

NOT DESIGNATED FOR PUBLICATION

No. 123,853

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

DOMINIC CLARK,  
*Appellant,*

v.

STATE OF KANSAS,  
*Appellee.*

MEMORANDUM OPINION

Appeal from Wyandotte District Court; AARON T. ROBERTS, judge. Opinion filed July 28, 2023.  
Affirmed.

*Jeffrey Leiker*, of Leiker Law Office, P.A., of Overland Park, for appellant.

*Lois Malin*, assistant district attorney, *Mark A. Dupree Sr.*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before ISHERWOOD, P.J., SCHROEDER, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: Dominic Clark appeals the district court's denial of his K.S.A. 60-1507 motion after an evidentiary hearing. He claims that his trial attorney rendered constitutionally deficient representation when she opted to not pursue an alibi defense at trial. After carefully reviewing the record and the parties' arguments, we agree with the conclusion that Clark failed to show he was deprived of constitutionally effective assistance at trial and affirm the trial court's denial of his K.S.A. 60-1507 motion.

## FACTUAL AND PROCEDURAL BACKGROUND

Dominic Clark was convicted of second-degree murder and felony possession of a firearm following a jury trial. The facts underlying Clark's convictions were thoroughly fleshed out in his direct appeal and need not be repeated in full here. See *State v. Clark*, No. 114,883, 2017 WL 1104560, at \*1-2 (Kan. App.) (unpublished opinion), *rev. denied* 307 Kan. 989 (2017). In sum, the charges stemmed from an incident in which several witnesses observed a man wearing a red jacket fleeing from the scene of a shooting in Kansas City, Kansas, in a dark BMW. About 30 minutes later, another witness saw a man—who he identified at trial as Clark—driving a dark BMW stop near a dumpster in Kansas City, Missouri, and place a red jacket and bag inside. The witness found two guns inside the bag and called the police, who retrieved the items and tested them for DNA. Clark's DNA profile was a major contributor to the DNA found on the items.

About two weeks after trial, Clark's appointed counsel timely moved for a new trial challenging the district court's admission of the DNA evidence and the sufficiency of the witness' identification of Clark. The motion was denied at the first phase of Clark's sentencing. Roughly a week after that proceeding, Clark filed a pro se "Motion for Appeal," asserting that his trial counsel failed to provide him with effective assistance. He alleged that counsel advised him the State failed to prove its case, so there was no need to present the alibi defense Clark prepared. The district court appointed Michael Highland to represent Clark for further proceedings.

A month passed and Clark filed an untimely pro se motion for new trial in which he again alleged that trial counsel prevented him from testifying about an alibi, and reiterated the contentions set out in his earlier "Motion for Appeal" concerning trial counsel's representation. Several weeks later and the day before Clark's sentencing was scheduled to resume, Highland filed an amended motion for new trial on Clark's behalf and asserted the court should still consider Clark's pro se motion for new trial despite its

untimely nature. The district court simply denied the motion as untimely without delving into the merits and imposed a controlling prison sentence of 272 months.

Clark directly appealed his convictions to challenge the sufficiency of the evidence underlying his convictions and a purported error committed by the prosecutor. A panel of this court affirmed his convictions in February 2017, which was followed thereafter by the Kansas Supreme Court's denial of his petition for review in November 2017. *Clark*, 2017 WL 1104560, at \*1.

The following year, Clark filed a K.S.A. 60-1507 petition which outlined several perceived shortcomings in trial counsel's representation and raised a single claim of ineffective assistance of appellate counsel for failing to advance any issues related to trial counsel's performance. Clark specifically alleged his trial attorney provided deficient representation by failing to:

- (1) Prepare an alibi defense, including by not contacting four alibi witnesses provided by Clark and not filing a notice of alibi;
- (2) Communicate with Clark before trial about evidence he wished to present to the jury;
- (3) Make timely objections at trial and stipulating to evidence that harmed Clark's defense; and
- (4) Prepare any rebuttal to the State's DNA evidence, including by contacting any expert witnesses or explaining to Clark how the DNA evidence would be rebutted at trial.

The district court conducted an evidentiary hearing during which Clark presented testimony from several witnesses. The State called trial counsel as a witness.

