

NOT DESIGNATED FOR PUBLICATION

No. 124,977

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

JAMES E. ROWELL,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Geary District Court; BENJAMIN J. SEXTON, judge. Submitted without oral argument. Opinion filed October 6, 2023. Affirmed.

Michael P. Whalen, of Law Office of Michael P. Whalen, of Wichita, for appellant.

Krista L. Blaisdell, county attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before BRUNS, P.J., PICKERING, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: James E. Rowell—who pled guilty to and was convicted of attempted first-degree murder, aggravated robbery, and aggravated kidnapping in 2003—appeals from the district court's denial of his second K.S.A. 60-1507 motion. In his motion, he asserts that his previous K.S.A. 60-1507 attorney provided ineffective assistance of counsel. After holding an evidentiary hearing, the district court denied Rowell's motion. On appeal, Rowell contends that the district court applied the incorrect test in determining that he had not established manifest injustice to justify the untimely filing of his motion. Based on our review of the record on appeal, we find that the district court did not err in denying Rowell's K.S.A. 60-1507 motion. Thus, we affirm.

FACTS

When Rowell was 17 years old, he was charged as a juvenile for his role in the stabbing and beating that occurred on April 11, 2002. Subsequently, the State filed a motion to have Rowell certified as an adult under K.S.A. 38-1636 because he was charged with multiple person felonies and with using a firearm in the commission of those felonies. On May 22, 2002, the district court found that Rowell met the statutory criteria and that he had failed to successfully rebut the presumption for prosecution as an adult. Accordingly, Rowell was certified as an adult.

Subsequently, the State charged him with attempted first-degree murder, aggravated robbery, aggravated kidnapping, conspiracy to commit murder, aggravated robbery, conspiracy to commit aggravated kidnapping, and possession of marijuana. After plea negotiations, Rowell entered a plea of no contest to attempted first-degree murder, aggravated robbery, and aggravated kidnapping. In exchange for his plea, the State dismissed the other charges. The district court accepted Rowell's plea and found him to be guilty on the amended charges. Later, the district court sentenced Rowell to a presumptive term of imprisonment for 310 months.

Rowell filed a direct appeal from his sentence. However, he conceded that he had been sentenced in accordance with the Kansas sentencing guidelines. As a result, this court dismissed his appeal for lack of appellate jurisdiction. *State v. Rowell*, No. 92,560, 2005 WL 824101, at *1 (Kan. App. 2005) (unpublished opinion). The mandate was filed on May 16, 2005.

Nearly eight years after sentencing, on January 24, 2011, Rowell filed a pro se motion to correct illegal sentence. Specifically, he alleged due process violations and challenged the validity of his certification as an adult. The district court denied Rowell's

motion, and a panel of this court affirmed. In doing so, the panel found that the district court had appropriately considered the eight factors for certification set forth in K.S.A. 38-1636(e). The panel also found that the evidence in the record supported the district court's findings as well as its determination certifying Rowell as an adult. *State v. Rowell*, No. 106,713, 2012 WL 4794652, at *2-3 (Kan. App. 2012) (unpublished opinion).

On July 10, 2014, Rowell filed a pro se K.S.A. 60-1507 motion, arguing in part that he received ineffective assistance of trial counsel during the adult certification process. The district court appointed legal counsel to represent him on the motion. After the attorney conceded that Rowell's motion was not timely filed, the district court summarily dismissed the motion. The summary dismissal was affirmed by a panel of this court on appeal. In doing so, the panel found that Rowell had failed to assert manifest injustice for his belated filing and that his claims of ineffective representation by trial counsel were without merit. *Rowell v. State*, No. 115,711, 2017 WL 4216152, at *6 (Kan. App. 2017) (unpublished opinion). The mandate was issued on September 13, 2018.

On October 17, 2019, Rowell filed a second pro se K.S.A. 60-1507 motion. In this motion, Rowell alleged that his prior K.S.A. 60-1507 attorney was ineffective for conceding that his first motion was untimely filed. The district court summarily dismissed the second motion as untimely and found that there was no assertion of manifest injustice or a colorable claim of actual innocence. On appeal, a panel of this court agreed with Rowell that his second K.S.A. 60-1507 motion had been timely filed and remanded the matter to the district court for further proceedings. *Rowell v. State*, 60 Kan. App. 2d 235, 237-42, 490 P.3d 78 (2021).

