NOT DESIGNATED FOR PUBLICATION

No. 124,380

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

DAVID A. STEVENSON,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Gove District Court; THOMAS J. DREES, district judge. Opinion filed March 31, 2023. Affirmed in part and remanded with directions.

David A. Stevenson, appellant pro se.

Michael R. Serra, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before HILL, P.J., BRUNS and WARNER, JJ.

PER CURIAM: David Stevenson is in prison for murdering his father. He appeals the denial of his second motion for habeas corpus relief under K.S.A. 60-1507. We deny any relief because he has failed to show any exceptional circumstances or manifest injustice that would compel a court to entertain this motion filed outside the statutory time limit.

Stevenson also moved for DNA testing of his father's coveralls that he wore at the time of his death. This motion was also denied by the district court. After considering the circumstances, specifically that the court failed to appoint counsel for Stevenson even

though he requested legal counsel and the State was represented, we remand this issue to the district court to appoint counsel for Stevenson and to reconsider this motion.

The extensive procedural history of this case shows that this defendant's conviction has been reviewed many times.

Stevenson's crime

Stevenson was convicted of the 2008 premeditated first-degree murder of his father. On direct appeal, his conviction was later affirmed by the Kansas Supreme Court. Details of the crime and the jury trial are found in *State v. Stevenson*, 297 Kan. 49, 50-51, 298 P.3d 303 (2013).

Collateral attacks on his conviction followed.

In 2012, Stevenson filed a motion for DNA testing under K.S.A. 21-2512. He voluntarily withdrew this request. *Stevenson v. State*, No. 116,023, 2017 WL 5180847, at *5 (Kan. App. 2017) (unpublished opinion).

In 2013, Stevenson filed a timely K.S.A. 60-1507 motion raising 27 grounds for relief. The district court appointed an attorney, Charles Worden, to represent Stevenson. Worden added claims alleging ineffective assistance of trial counsel. And Stevenson filed a pro se supplement to his K.S.A. 60-1507 motion raising further grounds for relief. The district court held an evidentiary hearing at which Stevenson called 14 witnesses and the State called 1 witness. Both sides admitted several exhibits.

The district court issued a long order denying Stevenson's motion. The court ruled it did not have jurisdiction over 11 of his claims. The court also dismissed five of the

claims because they were not timely filed. And the court ruled Stevenson did not meet his burden for relief on the remaining claims.

As for his father's coveralls, the district court ruled that Stevenson had not shown prejudice because he did not have the DNA results and he had withdrawn his request for testing. After the hearing, Stevenson filed another motion for DNA testing. The district court denied the motion, ruling a request for DNA testing was not cognizable under K.S.A. 60-1507.

Stevenson appealed to this court the district court's order denying his first K.S.A. 60-1507 motion and motion for DNA testing. From the 60-1507 motion, Stevenson raised these errors on appeal:

- his trial counsel was ineffective when counsel presented no evidence regarding unanswered phone calls made to Stevenson's father;
- the State committed a *Brady* violation when it did not turn over cell phone records;
- his trial counsel was ineffective when counsel failed to impeach a witness' testimony;
- his trial counsel was ineffective when counsel failed to challenge the State's timeline;
- his trial counsel was ineffective when counsel failed to call a favorable witness;
- his trial counsel was ineffective when counsel failed to object to the State's closing arguments;
- prosecutorial error occurred when the State failed to correct testimony it knew to be false;

- prosecutorial error occurred when the State failed to inform Stevenson that witnesses would be testifying differently; and
- prosecutorial error occurred when the State vouched for a witness' credibility during closing argument.

A panel of this court dismissed the claims because Stevenson failed to include in the record on appeal the transcripts of his jury trial. 2017 WL 5180847, at *3-4.

On the request for DNA testing, the panel ruled Stevenson's request for DNA testing in his 60-1507 motion did not comply with K.S.A. 21-2512 because he failed to allege the coveralls were in the possession of the State, or that touch DNA analysis had a reasonable likelihood of more accurate and probative results. On the posthearing motion, the panel held the district court was incorrect in ruling that the request for DNA testing was not cognizable under K.S.A. 60-1507. But because Stevenson's motion was not included in the record on appeal, the panel could not determine whether the motion complied with K.S.A. 21-2512. 2017 WL 5180847, at *5-6.