Clark's first witness was his sister, Azucena Mitchell, who said she and her mother helped Clark prepare his alibi defense by speaking with trial counsel on one or two occasions "months before" trial. Mitchell said trial counsel "was kind of hard to get in contact with" but that Mitchell was in charge of maintaining contact with the alibi witnesses and ensuring they were present at the trial. According to Mitchell, trial counsel exited the courtroom during a break toward the end of trial and told the alibi witnesses that "the trial seemed to be going in [Clark's] favor" so their testimony was no longer needed. On cross-examination, Mitchell acknowledged she was not personally involved with any conversations trial counsel shared with the alibi witnesses, but she was aware counsel asked those witnesses to prepare sworn statements.

Delano Hutchins, Mitchell's cousin, was one of the potential alibi witnesses who was present at trial and prepared to testify. He testified at Clark's evidentiary hearing that he only met briefly with Clark's initial trial attorney, Gary Stone, to discuss that he was with Clark at the time of the shooting. Although he never met with trial counsel, Hutchins was present at trial and prepared to testify consistent with the conversation he had with Stone. Hutchins claimed that other alibi witnesses were also present and ready to testify that day.

Clark testified on his own behalf and informed the court that he initially retained Stone who then represented him for the first eight or nine months of the case. During that time, they discussed an alibi defense and Clark provided him with the names of potential alibi witnesses, including Hutchins. When trial counsel was appointed, Clark similarly discussed the alibi defense with her, but she purportedly did not investigate the witnesses to his satisfaction. Clark expected the witnesses to testify at trial, but he did not find out until "the very end" that trial counsel did not intend to use them. Clark said trial counsel told him that she did not file a notice of alibi, but it was not cause for concern because Clark was "winning" so their testimony was not needed. On cross-examination, Clark

explained that his reference to only a singular alibi witness in his posttrial pro se motions was a mistake and he intended to assert there was "more than one."

Stone testified and acknowledged that Clark provided him with the names of potential alibi witnesses and that he "definitely" intended to "file a notice of alibi" if he continued to represent Clark. He simply had not yet done so before he departed from the case as a matter of trial strategy. Stone asserted that he interviewed "in excess of 10, 15 witnesses" and investigated the locations mentioned by Hutchins to verify the information he provided. Stone did not recall the entirety of Hutchins' statement, but specifically remembered that he was one of two witnesses who could testify about where Clark was during a specific timeframe.

Trial counsel testified and informed the court that her usual practice was to maintain client files through their direct appeal and, upon conclusion of that procedural leg of the case, the file would be destroyed. So by the time Clark filed his K.S.A. 60-1507 petition only a few documents still existed for his case file—a post-conviction letter she had written to Clark, a notice of appeal, a document sent to the Board of Indigents' Defense Services for billing purposes, and "one or two other ancillary things." It could be gleaned from the billing statement that trial counsel either met with witnesses personally or spoke with them over the phone on three specific dates. She elaborated that she typically speaks with her client then contacts the witness to vet the information given by the client and get a feel for what information the witness possesses and determine whether they would be willing to testify. If there is consistency between her client's statements and those of the potential witness, she advises the person about the opportunity to testify and "if all of the pieces fell in place, I would file a notice of alibi defense." She further testified that she asks witnesses to draft a statement to "use it as an outline regarding what their testimony would be for trial," but she did not believe sworn statements were necessary. As to Clark's case, trial counsel had a specific recollection of speaking with at least one person about an alibi but could not recall their gender or

whether it occurred face-to-face or over the phone. She remembered Clark giving her names of alibi witnesses and while she could not recall exactly how many, she could say with certainty that she would have followed up on them and filed a notice of alibi "[i]f they were viable."

