

NOT DESIGNATED FOR PUBLICATION

No. 126,058

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellee,*

v.

ANDRE ROBINSON,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Wyandotte District Court; JENNIFER L. MYERS, judge. Submitted without oral argument. Opinion filed December 8, 2023. Affirmed.

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

*Francis X. Altomare*, assistant district attorney, *Mark A. Dupree Sr.*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before MALONE, P.J., GARDNER and CLINE, JJ.

PER CURIAM: In 1997, a jury convicted Andre A. Robinson of 15 offenses, including aggravated kidnapping, aggravated robbery, and rape. In 2022, Robinson filed three pro se motions for postconviction relief under K.S.A. 2022 Supp. 60-1507 and K.S.A. 2022 Supp. 22-3504 and seeking to disqualify the Wyandotte County District Attorney's Office. The district court summarily denied these motions. Robinson now appeals. After careful review, we affirm the district court.

## *Factual and Procedural Background*

A jury convicted Robinson of two counts of aggravated kidnapping, three counts of aggravated robbery, two counts of rape, three counts of aggravated criminal sodomy, one count of aggravated burglary, two counts of kidnapping, one count of aggravated sexual battery, and one count of criminal possession of a firearm. As a result of these convictions, in 1997 the district court sentenced Robinson to 1,089 months' imprisonment. Another panel of this court affirmed his convictions. *State v. Robinson*, No. 81,016, 1999 WL 35814422, at \*1-2 (Kan. App. 1999) (unpublished opinion).

Robinson then began filing motions attacking his convictions and sentence. In 2000, he filed his first K.S.A. 60-1507 motion. The district court denied that motion and another panel of this court affirmed that denial. *Robinson v. Nelson*, No. 87,934, 2002 WL 35657904, at \*2 (Kan. App. 2002) (unpublished opinion).

In 2003, he filed his second K.S.A. 60-1507 motion, which the district court denied as successive and lacking exceptional circumstances to justify a successive motion. Another panel of this court affirmed that denial. *Robinson v. State*, No. 92,315, 2005 WL 1137323, at \*2 (Kan. App. 2005) (unpublished opinion).

In 2014 and 2015, Robinson filed two motions to correct an illegal sentence; both were denied by the district court. In 2016, Robinson filed a third K.S.A. 60-1507 motion, which the district court denied as untimely and successive. In 2017, he filed yet another motion to correct an illegal sentence, which the district court denied.

On June 14, 2022, Robinson filed the motions giving rise to this appeal. He moved to correct an illegal sentence under K.S.A. 2021 Supp. 22-3504, arguing in part that his convictions were multiplicitous so his sentence should be vacated, and that he was "wrongfully convicted . . . due to ineffective assistance of counsel [and] egregious collusion between the [assistant district attorney] [and] the trial judge." On June 28,

2022, he moved to disqualify every Wyandotte County District Court judge, alleging in part that his judge was biased due to his sexual relationship with the prosecutor and that the other judges had conspired to cover it up. He also moved to disqualify the entire Wyandotte County District Attorney's Office and to compel the State Attorney General or Solicitor General to prosecute on behalf of the State due to the impermissible conflict of interest between the trial judge and the prosecutor.

Robinson asked the district court to consider these motions as both motions to correct illegal sentences and as K.S.A. 60-1507 motions, and the district court did so. The district court summarily denied these motions as untimely, successive, and barred. When construing the motions as K.S.A. 60-1507 motions, the district court held that the motions were

- untimely without any showing of manifest injustice;
- successive because the issues raised either had been raised in prior K.S.A. 60-1507 motions or could have been raised in them;
- meritless as Robinson did not point to a specific ruling that shows he did not receive a fair trial because of the prior relationship between the judge and the prosecutor; and
- that Robinson showed no ineffective assistance of counsel.

When viewing Robinson's motions as ones to correct an illegal sentence, the district court held, in part, that Robinson's claims of multiplicity were conclusory because he failed to detail which of the underlying charges were unitary when the charges were brought by each victim. As for Robinson's argument that counsel's failure to raise the multiplicity argument was ineffective assistance of counsel, the district court also disagreed. It held that Robinson failed to show deficient performance based on counsel's failure to make these arguments in prior proceedings.

Robinson now timely appeals.

*Did the District Court Err in Denying Robinson's Motions?*

Robinson's brief focuses on the denial of his motions as motions to correct an illegal sentence and as K.S.A. 60-1507 motions. The only substantive argument that he briefs under those two frameworks is his claim that his convictions are multiplicitious. Thus, we will focus only on that issue and will not address the other issues raised in his motions before the district court or the district court's decision on those issues in its order dismissing Robinson's three motions. See *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021) (holding issue not briefed is deemed waived or abandoned). We will first view Robinson's motions as motions to correct an illegal sentence under K.S.A. 2022 Supp. 22-3504 and then consider them to be K.S.A. 60-1507 motions.