The Supreme Court denied Stevenson's motion to file a pro se petition for review on December 7, 2017, and the mandate was issued December 21, 2017.

Stevenson then seeks relief in federal court.

After that, Stevenson sought relief in federal court and filed a federal habeas petition under 28 U.S.C. § 2254. Stevenson asserted he showed actual innocence that warranted review, pointing to the failure of his trial counsel to introduce evidence of unanswered calls to his father on the day of his death, the failure of trial counsel to introduce cell tower records at trial, and the failure of his K.S.A. 60-1507 appellate counsel to include trial transcripts in the record on appeal, which this court found precluded review of his appeal.

The federal district court found that "it does not appear that the cell tower records that he identifies as evidence of his actual innocence have ever been developed." According to Stevenson, the State and his counsel had unsuccessfully attempted to get the cell tower data. The court determined, "Therefore, on the present record, the Court cannot find that petitioner has presented new evidence that supports a claim of actual innocence sufficient to excuse procedural default." The court ruled that Stevenson's request to pursue the production of cell tower records should have been presented in the first instance in state court. On September 25, 2019, the court dismissed his petition without prejudice.

Stevenson returns to state court.

On February 25, 2021, Stevenson filed his second K.S.A. 60-1507 motion, the subject of this appeal. In an "Affidavit of Fact," also filed on the 25th, he alleged a successive 60-1507 motion was necessary to cure manifest injustice because Cheryl Stewart provided ineffective assistance of counsel by refusing to move this court to allow the jury trial transcripts to be added to the record on appeal in his prior K.S.A. 60-1507 appeal. He also cited the federal court order dismissing his habeas motion without prejudice.

In his K.S.A. 60-1507 motion, Stevenson alleged he was innocent and listed three grounds for relief:

- The State relied on false testimony to show that Stevenson had the opportunity to commit the murder. Trial counsel failed to impeach Todd Stevenson's testimony concerning the time that Stevenson arrived at the farm. Trial counsel was ineffective by failing to:
    - cross-examine Todd concerning his prior statements to investigators;
    - call Tate Ricker to impeach Todd's testimony; and

    - object when the prosecutor bolstered Todd's false testimony in closing arguments. Stevenson alleged his 60-1507 counsel was ineffective for failing to ask his trial counsel about this matter at the evidentiary hearing and failing to include the issue in his trial brief.
- The victim's phone contained location data that would have exonerated Stevenson. Trial counsel was ineffective by failing to:
    - investigate and secure cell tower records;
    - present evidence of the bloody cell phone found next to the victim's body;
    - present evidence of five calls made to the victim's phone that went unanswered during the time frame that the victim could have been dead as established by the coroner;
    - point out to the jury that it was conceivable those calls went unanswered because the victim was already dead; and
    - recognize the cell phone would contain information of its location. The State failed to disclose this *Brady* material.
- The State's theory of the crime was impossible. Trial counsel was ineffective by failing to call the State's expert witness to testify. The expert had tested the truck and submitted an affidavit stating, "It would not be possible for an individual reaching across the truck-frame around the area of the pump, to lower the hoist." The prosecution did not prove it was possible for one individual to lift and hold the body while simultaneously causing the hoist to come down. If the State's theory was possible, there would be a significant amount of the perpetrator's DNA on the victim's clothing.

A fair reading of these claims reveals that they are essentially the same three issues Stevenson raised in his appellate brief in response to the denial of his first K.S.A. 60-1507 motion.