On remand, the district court held an evidentiary hearing and heard testimony from Rowell and his prior K.S.A. 60-1507 attorney. Rowell testified—among other things—that he believed he could file his first K.S.A. 60-1507 motion out of time for two reasons: (1) adult certification is a matter of subject matter jurisdiction and can be

addressed at any time; and (2) that he was told that he could not file a K.S.A. 60-1507 motion while he had a motion to correct illegal sentence pending. He also testified that had his prior K.S.A. 60-1507 attorney communicated with him, he would have told her that he believed his challenge to adult certification qualified as a challenge to subject matter jurisdiction that could be raised at any time.

In her testimony, the prior K.S.A. 60-1507 attorney indicated that she could not recall any conversations or contact she may have had with Rowell when she represented him. Further, the attorney testified that she had been unable to review her case file in the matter prior to the hearing and was unsure of what contact she may have had with Rowell. However, the attorney testified that she always answered written correspondence and accepted any phone calls she received from the jail. She testified that it was her belief that she would have reviewed the case with her supervisor and would have considered manifest injustice before representing to the district court that Rowell's K.S.A. 60-1507 motion was not timely filed.

On rebuttal, Rowell testified that he never had any conversations with his prior K.S.A. 60-1507 attorney nor did he receive any correspondence from her. He also testified that she failed to file a notice of appeal from the dismissal of the K.S.A. 60-1507 motion and that he did not know his motion had been dismissed until about a year later. He testified that—as a result of his prior attorney failing to communicate with him—he was unable to file a timely notice of appeal. At the conclusion of the hearing, the district court requested findings of fact and conclusions of law from both parties and took the matter under advisement.

On January 19, 2022, the district court issued a 13-page decision denying Rowell's K.S.A. 60-1507 motion. In doing so, the district court found that Rowell's prior K.S.A. 60-1507 attorney's performance had been deficient. Nevertheless, the district court found that "there was [no] reasonable probability that the outcome of the proceeding would

have been different absent the deficient performance." The district court also found that Rowell's prior K.S.A. 60-1507 motion was based on his allegation that manifest injustice occurred when he was certified as an adult in 2002 and, as such, he had "over 15 years in which to cultivate a manifest injustice claim" but was unable to do so.

The district court found there was no indication that Rowell's trial counsel had provided "substandard" representation during the certification process. Moreover, the district court found that Rowell had failed to come forward with "the names of witnesses, proffers of testimony or any new or additional evidence to illustrate how he could rebut the adult certification presumption." Furthermore, the district court found that Rowell had not asserted any colorable claim of actual innocence. Ultimately, in denying the motion, the district court concluded that there was no "evidence to show that the probability of the outcome of the proceeding would have been different absent the deficient performance."

Thereafter, Rowell filed a timely notice of appeal.

ANALYSIS

On appeal, Rowell contends that the district court erred in denying his K.S.A. 60-1507 motion. He argues that the district court did not correctly assess his allegations of manifest injustice to justify the filing of his untimely motion. After a full evidentiary hearing on a K.S.A. 60-1507 motion—as the district court conducted in this case—we review the record on appeal to determine whether the district court's findings of fact are supported by substantial competent evidence and are sufficient to support its conclusions of law. Our 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).

It is undisputed that Rowell did not file his first K.S.A. 60-1507 motion for more than nine years after the statutory deadline. However, a district court may extend the

deadline for filing a K.S.A. 60-1507 motion to prevent manifest injustice. K.S.A. 2022 Supp. 60-1507(f)(2). In his second K.S.A. 60-1507 motion—which is the subject of this appeal—Rowell asserts that the attorney appointed to represent him in his first K.S.A. 60-1507 motion was ineffective. Although the district court found after an evidentiary hearing that his first K.S.A. 60-1507 attorney's performance was deficient, it ultimately determined that Rowell had failed to show that he was entitled to relief because there was not a reasonable probability that the outcome of the proceeding would have been different absent the alleged deficient performance by counsel.

We analyze claims of ineffective assistance of counsel under the two-prong test articulated in *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674, *reh. denied* 467 U.S. 1267 (1984). Under the first prong, a defendant must show that counsel's performance was deficient. If successful on the first prong, we must determine whether there is a reasonable probability that—absent counsel's errors—the result would have been different. *State v. Evans*, 315 Kan. 211, 217-18, 506 P.3d 260 (2022). Because the district court found that Rowell met the first prong of the *Strickland* analysis and the State has not challenged this determination, we will move directly to consideration of the second prong.

