

NOT DESIGNATED FOR PUBLICATION

No. 124,882

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

AUSTIN N. JONES,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; DAVID J. KAUFMAN, judge. Opinion filed April 14, 2023.
Affirmed.

Wendie C. Miller and David L. Miller, of The Law Office of David L. Miller, LLC, of Wichita,
for appellant.

Lance J. Gillett, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*,
attorney general, for appellee.

Before HURST, P.J., BRUNS and SCHROEDER, JJ.

PER CURIAM: Austin N. Jones timely appeals the district court's denial of his second K.S.A. 60-1507 motion after a preliminary hearing. Jones asserts the district court should have held a full evidentiary hearing related to his claim that habeas counsel was ineffective in failing to raise all of Jones' allegations in his first K.S.A. 60-1507 motion. Specifically, Jones claims habeas counsel was ineffective for failing to raise claims of judicial misconduct, prosecutorial misconduct, and ineffective assistance of trial counsel and direct appellate counsel. We observe no claim of exceptional circumstances to

support Jones' second successive 1507 motion containing multiple allegations of trial errors. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying facts of this case were set forth fully by our Supreme Court in *State v. Jones*, 298 Kan. 324, 324-29, 311 P.3d 1125 (2013). Relevant to this appeal, a jury convicted Jones of two counts of first-degree premeditated murder, one count of aggravated assault, and one count of criminal possession of a firearm for his actions in July 2009. For each of the two first-degree murder charges, the district court sentenced Jones to imprisonment for life with a mandatory minimum term of imprisonment of not less than 25 years. The district court also sentenced Jones to 29 months' imprisonment for aggravated assault and 9 months' imprisonment for criminal possession of a firearm. All sentences were to run consecutive.

Jones appealed his convictions to our Supreme Court, arguing for the first time on appeal he was immune from prosecution under K.S.A. 21-3219—the stand-your-ground law in effect at the time of the crime. Alternatively, Jones argued prosecutorial misconduct deprived him of a fair trial. Our Supreme Court affirmed Jones' convictions. *Jones*, 298 Kan. at 341. The mandate was issued on December 2, 2013. Because this is Jones' second K.S.A. 60-1507 motion, we set out the issues developed in his first K.S.A. 60-1507 motion, as that motion impacts our review of this K.S.A. 60-1507 motion.

Jones timely filed a pro se K.S.A. 60-1507 motion on November 6, 2014, alleging four claims. Specifically, Jones claimed:

- judicial misconduct, alleging the district court misstated facts at sentencing used to enhance his sentences;

- prosecutorial misconduct, asserting the State fabricated evidence and contaminated the crime scene;
- introduction of perjured testimony, alleging the State's witness lied under oath; and
- ineffective assistance of trial counsel for not asserting statutory immunity from prosecution under the stand-your-ground law, inadequate trial preparation by failing to subpoena a corroborating witness, and inadequate knowledge of the law.

The district court denied Jones' K.S.A. 60-1507 claims in part, stating:

"Denied in part. The defendant was found guilty and appealed said conviction. The conviction was affirmed rejecting the matter of prosecutorial misconduct. The defendant for the first time now raises the issues of judicial misconduct and perjured testimony only in conclusory statements without any support. These arguments do not provide a basis for which relief can be granted. However, the state is ordered to provide written briefs addressing the issue of defense [counsel's] failure to raise the defense of prosecutorial immunity."

In response, the State argued Jones could not establish ineffective assistance of counsel related to the prosecutorial immunity claim because he was not entitled to such immunity. The State explained Jones' "immunity claim is rooted in his belief that he was acting in self-defense, as permitted under K.S.A. 21-3211." The State claimed Jones had to timely move to dismiss before trial if he wanted to claim prosecutorial immunity and was prevented from raising the issue for the first time on appeal. Alternatively, the State asserted Jones was not prejudiced by his trial counsel's failure to assert prosecutorial immunity as the State would have defeated such claim.