Stevenson asked for the appointment of counsel. He also moved to exhaust newly discovered evidence. He alleged the State failed to disclose cell phone location information that would have exonerated him in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). While researching cell phone location information on June 23, 2019, Stevenson discovered a case stating that virtually any activity on a cell phone generates cell phone location data automatically. The victim's phone received five calls that went unanswered between 3:49 p.m. and 6:05 p.m. on the day of his death. The coroner testified the time of death was between 2 p.m. and 5 p.m. Stevenson arrived at the farm between 4:30 p.m. and 4:45 p.m. Stevenson believed location data on the phone would show the phone did not move during the timeframe it received the unanswered calls. Therefore, the time of death had to be before the 3:49 p.m. call, when Stevenson was in Scott City, 41 miles away. Stevenson requested a forensic examination of the phone.

Finally, Stevenson moved for DNA testing of his father's coveralls under K.S.A. 21-2512. He alleged the biological material to be tested was the coveralls and they were (1) related to the investigation or prosecution that resulted in his conviction; (2) in the actual or constructive possession of the State; and (3) were not previously subjected to DNA testing and could be subjected to "'Touch DNA'" analysis that would provide a reasonable likelihood of more accurate and probative results, and would likely produce noncumulative exculpatory evidence.

The district court held a nonevidentiary hearing at which the State was represented by counsel; Stevenson appeared pro se. The hearing was to determine whether Stevenson "can proceed with any of these motions given the procedural nature of [his] case." The court called it a status conference.

Stevenson noted that he was denied his last appeal strictly because his appointed attorney did not file a motion for the trial transcripts to be part of the appeal.

The court found that the unanswered calls did not establish a time of death—rather, "That just establishes the calls weren't answered, and this was dealt with during the trial." The court found that Stevenson was just trying to raise the same issue in a different way and it was not "newly discovered evidence" because he could have presented the cell phone calls to the jury and the issue was raised in his prior 60-1507 motion.

Stevenson responded that the federal judge had ruled the cell tower information had never been presented in state court, the State's investigator had said at trial that no calls were made to the phone, and his prior 60-1507 counsel failed to include the issue in his trial brief. Stevenson argued it was new evidence because it was not presented to the jury. Stevenson stated, "The time of those cell phone calls will—this is an actual innocence claim. I did not kill my father. Under *Murray v. Carrier*, this is new evidence that wasn't presented to the jury."

Stevenson admitted he withdrew his original motion for DNA testing under K.S.A. 21-2512 because he could not pay for it. Stevenson argued that the lack of DNA on the victim's clothing would exonerate him because a substantial amount of the perpetrator's DNA would have to be on the clothing if the State's theory was correct.

The court pointed out that Stevenson had told investigators, KBI agents, and Todd that he handled the body after he found it. Stevenson admitted that was true but argued that he never touched the body below the shoulders. He argued that the perpetrator would have had to lift the body by the waist—"it would have had to almost be hugged to pick it up."

Stevenson said he pulled the body out from underneath the bed of the truck by the head and shoulders. He argued that in the JonBenét Ramsey and Tim Masters cases, the accused were exonerated because their DNA was not present, and they found somebody

else's DNA. The court ruled the testing could not lead to exculpatory evidence because Stevenson told multiple people he had handled the body. The court denied the motion for DNA testing. The court asked the State whether the coveralls were in the custody of the KBI. The State said it had not been able to confirm that.

The court ruled Stevenson's K.S.A. 60-1507 motion was untimely and successive and Stevenson did not show manifest injustice. Stevenson's argument about the cell phone was speculative, conclusory, and not newly discovered evidence because if the data existed, it existed at the time of trial. Stevenson had not shown it was more likely than not that no reasonable juror would have convicted him in light of the alleged cell phone evidence. The court dismissed Stevenson's motion.

The district court denied Stevenson's motion for DNA testing. It ruled that Stevenson did not establish the victim's clothing was in the State's possession, testing to show his lack of DNA on the victim's lower clothing would produce noncumulative or exculpatory evidence, or that touch DNA analysis would produce new or more accurate results.

Stevenson asked the court to reconsider and to alter or amend the judgments on both motions. He argued that he had asserted a claim of actual innocence and provided newly discovered evidence that was withheld or not disclosed by the State at trial. He argued res judicata did not apply because his claims were not previously adjudicated on the merits; the court failed to address his request for DNA testing; the court failed to make sufficient findings of fact and conclusions of law; and the court should have appointed him counsel under Supreme Court Rule 183(i) (2022 Kan. S. Ct. R. at 244) since the State was represented at the hearing.