At that point in questioning, trial counsel requested to be released from confidentiality and privilege restrictions and the district court agreed. She testified that despite no longer having the case file, she specifically remembered Clark's case because of the unique fact pattern. She recalled that Clark wanted to devise an alibi defense "that he was with . . . a girlfriend or a relative or something of that nature." She sought to piece together that alibi but could not recall why it never came to fruition. She also remembered the facts of the killing and that Clark told her that "he had been a participant in that murder." She could not assign a precise date to when that conversation occurred but was "100 percent confident" it did. Counsel assured the court she was testifying truthfully. Given Clark's acknowledgment, counsel had concerns that she would be suborning perjury if she allowed Clark to present an alibi defense, so she made the decision to shift the defense strategy to simply put the State to the test. When asked if she recalled speaking with Clark about pursuing the alibi defense after this conversation, trial counsel responded that if she did not believe a viable alibi defense existed, she certainly would have discussed that with him. Counsel disputed Clark's testimony and stated that she "wouldn't have told him I'm going to present an alibi and then at the last minute say, look, I'm not going to. No, I would have never done that to him or anybody."

Following questioning by the parties, the district court asked trial counsel whether she and Clark discussed the possibility of him taking the stand to testify despite his apparent admission. Counsel explained that her recollection was that Clark did not wish to testify, but that if he opted to do so she would have limited the inquiry by merely asking him to "introduce himself to the Jury and tell [his] side of the story."

On rebuttal, Clark disputed telling counsel that he participated in the murder and maintained his innocence. To the contrary, he remembered telling her about the alibi witnesses at their very first meeting and that up until the trial he was under the impression she would be putting on an alibi defense.

After considering the parties' arguments, the district court denied Clark's K.S.A. 60-1507 motion. Relevant to this appeal, the court found that trial counsel's testimony that Clark "basically told her that he participated in the murder" changed "everything" about the alibi defense. In the court's view, the question became "[Counsel's] word against Mr. Clark's," and Clark had a "much stronger [motive] to testify in a self-serving manner." The court agreed with trial counsel that allowing Clark to testify or calling alibi witnesses that contradicted the inculpatory statement he made to her would have been "unethical" and suborning perjury. As a result, the court found that Clark's only option would have been to testify in his own defense, but he chose not to pursue that course.

Clark now brings his case before us to analyze whether the district court erred in concluding he was not entitled to relief and denying his motion.

#### LEGAL ANALYSIS

*Clark failed to substantiate his claim that he was denied the right to effective representation during his trial.*

After an evidentiary hearing on a K.S.A. 60-1507 motion, we review the district court's findings of fact to determine whether they are supported by substantial competent evidence and are enough to support the district court's conclusions of law. But our review of the district court's ultimate conclusions of law is de novo. *Balbirnie v. State*, 311 Kan. 893, 897-98, 468 P.3d 334 (2020). The burden of proof in establishing ineffective assistance of counsel is on the movant. *Fuller v. State*, 303 Kan. 478, 486, 363 P.3d 373 (2015).

At the outset we must note that of the five ineffective assistance of counsel claims Clark raised in his K.S.A. 60-1507 motion, he carried only one forward for appellate review—whether counsel provided constitutionally deficient representation when she opted not to pursue an alibi defense. As a result, the remaining four issues are treated as abandoned and will not play a part in our analysis. *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021) (An issue not briefed is considered waived or abandoned.). Accordingly, the only question we must resolve is whether the district court erred in concluding trial counsel's handling of the alibi defense matter did not amount to subpar representation.

Courts will consider whether a defendant's Sixth Amendment right to effective assistance of counsel has been denied using a well-known two-prong test established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under the first prong, Clark must establish that his attorney's performance was deficient by "show[ing] that counsel's representation fell below an objective standard of reasonableness." 466 U.S. at 688. Under *Strickland's* second prong, defendants must also show that the complained of conduct was prejudicial. To do so, they carry the burden to establish, with reasonable probability, that based on the totality of the evidence, counsel's deficient performance adversely affected the outcome of the proceedings. *Edgar v. State*, 294 Kan. 828, 838, 283 P.3d 152 (2012). "A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." 294 Kan. at 838.

