NOT DESIGNATED FOR PUBLICATION

No. 125,428

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

WALLACE DIXON,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Lyon District Court; MERLIN G. WHEELER, judge. Submitted without oral argument. Opinion filed December 1, 2023. Affirmed.

Stephen J. Atherton, of Atherton & Huth Law Office, of Emporia, for appellant.

Natalie Chalmers, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before ISHERWOOD, P.J., GREEN and PICKERING, JJ.

PER CURIAM: Wallace Dixon appeals the district court's summary denial of his K.S.A. 60-1507 motion. The district court denied the motion as untimely, but Dixon argues that he showed manifest injustice allowing the district court to review his motion out of time. The district court also denied the motion as successive, but Dixon argues that exceptional circumstances allow him to file a second 60-1507 motion. Because Dixon does not show either manifest injustice or exceptional circumstances, we affirm the district court's denial of his 60-1507 motion.

FACTS

More than 20 years ago, Dixon began down the path leading to this appeal of this motion. The facts underlying Dixon's convictions are set forth in *State v. Dixon*, 279 Kan. 563, 112 P.3d 883 (2005) (*Dixon I*), and *State v. Dixon*, 289 Kan. 46, 209 P.3d 675 (2009) (*Dixon II*):

> "At approximately 9 a.m. on July 29, 2001, an explosion and fire destroyed a building containing five townhouse apartment units, A through E, at the Eastgate Plaza Apartments in Emporia. Dana Hudson and her infant son Gabriel, who lived in the middle apartment, C, were trapped inside by debris and flames. They died of smoke inhalation and exposure to heat. Other tenants and neighbors were injured. Tena Wright, who lived in apartment A, was injured when she had to jump from a second-floor window, and two neighbors, James Woodling and Nathan Medlen, were injured trying to help her. Stacey DePriest was upstairs in her apartment, D, when the ceiling fell on her. A neighbor, Rosalind Harris, was injured trying to assist DePriest.
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> "The explosion and fire originated in unit B. Alicia Shaw and her young son lived in unit B. Alicia's sister, Schelese Shaw, and Schelese's son lived in Topeka with Dixon.
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> "Several weeks before July 29, after quarreling with Dixon, Schelese removed her things from his house and went to stay with Alicia. For hours Dixon called Alicia's apartment and the sisters' cell phones and later banged on Alicia's door. He threatened to blow up Alicia's car if Schelese did not come out of the apartment. Schelese returned home with Dixon after 1 day.
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> "At approximately 7 p.m. on July 28, Alicia and some friends drove to Topeka to get Alicia's son, who had been staying with Schelese for a few days. Schelese, Schelese's son, and Alicia's son came out of Dixon's house and got in the car with them. Schelese told her sister that she was leaving Dixon. Schelese had told Dixon that she was just going to get diapers. While the sisters were still in Topeka, Dixon began calling the sisters' cell phones. Schelese then told Dixon that she was going to Emporia to a bar called Fatty's, and he was angry. Instead of going to Emporia, the sisters left their sons with a sitter and went with their friends to a liquor store. Cell phone records showed that Dixon called Schelese's cell phone 95 times in the 15-hour period between 9:11 p.m. on

July 28 and 12:12 p.m. on July 29. He called Alicia's cell phone and her apartment phone a total of 20 times during approximately the same period.

"Dixon asked some friends to go with him to Emporia. Dixon drove his White Chevrolet Suburban. Rodney Hayes, Jerry Hall, and Ethan Griffin rode with him. They left Topeka for Emporia shortly after 12:20 a.m., when Griffin got off work. They went to Fatty's until it closed and then drove to an after-hours party at a house.

"Later, after riding around awhile, they went to the apartment complex where Alicia lived. Dixon told his friends that he had gotten a lot of the belongings in the apartment and he wanted them back. The four men broke into the apartment. Dixon was angry, and he was barking orders to his friends. Hayes took a television and put it in the Suburban. Griffin took a jewelry box. They also took a video cassette recorder and a lamp.

"After putting the belongings in the Suburban, they drove around while Dixon continued to make calls on his cell phone. Hayes complained that he wanted to go back to Topeka. Dixon slammed on the brakes, and he and Hayes jumped out of the vehicle and tried to hit and kick each other. Later, there was a second altercation between Dixon and Hayes. Dixon again slammed on the brakes, and, when he and Hayes got out of the vehicle, Dixon fired his gun at Hayes' feet until it was empty. When they got back in the Suburban, Dixon drove by the Eastgate apartments at least four or five times.

