

NOT DESIGNATED FOR PUBLICATION

No. 124,729

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

BIRGILIO CASTRO-MONCADA,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Shawnee District Court; CHERYL A. RIOS, judge. Opinion filed March 17, 2023.
Affirmed.

Gerald E. Wells, of Jerry Wells Attorney-at-Law, of Lawrence, for appellant.

Natalie Chalmers, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before ISHERWOOD, P.J., ATCHESON, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: A jury sitting in Shawnee County District Court convicted Birgilio Castro-Moncada of two off-grid felony sex crimes covered by Jessica's Law, and he is now serving consecutive hard 25 life sentences. The district court later summarily denied Castro-Moncada's habeas corpus motion under K.S.A. 60-1507 challenging those convictions. Castro-Moncada has appealed that ruling. Because his motion recited only conclusory and speculative grounds for relief rather than particularized factual assertions of constitutional error calling the jury verdicts into question, we affirm.

Given the issues on appeal, the circumstances of the underlying crimes are largely irrelevant. Two relatives of Castro-Moncada reported in 2015 that he had been sexually abusing them. The two victims were less than 14 years old, triggering the enhanced punishments under Jessica's Law, K.S.A. 2014 Supp. 21-6627. The jury heard evidence in March 2017 and convicted Castro-Moncada of one count of rape of a child under 14 years of age and one count of aggravated indecent liberties with a child. Two months later, the district court sentenced Castro-Moncada to a hard 25 term of life in prison on each count, to be served consecutively, meaning he will not be parole eligible for 50 years when he would be about 105 years old.

Castro-Moncada filed an appeal in the criminal case, and this court affirmed the verdicts and sentences with the exceptions of the district court's erroneous imposition of lifetime postrelease supervision. *State v. Castro-Moncada*, No. 117,993, 2019 WL 1303172, at *1 (Kan. App. 2019) (unpublished opinion). The Kansas Supreme Court denied review. This court's opinion contains a detailed recitation of the trial evidence and sentencing. 2019 WL 1303172, at *1-5.

Castro-Moncada timely filed his 60-1507 motion collaterally attacking the convictions. The district court summarily denied the motion without appointing a lawyer for Castro-Moncada or holding an evidentiary hearing. He has appealed the district court's ruling, and that is what we have in front of us.

A district court may summarily deny a 60-1507 motion, as happened here, if the claims in the motion and the record in the underlying criminal case conclusively show the movant is entitled to no relief. *Sola-Morales v. State*, 300 Kan. 875, 881, 335 P.3d 1162 (2014). In that circumstance, we review the district court's decision anew and without any deference, since we can review the motion and record equally well. *Bellamy v. State*, 285 Kan. 346, 354, 172 P.3d 10 (2007). But a 60-1507 motion cannot rest on conclusory or conjectural allegations—speculative assertions are not good enough to stave off summary

dismissal in the district court. The motion must set forth specific factual representations, supported with citations to the record in the direct criminal case or with evidentiary materials accompanying the motion. See *Mundy v. State*, 307 Kan. 280, 304, 408 P.3d 965 (2018); *Skaggs v. State*, 59 Kan. App. 2d 121, 131, 479 P.3d 499 (2020). Not to put too fine a point on it, Castro-Moncada fails to establish specific errors that, if proved in a hearing, would entitle him to relief.

On appeal, Castro-Moncada raises three issues drawn from his 60-1507 motion. But they lack the requisite factual particularity to be viable or otherwise fall short legally.

- First, Castro-Moncada contends the jury was "contaminated," and his lawyer was constitutionally ineffective in dealing with the situation. He claims all of the potential jurors summoned for the criminal case were related to law enforcement officers, had children, worked for the school district, or knew other potential jurors. The trial transcript does not factually support the contention that every potential juror presented one or more of those characteristics. Second, those characteristics, singly or in combination, would not disqualify someone from jury service. So the jury pool was not contaminated in some legally recognized way.

Castro-Moncada also says the district court did not record the names of the twelve jurors who ultimately were selected, heard the trial evidence, and rendered the guilty verdicts. As the State concedes, it is difficult (and probably impossible) to tell from the appellate record who served on the jury. The names of the individuals questioned by the lawyers during the jury selection process are readily apparent from the trial transcript. But the names of the twelve actually seated as jurors are not. Likewise, the record does not indicate who the lawyers peremptorily struck from the group of potential jurors or passed for cause, so we can't identify the jurors by process of elimination. But Castro-Moncada has not shown that the absence of the names of the seated jurors from the record creates some constitutional violation or now presents some form of prejudice

requiring the reversal of his convictions. The point, therefore, is without merit. An evidentiary hearing would not fill in that fatal hole.

