

NOT DESIGNATED FOR PUBLICATION

No. 125,321

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

LARRY G. EVANS JR.,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JEFFREY SYRIOS, judge. Opinion filed May 26, 2023.
Affirmed.

Mark Severt, of Derby, for appellant, and *Larry G. Evans Jr.*, appellant pro se.

Lance J. Gillett, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

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

PER CURIAM: Larry G. Evans Jr. appeals from the district court's summary denial of his K.S.A. 60-1507 motion after he was convicted of attempted aggravated human trafficking and two counts of sexual exploitation of a child. Although Evans filed a direct appeal, it was summarily dismissed by the Kansas Supreme Court. On appeal in this case, Evans argues that both his trial and appellate counsel were ineffective for failing to argue that his criminal history score was incorrect. However, we find that his criminal history score was correct as a matter of law and that his attorneys were not ineffective. We also find that the district court had a factual basis to accept Evans' plea. Thus, we affirm.

FACTS

On April 4, 2017, the State charged Evans with one count of aggravated human trafficking in violation of K.S.A. 2016 Supp. 21-5426(b)(4)(c), (2) and two counts of sexual exploitation of a child in violation of K.S.A. 2016 Supp. 21-5510(a)(2), (b)(1)(A). Evans subsequently entered into a plea agreement with the State in which he agreed to plead guilty to a reduced charge of attempted aggravated human trafficking and the two counts of sexual exploitation of a child. In exchange, the State agreed to recommend that Evans be sentenced using the mid-range number in the appropriate Kansas Sentencing Guidelines grid box.

At the plea hearing, the district court read the amended complaint—which set out the essential elements and factual basis for each crime—to Evans. In addition, the State supplemented the factual basis for the plea. The district court then asked Evans if the facts read from the amended complaint and as supplemented by the State were true. In response, Evans said, "Yes, sir." At the conclusion of the hearing, the district court accepted Evans' plea and found him guilty of the charges set forth in the amended complaint.

Although the parties anticipated that Evans' criminal history score would be C, the presentence investigation (PSI) report revealed that Evans' criminal history score was actually B. As explained in the report, Evans had 2 prior person felony convictions among his 22 total prior convictions. Specifically, he was convicted of fleeing or attempting to elude a law enforcement officer in Sedgwick County Case No. 99 CR 2797 and of voluntary manslaughter in Sedgwick County Case No. 99 CR 3329. Both crimes were person felonies at the time and continue to be today. See K.S.A. 1998 Supp. 8-1568(b)(1)(D), (c)(4); K.S.A. 8-1568(c)(2); K.S.A. 21-3403; K.S.A. 2022 Supp. 21-5404(b).

Prior to the sentencing hearing, Evans filed a motion for departure in which he asked for either a dispositional or durational departure. Evans pointed out that his prior fleeing or attempting to elude conviction had previously been treated as a nonperson felony. He also pointed out that if his criminal history score is B instead of C, the presumptive sentence for his current crimes of conviction was substantially higher. In addition, Evans argued that the district court should take into consideration that his prior person felony convictions were about 20 years old.

On October 4, 2019, the district court held a sentencing hearing. Although both parties agreed that Evans' criminal history score was B, Evans argued he should either be placed on probation or receive a sentence consistent with a criminal history score of C. His trial counsel explained that both parties were under the mistaken impression that Evans' criminal history score would be C during their plea negotiations because they were unaware of the previous misclassification of the fleeing or attempting to elude conviction. Evans' trial counsel also emphasized that the prior person felony convictions occurred 20 years ago.

In response, the State argued that the prior misclassification of Evans' fleeing or attempting to elude conviction did not warrant either a dispositional or durational departure sentence in this case. The State agreed that Evans' prior fleeing or attempting to elude conviction had previously been misclassified but that it had always been a person felony as a matter of law. Moreover, the State argued that Evans already received the benefit of the misclassification because the district court did not count his prior fleeing or attempting to elude conviction as a person felony in his voluntary manslaughter case.

