

NOT DESIGNATED FOR PUBLICATION

No. 119,599

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

KISHA DENISE SCHABERG,  
*Appellant,*

v.

STATE OF KANSAS,  
*Appellee.*

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JEFFREY E. GOERING, judge. Opinion filed February 14, 2020. Affirmed.

*Reid T. Nelson* and *Debra J. Wilson*, of Kansas Capital and Conflicts Appeals Office, for appellant.

*Lance J. Gillett*, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before SCHROEDER, P.J., MALONE and STANDRIDGE, JJ.

PER CURIAM: This is a direct appeal from the district court's decision to deny Kisha Denise Schaberg's motion seeking habeas corpus relief under K.S.A. 60-1507. Her motion alleged ineffective assistance of trial counsel during plea negotiations in her underlying criminal case. For the reasons stated below, we affirm.

## FACTUAL AND PROCEDURAL HISTORY

Schaberg is the biological mother of two young men, Tony and Christopher, who were adopted by Melissa and Roger Bluml when they were young. The two boys grew up with the Blumls in Valley Center, Sedgwick County, Kansas. As Tony got older, he began to exhibit violent behavior towards Christopher and his adoptive parents. That violent behavior came to a head in the summer of 2013 when Tony—who was approximately 18 years old at the time—got angry, punched a hole in a wall, and was kicked out of the Blumls' house. At this point, Tony contacted Schaberg. Eventually, Tony and his friend, Braden Smith, moved to California to stay with Schaberg. But when Tony, Smith, and Schaberg began to run out of money, they decided to move back to Wichita, Kansas. On the way, Schaberg reportedly said several times that she wanted to kill the Blumls so that she, Tony, and Christopher could be reunited as a family. Schaberg was particularly upset that Christopher wanted "nothing to do with her" and blamed the Blumls for turning her youngest son against her.

By the time the three arrived in Wichita, they had devised a plan to kill the Blumls. Smith originally was a part of that plan and was set to receive \$1,000 for "taking care of" one of the Blumls. But Smith later changed his mind and decided he did not want to be involved in the killings. Smith allegedly recruited Andrew Ellington to take his place and provided Ellington with the firearms that were to be used in the killings. Ellington later met with Tony and Schaberg and was told that the plan was to make the murders look like a robbery. Ellington agreed to participate in exchange for the sum of \$1,000.

On the evening of November 15, 2013, Tony went out to eat with the Blumls. While Tony was at dinner with his adoptive parents, Schaberg and Ellington went to the Blumls' home but had trouble breaking in to stage the robbery. At one point, Ellington texted Tony asking for the garage door code. Tony responded to Ellington's text by

calling him from the restaurant. Tony reportedly told Ellington what he thought was the garage door code, but said if that did not work, they should get into the house by breaking a window or the glass door that led to the basement. Eventually, Schaberg and Ellington were able to enter the house by lifting the garage door and then kicking in an interior door. Once inside, the two went into the master bedroom, opened up a number of dresser drawers, and removed small items of property, all in an attempt to make it look like the scene of a robbery. The two of them then went back outside and waited behind some trees beside the driveway.

While they were waiting, Tony texted Ellington and told him that the Blumls had dropped him off at his hotel and were on their way home. The Blumls pulled into their driveway about 15 minutes later. As they moved forward in the driveway, Schaberg pulled out her gun and rushed the passenger's side of the vehicle. At the same time, Ellington rushed the driver's side, pulled out his gun, and told Roger to stay in the vehicle. Ellington then heard Melissa say, "[d]amn" just before Schaberg shot Melissa in the head. Ellington then heard Roger say, "[h]oney" before he too was shot in the head by Schaberg. After the shootings, Schaberg removed Melissa's purse and cell phone from the vehicle and gave them to Ellington to dispose of. She also removed Roger's cell phone and keys, but Ellington dropped them and did not pick them back up from the ground next to the vehicle before leaving the scene. The two returned to Ellington's vehicle and drove back to the hotel where Schaberg and Tony were staying. When they arrived, Schaberg told Tony that it was "done," and Tony said, "OK." Schaberg wrapped the gun in a shirt and told Ellington to get rid of it along with Melissa's purse. Ellington did so by throwing both items off of a concrete spillway.