The district court denied Jones relief on the prosecutorial immunity issue based on the State's written response without appointing Jones counsel or ordering him to brief the

issue. Two days after the district court denied Jones' K.S.A. 60-1507 motion, Jones filed a "Detached Memorandum in Support."

Jones' detached memorandum essentially argued: (1) The district court erred by not allowing Jones to present his theory of self-defense; (2) the State knowingly introduced perjured testimony as shown by inconsistent testimony admitted at trial; (3) Jones was entitled to prosecutorial immunity; and (4) the crime scene was unsecure and the State permitted valuable exculpatory evidence to be removed from the scene. Jones also alleged ineffective assistance of trial counsel for failure to investigate the law, call witnesses, and file a motion to dismiss asserting prosecutorial immunity.

Jones timely appealed the district court's denial of his K.S.A. 60-1507 motion to a panel of our court. The district court appointed counsel to represent Jones on his K.S.A. 60-1507 appeal. Habeas counsel explained to Jones that this court would not receive new evidence or reach a new verdict but would determine whether there was legal error affecting the validity of the convictions. Habeas counsel further explained to Jones:

"Because of the way you handled your case in district court, I was limited in what I could argue for you. Mostly, this is because your Detached Memorandum was filed on March 25, 2015, after the district court had dismissed your claims on January 14th and March 23rd. Appeals are limited to the original papers, exhibits, and transcripts that were actually on file in the district court at the time the decision was made. . . . Unfortunately, your Detached Memorandum was filed way too late for anything in it to be useful in arguing that the district court should be reversed.

"The other problem was the Notice of Appeal you filed which specifically argued that the district court wrongly decided the issue of justified use-of-force immunity. . . .

. . . .

"Because your Notice of Appeal was so specific—and because you did not file a Notice of Appeal after the district court dismissed most of your claims on January 14th, even though none was required—it is likely that you forfeited your claims of judicial misconduct, prosecutorial misconduct, and introduction of perjured testimony.

. . . .

"Unfortunately, your motion was so brief it left the district court guessing at just how you thought that the trial court misstated facts at sentencing used to enhance your sentence, that evidence was fabricated, that the crime scene was contaminated, or which State's witness lied under oath. . . .

"Particularly from all the material you sent me in March, I know that you believe that your trial counsel failed to provide you with effective assistance by failing to assert a defense of Stand-Your-Ground immunity under K.S.A. 21-3219 before your trial began. I am concerned that, by focusing on that issue so narrowly, you will not be able to obtain relief. As your direct appeal opinion notes, 'the necessary timing of an immunity assertion under K.S.A. 21-3219 raises a question of first impression. . . .'

"A more comprehensive allegation of ineffectiveness due to failure to adequately investigate and present your claim of self-defense—which you raised in your motion—is more to your advantage, assuming your Notice of Appeal can be read broadly enough to preserve it. That's why I argued in your Brief that you were entitled to an evidentiary hearing on the issue without emphasizing the immunity claim."

Habeas counsel ultimately argued on appeal:

- The district court failed to appoint Jones counsel after determining a potentially substantial issue existed in his K.S.A. 60-1507 motion;
- the district court erred in rejecting Jones' claim of ineffective assistance of trial counsel for not asserting statutory immunity from prosecution, failing to subpoena a corroborating witness, and trial counsel's lack of knowledge of the law and inadequate trial preparation; and
- the district court's journal entries did not make explicit findings of fact and conclusions of law regarding each of Jones' claims.

The district court's denial of Jones' K.S.A. 60-1507 motion was affirmed in *Jones v. State*, No. 114,601, 2016 WL 7494363, at *1 (Kan. App. 2016) (unpublished opinion). The panel found "the district court erred in failing to appoint counsel for Jones before

reviewing the State's brief." 2016 WL 7494363, at *3. But the panel found the error harmless as our Supreme Court had resolved the issue of prosecutorial immunity; thus, it was res judicata. 2016 WL 7494363, at *5. The panel also found Jones' "other claim of ineffective assistance of counsel—that counsel had failed to subpoena a corroborating witness" was not briefed and, therefore, waived and abandoned. 2016 WL 7494363, at *4. The panel found Jones' new claims of prosecutorial misconduct, alleging the State fabricated evidence and contaminated the crime scene, should have been raised on direct appeal. The panel specifically stated: "By including some, but not all of his claims of prosecutorial misconduct on direct appeal, Jones waived those not included." 2016 WL 7494363, at *5.