To prevail on a 60-1507 motion based on ineffective legal assistance, a convicted defendant must show both that his or her legal representation "fell below an objective standard of reasonableness" guaranteed by the right to counsel in the Sixth Amendment to the United States Constitution and that absent the substandard lawyering there is "a reasonable probability" the outcome in the criminal case would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Phillips*, 312 Kan. 643, 676, 479 P.3d 176 (2021); *Sola-Morales*, 300 Kan. at 882; see *Chamberlain v. State*, 236 Kan. 650, Syl. ¶¶ 3, 4, 694 P.2d 468 (1985) (adopting and stating *Strickland* test for ineffective assistance). A reasonable probability of a different outcome "undermine[s] confidence" in the result and marks the criminal proceeding as fundamentally unfair. See *Strickland*, 466 U.S. at 694.

Castro-Moncada has offered no sound factual support or legal argument for prejudice on his claim the jury was "contaminated" because of the potential jurors' personal characteristics—a conclusory assertion contradicted by the record—or because the jurors' names cannot be discerned in the record—a legally empty assertion.

- Second, Castro-Moncada alleges the lawyer representing him leading up to and during the criminal trial violated Rule 1.3 (2023 Kan. S. Ct. R. at 331) of Kansas Rules of Professional Conduct requiring a lawyer to represent a client with "reasonable diligence and promptness" and Rule 1.6 (2023 Kan. S. Ct. R. at 336) requiring a lawyer to maintain client confidentiality with respect to their communications. Even assuming the lawyer breached those rules, the breaches would not automatically equate to constitutionally inadequate legal representation. See *State v. Wallace*, 258 Kan. 639, 646, 908 P.2d 1267 (1995); *Gibson v. State*, No. 121,522, 2020 WL 4379133, at *4-5 (Kan. App. 2020) (unpublished opinion). Moreover, in his motion, Castro-Moncada does not describe any

particular instances in which his trial lawyer failed to adhere to those professional standards. As we have explained, those generic assertions of lawyer incompetence or misconduct cannot support a 60-1507 claim. This claim fails.

- Finally, Castro-Moncada claims the prosecutors trying the criminal case knowingly presented false testimony from a purported victim of the alleged crimes and, thus, suborned perjury. There were two victims based on the charges, the testimony, and the verdicts. Castro-Moncada hasn't identified the victim he contends testified falsely and may be referring to both.

In any event, Castro-Moncada has offered nothing substantive to suggest either victim lied, such as evidence one or the other has recanted or has told a third party they gave false testimony, let alone that the prosecutors were in league with the victims. Rather, Castro-Moncada seems to rest his argument on an implication to be drawn from his own trial testimony that he did not sexually abuse either victim and that their accusations were part of a plot to keep him from inheriting from his wife or receiving benefits from her life insurance. That is, he relies on a speculative assumption that because he testified truthfully, the victims necessarily were liars. But Castro-Moncada's otherwise unsupported claim to be a truth teller (or, conversely, that one or both victims lied) is insufficient to go forward and does not require an evidentiary hearing on his 60-1507 motion. See *Potts v. State*, 214 Kan. 369, 520 P.2d 1259 (1974).

A contrary rule would require an evidentiary hearing on every 60-1507 motion in which the defendant sought relief because he or she testified at trial and contradicted the State's witnesses testifying as to his or her guilt. And it would put the district court hearing the motion in a position of simply reviewing a credibility determination that the jury had already made in finding the defendant guilty in the criminal case. In effect, the claim amounts to a disguised attack on the sufficiency of the evidence based on witness credibility determinations. As such it is doubly improper. First the claim could have been

brought on direct appeal and, therefore, cannot be raised in a 60-1507 proceeding. *State v. Kelly*, 291 Kan. 868, 872, 248 P.3d 1282 (2011) (60-1507 motion cannot substitute for direct appeal). Second, it would have been a loser on direct appeal because appellate courts do not reweigh witness credibility. *State v. Chandler*, 307 Kan. 657, 668, 414 P.3d 713 (2018); *State v. Franco*, 49 Kan. App. 2d 924, 936-37, 319 P.3d 551 (2014). A 60-1507 motion is not a device for animating claims that are factually and legally moribund.

Castro-Moncada has shown no error in the district court's decision to summarily deny his 60-1507 motion.

Affirmed.