"Dixon then drove to a gas station and had Griffin pump gasoline into a bucket. Griffin left the jewelry box at the station. When they left the gas station, the bucket was in the back seat between Griffin and Hall. Griffin heard Dixon say, 'I'll burn it up.' Hayes, Griffin, and Hall complained about the smell of the gasoline, its sloshing out of the bucket, and that they could not smoke with it in the vehicle. Dixon told Griffin to throw it out the window, and Griffin did.

"After driving around some more, Hayes convinced Dixon to go see Donnie Wishon, a friend of Hall. They took the items from Alicia's apartment into Wishon's residence. Hayes and Hall stayed there and went to sleep.

"Griffin went with Dixon back to Alicia's apartment. Griffin testified that after again entering the apartment, Dixon went upstairs, threw a candle, knocked over a television, and kicked a bookshelf. Back downstairs, he tore a curtain off a front room window, rifled through the kitchen cabinets, and knocked the stove onto its side. It was full daylight when Dixon and Griffin returned to Wishon's residence to wake up Hayes and Hall and urge them to hurry so they could head back to Topeka.

> "Peter Lobdell, a special agent, certified explosives specialist, and certified fire investigator with the federal Bureau of Alcohol, Tobacco, and Firearms, led the team that investigated the explosion and fire. He determined from the large debris field and large sections of intact walls which had been blown out that the explosion was a fuel-air explosion. The fuel was natural gas, which combined with air to support combustion. The source of the natural gas was a leak in the pipe that supplied fuel to Alicia's stove. According to Lobdell, 'the supply pipe was manually manipulated,' which caused 'it to fail, to leak and emit gas into the apartment.' He was unable to determine what ignited the fuel-air combination." *Dixon I*, 279 Kan. at 565-68.

In *Dixon I*, our Supreme Court ordered a new trial, primarily based on prosecutorial misconduct in eliciting testimony and commenting in closing argument about the fact that Dixon visited his attorney before police ever contacted him. 279 Kan. at 591-92. In *Dixon II*, our Supreme Court upheld Dixon's convictions of two counts of felony murder, attempted burglary or flight from burglary, two counts of aggravated battery, two counts of burglary, theft, felony criminal damage to property worth at least $500 but less than $25,000, and criminal possession of a firearm. 289 Kan. at 55, 71.

Dixon filed a K.S.A. 60-1507 motion, and the district court held an evidentiary hearing before denying the motion. This court affirmed the district court's denial in *Dixon v. State*, No. 106,118, 2012 WL 2924545 (Kan. App. 2012) (unpublished opinion). The mandate issued on September 6, 2013.

Dixon filed his current K.S.A. 60-1507 motion in 2017, although he contests the precise date. He signed his pro se motion on March 28, 2017. There is some indication in the record that the clerk of the district court received mailings from Dixon as early as May 25, 2017. But the date stamps on accompanying documents show that the motion was not filed until December 6, 2017. All those dates are well beyond the one-year time limit to file a 60-1507 motion.

Dixon's motion alleged actual innocence and accused the State of withholding exculpatory evidence. Specifically, Dixon alleged that exculpatory evidence in the form of reports and testimony from Gregory Aluise were withheld from original trial counsel. He explained that he discovered Aluise's statements through a private investigator. Dixon proffered that Aluise would testify that he was interviewed by investigators from several law enforcement agencies. Dixon explained that Aluise was a maintenance man for the apartment complex and his testimony would establish that there were several complaints of natural gas leak smells before the gas explosion occurred.

The district court summarily denied the motion. The district court noted this court's mandate in the prior 60-1507 case and found that Dixon's current motion was untimely filed. The district court stated that Dixon presented only one argument to establish the manifest injustice required to accept an untimely motion—his claim of actual innocence. But the district court held that his claim of actual innocence had no new evidentiary support.

In addition to being untimely, the district court also held that Dixon's motion was successive. The district court stated that Dixon could not bring a second 60-1507 motion unless he showed exceptional circumstances to explain why he did not bring his claims in the first 60-1507 motion. The district court held that any complaints about his counsel at his two trials or direct appeals were successive without excuse. But the district court acknowledged that he could not have raised complaints about his 60-1507 counsel in the 60-1507 motion. The district court held that Dixon's claims against his trial and appellate counsel on his first 60-1507 motion were baseless assertions without supporting facts.

Dixon filed five postjudgment motions. The district court issued a second memorandum opinion denying his postjudgment motions.