Our Supreme Court initially granted further review but later determined review was improvident. The mandate was issued on July 19, 2019.

On May 20, 2020, Jones filed a second pro se K.S.A. 60-1507 motion with a memorandum in support of his motion. In his motion, Jones claimed:

"(a) Direct Appeal counsel was [i]neffective for [failing to raise] self-defense arguments on direct appeal.

"(b) District Court violated [Jones'] Sixth Amendment rights to self representation, failed to give notice of hearing, opportunity to present evidence and held no communication with [Jones].

"(c) Trial Counsel was ineffective for failing to challenge the affidavit of probable cause in a Franks hearing.

"(d) Trial Counsel failed to identify and compel the State to correct the false testimony of [State's witness Johnny] Nash and [Detective Robert] Chisholm[']s false narrative prior to trial. Counsel failed to object to the false testimony at trial, argue it and preserve it as an appeal issue.

"(e) Trial Counsel failed to file a motion to dismiss 1st Degree Premeditated Murder charges and argue the facts of the case warrant Second Degree Murder.

"(f) Trial Counsel failed to investigate and failed to impeach the State[']s witnesses and their Case in Chief[.]

"(g) Trial Counsel failed to raise Immunity Defense, under K.S.A. 21-3219 and incorporate a proper defense strategy at trial.

"(h) Trial Counsel failed to object to erroneous findings by the District Court at sentencing, failed to investigate, provide mitigating evidence, [thereby] violating Jones['] rights to due process.

"(i) Appellate Counsel failed to raise on Direct Appeal the District Court[']s erroneous findings of fact for sentencing.

"(j) Appellate Counsel for first K.S.A. 60-1507 failed to raise and argue all issues that were raised and argued within [Jones'] petition for Writ of Habeas Corpus. Which were denied by the District Court[.]

"(k) Appellate Counsel failed to raise and argue [Jones'] original claim of [ineffective assistance of counsel] against trial counsel for not [issuing a] subpoena for a corroborating witness.

"(l) [Jones] must be given a new trial, due to cumulative errors or in the alternative, a new first 60-1507 and appeal, with remand, to correct the records of State[']s witness Johnny Nash and impeach Detective Robert Chisholm's misconduct against the Sedgwick County District Attorney, the District Court, the [Kansas Court of Appeals], and the Kansas Supreme Court.

"(m) [Jones] request[s] an evidentiary hearing[.]"

The district court appointed Jones counsel as it related to issues j—habeas counsel failed to raise and argue all issues raised in Jones' first K.S.A. 60-1507 motion—and k—habeas counsel failed to raise and argue a claim of ineffective assistance of trial counsel for failing to subpoena a corroborating witness. The district court scheduled a preliminary hearing on these two issues to determine whether a substantial issue existed. The district court found Jones was not entitled to relief on his 10 other claims because this was his second habeas claim and he failed to show exceptional circumstances justifying relief.

Prior to the preliminary hearing, both parties filed written responses related to the two issues the district court had not dismissed. After the preliminary hearing, the district

court took the matter under advisement and later issued an opinion denying Jones' remaining two claims of ineffective assistance of counsel, explaining Jones' claims were either conclusory, meritless, or should have been raised on direct appeal and Jones had provided no exceptional circumstances excusing his failure to raise the issues on direct appeal.

Additional facts are set forth as necessary.

ANALYSIS

Jones argues the district court should have held a full evidentiary hearing related to his claim that habeas counsel was ineffective in failing to raise all of Jones' allegations in his first K.S.A. 60-1507 motion. That is, habeas counsel was ineffective for failing to: (1) raise the issue of judicial misconduct and evidence preclusion; (2) raise the issue trial counsel was ineffective for failing to impeach the State's witnesses at trial; (3) raise and argue Jones' original claim of ineffective assistance of trial counsel for failing to issue a subpoena for a corroborating witness; and (4) raise the issue of ineffective assistance of trial counsel and ineffective assistance of appellate counsel.