After hearing the arguments of counsel, the district court denied Evans' motion for departure. But it did apply the low number sentence in the grid box and sentenced Evans to 206 months in prison on the attempted aggravated human trafficking conviction. The

district court also sentenced Evans to concurrent sentences of 31 months in prison for each count of sexual exploitation of a child. Thereafter, Evans filed a direct appeal.

In his direct appeal, Evans' appellate counsel moved for summary disposition on the sole issue presented—whether the district court erred in denying the motion for dispositional or durational departure. The appeal was transferred to the Kansas Supreme Court under K.S.A. 20-3018(c) and Supreme Court Rule 7.041A(b) (2020 Kan. S. Ct. R. 47). On July 27, 2020, the Kansas Supreme Court summarily dismissed Evans' direct appeal and filed a mandate on August 25, 2020.

The following year, Evans filed a motion to correct an illegal sentence, arguing the district court improperly calculated his criminal history score because of the misclassification of his prior fleeing or attempting to elude conviction. Evans argued that because this offense had previously been—albeit incorrectly—classified as a nonperson felony, the district court should not have treated it as a person felony in this case. The district court summarily denied the motion because the sentence in Evans' current case was based on his actual criminal history. Evans appealed from the district court's denial of his motion to correct an illegal sentence—as well as the denial of his related motions—and that case is pending before a different panel of this court. See *State v. Evans*, No. 125,026.

This appeal arises out of the filing of a K.S.A. 60-1507 motion by Evans on August 27, 2021. In his motion, Evans argued that both his trial counsel and appellate counsel were ineffective for not challenging the classification of his prior fleeing or attempting to elude conviction as a person felony. Evans later filed a declaration in support of his K.S.A. 60-1507 motion. In his declaration, Evans argued that the State had previously reduced his fleeing or attempting to elude conviction from a person felony to a nonperson felony.

The State responded to Evans' motion by pointing out that the crime of fleeing or attempting to elude was a person felony in 1999 and that it continues to be a person felony. Although the State acknowledged the misclassification of the fleeing or attempting to elude conviction in prior cases, it asserted that the conviction was properly classified in the underlying case and that Evans was properly sentenced. As a result, the State asserted that neither trial counsel nor appellate counsel could be faulted for not arguing that the scoring mistake should be repeated in this case.

On November 17, 2021, the district court summarily denied Evans' K.S.A. 60-1507 motion. In doing so, the district court found:

"[Evans] fails to show a deficiency concerning the action of either trial or appellate counsel as it relates to criminal history classification. [Evans'] criminal history was initially scored incorrectly in 2000. However, since then and specific to the underlying criminal case here, the error was discovered and the reclassification of the flee and elude conviction to a person crime was corrected. In fact, [Evans] agreed at sentencing that his criminal history score was B, thereby acknowledging the corrected 'person' designation for the flee and elude. Neither trial nor appellate counsel had or has any legal authority to change the classification. Neither counsel was deficient for not contesting the lawful classification."

Evans then requested reconsideration, alteration, or amendment of the district court's ruling. After the district court denied these requests, Evans filed a timely notice of appeal.

ANALYSIS

Summary Denial of K.S.A. 60-1507 Motion

On appeal, Evans contends that the district court erred in summarily denying his K.S.A. 60-1507 motion and asks that we remand this matter to the district court for an

evidentiary hearing. He also asks us to disregard the Kansas Supreme Court's decision in *State v. Terrell*, 315 Kan. 68, Syl. ¶ 2, 504 P.3d 405 (2022), in which our Supreme Court held that all prior convictions are to be classified as person or nonperson as of the time the new crime is committed. In response, the State contends that the district court appropriately dismissed Evans' K.S.A. 60-1507 motion because the record conclusively establishes that he is not entitled to relief. In particular, the State points to the fact that his prior conviction for fleeing or attempting to elude a law enforcement officer was not only a person felony in 1999 but continues to be a person felony. As a result, the State asserts that Evans' criminal history score in the underlying case is accurate and, as a result, Evans cannot show that the performance of his trial or appellate counsel was deficient or prejudiced his rights.

