NOT DESIGNATED FOR PUBLICATION

No. 126,121

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

HARVEY L. ROSS,
Appellant,

v.

TOMMY WILLIAMS, WARDEN,
Appellee.

MEMORANDUM OPINION

Appeal from Butler District Court; JOHN E. SANDERS, judge. Submitted without oral argument. Opinion filed December 29, 2023. Affirmed.

Kristen B. Patty, of Wichita, for appellant.

Robert E. Wasinger, legal counsel, Kansas Department of Corrections, for appellee.

Before BRUNS, P.J., COBLE and PICKERING, JJ.

PER CURIAM: Harvey L. Ross appeals the district court's summary dismissal of his K.S.A. 60-1501 petition that claims Warden Tommy Williams of El Dorado Correctional Facility erred by incorrectly computing his sentence. Finding that the Kansas Department of Corrections (KDOC) correctly computed Ross' sentence, we affirm the district court's dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

In 2004, Ross was convicted by a jury of one count of first-degree murder under K.S.A. 21-3401(a), one count of attempted first-degree murder under K.S.A. 21-3301 and

K.S.A. 21-3401, and one count of criminal in possession of a firearm under K.S.A. 21-4204(a)(3) for crimes occurring in 2002. On the first-degree murder conviction, the district court sentenced Ross to hard 25 life imprisonment (defendant shall not be eligible for parole prior to serving 25 years' imprisonment). In addition to the life sentence, the district court imposed a total of 594 months' imprisonment for Ross' other two convictions—586 months for attempted first-degree murder and 9 months for the firearm charge. The district court ordered the 586-month sentence to run concurrent with Ross' life sentence, and the 9-month sentence to run consecutive to both. And the sentences for the 2002 cases were ordered to run consecutive to Ross' earlier 57-month sentence imposed on a prior conviction. In sum, Ross was ordered to serve one hard 25 life sentence, and one aggregated sentence of 652 months.

On direct appeal, the Kansas Supreme Court affirmed Ross' convictions. *State v. Ross*, 280 Kan. 878, 127 P.3d 259 (2006). The facts pertaining to his underlying convictions are not relevant to this appeal.

On December 17, 2021, Ross filed a K.S.A. 60-1501 habeas petition with the district court. In his petition, Ross claimed the warden incorrectly aggregated his life sentence with his attempted murder sentence, rather than run them concurrent, and ordered him to serve 652 months if he is granted parole from his life sentence. He argued the warden's calculation is ambiguous and does not conform to the statute. Relying on an Inmate Data Summary generated on October 18, 2021, Ross asserted the warden incorrectly designated the 652 months as the controlling maximum term and such calculation was improper because it reflects his sentence as running consecutive and not concurrent. In sum, Ross claims if he is granted parole from the review board, he should be released from prison 25 years after the start of his sentence because the remaining sentence that was to run concurrent with the life sentence would be subsumed into the life sentence.

KDOC moved to dismiss Ross' petition in the district court. KDOC argued that Ross was under the misconception that his 652-month aggregated on-grid sentence term would somehow be purged once he is paroled from his off-grid hard 25 life sentence. Because Ross' earliest possible release date on his life sentence would be at the 25-year mark (300 months), the aggregated sentence of 652 months is at least 352 months longer than the earliest possible release date of his life sentence. KDOC reasoned that if Ross was released on parole after 25 years, he would still need to serve the remaining 352 months to be eligible for release. The district court summarily dismissed the petition, finding that Ross failed to meet his burden of proof and that KDOC's computation of Ross' sentence was correct.

Ross now appeals.

ANALYSIS

On appeal, Ross argues that the district court erred by summarily dismissing his K.S.A. 60-1501 petition because KDOC incorrectly calculated his sentences to run consecutive rather than concurrent as the district court imposed. We disagree and find no such error.

First, though, under K.S.A. 75-52,138, we stress that inmates must exhaust administrative remedies before filing any civil action against the State. And, under this same statute, the inmate must demonstrate he or she did so by providing the appropriate documents in his or her K.S.A. 60-1501 petition. Here, Ross did not provide any information indicating he filed some sort of grievance with the KDOC or did more than simply ask the KDOC for a summary of his calculated sentences. We could, then, dismiss his claim for lack of jurisdiction. However, even when reviewing his claim on its merits, we find his allegations unpersuasive.

To state a claim for relief under K.S.A. 60-1501 and avoid summary dismissal, a petition must allege "'shocking and intolerable conduct or continuing mistreatment of a constitutional stature.'" *Denney v. Norwood*, 315 Kan. 163, 173, 505 P.3d 730 (2022). "But if it is apparent from the petition and attached exhibits that the petitioner is entitled to no relief, then no cause for granting a writ exists and the court must dismiss the petition." 315 Kan. at 173. Then summary dismissal is proper. See K.S.A. 2022 Supp. 60-1503(a).

We exercise de novo review over a district court's summary dismissal of a K.S.A. 60-1501 petition. 315 Kan. at 176. Additionally, to the extent that the issue requires interpretation of a sentencing statute, such review is a question of law under which appellate courts also exercise unlimited review. *State v. Moore*, 309 Kan. 825, 828, 441 P.3d 22 (2019).