A district court has three options when handling a K.S.A. 60-1507 motion:

“(1) The court may determine that the motion, files, and case records conclusively show the prisoner is entitled to no relief and deny the motion summarily; (2) the court may determine from the motion, files, and records that a potentially substantial issue exists, in which case a preliminary hearing may be held. If the court then determines there is no substantial issue, the court may deny the motion; or (3) the court may determine from the motion, files, records, or preliminary hearing that a substantial issue is presented requiring a full hearing.” *White v. State*, 308 Kan. 491, 504, 421 P.3d 718 (2018).

Here, the district court held a preliminary hearing specific to two of Jones' claims in his second K.S.A. 60-1507 motion but ultimately denied those claims. After an 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. K.S.A. 2022 Supp. 60-1507(b); Supreme Court Rule 183(j) (2023 Kan. S. Ct. R. at 244). 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 district court's conclusions of law. Appellate review of the district court's ultimate conclusions of law is *de novo*. *Khalil-Alsalaami v. State*, 313 Kan. 472, 486, 486 P.3d 1216 (2021).

A district court must set aside a movant's conviction if "there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack." K.S.A. 2022 Supp. 60-1507(b). The right to *effective* counsel is embodied in the Sixth Amendment to the United States Constitution and "plays a crucial role in the adversarial system." *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674, *reh. denied* 467 U.S. 1267 (1984); see *Chamberlain v. State*, 236 Kan. 650, 656-57, 694 P.2d 468 (1985) (adopting *Strickland*). Ineffective assistance of counsel claims can be categorized into three subgroups, one of which is a claim that defense counsel's "performance was so deficient that the defendant was denied a fair trial." *Sola-Morales v. State*, 300 Kan. 875, 882, 335 P.3d 1162 (2014). That is, "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

"To prevail on a claim of ineffective assistance of trial counsel, a criminal defendant must establish (1) that the performance of defense counsel was deficient under the totality of the circumstances, and (2) prejudice, i.e., that there is a reasonable probability the jury would have reached a different result absent the deficient performance. *Sola-Morales v. State*, 300 Kan. 875, 882, 335 P.3d 1162 (2014) (relying on

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674, *reh. denied* 467 U.S. 1267 [1984])." *State v. Salary*, 309 Kan. 479, 483, 437 P.3d 953 (2019).

"[T]here is no reason for a court deciding an ineffective assistance claim to . . . address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697. In other words, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Edgar v. State*, 294 Kan. 828, 830, 283 P.3d 152 (2012). There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment. *Strickland*, 466 U.S. at 689. The burden is on the criminal defendant to establish counsel's representation fell below an objective standard of reasonableness viewed at the time of counsel's conduct. 466 U.S. at 687-88, 690.

There are limits to the types of claims a movant can raise in a K.S.A. 60-1507 motion. See *Manco v. State*, 51 Kan. App. 2d 733, 741, 354 P.3d 551 (2015) ("[T]he legislature provided movants with the right to file [a K.S.A. 60-1507 motion], but it placed reasonable limits on that right to avoid the abuse of remedy."). Ordinarily, a K.S.A. 60-1507 motion cannot be used as a substitute for a second appeal involving mere trial errors. See *State v. Neal*, 292 Kan. 625, 630, 258 P.3d 365 (2011) ("[O]ur general rule requires a defendant to raise all available issues on direct appeal."); Supreme Court Rule 183(c)(3) (2023 Kan. S. Ct. R. at 243) ("Mere trial errors must be corrected by direct appeal, but trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal, provided exceptional circumstances excuse the failure to appeal.").

A sentencing court is also not required "to entertain a second or successive motion for similar relief on behalf of the same prisoner." K.S.A. 2022 Supp. 60-1507(c); *Beauclair v. State*, 308 Kan. 284, 304, 419 P.3d 1180 (2018). "A [movant] in 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, 904, 295 P.3d 1039 (2013).