When the district court summarily dismisses or denies a K.S.A. 60-1507 motion, we conduct 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). As the movant, Evans has the burden of establishing that an evidentiary hearing is warranted. To do so, he must come forward with "more than conclusory contentions and must state an evidentiary basis in support of the claims or an evidentiary basis must appear in the record." *Holmes v. State*, 292 Kan. 271, Syl. ¶ 2, 252 P.3d 573 (2011).

To establish ineffective assistance of trial counsel, a movant must satisfy what is commonly referred to as the *Strickland* test. In order to prevail, the person alleging that counsel was ineffective must show: (1) that counsel's performance was deficient under the totality of the circumstances; and (2) that the defendant suffered prejudice because of that performance. *State v. Salary*, 309 Kan. 479, 483, 437 P.3d 953 (2019) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 [1984]). The *Strickland* test also applies to claims of ineffective assistance of appellate counsel. See *Khalil-Alsalaami v. State*, 313 Kan. 472, 526, 486 P.3d 1216 (2021).

It is important to recognize that judicial review of the legal representation provided by attorneys to their clients is highly deferential. We are not to review an attorney's performance based on hindsight. Rather, we are to assess a counsel's performance from the attorney's perspective at the time the professional services were rendered. As a result, a movant must overcome a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689; *State v. Dinkel*, 314 Kan. 146, 148, 495 P.3d 402 (2021) (citing *Fuller v. State*, 303 Kan. 478, 488, 363 P.3d 373 [2015]).

To establish prejudice, a movant must show a reasonable probability—based on the totality of the evidence—that the alleged deficient performance by counsel affected the outcome of the proceedings. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *Khalil-Alsalaami*, 313 Kan. at 486. Even if the legal representation were deficient, a movant has no right to relief if the result would not have been different with effective counsel. *Edgar v. State*, 294 Kan. 828, 843-44, 283 P.3d 152 (2012).

In his K.S.A. 60-1507 motion, Evans argued that both his trial and appellate counsel were ineffective for failing to challenge his criminal history score. However, the record establishes that the criminal history score determined by the district court in the underlying case was accurate as a matter of law. In *State v. Terrell*, the Kansas Supreme Court expressly held "that all prior convictions, whether out-of-state, pre-guidelines, or amended post-guidelines, be classified as person or nonperson as of the time the new infraction is committed." 315 Kan. at 75. In other words, regardless of how Evans' prior conviction for fleeing or attempting to elude may have been classified previously, Kansas courts are required to classify this offense as of the time he committed his crimes in the current case.

It is undisputed that Evans committed his crimes in the underlying case in March 2017. At that time, K.S.A. 2016 Supp. 8-1568(c)(2) provided that fleeing or attempting to elude a law enforcement officer was a person felony. As such, the court services officer who prepared the PSI report and the district court were required by law to classify the prior fleeing or attempting to elude conviction as a person felony for the purposes of determining Evans' criminal history score. Therefore, there was no legal basis for Evans' trial counsel or his appellate counsel to challenge his criminal history score in the underlying case.

We pause to note that even in 1999—when Evans committed his prior offense—the crime of fleeing or attempting to elude a law enforcement officer was a person felony. See K.S.A. 1998 Supp. 8-1568(b)(1)(D), (c)(4). Furthermore, the plea agreement that Evans entered into in that case identified fleeing or attempting to elude as a person felony. The fact that the crime was misclassified as a nonperson felony in the complaint and at sentencing does not change the fact that as a matter of law the crime of fleeing or attempting to elude a law enforcement officer was—and continues to be—a person felony as a matter of law.

Notwithstanding, Evans attempts to avoid this result by arguing that the prosecutor in his 1999 case agreed to reduce the classification of his fleeing or attempting to elude offense to a nonperson felony. This argument is inconsistent with the plea agreement that Evans entered into in that case which—as indicated above—correctly stated that the crime of fleeing or attempting to elude was a person felony. Furthermore, we are aware of no legal authority that would allow a prosecutor or a district court to change the classification of a crime as established by the Kansas Legislature.

