NOT DESIGNATED FOR PUBLICATION

No. 126,180

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

MARCUS TYLER JR.,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; COURTNEY MIKESIC, judge. Submitted without oral argument. Opinion filed December 29, 2023. Affirmed.

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

Garett C. Relph, deputy district attorney, *Mark A. Dupree Sr.*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

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

PER CURIAM: Marcus Tyler Jr. appeals from the district court's summary dismissal of his K.S.A. 60-1507 motion. In 2005, Tyler was convicted—as an aider and abettor—of first-degree murder and conspiracy to commit murder. After the Kansas Supreme Court affirmed his convictions on direct appeal, Tyler filed a K.S.A. 60-1507 motion in which he alleged that his trial counsel and his appellate counsel were ineffective. Finding that the motions, files, and records of the case conclusively establish that Tyler is not entitled to relief, we affirm the district court's summary dismissal of his K.S.A. 60-1507 motion.

FACTUAL AND PROCEDURAL HISTORY

The facts of the underlying criminal case are largely immaterial to the issues presented on appeal. The Kansas Supreme Court adequately discussed these facts in affirming Tyler's convictions on direct appeal. *State v. Tyler*, 286 Kan. 1087, 1088-89, 191 P. 3d 306 (2008). Instead of repeating them here, we will focus on the procedural history that leads to Tyler's current appeal and discuss additional facts as necessary in the Analysis section of this opinion.

On May 19, 2004, the State charged Tyler—as an aider and abettor—with first-degree murder, conspiracy to commit murder, and theft for acts committed in November 2003 when he was 17 years old. Prior to trial, the district court certified Tyler for adult prosecution. At his first jury trial, the jury acquitted Tyler on the theft charge but hung on the remaining charges.

At Tyler's second jury trial—which was conducted in December 2005—the jury found him guilty of both first-degree murder and conspiracy to commit murder. The district court subsequently sentenced Tyler to life imprisonment with eligibility for parole after 25 years on the first-degree murder conviction and a concurrent sentence of 117 months on the conspiracy to commit murder conviction. Thereafter, the Kansas Supreme Court affirmed Tyler's convictions. 286 Kan. at 1090, 1097.

On September 25, 2009, Tyler filed a K.S.A. 60-1507 motion claiming that both his trial counsel and his appellate counsel were ineffective in providing him assistance for multiple reasons. In response, the State requested summary dismissal pursuant to K.S.A. 60-1507. See Kansas Supreme Court Rule 183 (2023 Kan. S. Ct. R. at 242). However, Tyler—by and through his retained K.S.A. 60-1507 counsel—moved to voluntarily dismiss the motion without prejudice, and the district court granted this request.

Many years later, on May 28, 2021, a different attorney filed a motion on Tyler's behalf seeking to set aside the order of voluntary dismissal. In his motion to set aside, Tyler alleged that his previous counsel did not obtain his permission to voluntarily dismiss his K.S.A. 60-1507 motion. He also alleged that he did not receive notice that the motion was filed or granted. Further, Tyler alleged that one of his former attorneys had committed a fraud on the court pursuant to K.S.A. 2020 Supp. 60-260(d)(3). On November 16, 2021, the district court reinstated Tyler's K.S.A. 60-1507 motion originally filed in 2009. The district court appointed new counsel to represent Tyler, and the case was reassigned to a different district court judge.

At a hearing on the motion held on February 10, 2023—at which Tyler appeared in person and through counsel—Tyler's attorney explained that he had been confused about the purpose of his appointment. Evidently, the attorney initially thought that he was appointed to represent Tyler on an unrelated motion relating to postrelease supervision that he recently learned had been resolved in Tyler's favor. As a result, the attorney asked the district court to set Tyler's K.S.A. 60-1507 motion for an evidentiary hearing. After hearing arguments from both parties, the district court denied the request.

On February 16, 2023, the district court issued a comprehensive 14-page journal entry in which it summarily dismissed Tyler's K.S.A. 60-1507 motion. Specifically, the district court determined that Tyler had "failed to establish an insufficient assistance of counsel claim and the [motion] must be summarily dismissed as being without legal merit." It also determined that Tyler's claims regarding the ineffectiveness of trial counsel were barred as successive.