1. *Robinson's Motions as K.S.A. 2022 Supp. 22-3504 Motions*

Whether a sentence is illegal under K.S.A. 2022 Supp. 22-3504 is a question of law over which we have unlimited review. *State v. Mitchell*, 315 Kan. 156, 158, 505 P.3d 739 (2022). An illegal sentence is: (1) a sentence imposed by a court without jurisdiction; (2) a sentence that does not conform to the applicable statutory provision, either in character or the term of authorized punishment; or (3) a sentence that is ambiguous with respect to the time and manner in which it is to be served. K.S.A. 2022 Supp. 22-3504(c)(1).

When a district court summarily denies a motion to correct an illegal sentence, we apply a de novo standard of review because we have the same access to the motion, records, and files as does the district court. *Mitchell*, 315 Kan. at 158. The illegal sentence statute, K.S.A. 2022 Supp. 22-3504, "has very limited applicability." *State v. Edwards*, 281 Kan. 1334, 1336, 135 P.3d 1251 (2006).

Robinson argues that his sentence is illegal, as defined in K.S.A. 2022 Supp. 22-3504(c)(1) and (2), because his rape charges served as the basis to support his aggravated kidnapping charges so they are multiplicitous. His motion alleged that aggravated robbery is not a lesser offense of aggravated kidnapping, nor is rape or aggravated sodomy a lesser degree of aggravated kidnapping, and using the same bodily harm element of aggravated robbery for each of the three aggravated kidnapping charges is multiplicitous under *State v. Garcia*, 272 Kan. 140, 32 P.3d 188 (2001) and *State v. Robbins*, 272 Kan. 158, 32 P.3d 171 (2001).

But Robinson's argument ignores the Kansas Supreme Court's long-standing holding that a motion to correct an illegal sentence is not the appropriate vehicle by which to raise a multiplicity challenge. See *State v. Laughlin*, 310 Kan. 119, 124, 444 P.3d 910 (2019) (rejecting argument that aggravated kidnapping and aggravated robbery convictions were multiplicitous with felony-murder conviction, because "multiplicity challenges fall outside the scope of a motion to correct an illegal sentence"); *State v. Bradford*, 299 Kan. 288, 289, 323 P.3d 168 (2014) (affirming caselaw that precluded raising multiplicity challenge in motion to correct illegal sentence); *State v. Sims*, 294 Kan. 821, 825-26, 280 P.3d 780 (2012) (refusing to consider multiplicity challenge raised in motion to correct illegal sentence); *Edwards*, 281 Kan. at 1338-39 (same).

This court is duty bound to follow Kansas Supreme Court precedent unless the Supreme Court suggests it is departing from its previous position, yet Robinson has pointed us to no such departure. *State v. Patton*, 315 Kan. 1, 16, 503 P.3d 1022 (2022). Based on the unequivocal holding from the Kansas Supreme Court that "multiplicity challenges fall outside the scope of a motion to correct an illegal sentence," we must conclude that the district court properly denied Robinson's motions when viewing them as motions to correct an illegal sentence. *Laughlin*, 310 Kan. at 124.

2. *Robinson's Motions as K.S.A. 60-1507 Motions*

To be entitled to relief under K.S.A. 60-1507, the movant must establish by a preponderance of the evidence either: (1) "the judgment was rendered without jurisdiction"; (2) "the sentence imposed was not authorized by law or is otherwise open to collateral attack"; or (3) "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) (grounds for relief); Supreme Court Rule 183(g) (2023 Kan. S. Ct. R. at 244) (preponderance burden).

A K.S.A. 60-1507 movant bears the burden to establish 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 the court finds either, the district 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). This court has unlimited review over a K.S.A. 60-1507 motion that was dismissed or denied without an evidentiary hearing, as this one was. *Bellamy v. State*, 285 Kan. 346, 354, 172 P.3d 10 (2007). And as above, this court is in the same position as the district court to determine whether "the motion and the files and records of the case conclusively show that [Robinson] is entitled to no relief." K.S.A. 2022 Supp. 60-1507(b); *Beauclair v. State*, 308 Kan. 284, 293, 419 P.3d 1180 (2018).

In part, the district court denied Robinson's K.S.A. 60-1507 motions as untimely and successive. We will first review the court's procedural reasons for denial because if any of those reasons are valid, we need not consider the merits of the motion, even though the district court did so.