Dixon timely appeals.

ANALYSIS

Did Dixon show that manifest injustice would result from the district court not considering his untimely motion?

Dixon argues that the district court erred in denying his motion as untimely because he showed that manifest injustice would result from the denial. The State correctly argues that Dixon's claims were previously raised, and Dixon cannot show that he was prejudiced by any of the alleged errors by his prior 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.' [Citations omitted.]" *State v. Adams*, 311 Kan. 569, 578, 465 P.3d 176 (2020).

Our standard of review depends upon which of these options a district court used. 311 Kan. at 578.

When the 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. *State v. Vasquez*, 315 Kan. 729, 731, 510 P.3d 704 (2022).

A defendant has one year from when a conviction becomes final to file a motion under K.S.A. 2022 Supp. 60-1507(a). K.S.A. 2022 Supp. 60-1507(f)(1); *Noyce v. State*, 310 Kan. 394, 399, 447 P.3d 355 (2019).

Claims of ineffective assistance of K.S.A. 60-1507 counsel do not accrue at the time of conviction. Thus, the time limit to file a second 60-1507 motion alleging ineffective assistance on the first motion is one year from the appellate court's mandate in the first proceeding. *Rowell v. State*, 60 Kan. App. 2d 235, 240-41, 490 P.3d 78 (2021).

The one-year time limitation for bringing an action under K.S.A. 2022 Supp. 60-1507(f)(1) may be extended by the district court only to prevent a manifest injustice. K.S.A. 2022 Supp. 60-1507(f)(2).

"'A defendant who files a motion under K.S.A. 60-1507 outside the 1-year time limitation in K.S.A. 60-1507(f) and fails to assert manifest injustice is procedurally barred from maintaining the action.'" *State v. Roberts*, 310 Kan. 5, 13, 444 P.3d 982 (2019) (quoting *State v. Trotter*, 296 Kan. 898, Syl. ¶ 3, 295 P.3d 1039 [2013]).

Effective July 1, 2016, the Kansas Legislature amended K.S.A. 60-1507(f)(2) to include a definition of manifest injustice. It states that 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. 2022 Supp. 60-1507(f)(2)(A). The Legislature defined actual innocence to mean 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. 2022 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. 2022 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. 2022 Supp. 60-1507(f)(3).

A colorable claim of actual innocence sufficient to allow an untimely 60-1507 motion to proceed requires the movant to show that "it is more likely than not that no reasonable juror would have convicted the prisoner in light of new evidence." K.S.A. 2022 Supp. 60-1507(f)(2)(A); *Beauclair v. State*, 308 Kan. 284, 294, 419 P.3d 1180 (2018).

Dixon blames his failure to meet the one-year deadline on a late realization. He explains that he pursued a federal habeas corpus action, and his retained counsel in that case told him that questions of postconviction ineffectiveness should be raised in a Kansas district court. He also explains that an order from the Tenth Circuit Court of Appeals denied his federal claims as procedurally barred because they had not been fully litigated in state court. So, he now alleges claims of ineffective assistance from his previous 60-1507 counsel in his current 60-1507 motion filed in Kansas. But Dixon provides no citation showing that manifest injustice results from a movant's confusion about whether to file in federal or state court. In fact, this court has previously held that the one-year time limit for filing a K.S.A. 60-1507 motion is unaffected by the movant's pursuit of federal habeas relief. *Clemons v. State*, 39 Kan. App. 2d 561, 564-65, 182 P.3d 730 (2008).

The district court correctly held that Dixon presented only one reason to extend the one-year deadline: "Unfortunately, neither Movant's motion nor the attached memo address either his failure to meet the time limitation of K.S.A. 60-1507(f) or suggest, with one exception, any basis to extend the deadline for manifest injustice." The one exception that the district court pointed to was Dixon's claim of actual innocence.

Dixon argues that the statements of Aluise, the apartment's maintenance man, show complaints of natural gas leak smells. This claim, although ostensibly related to actual innocence, serves as the heart of several interrelated claims. Dixon learned of Aluise's statements through a private investigator, and he faults his previous trial 60-1507 counsel for not securing an investigator. He also faults his appellate 60-1507 counsel for abandoning issues he wanted to raise against his trial 60-1507 counsel. In short, Dixon's claims about his first 60-1507 counsel tie into his claim of actual innocence.