ANALYSIS

At the outset, we note that the State concedes that Tyler's K.S.A. 60-1507 motion was not successive. As such, the only issue presented on appeal is whether the district court erred in summarily dismissing the K.S.A. 60-1507 motion. Although the parties disagree over the nature of the hearing conducted by the district court, our standard of review in this case is the same regardless. This is because the district court explained that it based its decision on a review of the transcripts, motions, pleadings, and records in the case. As a result, we are in as good of a position as the district court to determine whether Tyler's K.S.A. 60-1507 motion should have been summarily dismissed. See *Grossman v. State*, 300 Kan. 1058, 1061, 337 P.3d 687 (2014).

Accordingly, we conduct 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). As the movant, Tyler 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) Counsel's performance was deficient under the totality of the circumstances; and (2) 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).

Judicial review of the legal representation provided by attorneys to their clients is highly deferential. It is not our role to review an attorney's performance based on hindsight. Rather, we are to assess the performance of counsel 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) (quoting *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).

Here, a review of Tyler's K.S.A. 60-1507 motion reveals that it is based on conclusory allegations which are not supported by the record. In other words, he did not provide evidentiary support in his motion for his ineffectiveness of counsel claims sufficient to pass the *Strickland* test. See *Mundy v. State*, 307 Kan. 280, 304, 408 P.3d 965 (2018). Moreover, we do not find such support based on our review of the motions, pleadings, transcripts, files, and records of this case.

Tyler's first claim of ineffective assistance of trial counsel alleged that his attorney failed to address his alleged diminished capacity, mental defects, and low intelligence. In his K.S.A. 60-1507 motion, Tyler asserted that his trial counsel only had him evaluated by Dr. William S. Logan—a forensic psychiatrist—on the limited issue of competency to stand trial. Tyler alleged that "[w]ith proper preparation and investigation, [trial] counsel

could have clearly demonstrated that [Tyler] lacked the ability to understand the nature and consequences of his actions, right from wrong, or the ability to conform his conduct to the requirements of the law." Tyler also claimed that trial counsel "abandoned all mental defenses."

Tyler failed to support his conclusory allegations with citations to the record. Likewise, while Tyler listed individuals who he believed may have knowledge regarding his diminished capacity, he did not state what information these individuals allegedly possess. Additionally, the record contains numerous examples of trial counsel's attempts to admit evidence regarding Tyler's diminished capacity. In particular, as the district court noted, the record reflects that Tyler's trial counsel attempted to pursue a mental disease or defect defense at the suppression hearing, at trial, and at sentencing.

The record further reflects that Dr. Logan evaluated Tyler at the request of trial counsel and submitted an 11-page report detailing Tyler's mental state, low intelligence, and health conditions. Likewise, a review of the record reveals that before both of Tyler's jury trials, his trial counsel attempted to admit Dr. Logan's report into evidence to support a mental disease or defect defense. Moreover, trial counsel renewed his requests to admit Dr. Logan's report at trial. Then, at the sentencing hearing, trial counsel submitted Dr. Logan's report as an exhibit in an attempt to mitigate Tyler's sentence. Thus, we find that Tyler's first claim of ineffectiveness of trial counsel is not supported by the record.

Tyler also claims that his trial counsel failed to raise the issue of "threats, intimidation, duress, and coercion" allegedly made by his codefendant, Mark McGee, against him. In other words, Tyler argues that his trial counsel was ineffective for not asserting the defense of compulsion or threat on his behalf. However, we do not find this argument to be supported by the record or by law.

K.S.A. 21-3209(1) provided that the defense of compulsion or threat was not available to someone charged with murder. Consequently, the plain language of the statute prohibited trial counsel from using compulsion or threat as a defense to Tyler's first-degree murder charge. See *State v. Matson*, 260 Kan. 366, 385, 921 P.2d 790 (1996). At most, a compulsion or threat defense may have been applicable to Tyler's conspiracy to commit murder charge if supported by the facts. See *State v. Jackson*, 280 Kan. 16, 28, 118 P.3d 1238 (2005).