Christopher, who was 16 at the time, arrived home later that evening and saw the Blumls inside their vehicle. He initially thought his adoptive parents were playing a prank on him. When it became clear that they were not, Christopher called 911 and told the dispatcher that his parents were passed out inside their vehicle and that there was blood

inside. EMS later removed the Blumls from the vehicle and transported them to Wesley Medical Center. Both Melissa and Roger were in critical condition. Melissa was pronounced dead the next day, November 16, 2013. Roger died from his injuries just over a month later, on December 21, 2013.

The Sedgwick County Sheriff's Department quickly identified Schaberg, Tony, Ellington, and Smith as the suspects. In interviews with police, Tony, Ellington, and Smith all waived their rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), admitted to their roles in the murders, and provided information that led to the collection of evidence, including Melissa's purse and the gun that Schaberg used. The police also interviewed Schaberg, but she denied any involvement in the killings.

On January 3, 2014, Schaberg, Tony, Ellington, and Smith were all charged with one count of capital murder (the killing of more than one person in one occurrence) or, alternatively, two counts of first-degree murder, both off-grid person felonies. In addition Schaberg was charged with two counts of aggravated robbery, one count of burglary, and one count of theft. A preliminary hearing in Schaberg's case was held on July 9, 2014. But after hearing the testimony of just one witness, Schaberg waived the rest of her preliminary hearing, and the district court bound her over for trial on all seven counts.

After almost a year of motions and plea negotiations, Schaberg and the State eventually reached an agreement on May 13, 2015. Under the terms of that deal, Schaberg agreed to plead no contest to one count of capital murder, an off-grid person felony; and two counts of aggravated robbery, both severity level 3 person felonies. She also agreed to waive certain rights as set forth in a document titled, "Waiver of Rights," which provided:

"This waiver is being made in conjunction with a plea agreement being entered into by me and the State of Kansas in this case.

- "1. As a condition of the plea agreement, and in exchange for offers made by the State in that negotiated resolution to this case, I have agreed to waive certain rights that I have the ability and authority to do, as recognized by *State v. Patton*, 287 Kan. 200[, 195 P.3d 753] (2008).
- "2. I, Kisha D. Schaberg, hereby waive my right to appeal or collaterally attack the prosecution, convictions, sentence or terms set forth in the associated plea agreement, including but not limited to the following:
  - a. My conviction of Capital Murder of Roger Bluml and Melissa Bluml and the Aggravated Robbery of Roger Bluml and the Aggravated Robbery of Melissa Bluml;
  - b. The sentence imposed by the sentencing judge for the Capital Murder of Roger Bluml and Melissa Bluml and the Aggravated Robbery of Roger Bluml and the Aggravated Robbery of Melissa Bluml, whether or not the sentencing judge follows the terms of the above and foregoing plea agreement;
  - c. Any claim that the negotiated plea agreement in this case violates the bar under the Kansas and Federal Constitutions to double jeopardy, statu[t]es or case law interpreting the same.
- "3. I further affirm that I waive the above-described rights knowingly, freely, voluntarily and intelligently without threat, coercion or duress, having been fully advised of the consequences and penalties of this waiver."

In return, the State agreed to dismiss the remaining counts, to withdraw its notice of intent to seek the death penalty, and to recommend that Schaberg be sentenced to life in prison without the possibility of parole for the capital murder charge and to consecutive prison sentences for the aggravated burglary charges.

A plea hearing was held two days after the plea agreement, and the waiver of rights documents were signed by the parties. The district court reviewed the agreement with Schaberg, and she affirmed that she both had reviewed and understood the

agreement with the help of trial counsel. The district court then engaged in a lengthy plea colloquy with Schaberg during which it reviewed her rights and confirmed that she understood them and that, by pleading no contest, she knew that she was giving up those rights. The district court also reviewed the additional waiver of rights form that Schaberg signed, in which she agreed to waive certain rights regarding her ability to appeal or collaterally attack her convictions. Specifically, the district court ensured that Schaberg understood the importance of those rights and that she was willing to give them up to obtain the benefit of the plea agreement. When the district court was satisfied with Schaberg's responses, and after the State provided a factual basis for the charges, it accepted her no-contest pleas and found her guilty of one count of capital murder and two counts of aggravated robbery. The court later sentenced Schaberg to life in prison without the possibility of parole for the capital murder charge and to 61 months in prison for each of the aggravated burglary charges, with all of the sentences running consecutive to one another.

