district court's rulings on

any of the claims that were summarily denied without additional evidence. See *Nguyen v. State*, 309 Kan. 96, 108, 431 P.3d 862 (2018) ("[A]n issue not raised or briefed is deemed waived and abandoned."). Rather, he claims that some of the testimony presented at the evidentiary hearing was inconsistent with the district court's rulings.

When a district court denies a K.S.A. 60-1507 motion after holding an evidentiary hearing—as the district court did here—appellate courts review factual findings for substantial competent evidence and then determine whether those findings support the district court's legal conclusions. *State v. Adams*, 297 Kan. 665, Syl. ¶ 1, 304 P.3d 311 (2013). "Substantial competent evidence is legal and relevant evidence a reasonable person could accept to support a conclusion." *State v. Talkington*, 301 Kan. 453, Syl. ¶ 3, 345 P.3d 258 (2015). Appellate courts do not reweigh the evidence, assess witness credibility, or resolve evidentiary conflicts. 301 Kan. 453, Syl. ¶ 3. Legal conclusions are subject to unlimited review. *Adams*, 297 Kan. 665, Syl. ¶ 1.

As we have noted, the district court held an evidentiary hearing on four of Donaldson's claims. Each of these claims challenged some aspect of the representation that Donaldson's trial attorney, Smartt, provided before and during the jury trial. At the evidentiary hearing, the district court heard testimony from Smartt, Donaldson, and three other witnesses, including one person who Donaldson claims would have provided him with an alibi if called at trial.

Claims alleging constitutional deficiencies of trial counsel's representation are evaluated under the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A movant therefore must show that counsel's performance was deficient and that, but for counsel's deficient performance, there is a reasonable probability the jury would have reached a different result. *Breedlove v. State*, 310 Kan. 56, 64, 445 P.3d 1101 (2019). Applying these standards, the district court found that Donaldson had not demonstrated that he was denied a fair trial due to

any of his attorney's decisions or omissions. And the court specifically found Smartt's testimony about the events leading up to and during trial was more credible than Donaldson's account.

On appeal, Donaldson's brief provides a lengthy recitation of legal standards that govern K.S.A. 60-1507 proceedings, but his argument about the district court's alleged error consists of two broad and conclusory paragraphs that provide a surface-level discussion of some of the testimony presented at the evidentiary hearing. Donaldson points generally to the evidence that was favorable to him, asserting without explanation that this evidence "would tend to undermine the court's findings."

As the appellant, Donaldson must demonstrate that the district court erred. His conclusory allegations, with no additional explanation or reasoning, do not carry this burden. See *Mundy v. State*, 307 Kan. 280, 304, 408 P.3d 965 (2018). For example:

- Donaldson's brief references testimony from a "potential alibi witness" who was never contacted by his attorney. But the district court found that evidence at the hearing showed that Donaldson had not provided his attorney with the name of this witness in time for the attorney to provide notice of an alibi or otherwise investigate the claim. Thus, the court found that the evidence at the hearing showed the attorney had not provided deficient representation. And Donaldson's appellate brief provides no explanation of why he believes this witness would have changed the jury's verdict.
- Donaldson's brief argues that he presented evidence regarding his attorney's lack of effort to present evidence of a medical condition that Donaldson claims would have undermined the State's claim. But the district court heard testimony regarding this medical condition at the hearing and found that even if it had been presented,

he had not shown a reasonable probability that the evidence would have changed the outcome of his jury trial. Donaldson does not address this finding.

- Donaldson's brief asserts that there was evidence presented at the hearing that he filed a disciplinary complaint against his attorney a week before the jury trial. But the district court found that this claim was untimely, as it was not raised in either of his K.S.A. 60-1507 motions and only came to light the morning of the evidentiary hearing. Donaldson does not dispute this ruling and provides no explanation for why this claim was timely filed or can otherwise be considered. The district court also found that the evidence showed that Smartt did not receive any notice of this complaint until after the trial concluded, and thus it did not affect his representation at trial; Donaldson does not dispute this finding.