As discussed above, Rowell's first K.S.A. 60-1507 motion was not filed until 2014. But he attempts to justify the untimely filing on the ground of manifest injustice. At the time Rowell filed his motion, the applicable test for determining whether manifest injustice exists was set forth in *State v. Vontress*, 299 Kan. 607, 616, 325 P.3d 1114 (2014). In *Vontress*, the Kansas Supreme Court directed us to apply a totality of the circumstances test to determine manifest injustice. In doing so, we are to consider a nonexhaustive list of factors that include three main factors: (1) whether the movant provides persuasive reasons or circumstances that prevented him or her from filing the K.S.A. 60-1507 motion within the statutory time limit; (2) whether the merits of the movant's claim raises substantial issues of law or fact deserving of the district court's

consideration; and (3) whether the movant sets forth a colorable claim of actual innocence. 299 Kan. at 616.

In 2016, the Kansas Legislature amended K.S.A. 60-1507 and limited the analysis of manifest injustice to merely two factors: (1) a movant's reasons for the failure to timely file the motion; and (2) a claim of actual innocence. See L. 2016, ch. 58, § 2. Significant to the present case, our Supreme Court held in *White v. State*, 308 Kan. 491, 498-99, 421 P.3d 718 (2018), that the test set forth in the amended statute does not apply retroactively to K.S.A. 60-1507 motions filed prior to the effective date of the statutory amendment. Accordingly, we will apply the test for manifest injustice in this case as set forth in *Vontress*.

Because the question of whether a movant has established manifest injustice is a question of law, our review is de novo review. *Khalil-Alsalaami*, 313 Kan. at 486. In performing our review, we first consider the reasons Rowell alleged for his failure to file his first K.S.A. 60-1507 motion in a timely manner. We note that Rowell does not provide argument regarding this factor in his brief and, as a result, it has been abandoned. *In re Marriage of Williams*, 307 Kan. 960, 977, 417 P.3d 1033 (2018).

Regardless, even if he had made an argument in his brief consistent with his testimony at the evidentiary hearing, we do not find his rationale for the delay in filing his first K.S.A. 60-1507 motion to be persuasive. Rowell does not explain why he waited nine years to file his initial K.S.A. 60-1507 motion. The decision from this court in the appeal from Rowell's motion to correct illegal sentence was filed on October 5, 2012. Hence, even if he believed he must wait until that appeal was final to file his K.S.A. 60-1507 motion, this does not justify him waiting until July 2014 to do so.

Next, *Vontress* directs us to consider whether the merits of the movant's claim raise substantial issues of law or fact. Like the district court, we do not find that the

record establishes trial counsel's representation of Rowell at his adult certification hearing was deficient. In addition, based on our review of the record, we agree with the district court that Rowell has failed to come forward with evidence to establish that he could have rebutted the presumption of adult certification in his underlying criminal case. In addition, a panel of this court previously rejected Rowell's claims that the district court did not have jurisdiction to sentence him as an adult based on his claim that the district court failed to make statutorily mandated findings during the certification process. That panel found that the record showed the district court properly considered the eight factors and the evidence in support of each factor before certifying Rowell for prosecution as an adult. *Rowell*, 2012 WL 4794652, at *3.

On appeal, Rowell argues that he "would have wanted to have his mother testify [at his certification hearing] as well as fellow church members and teachers" in an attempt to show why he should not be prosecuted as an adult. However, he does not proffer their testimony or explain why it is likely that these witnesses would have changed the district court's certification decision. The record reflects that in considering certification, the district court found that six of the eight factors under K.S.A. 38-1636(e) favored adult prosecution under the circumstances presented.

Significantly, Rowell does not assert that the district court's findings at the certification hearing were incorrect or that they were not supported by the evidence. Likewise, he has not shown how additional testimony would have changed the outcome of the certification hearing. As a result, we find that the second *Vontress* factor does not weigh in Rowell's favor because he has not met his burden to show prejudice. Additionally, we find that he has not met the third *Vontress* factor because he has not asserted a colorable claim of actual innocence. Finally, we do not find that any other factors justify a finding of manifest injustice or prejudice.

We, therefore, conclude that the district court did not err in denying Rowell's second K.S.A. 60-1507 motion.

Affirmed.