In response, the State argued several points:

- The court's failure to address Stevenson's claims on the merits in his prior appeal did not amount to exceptional circumstances because Stevenson was pro se and failed to follow the rules of procedure.
- Stevenson had not established that the cell phone data existed or why the cell phone data could not have been discovered and produced at trial with reasonable diligence. Nor had he shown that the cell phone data, if it existed, would likely produce a different result on retrial.
- Stevenson was not entitled to appointment of counsel because his 60-1507 motion did not present a substantial question of law or fact.

Stevenson's motion for DNA testing did not meet the statutory requirements because he sought to test for the *absence* of biological material, he failed to establish how touch DNA analysis was either new technology or would produce more accurate or reliable results, and the lack of DNA would not produce exculpatory evidence because Stevenson told witnesses he tried to move the body.

After it adopted the State's reasoning set out above, the district court denied Stevenson's motion to reconsider. Stevenson brings this appeal.

The rules that guide us

When a district court summarily dismisses a K.S.A. 60-1507 motion, an appellate court conducts a de novo review to determine whether the motion, files, and records of the case conclusively establish that the movant is not entitled to relief. *Beauclair v. State*, 308 Kan. 284, 293, 419 P.3d 1180 (2018).

To be entitled to relief under K.S.A. 60-1507, the movant must establish by a preponderance of the evidence either: (1) the judgment was rendered without jurisdiction; (2) the sentence imposed was not authorized by law or is otherwise open to

collateral attack; or (3) there has been such a denial or infringement of the constitutional rights of the prisoner that it renders the judgment vulnerable to collateral attack. K.S.A. 2020 Supp. 60-1507(b); Rule 183(g) (2022 Kan. S. Ct. R. at 244).

The district court must hold a hearing on a K.S.A. 60-1507 motion unless the motion, files, and records of the case conclusively show the movant is not entitled to relief. K.S.A. 2020 Supp. 60-1507(b). A movant bears the burden of establishing entitlement to an evidentiary hearing. To meet this burden, a movant's contentions must be more than conclusory, and either the movant must set forth an evidentiary basis to support those contentions or the basis must be evident from the record. *Thuko v. State*, 310 Kan. 74, 80, 444 P.3d 927 (2019). If this showing is made, the court must hold a hearing unless the motion is a second or successive motion seeking similar relief. *Sola-Morales v. State*, 300 Kan. 875, 881, 335 P.3d 1162 (2014).

Under K.S.A. 2020 Supp. 60-1507(c), a sentencing court need not entertain a second or successive motion for similar relief on behalf of the same prisoner. *Beauclair*, 308 Kan. at 304; see Rule 183(d) (2022 Kan. S. Ct. R. at 243). "An inmate filing a second or successive motion under K.S.A. 60-1507 must show exceptional circumstances to avoid having the motion dismissed as an abuse of remedy." *Littlejohn v. State*, 310 Kan. 439, Syl., 447 P.3d 375 (2019). "A movant in a K.S.A. 60-1507 motion is presumed to have listed all grounds for relief, and a subsequent motion need not be considered in the absence of a showing of circumstances justifying the original failure to list a ground." *State v. Trotter*, 296 Kan. 898, Syl. ¶ 2, 295 P.3d 1039 (2013).

A defendant has one year from when a conviction becomes final to file a motion under K.S.A. 60-1507(a). K.S.A. 2020 Supp. 60-1507(f)(1). The one-year time limitation for bringing an action under K.S.A. 60-1507(f)(1) may be extended by the district court only to prevent a manifest injustice. K.S.A. 2020 Supp. 60-1507(f)(2).

Stevenson has not shown manifest injustice.

The one-year period for filing a successive K.S.A. 60-1507 motion to challenge counsel's representation in a prior K.S.A. 60-1507 proceeding begins when the mandate is issued in that prior 60-1507 proceeding. See K.S.A. 2022 Supp. 60-1507(f)(1)(C); *Rowell v. State*, 60 Kan. App. 2d 235, 241, 490 P.3d 78 (2021).