To avoid a dismissal of a second or successive K.S.A. 60-1507 motion, the movant bears the burden of establishing exceptional circumstances. "Exceptional circumstances are unusual events or intervening changes in the law that prevented the defendant [from] raising the issue in a preceding [K.S.A.] 60-1507 motion." *Beauclair*, 308 Kan. at 304. Exceptional circumstances can include ineffective assistance of counsel claims. *Rowland v. State*, 289 Kan. 1076, 1087, 219 P.3d 1212 (2009).

Even assuming, without deciding, habeas counsel performed deficiently for failing to ask the panel of this court reviewing Jones' first K.S.A. 60-1507 appeal to remand and address the claims raised in Jones' detached memorandum, Jones fails to establish exceptional circumstances on appeal. While exceptional circumstances can be established by a showing of ineffective assistance of counsel, Jones' detached memorandum did not assert new claims but, rather, elaborated on his initial claims the district court had addressed.

Jones asserts the district court erred in denying his claims of ineffective assistance of habeas counsel and we should remand for a full evidentiary hearing. Jones argues the district court should conduct a full evidentiary hearing related to claim j of his second K.S.A. 60-1507 motion—habeas counsel failed to raise and argue all issues raised in his original habeas motion—and claim k—habeas counsel failed to raise and argue Jones' original claim of ineffective assistance of trial counsel for failing to subpoena a corroborating witness.

Habeas counsel raised three issues on appeal: (1) The district court failed to appoint counsel; (2) Jones' claim that trial counsel was ineffective in failing to raise

prosecutorial immunity required an evidentiary hearing; and (3) the district court failed to make findings of fact and conclusions of law on Jones' claims of prosecutorial misconduct. But before us, Jones asserts habeas counsel failed to raise these claims on appeal: (1) judicial misconduct; (2) prosecutorial misconduct; (3) introduction of perjured testimony; and (4) ineffective assistance of trial counsel for inadequate knowledge of the law, inadequate trial preparation, and failure to subpoena a corroborating witness. Specifically, Jones argues:

- The district court erred in finding Jones' knowledge of one of the victim's prior arrests for domestic violence, which occurred shortly before the shooting, was irrelevant to Jones' self-defense claim;
- habeas counsel was ineffective for failing to raise the issue trial counsel was ineffective for failing to impeach the State's witnesses at trial and raise a claim the State did not secure the crime scene and lost exculpatory evidence;
- habeas counsel was ineffective for failing to claim ineffective assistance of trial counsel for failure to subpoena a corroborating witness; and
- ineffective assistance of habeas counsel for failing to raise a claim of ineffective assistance of trial counsel for failure to move for a prosecutorial immunity hearing.

Jones' claims fail as he should have raised these issues on direct appeal. See *Neal*, 292 Kan. at 630; Rule 183(c)(3). On direct appeal, our Supreme Court stated:

"[T]he evidence against Jones was substantial. Two witnesses testified that Jones rushed past them, and moments later they heard gunshots. Nash testified that he saw Jones suddenly appear and shoot both victims in the back of the head. The coroner testified that both victims died from gunshot wounds to the back of the head. Jones fled after the shooting, suggesting a culpable mental state rather than a subjective belief that the shooting was necessary to defend himself, undercutting his theory of the case." *Jones*, 298 Kan. at 340.

Jones failed to provide exceptional circumstances excusing his failure to raise mere trial errors on direct appeal. In fact, Jones tries to manipulate claims of trial errors into claims of ineffective assistance of trial counsel. Habeas counsel's performance was not deficient under the totality of the circumstances for failing to brief issues that would have been procedurally barred.

Jones may not have had a perfect trial; however, the evidence against Jones was overwhelming as it uncontrovertibly showed Jones shot both victims in the back of the head. Jones continues to assert mere trial errors and does not show exceptional circumstances prevented him from raising the issues on direct appeal. The district court properly denied Jones' second habeas motion.

Affirmed.