A review of the record reveals that a compulsion or threat defense would not have been appropriate. As the Kansas Supreme Court has held, a compulsion or threat defense "requires coercion or duress to be present, imminent, impending, and continuous. It may not be invoked when the defendant had a reasonable opportunity to escape or avoid the criminal act without undue exposure to death or serious bodily harm." 280 Kan. at 28.

In his K.S.A. 60-1507 motion, Tyler alleges threats made after the completion of the crime while he was incarcerated awaiting trial. But he does not claim that the role he played in committing the murder was done under compulsion or threat. Furthermore, the record would not support such a claim even if it had been asserted in the motion. Rather, the record reveals that Tyler agreed to be the lookout for McGee and Aaron Roundtree—who also participated in the crime—not under compulsion or threat but in exchange for drugs.

Significantly, in Tyler's direct appeal, our Supreme Court recognized:

> "Tyler does not dispute his own statements which admitted that he accompanied McGee and Roundtree on their murderous venture in return for a promise that he would receive drugs; that he agreed to be a lookout in the victim's vehicle to assure that it was not being followed by her boyfriend; that he entered into the victim's vehicle and, from outward appearances, maintained a position from which he could act as a lookout; and that he

> remained with the group until the murder was completed, despite a change of vehicles and one or more intervening stops." (Emphasis added.) *Tyler*, 286 Kan. at 1094.

Even so, trial counsel asked questions of witnesses and made statements during closing argument in an attempt to elicit sympathy for his client from the jury. He did so by pointing out that McGee was a bad person and suggesting that Tyler was simply his pawn. Accordingly, we agree with the district court that Tyler's claim regarding trial counsel's failure to assert the defense of compulsion or threat is meritless.

Tyler's third claim of ineffective assistance of trial counsel alleged that his attorney failed to investigate and consider the effects of his sickle cell anemia on his mental capacity and ability to make decisions. In his K.S.A. 60-1507 motion, Tyler claimed that his medical condition resulted in an "inability to grasp legal concepts, and an obvious inability to understand consequences and make rationale and reasonable decisions . . . ." But he again offers nothing more than conclusory allegations without an evidentiary basis for this contention.

The record reflects that Dr. Logan provided an intensive analysis of Tyler's mental state and health conditions—including his sickle cell anemia. In his report, Dr. Logan stated that Tyler had suffered from sickle cell anemia since birth and that it bothered him almost daily. Dr. Logan went on to describe the pain Tyler suffered from his condition and his methods for managing his symptoms. Dr. Logan also described the effect of Tyler's sickle cell anemia on his academic achievements because of flare ups that caused him to miss school.

Dr. Logan's report provided no indication that Tyler's sickle cell anemia affected his mental abilities or his ability to stand trial. On the other hand, Dr. Logan discussed Tyler's diagnosis of what is now referred to as intellectual disability that impacted his learning and his verbal comprehension. Even so, Dr. Logan—who was retained on behalf

of the defense to evaluate Tyler—ultimately rendered the opinion that Tyler's low IQ did not "play[] a role in his actions or produce[] any lack of the appreciation of the wrongfulness of killing the victim in this matter." Hence, we agree with the district court that trial counsel "zealously pursued a mental disease/defect defense and sickle cell anemia defense in this case."

Based on our review of the record, we find that each of Tyler's claims of ineffective assistance of trial counsel are conclusory and unsupported by the record. Likewise, we find nothing in the record to suggest that Tyler can overcome the strong presumption that trial counsel's representation fell within the wide range of reasonable professional assistance. Finally, we note that Tyler candidly admits in his brief that there is "a lack of support in the record" to support a claim of ineffective assistance of appellate counsel. Consequently, this issue is deemed to be waived or abandoned. See *State v. Arnett*, 307 Kan. 648, 650, 413 P.3d 787 (2018).

In summary, we find that Tyler has not stated an evidentiary basis in support of the claims asserted in his K.S.A. 60-1507 motion. Likewise, we find no evidentiary basis in the record to establish that his trial counsel's performance was deficient under the totality of the circumstances or that he suffered prejudice because of his attorney's performance. Therefore, we conclude that the motion, files, and records of the case conclusively establish that Tyler is not entitled to relief on his K.S.A. 60-1507 motion.

Affirmed.