Stevenson contends his second K.S.A. 60-1507 motion was timely because he filed several motions under Gove County case No. 13-CV-5 beginning January 21, 2020—only 119 days after the federal court's order dismissing his habeas motion without prejudice.

We agree with the State that the deadline for Stevenson to allege ineffective assistance of his prior 60-1507 counsel or 60-1507 appellate counsel was December 21, 2018, i.e., one year after the mandate was issued in his first 60-1507 case under K.S.A. 60-1507(f).

Stevenson's federal habeas motion does not toll the one-year deadline under K.S.A. 60-1507. See *Clemons v. State*, 39 Kan. App. 2d 561, 566, 182 P.3d 730 (2008). The mandate was issued on Stevenson's prior K.S.A. 60-1507 motion on December 21, 2017. His one-year deadline to file a second motion was December 21, 2018. Therefore, he must show manifest injustice.

When considering whether the movant has shown manifest injustice, courts are "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." K.S.A. 2020 Supp. 60-1507(f)(2)(A). Actual innocence means that the prisoner must "show it is more likely than not that no reasonable juror would have convicted the prisoner in light of new evidence." K.S.A. 2020 Supp. 60-1507(f)(2)(A). If a court finds

manifest injustice exists, it must state the factual and legal basis for its manifest injustice finding in writing with service to the parties. K.S.A. 2020 Supp. 60-1507(f)(2)(B). Courts are to dismiss a motion as untimely filed if, after inspection of the motion, files, and records of the case, the court determines that the time limitations have been exceeded and that dismissing the motion would not equate with manifest injustice. K.S.A. 2020 Supp. 60-1507(f)(3).

Stevenson has not given a legally sufficient reason why he failed to file the motion within the one-year time limitation. As stated above, the filing of a federal habeas motion does not excuse the late filing. He had the facts to support his claim of Stewart's ineffectiveness as soon as the Court of Appeals panel dismissed his prior appeal.

We turn to Stevenson's claim of innocence.

Stevenson argues he made a colorable claim of actual innocence. When a K.S.A. 60-1507 movant advances a claim of actual innocence as a way to overcome the procedural bar of untimeliness under K.S.A. 60-1507(f), the movant is entitled to consideration of the merits of the motion if the claim of actual innocence meets the standard from *Murray v. Carrier*, 477 U.S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). *Beauclair*, 308 Kan. 284, Syl. ¶ 1.

The *Carrier* standard allows a movant to overcome a procedural bar of untimeliness "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Carrier*, 477 U.S. at 496.

> "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence. The petitioner thus is required to make a stronger showing than that needed to establish prejudice. At the same time, the showing of 'more likely than not' imposes a

> lower burden of proof than the 'clear and convincing' standard." *Schlup v. Delo*, 513 U.S. 298, 327, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).

Movants must support their claims with "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324. The court must decide the movant's innocence "'in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial.'" *Schlup*, 513 U.S. at 328.

But we must not become confused about the term "new evidence." As used in K.S.A. 60-1507, "new evidence" is not the same as "newly discovered evidence," as defined in *Moncla v. State*, 285 Kan. 826, 176 P.3d 954 (2008). New evidence can include evidence available but not presented at trial, at least when the movant claims the evidence was not presented because counsel was ineffective. For a claim of "ineffective assistance of counsel based on counsel's failure to discover or present to the fact-finder the very exculpatory evidence that demonstrates the actual innocence alleged, such evidence constitutes new evidence for purposes of the actual innocence gateway to excusing procedural default of a prisoner's habeas claim." *Skaggs v. State*, 59 Kan. App. 2d 121, Syl. ¶ 7, 479 P.3d 499 (2020).