A defendant has one year from when a conviction becomes final to file a motion under K.S.A. 60-1507(a). K.S.A. 2022 Supp. 60-1507(f)(1); Supreme Court Rule 183(c)(4) (2023 Kan. S. Ct. R. at 243). A court must dismiss a motion as untimely if, "upon its own inspection of the motions, files and records of the case, [it] determines the time limitations under this section have been exceeded and that the dismissal of the motion would not equate with manifest injustice." K.S.A. 2022 Supp. 60-1507(f)(3). This one-year period under K.S.A. 60-1507 may be extended, as the statute states, only to prevent a manifest injustice. See K.S.A. 2022 Supp. 60-1507(f)(2). This exception to timeliness is narrow, as the statute limits the scope of manifest injustice to only two considerations:

1. whether the movant has explained why he or she "failed to file the motion within the one-year time limitation" and
2. whether the person "makes a colorable claim of actual innocence." K.S.A. 2022 Supp. 60-1507(f)(2)(A).

Robinson's motions, which were construed as K.S.A. 60-1507 motions, were filed well after the one-year time limitation, so Robinson has to show that consideration of his untimely motions is warranted under one of these two exceptions. See *White v. State*, 308 Kan. 491, 496, 421 P.3d 718 (2018). If he does not demonstrate manifest injustice under either of these definitions, Kansas law requires the district court to dismiss his motions. K.S.A. 2022 Supp. 60-1507(f)(3).

To meet the first exception—a colorable claim of actual innocence—Robinson mentions only in passing that he is innocent of these crimes. Because he gives no other detail or evidence of his innocence, his claim is not enough to show manifest injustice excusing the untimeliness of the motions. See *Thuko v. State*, 310 Kan. at 80 (K.S.A. 60-1507 movant must make more than conclusory contentions and must state an evidentiary basis in support of claims or evidentiary basis must appear in the record.).

To meet the second exception, Robinson tries to explain why he failed to file the motions within the one-year time limitation. He claims he did not raise the multiplicity issue in his three prior K.S.A. 60-1507 motions because no counsel or judge ever told him that he had a multiplicity argument available. He asserts that such a failure is "legal malpractice." He does not allege that a particular attorney committed this "legal malpractice," but argues that "legal malpractice abounds across the spectrum by defense [and] prosecuting [attorneys and] the courts." Without a direct complaint of *who* allegedly ineffectively assisted Robinson, he cannot prevail.

But even if we were to assume that Robinson is targeting the acts of his trial counsel, we have no facts by which to review that claim. Robinson argues he was found guilty of all "unlawfully charged" counts in "violation of K.S.A. 21-3107(2)(d)," that "the courts had zero jurisdiction to proceed to trial, [and] the entire trial proceedings are infected with impermissible structural defects," and that his convictions and sentence should be barred. He continues:

"aggravated robbery is not a lesser offense of aggravated kidnapping, nor is rape or aggravated sodomy a lesser degree attempt, or an attempt to commit a lesser degree of aggravated kidnapping, [and] using the same bodily harm element of aggravated robbery for each of the [three] aggravated kidnapping charges is likewise multipli[citous] under *Garcia and Robbins*."

But Robinson provides no record to support these allegations. The trial transcript is not included in the record on appeal as is necessary to enable us to review trial counsel's performance; that performance requires a fact-based analysis even when questions of law, such as multiplicity, are involved.

Nor can we glean any facts from Robinson's direct appeal. That opinion did not set out the facts of the case but addressed only selected facts surrounding the admissibility of a voice identification. *Robinson*, 1999 WL 35814422, at \*1 ("The sordid details of the underlying crimes need not be reiterated. The victims of these crimes were all members



of one family, the mother, S.S., two daughters, 15-year-old A.S. and 16-year-old E.S., and a son, 11-year-old J.S.").

As the party claiming error, Robinson has the burden to designate a record that affirmatively shows prejudicial error. *State v. Miller*, 308 Kan. 1119, 1157, 427 P.3d 907 (2018). But Robinson has failed to do so. And without such a record, we presume the action of the district court was proper. *State v. Simmons*, 307 Kan. 38, 43, 405 P.3d 1190 (2017). See *Angelo v. State*, No. 123,237, 2022 WL 569738, at \*4 (Kan. App.) (unpublished opinion) (applying these principles to K.S.A. 60-1507 movant), *rev. denied* 316 Kan. 756 (2022). Robinson has thus failed to show that counsel's performance was deficient, as is necessary to prove ineffective assistance of counsel and excuse the motion's untimeliness. Accordingly, the district court properly dismissed the motions as untimely, as required by K.S.A. 2022 Supp. 60-1507(f)(3). Because dismissal after a proper finding of untimeliness is mandatory, we do not consider the other grounds upon which Robinson's motions, construed as K.S.A. 60-1507 motions, were dismissed.

Affirmed.