In his supplemental brief, Evans cites *State v. Ratley*, 253 Kan. 394, Syl.¶ 4, 855 P.2d 943 (1993), in support of the proposition that a prosecutor or district court "has the authority to dismiss any charge or reduce any charge." Although this is true, this does not

mean that a prosecutor or the district court has the authority to change the classification of a crime. See, e.g., *State v. Williamson*, 253 Kan. 163, 165-66, 853 P.2d 56 (1993); *State v. Turner*, 223 Kan. 707, 709, 576 P.2d 644 (1978); *State v. Pruett*, 213 Kan. 41, 47, 515 P.2d 1051 (1973); *State v. Bird*, 59 Kan. App. 2d 379, 391-92, 482 P.3d 1157 (2021). Rather, the establishment of the elements of a crime as well as the classification of crimes are legislative functions. See *State v. Logan*, 198 Kan. 211, 216, 424 P.2d 565 (1967); see also K.S.A. 2022 Supp. 21-6802.

Nevertheless, it is clear that the district court corrected the erroneous classification of Evans' prior fleeing or attempting to elude conviction in the underlying case. The record establishes that the 1999 conviction was properly classified as a person felony in the PSI report, and the district court appropriately determined Evans' criminal history score at sentencing. As a result, neither trial counsel nor appellate counsel had a legal basis to object to Evans' criminal history score of B in the underlying case. Accordingly, we conclude that the motion, files, and records of the case conclusively establish that Evans is not entitled to relief pursuant to his K.S.A. 60-1507 motion.

Factual Basis for Guilty Plea

For the first time on appeal, Evans contends that the district court lacked a sufficient factual basis to find him guilty of attempted aggravated human trafficking. Although the argument in his supplemental pro se brief is difficult to follow, it appears that Evans is arguing that the district court's acceptance of his guilty plea to the reduced charge of attempted aggravated human trafficking pursuant to his plea agreement constituted an "acquittal" of the original charge of aggravated human trafficking. And, as a result, he suggests that the district court lost jurisdiction to sentence him for attempted aggravated human trafficking.

In response, the State contends that Evans cannot raise this new issue for the first time on appeal. As the State points out, Evans did not raise this issue in either his K.S.A. 60-1507 motion or in his subsequent declaration filed in support of his motion. Consequently, the State argues that asserting this issue now is untimely and points out that Evans has not alleged manifest injustice. In the alternative, the State argues that to the extent that Evans is suggesting a deficiency in the factual basis for his convictions, the record does not support such an assertion.

Whether jurisdiction exists is a question of law over which this court's scope of review is unlimited. *State v. Lundberg*, 310 Kan. 165, 170, 445 P.3d 1113 (2019). As a general rule, appellants are not permitted to raise new issues on appeal. However, "certain issues, such as subject matter jurisdiction or an illegal sentence can be raised at any time regardless of whether the issue was presented to the district court." *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019). Because Evans frames this new issue as one involving subject matter jurisdiction, we will address his argument on the merits even though it was not previously presented to the district court.

K.S.A. 2022 Supp. 22-3210(a) provides that a district court may accept a defendant's plea when:

"(1) The defendant or counsel for the defendant enters such plea in open court; and

"(2) in felony cases the court has informed the defendant of the consequences of the plea, including the specific sentencing guidelines level of any crime committed on or after July 1, 1993, and of the maximum penalty provided by law which may be imposed upon acceptance of such plea; and

"(3) in felony cases the court has addressed the defendant personally and determined that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea; and

"(4) the court is satisfied that there is a factual basis for the plea."

Likewise, the Kansas Supreme Court has held that a factual basis for a plea may be satisfied:

"(1) by a complaint or information given or read to the defendant which sets forth the factual details and essential elements of the particular crime charged; (2) by the prosecutor or defendant's factual statement presented to the court at the plea hearing; or (3) based on the evidence presented at a preliminary hearing at which the same judge presided." *State v. Ehaben*, 294 Kan. 807, 813, 281 P.3d 129 (2012).