And this is where Stevenson's arguments fail. The district court did not err in concluding the unanswered calls do not "show it is *more likely than not* that no reasonable juror would have convicted" Stevenson. (Emphasis added.) K.S.A. 2020 Supp. 60-1507(f)(2)(A). The calls could have been unanswered because Walter was deceased, he did not have his phone, or he chose not to answer it. It cannot be said that Stevenson's counsel's failure to present this evidence "probably resulted in the conviction

of one who is actually innocent." *Carrier*, 477 U.S. at 496. Thus, Stevenson cannot overcome the procedural barrier for his late filing of this motion.

This means we cannot reverse the district court's ruling on the 60-1507 motion. We must affirm.

Stevenson has asked, for the first time on appeal, to obtain postconviction discovery of the cell phone. We deny the request. He has not shown a reasonable possibility that there is discoverable information on the cell phone that could affect the outcome of this proceeding—that no reasonable juror would have convicted him.

The failure to appoint counsel for the motion for DNA testing is troubling.

Stevenson contends he was improperly denied DNA testing, which would

> "prove that his skin cells are not on [W]alter Stevenson's coveralls, which means that the defendant was not involved in any physical confrontation with his father at any time. [N]or did he place the deceased body between the truck frame and truck bed as purported by the prosecution at trial."

In other words, because of the brutal, bloody way his father was killed, the absence of Stevenson's DNA on his father's coveralls would be exculpatory.

The State contends that the statute does not allow for DNA testing to prove the lack of biological material and that Stevenson failed to show that touch DNA analysis is new technology or would produce more accurate or reliable results. The State also contends the lack of DNA on the coveralls would not produce noncumulative material evidence.

Kansas law permits a person in state custody, at any time after conviction for first-degree murder or rape, to petition the court for "forensic DNA testing (deoxyribonucleic acid testing) of any biological material" that:

(1) is related to the murder or rape investigation or prosecution;

(2) is in the possession of the State; and

(3) was not previously subjected to DNA testing or can be subjected to retesting with new DNA techniques that provide a reasonable likelihood of more accurate or probative results. K.S.A. 2022 Supp. 21-2512(a).

The statute continues, the court "shall order DNA testing . . . upon a determination that testing may produce noncumulative, exculpatory evidence relevant to the claim of the petitioner that the petitioner was wrongfully convicted or sentenced." K.S.A. 2022 Supp. 21-2512(c).

The summary denial of a petition for DNA testing under K.S.A. 2022 Supp. 21-2512 presents a question of law over which the appellate court has unlimited review. *State v. Angelo*, 316 Kan. 438, 446, 518 P.3d 27 (2022).

We offer no opinion on the merits of the motion for DNA testing but we are concerned with the district court's procedures.

When considering a motion for DNA testing under K.S.A. 2022 Supp. 21-2512, the district court "may at any time appoint counsel for an indigent applicant under this section." K.S.A. 2022 Supp. 21-2512(e). The district court is not required to appoint counsel where the files and records demonstrate conclusively that DNA testing could not lead to exculpatory evidence. *Wimbley v. State*, 292 Kan. 796, 809, 275 P.3d 35 (2011).

But when the district court holds a hearing on a motion for DNA testing at which the State is represented by counsel, the defendant should be represented by counsel unless

the defendant waived such right. *State v. Rivera*, No. 111,857, 2015 WL 5009324, at *4 (Kan. App. 2015) (unpublished opinion). We see nothing in this record that suggests that Stevenson waived his right to counsel.

The district court held a preliminary hearing (the court called it a status conference) to assist it in making the determination whether

(1) Stevenson had alleged exceptional circumstances and manifest injustice necessary for the court to review his successive out-of-time 60-1507 motion; and

(2) his motion for DNA testing met the statutory requirements.

The district court erred by holding a preliminary hearing at which the State was represented by counsel without appointing counsel for Stevenson. Even though the State's counsel offered nothing substantive at the hearing, later the court adopted the State's reasoning for denying Stevenson's motion for reconsideration. Simply put, Stevenson was unrepresented and the State was.

Because of this error, we remand Stevenson's motion for DNA testing to the district court for reconsideration and appointment of counsel, unless Stevenson waives counsel.

We affirm the district court's denial of Stevenson's 60-1507 motion.

Affirmed in part and remanded with directions.