But the heart of Dixon's arguments—his actual innocence claim—has two fatal flaws. It is logically incoherent and factually incorrect. Complaints about a gas leak would help Dixon if they pointed to another possible source for the leak. But Dixon does not even claim that residents complained about the smell of natural gas in the weeks or days leading up to the explosion, which might reasonably indicate a pre-existing gas leak elsewhere. Dixon claims that Aluise received complaints of a natural gas smell "prior to the gas explosion," "prior to the explosion," and "just prior to the explosion." Even if we were to assume that Dixon's alleged facts were true, Aluise's statements would not help Dixon. Here, the State's evidence was that Dixon knocked over a gas stove in the apartment in the early morning hours of July 29, 2001, causing natural gas to leak into the building. Then, at approximately 9 a.m., something ignited that gas, resulting in an explosion. If, as Dixon now alleges, Aluise received complaints about a natural gas smell just before 9 a.m., then those complaints would fit with the State's case. The facts that Dixon presents—even if this court were to accept them as true—do not logically lead to the conclusion that Dixon is actually innocent of causing the explosion which killed two people.

For example, the question that is begged here in Dixon's claim is the assumption that the residents of the apartment had complained about the smell of gas before the explosion occurred. Thus, the explosion was caused by those gas leaks. His premise offered to justify the conclusion logically implies it, but no independent evidence for the

conclusion is offered except what Dixon maintains that Aluise told to private investigators.

Nevertheless, in one of the attached exhibits, Aluise acknowledged "that the stove of the targeted apartment had been forcefully ripped from the wall causing the flex line to completely disconnect from the gas source which led to the explosion hours later when an unknown spark ignited the massive amount of gas." So, any alleged probative value about Aluise receiving complaints about the odor of a natural gas leak has been completely demolished by Aluise's statement that he made to the private investigators.

Second, Dixon's alleged facts are not true. In his 60-1507 motion, he asserts that Aluise received complaints about the odor of a natural gas leak, with reports from private investigators who spoke to Aluise attached as exhibits. But Aluise told investigators "that there was never any problems with any of the gas lines, nor had there been any write-ups or work orders for any of the apartments, particularly the apartments in Building 707." Presumably, the word "never" included the morning of July 29, 2001, because Aluise told investigators that he simultaneously received calls on his pager, cell phone, and home phone that day. He spoke with someone on the phone who told him the building was inflamed. According to the exhibits that Dixon attached, Aluise did not receive a complaint about the odor of natural gas because the first complaint he received that morning was about the building being on fire.

Further, Aluise was not subpoenaed to be a witness at Dixon's trial, but the investigator's report does not show that he would have been a favorable witness. The report mentions that Dixon was seen that morning "in an intimidating state, armmed [*sic*] with a 45, and carrying gasoline," and further mentions that Aluise quit his job "approximately 6 months after the incident due to symptoms of PTSD." The exhibit that Dixon relies on does not show evidence of actual innocence, nor does it establish that his counsel was ineffective for not further investigating or subpoenaing Aluise to testify or

both. Because Dixon fails to show it is more likely than not that no reasonable juror would have convicted him in light of new evidence, we affirm the district court's denial of his K.S.A. 60-1507 motion as untimely without a showing of manifest injustice.

Did exceptional circumstances justify Dixon filing this second motion?

Dixon argues that his K.S.A. 60-1507 motion, while successive, presented exceptional circumstances warranting an evidentiary hearing. The State correctly argues that Dixon's allegations of ineffective assistance of counsel are conclusory.

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); see also *Littlejohn v. State*, 310 Kan. 439, Syl., 447 P.3d 375 (2019) ("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."); *State v. Sprague*, 303 Kan. 418, 425, 362 P.3d 828 (2015) (applying initial pleading requirements when reviewing denial of posttrial, presentencing motion for ineffective assistance of counsel).

"[U]nder K.S.A. 2020 Supp. 60-1507(c), district courts need not consider more than one habeas motion seeking similar relief filed by the same prisoner." *State v. Mitchell*, 315 Kan. 156, 160, 505 P.3d 739 (2022); see Supreme Court Rule 183(d) (2023 Kan. S. Ct. R. at 243). A movant is presumed to have listed all grounds for relief in an initial K.S.A. 60-1507 motion and, therefore, "must show exceptional circumstances to justify the filing of a successive motion." *Mitchell*, 315 Kan. at 160.