These conclusory allegations do not apprise us of any error by the district court. Donaldson has not pointed to any evidence presented at the hearing that the court ignored or that demanded a different result. It was Donaldson's burden to present evidence at the hearing that demonstrated deficient representation by his attorney and explained how that representation affected the outcome of his trial. And it is Donaldson's burden on appeal to demonstrate why the district court erred in denying his motion. Based on the scant explanation provided, we conclude he has not made this requisite showing.

Donaldson has not shown that the district court erred when it denied his first K.S.A. 60-1507 motion.

2. *Donaldson has not provided any explanation that would allow the district court to consider his untimely second K.S.A. 60-1507 motion.*

As we have previously observed, a person generally must file a K.S.A. 60-1507 motion within one year of when a conviction becomes final—usually at the conclusion of

a direct appeal. K.S.A. 2022 Supp. 60-1507(f)(1). The Kansas habeas-corpus statute allows this one-year period to be extended if the person seeking relief shows that consideration of the motion is necessary "to prevent a manifest injustice." K.S.A. 2022 Supp. 60-1507(f)(2). But the statute limits "manifest injustice" to two considerations—whether something prevented the person from filing the motion within the one-year period and whether the person has made "a colorable claim of actual innocence." K.S.A. 2022 Supp. 60-1507(f)(2)(A).

If a person has not shown that dismissal of an untimely motion will result in manifest injustice, the statute directs the court to dismiss the motion. K.S.A. 2022 Supp. 60-1507(f)(3). A person who files a K.S.A. 60-1507 motion outside the one-year time limitation in K.S.A. 60-1507(f) and fails to assert manifest injustice is "procedurally barred from maintaining the action." *State v. Roberts*, 310 Kan. 5, 13, 444 P.3d 982 (2019).

The parties acknowledge that Donaldson's second motion was filed outside the one-year time frame in K.S.A. 2022 Supp. 60-1507(f)(1). As the district court noted, the final mandate in Donaldson's direct appeal was issued in July 2018, and Donaldson filed his second K.S.A. 60-1507 motion in September 2019. The district court found that the issues raised in Donaldson's second motion did not relate back to his earlier motion because the second motion attempted to raise new and distinct claims. Accord *Pabst v. State*, 287 Kan. 1, Syl. ¶ 7, 192 P.3d 630 (2008) (discussing relation back of K.S.A. 60-1507 claims). Donaldson does not dispute this ruling on appeal.

Rather, Donaldson argues that the district erred when it denied his second K.S.A. 60-1507 motion without explaining why this denial would not constitute manifest injustice. But this argument confuses Donaldson's burden with the role of the district court. The district court was not required to make a finding that manifest injustice would not result from its order denying Donaldson's untimely motion. Instead, because



Donaldson filed his motion outside the one-year period in K.S.A. 2022 Supp. 60-1507(f)(1), he bore the burden to show that manifest injustice would result if the district court did not consider the motion. Put another way, it was Donaldson—not the district court—who needed to explain the reason for his delay in filing his second motion or show a colorable claim of actual innocence. But Donaldson did not make either argument before the district court or on appeal. Thus, his second K.S.A. 60-1507 motion is untimely and procedurally barred.

The district court noted that Donaldson did "not set forth any reason for this court to consider his untimely filing." Donaldson's brief on appeal suffers from this same deficiency; though he argues the district court should have considered whether dismissal would result in manifest injustice, his brief does not explain, or even reference, any circumstances that would have allowed the district court to review his motion.

It was Donaldson's responsibility to show why dismissal of his untimely second K.S.A. 60-1507 motion would result in manifest injustice. He did not do so. The district court thus properly dismissed that motion under K.S.A. 2022 Supp. 60-1507(f)(3).

Affirmed.