

NOT DESIGNATED FOR PUBLICATION

No. 125,607

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

RONNELL BURNETT,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; DANIEL CAHILL, judge. Opinion filed March 31, 2023.
Affirmed.

Joseph A. Desch, of Law Office of Joseph A. Desch, of Topeka, for appellant.

Kayla Roehler, deputy district attorney, *Mark A. Dupree Sr.*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ISHERWOOD, P.J., MALONE and WARNER, JJ.

PER CURIAM: Ronnell Burnett appeals the district court's denial of his second K.S.A. 60-1507 motion as untimely and successive. He contends that an evidentiary hearing was warranted to thoroughly analyze his motion and that his ineffective assistance of counsel claims provided the necessary manifest injustice and exceptional circumstances required to overcome the procedural hurdles that burden his motion. Finding no error, we affirm the judgment of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

Burnett stands convicted of felony murder along with two firearms related offenses. He is currently serving a hard 20 life prison sentence for the murder conviction and 67 months for the gun charges. He pursued a direct appeal, and our Supreme Court affirmed those convictions. *State v. Burnett*, 300 Kan. 419, 329 P.3d 1169 (2014).

In December 2015, Burnett filed his first K.S.A. 60-1507 motion and alleged that he received ineffective assistance from the attorney appointed to represent him at trial. The district court summarily denied Burnett's motion. Burnett opted not to appeal the district court's denial and instead filed a writ of habeas corpus directly with this court. We denied Burnett's writ in February 2016.

Four years later, Burnett filed his second K.S.A. 60-1507 motion, the one that is the subject of this appeal. Burnett raised seven claims and reiterated that his trial attorney provided substandard representation. The State responded that Burnett failed to establish that manifest injustice existed to excuse the late filing, and that his claims were successive because his allegations and request for relief were similar to what he attempted to obtain through his first K.S.A. 60-1507 motion. Several months later, Burnett supplemented his motion with an additional 18 issues, including multiple claims of ineffective assistance from his trial and appellate counsel.

The district court summarily denied Burnett's K.S.A. 60-1507 motion. It found the motion was untimely because more than one year had passed since the final judgment on Burnett's first K.S.A. 60-1507 motion and he failed to provide an adequate foundation for the court to determine that manifest injustice existed to extend that deadline. It also found the motion was successive and no exceptional circumstances justified its review. Finally, the court determined the motion was barred by principles of res judicata because Burnett again sought to challenge the representation provided by trial and appellate counsel.

Burnett timely brings the matter to us to determine whether summary denial was the appropriate resolution for his motion.

LEGAL ANALYSIS

Summary denial of Burnett's second K.S.A. 60-1507 motion was appropriate where he failed to sufficiently establish grounds to overcome the various procedural hurdles that plagued his motion.

On appeal, Burnett argues he asserted a sufficient basis to excuse his untimely and successive motion and that his claims are not barred by res judicata.

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).

"The standard of review depends upon which of these options the district court used." 311 Kan. at 578. When it 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. *Beauclair v. State*, 308 Kan. 284, 293, 419 P.3d 1180 (2018).

Timeliness

A defendant's K.S.A. 60-1507 motion must be brought within one year from when a conviction becomes final. K.S.A. 2021 Supp. 60-1507(f)(1). The one-year time limitation for bringing an action under K.S.A. 2021 Supp. 60-1507(f)(1) may be extended by the district court only to prevent a manifest injustice. K.S.A. 2021 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]).

Burnett concedes that he did not file his K.S.A. 60-1507 motion within one year from the Supreme Court's decision affirming his convictions on direct appeal. To save his untimely motion, Burnett claims he established manifest injustice to excuse his late filing and the district court should have appointed counsel and granted a preliminary hearing.

Effective July 1, 2016, the 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. 2021 Supp. 60-1507(f)(2)(A). The Kansas Supreme Court has described "manifest injustice," in the context of K.S.A. 60-1507(f)(2), as that which is "'obviously unfair' or 'shocking to the conscience.'" *State v. Kelly*, 291 Kan. 868, 873, 248 P.3d 1282 (2011) (quoting *Ludlow v. State*, 37 Kan. App. 2d 676, 686, 157 P.3d 631 [2007]). Courts are to dismiss a motion as untimely filed if, after inspection of the motion, files, and records of the case, the court determines the time limitations have been exceeded and dismissing the motion would not equate with manifest injustice. K.S.A. 2021 Supp. 60-1507(f)(3).