Exceptional circumstances are unusual events or intervening changes in the law that prevented the movant from reasonably being able to raise the issue in the first postconviction motion. 315 Kan. at 160. Exceptional circumstances can include ineffective assistance of counsel claims and a colorable claim of actual innocence based on the crime victim's recantation of testimony that formed the basis of the charge against the defendant. See *Beauclair*, 308 Kan. at 304 (colorable claim of actual innocence); *Rowland v. State*, 289 Kan. 1076, 1087, 219 P.3d 1212 (2009) (ineffective assistance of counsel). In deciding whether a district court erred in summarily denying a K.S.A. 60-1507 motion as abuse of remedy, the appellate court's test should be whether the movant "presented exceptional circumstances to justify reaching the merits of the motion, factoring in whether justice would be served by doing so." *Littlejohn*, 310 Kan. at 446.

Although movants do not have a constitutional right to effective assistance of legal counsel on collateral attacks because they are civil, not criminal actions, Kansas provides a statutory right to counsel on collateral attacks under some circumstances. *Stewart v. State*, 310 Kan. 39, 45, 444 P.3d 955 (2019); see K.S.A. 22-4506. Once counsel has been appointed in a postconviction matter, the appointment should not be a useless formality, meaning that appointed counsel has a duty to provide effective representation. *Mundy v. State*, 307 Kan. 280, 295, 408 P.3d 965 (2018).

Dixon's sole argument for filing a successive K.S.A. 60-1507 motion is that his counsel on the first motion was ineffective, both at the district court and appellate levels. He asserts that they were ineffective because they failed to argue and brief issues that he raised in his original K.S.A. 60-1507 motion. Then he narrows the field from complaining about all prior counsel, including at his two trials and on his direct appeals, to asserting an ineffective assistance claim as it relates to only his 60-1507 counsels.

But Dixon's prior K.S.A. 60-1507 counsel was not required to argue or brief every issue regardless of merit. See *Khalil-Alsalaami v. State*, 313 Kan. 472, 499, 486 P.3d

1216 (2021) ("If the omitted motion is not meritorious, then trial counsel's failure to litigate the suppression issue cannot be characterized as objectively unreasonable."). "The failure of counsel to raise an issue on appeal is not, per se, to be equated with ineffective assistance of counsel." *Baker v. State*, 243 Kan. 1, 9, 755 P.2d 493 (1988). Dixon's claim is simply that his counsel failed to present all his issues and therefore counsel was ineffective.

But Dixon fails to identify which meritorious arguments his counsel abandoned in litigating his first K.S.A. 60-1507 motion.

> "[A]ppellate counsel should carefully consider the issues, and those that are weak or without merit, as well as those which could result in nothing more than harmless error, should not be included as issues on appeal. Likewise, the fact that the defendant requests such an issue or issues to be raised does not require appellate counsel to include them. Conscientious counsel should only raise issues on appeal which, in the exercise of reasonable professional judgment, have merit." *Baker*, 243 Kan. at 10.

To show that counsel was ineffective, Dixon must show that counsel's performance was deficient and that he was prejudiced by the deficiency. *Sola-Morales*, 300 Kan. at 882. To establish that he was prejudiced, Dixon would need to show a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Sprague*, 303 Kan. at 426. In short, Dixon needs to show not just that his counsel abandoned a K.S.A. 60-1507 claim, but that counsel abandoned a claim which was reasonably probable to be successful. But he fails to assert, let alone show, that any of his claims would have resulted in his K.S.A. 60-1507 motion being granted and that either the district court or an appellate court would have granted him a new trial.

The record and the district court's memorandum opinion show that the district court fully reviewed whether Dixon raised any meritorious claims. The district court

accurately characterized Dixon's claims as repetitions of his previous claims. "Dixon essentially makes the same claims as he did when he argued that his trial counsel was ineffective." Although the district court does not go word-by-word through each of Dixon's claims, the district court does give select examples. "Specific note should be taken of Movant's renewed claim dealing with counsel's performance in addressing testimony of KBI Agent Halvorsen which Movant suggests was deceitful. This claim is nearly identical to that made in paragraph 11(g) of Movant's first 60-1507 motion." Dixon also attacked the credibility of witnesses at his two trials and made allegations of prosecutorial misconduct. The district court found each of Dixon's claims to be either meritless conclusory assertions or repetitious (or both). On appeal, Dixon fails to identify any error committed by the district court. He confines his arguments to the district court's rulings on procedural matters but fails to challenge the district court's substantive findings. An issue not briefed is deemed waived or abandoned. *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021). Because Dixon's K.S.A. 60-1507 motion is successive, we affirm the district court's denial.

For the preceding reasons, we affirm.

Affirmed.