A review of the transcript of the plea hearing in the underlying case reveals that the district court read the amended complaint—which set forth the elements of the crimes charged as well as the factual basis for each crime—to Evans before accepting his guilty plea. In addition, the State supplemented the information in the amended complaint by providing a factual statement. Furthermore, Evans personally told the district court that the facts alleged in the amended complaint—as supplemented by the prosecutor's statements—were true.

Specifically, the district court advised Evans:

"THE COURT: Count 1 states that here in Sedgwick County, Kansas, on or between March 17th, 2017, and March 28th, 2017, you did commit any overt act, to wit or specifically, offer individual by the initials ANW, 17 years of age, to post ads with ANW's breast and vagina area exposed so ANW . . . could earn money for sex and to hold her money, toward the perpetration of a crime, specifically, aggravated human trafficking, as defined under Kansas law, and that you intended to commit such crime but failed in the perpetration thereof or was prevented or intercepted in executing such crime.

"Count 2 states that on or about March 23rd, 2017, here in Sedgwick County, Kansas, you did unlawfully possess a visual depiction, including a photograph, film, video picture, digital or computer-generated image or picture, whether made or produced by electronic, mechanical or other means, in which a child under 18 years of age is shown

or heard engaging in sexually explicit conduct, with the intent to arouse or satisfy the sexual desires or appeal to the prurient interest of yourself or any other person.

"Count 3 states that on or about March 23rd, 2017, here in Sedgwick County, Kansas, you did unlawfully possess a visual depiction, including a photograph, film, video picture, digital or computer-generated image or picture, whether made or produced by electronic, mechanical or other means, in which a child under the age of 18 years of age is shown or heard engaging in sexually explicit conduct, with the intent to arouse or satisfy the sexual desires or appeal to the prurient interest of yourself or any other person.

"More specifically, you did speak with ANW, said that you could help her make some money towards what is defined as human trafficking, made arrangements to have her picked up and brought to an apartment to go forward with that activity. There were multiple text messages from you instructing her how to make money, to set up tricks, talked about rates, and so forth."

The district court then asked the State if it had "any additional evidence along those lines with specificity that would support those allegations?" The prosecutor responded:

"I would just supplement [that] defendant at the time of these actions was over the age of 18, with a date of birth September 16th, 1974, and the victim in this case with the initials ANW has a year of birth of 2000, so she was under the age of 18 when these events took place.

"THE COURT: Anything else in terms of the depictions or visual images?"

"[PROSECUTOR]: I will just note one of the visual images is of ANW's breast. There's a series of images, but then the second image is of her vaginal area.

Next, the district court spoke directly to Evans:

"THE COURT: Very good. Now, Mr. Evans, with my statements, reading the Complaint, the affidavit, and then the supplemental facts given by [the prosecutor], are those facts true?"

"THE DEFENDANT: Yes, sir."

Based on our review of the record, we conclude that the district court had an adequate factual basis on which to accept Evans' plea on the reduced charge of attempted aggravated human trafficking as well as on the two charges of sexual exploitation of a child. We also conclude that the district court appropriately addressed Evans personally and determined that his plea was made voluntarily with an adequate understanding of the nature of the charges and the consequences of the plea. Finally, we conclude that the district court had subject matter jurisdiction over this case and, as such, had authority to accept Evans' plea.

CONCLUSION

We conclude that Evans' K.S.A. 60-1507 motion as well as the files and records in this case conclusively establish that he is not entitled to relief. In particular, we find that Evans' prior fleeing or attempting to elude a law enforcement officer conviction was properly scored as a person felony for the purposes of determining his criminal history score in the underlying case. As a result, neither Evans' trial counsel nor his appellate counsel had a legal basis to challenge his criminal history score and they were not ineffective. In addition, we find that the district court had subject matter jurisdiction over the underlying case and had an adequate factual basis to accept Evans' guilty plea to the amended charges. Accordingly, the district court's summary denial of Evans' K.S.A. 60-1507 motion is affirmed.

Affirmed.