Burnett has the burden to establish manifest injustice by a preponderance of the evidence. See *White v. State*, 308 Kan. 491, 496, 421 P.3d 718 (2018). The failure to successfully do so procedurally bars any review of the claims contained within the motion. *Roberts*, 310 Kan. at 13.

Burnett seeks to clear the timeliness hurdle by asserting that his appellate counsel's failure to raise constitutional issues in his direct appeal constituted ineffective assistance of counsel, and that subpar representation provides the manifest injustice required to overcome the bar erected by his untimeliness. For support he directs our attention to *Brown v. State*, No. 110,887, 2015 WL 1636714, at *3 (Kan. App. 2015) (unpublished opinion), a pre-2016 amendment case, which provides, "if a defendant can show prejudicial ineffective assistance of counsel, such proof could contribute to a finding of manifest injustice."

Burnett axiomatically concludes that a claim for ineffective assistance of counsel equates to manifest injustice. But he never explains why he waited nearly three years after the deadline to file his motion or how his appellate counsel's actions somehow prevented him from promptly raising his claims. Thus, we decline to find that Burnett's bald statement that his appellate counsel was deficient is either "shocking to the conscience" or "obviously unfair" as required to extend the time limitation that bars review of his claims.

Successiveness

Under K.S.A. 60-1507(c), a sentencing court need not entertain a second or successive motion for similar relief on behalf of the same prisoner. *Beauclair*, 308 Kan. at 304. Supreme Court Rule 183(d) provides:

"A sentencing court may not consider a second or successive motion for relief by the same movant when:

- (1) the ground for relief was determined adversely to the movant on a prior motion;
 - (2) the prior determination was on the merits; and
 - (3) justice would not be served by reaching the merits of the subsequent motion."
- Supreme Court Rule 183(d) (2022 Kan. S. Ct. R. at 240)

"A movant in a K.S.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." *Trotter*, 296 Kan. 898, Syl. ¶ 2. To avoid dismissal of a second or successive K.S.A. 60-1507 motion, the movant bears the burden of establishing that exceptional circumstances exist which warrant review of their claims. Exceptional circumstances are unusual events or intervening changes in the law that prevented them from raising the issue in a prior K.S.A. 60-1507 motion. *Beauclair*, 308 Kan. at 304.

Burnett concedes that he previously challenged the representation he received from trial and appellate counsel and that his claims of deficiency were denied, but he argues those earlier allegations did not highlight appellate counsel's failure to raise prosecutorial error or specific constitutional claims. He contends that counsel's failure to raise these issues on direct appeal is properly considered to be the type of exceptional circumstance that enables him to overcome the successiveness bar that would otherwise preclude review of his motion and directs us to *Rowland v. State*, 289 Kan. 1076, 1087, 219 P.3d 1212 (2009), as support for this assertion. But *Rowland* does not help advance Burnett's position. That case involved the reversal and remand of Rowland's K.S.A. 60-1507 motion because his allegation that trial counsel provided ineffective assistance could not have been considered for the first time in his direct appeal. Thus, Rowland was never afforded an earlier opportunity to litigate his claims. That is not this case. In contrast, the issues Burnett outlined in his successive motion were available to him when

he filed his first motion. He has failed to meet his burden of establishing that exceptional circumstances prevented him from raising these issues in his prior K.S.A. 60-1507 motion.

Res Judicata

Burnett lastly argues that his K.S.A. 60-1507 motion is not barred by res judicata because these claims were not litigated in the prior K.S.A. 60-1507 motion. But as a general rule, the principle of res judicata likewise applies to claims that *could have* been raised. *Boguess v. State*, 306 Kan. 574, 579, 395 P.3d 447 (2017). As previously noted, the claims at issue were known to Burnett when he filed his first K.S.A. 60-1507 motion and could have been litigated at that time.

The district court properly concluded that Burnett failed to establish manifest injustice to excuse the untimely nature of his motion, or the exceptional circumstances required to overcome its successiveness.

Affirmed.