Ross contends KDOC incorrectly computed his sentence to reflect that once he is granted parole from his hard 25 life sentence, he would have to serve another 652 months before he can be released. He then asserts that KDOC's calculation would result in designating the sentence start date for his attempted first-degree murder and firearms sentences different from his first-degree murder sentence. According to Ross' logic, that means his sentence is running consecutive and not concurrent. In this vein, Ross argues he has established manifest injustice based on a violation of his "state and Sixth Amendment Rights."

In response, the KDOC again argues Ross' sentence has not been incorrectly computed and he wrongly assumes his aggregated 652-month sentence would not start until he is granted parole from his life sentence. KDOC also contends Ross incorrectly interprets his grid sentence when he argues that sentence would be satisfied if he is released on parole on his off-grid life sentence.

Ross' appeal appears to stem from a simple misunderstanding of the information provided to him by KDOC—the Inmate Data Summary and related correspondence. Contrary to his argument, the Inmate Data Summary adheres to district court's sentencing order by breaking down Ross' sentence as follows:

> "Sentence breakdown—99CR2343 = 57 mos; 02CR1061 = ct 3- (H25) is concurrent to ct 1 (586-mos); ct 5 (9-mos) is consecutive to cts 3 & 1. All cts in '02 case are consecutive to '99 case per statute. *Offender must be paroled on the H25 AND reach his projected release date on the aggregate 652-mos sentence before he can be released*." (Emphasis added.)

And the written explanation provided to Ross by KDOC correctly reflects the sentence imposed by the district court:

> "The Court ordered that the LIFE sentence and the 586 month sentence imposed in SG 02CR1061 are to run *concurrent* to one another, with the 9 month sentence imposed in count 5 ordered to run consecutive to counts 3 and 1. The sentences imposed in 02CR1061 are consecutive to the 57 month sentence imposed in SG 99CR2343 as the '02 crimes occurred while on probation for the '99 case.
>
> "You are required to serve the sentence that results in the longest period of incarceration. *If you are granted parole on the LIFE sentence prior to the projected release date on the 652 month determinate sentence you will remain in custody to complete the 652 month sentence. If you are granted parole on the LIFE sentence after satisfying the 652 month sentence you will be released in accordance with the Prisoner Review Board's direction*." (Emphases added.)

The written explanation provided by KDOC could have been made clearer by including a few words; namely: "If you are granted parole on the LIFE sentence prior to the projected release date on the 652-month determinate sentence, you will remain in

custody to complete [*the remainder of*] the 652-month sentence." (Emphasis added.) Even so, the record supports KDOC's interpretation of Ross' sentence.

The Inmate Data Summary shows that the concurrent sentences imposed for Ross' instant convictions both began on March 24, 2003. Based on Ross' hard 25 life sentence, Ross must serve 25 years, or 300 months, before he is eligible for parole on that sentence on March 24, 2028. But even if Ross is granted parole on his life sentence sometime after March 24, 2028, the remaining aggregated sentence would continue to run until completed. For example, if Ross is granted parole exactly 25 years (300 months) after his life sentence began, he would still be required to serve the remaining 352 months' imprisonment (652 months - 300 months) for his attempted first-degree murder, aggravated battery, and criminal possession of a firearm convictions. Or, as explained by the KDOC, in the event Ross were to serve more than 652 months on his life sentence, he would then be released because his concurrent sentences would each be satisfied.

In his petition and on appeal, Ross relies on *State v. Grotton*, 50 Kan. App. 2d 1028, 337 P.3d 56 (2014), to argue his 652-month sentence should be subsumed by his off-grid life sentence. In *Grotton*, the defendant argued that her sentence was illegal under the double rule, according to K.S.A. 21-4720(b). "The double rule provides that a defendant sentenced for multiple convictions can generally only be required to serve a maximum sentence double the length of the sentence for [the] primary crime, which is the grid crime with the highest severity ranking." 50 Kan. App. 2d at 1031. The panel in *Grotton* found the double rule did not apply to off-grid crimes and "[i]n cases where the sentences all run concurrent [with] each other—as is the case here—the grid sentence is subsumed into the off-grid sentence, and the double rule does not come into play." 50 Kan. App. 2d at 1033. This court also held that the lesser 6-month grid sentence was subsumed into the longer off-grid sentence of two concurrent life sentences without the possibility of parole for 25 years. 50 Kan. App. 2d at 1033.

Ross' interpretation of *Grotton* is flawed and distinguishable from the facts presented here. Ross' grid sentence of 652 months is longer than the minimum term of his life sentence, which is 25 years or 300 months. Because Ross could still have 352 months (or less) remaining, depending on his date of parole after serving the life sentence, Ross' grid sentence would not be subsumed into the off-grid sentence like in *Grotton*, where the grid sentence was only 6 months.

Ross must serve the sentence that results in the longest period of incarceration, but this does not mean his sentences are not being run concurrent with one another. Ross' interpretation of his sentence is not supported by the record or the law. So, Ross has failed to establish a "'shocking and intolerable conduct or continuing mistreatment of a constitutional stature,'" and it is apparent that Ross is entitled to no relief. See *Norwood*, 315 Kan. at 173. As a result, there is no error to correct. The district court did not err by summarily dismissing Ross' K.S.A. 60-1501 petition.

Affirmed.