About a year after she was sentenced, Schaberg filed a pro se motion seeking habeas corpus relief under K.S.A. 60-1507 based on ineffective assistance of trial counsel. Specifically, Schaberg claimed she was coerced into accepting the plea agreement because her attorney purportedly told her "that if she did not sign the plea she would get the death penalty." The State argued Schaberg was procedurally barred from making such a claim because she had waived her right to collaterally attack her convictions and even if she was not procedurally barred, her claims had no substantive merit. After a nonevidentiary hearing, the district court denied Schaberg's motion. The court held Schaberg waived the right to collaterally attack her convictions and, even if she had not, her claims of ineffective assistance of counsel were without merit.

#### ANALYSIS

When handling a K.S.A. 60-1507 motion, a district court has three options:

“(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.]” *White v. State*, 308 Kan. 491, 504, 421 P.3d 718 (2018).

An appellate court's standard of review depends upon which of the three options a district court takes. *White v. State*, 308 Kan. 491, 504, 421 P.3d 718 (2018). Where, as here, the district court summarily denies a K.S.A. 60-1507 motion based solely on the motions, files, and records after a preliminary hearing, the appellate court is in just as good a position as the district court to consider the merits and therefore the standard of review is *de novo*. *Grossman v. State*, 300 Kan. 1058, 1061, 337 P.3d 687 (2014).

### *Waiver*

Schaberg argues the district court erred in finding she waived the right to bring a collateral claim alleging her counsel was ineffective in assisting her during the plea negotiation phase of trial. We agree. By its own plain and unambiguous language, the waiver of rights signed by Schaberg in conjunction with her plea agreement was limited in nature: “I have agreed to waive *certain* rights.” (Emphasis added.) Relevant here, her waiver with respect to the plea agreement stated she was waiving her right to collaterally attack “[a]ny claim that the negotiated plea agreement in this case violates the bar under the Kansas and Federal Constitutions to double jeopardy, statu[t]es or case law interpreting the same.” The language of this narrowly drawn waiver is unambiguous, and it clearly does *not* waive the right to bring a collateral claim related to the negotiated plea agreement so long as it does not allege a double jeopardy challenge. Accordingly, we find

the district court erred in concluding that Schaberg waived the right to bring a collateral claim alleging ineffective assistance of counsel during plea negotiations.

*Ineffective assistance of counsel*

Schaberg's claim of ineffective assistance of counsel is grounded in the allegation "that her attorney coerced her into entering a no contest plea to capital murder by representing that she 'would' get the death penalty if she did not do so." To set aside a guilty plea on the basis that Schaberg received ineffective assistance of counsel, Schaberg must show that her attorney's performance fell below an objective standard of reasonableness and that "there is a reasonable probability the result would have been different but for [her attorney's] errors." *State v. McDaniel*, 306 Kan. 595, 607, 395 P.3d 429 (2017) (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 [1984]). A "reasonable probability" is a sufficient enough probability to undermine confidence in the outcome of the proceeding. *State v. Bricker*, 292 Kan. 239, 246, 252 P.3d 118 (2011).

Assuming the allegations in Schaberg's motion are true, as we must when no evidentiary hearing has been held, we find it is unnecessary in this case to determine whether counsel's performance fell below an objective standard of reasonableness by allegedly representing to Schaberg that she "would" get the death penalty if she did not enter a plea of no contest. This is because there is nothing in the record to establish a reasonable probability that the result of the plea negotiations would have been different but for counsel's alleged deficient performance. More specifically, there is no evidence in the record to support a finding that Schaberg would *not* have entered a no-contest plea had her attorney not made the alleged misrepresentation to her.

There is no dispute in this case that Schaberg was facing the death penalty before she entered into the plea agreement. And as stated in her K.S.A. 60-1507 motion, she was



"scared" she would get the death penalty. Although Schaberg alleges in her motion that her attorney coerced her into the plea agreement by representing that she "would" get the death penalty, she fails to allege that she would *not* have pled absent that representation. To the contrary, the record is replete with instances in which the attorneys and Schaberg acknowledge that in exchange for her plea, the State is withdrawing its notice of intent to seek the death penalty. Implicit within the term "notice of intent to seek" is that the State had not yet committed to filing a request for the death penalty, and the court certainly had not committed to imposing a sentence of death in this case. Because Schaberg fails to bear her burden to prove she would not have entered her plea absent her attorney's alleged misrepresentation, we affirm the district court's decision denying her motion for relief.

Affirmed.