*Counsel's performance was not deficient.*

When assessing the first prong, judicial scrutiny of counsel's performance must be highly deferential. A court considering an ineffective assistance of counsel claim must strongly presume that defense counsel's conduct fell within the wide range of reasonable professional assistance, meaning that the defendant must overcome the strong



presumption that, under the circumstances, counsel's action might be considered sound trial strategy. *Khalil-Alsalaami v. State*, 313 Kan. 472, 486, 486 P.3d 1216 (2021). As Clark notes, a defendant can rebut the presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

The Kansas Supreme Court has routinely said that the decision on what witnesses to call is one of the "strategic and tactical decisions" which are within the "exclusive province of [defense counsel] after consultation with [their] client." *Winter v. State*, 210 Kan. 597, Syl. ¶ 2, 502 P.2d 733 (1972); see also *Flynn v. State*, 281 Kan. 1154, 1165, 136 P.3d 909 (2006) ("Even though experienced attorneys may disagree on the best tactics or strategy, deliberate decisions based on strategy may not establish ineffective assistance of counsel."). Likewise, "strategic decisions made by trial counsel based on a thorough investigation are virtually unchallengeable." *Fuller*, 303 Kan. at 488.

Clark's argument can be summarized as follows: Trial counsel's handling of the alibi defense cannot reasonably be considered sound trial strategy because: (1) his previous attorney thoroughly investigated the alibi defense and believed it had merit; and (2) her testimony explaining her abandonment of the defense is contradicted by her actions at trial. Neither of these points persuades us that reversal is required.

As Clark notes, we have previously found that defense counsel cannot "disregard pursuing a line of investigation and call it 'trial strategy.'" *State v. James*, 31 Kan. App. 2d 548, 554, 67 P.3d 857 (2003); see also *Flynn*, 281 Kan. at 1157 ("Strategic choices based on less than a complete investigation are reasonable to the extent that reasonable professional judgment supports the limitation on the investigation."); *Mullins v. State*, 30 Kan. App. 2d 711, 716-17, 46 P.3d 1222 (2002) ("[W]hen counsel lacks the information

to make an informed decision due to inadequacies of his or her investigation, any argument of 'trial strategy' is inappropriate.").

Clark contends the testimony provided by his previous attorney, Stone, establishes that trial counsel's decision to abandon the alibi defense falls outside the sphere of a reasonable exercise of professional judgment. He suggests that trial counsel's decision cannot be properly classified as "informed" since Stone believed the defense had merit and expected to pursue the theory if he remained on the case. He points out that Stone testified about speaking with several witnesses and attempting to corroborate the alibi statements, while trial counsel could not recall specific details about her own investigation aside from the fact that she spoke with one individual sometime before trial. Clark's argument misses the mark because it ignores a critical difference in the circumstances surrounding the representation provided by the two attorneys: Trial counsel specifically testified that she abandoned Clark's proposed alibi defense after he admitted participating in the murder. That admission to his involvement put her on very different footing than Stone. He points to nothing in the record suggesting that Stone would have handled the defense any differently if he had been similarly situated.

Clark also argues that trial counsel's testimony contradicted her previous statements at trial and thereby demonstrates her decision to abandon the defense was neither informed nor a product of strategic maneuvering. This argument is also unpersuasive. For instance, Clark highlights that trial counsel still alluded to an alibi defense when addressing the jury in her opening by stating "I believe that the evidence from the defense will show that he was actually with his girlfriend at the time. . . . We have several witnesses that are going to come forward and talk about where he was during the time of the shooting." But trial counsel similarly argued repeatedly in her closing that Clark did not commit the murder. From our view, Clark is merely presenting his own interpretation of these statements and removes them from their proper context.

Trial counsel also acknowledged it was possible for Clark to personally testify about his alibi had he taken the stand at trial, so it is likely that the remarks she made during opening statements simply reflected that possibility might occur. Similarly, counsel specifically stated that Clark admitted to his participation in the murder, which need not mean he admitted being the shooter. Counsel's closing argument encouraged the jury to consider the fact that while Clark's DNA was the major contributor found on the murder weapon and the jacket deposited in the dumpster, DNA from others was found as well. Thus, the argument went, there was no direct evidence that proved Clark fired the murder weapon, which tracks with her later testimony at the 60-1507 hearing that Clark admitted participating in some other way. In any event, the fact remains that Clark wanted counsel to call alibi witnesses who would have testified he was at home during the murder, which she properly declined to do based on her ethical duties as a lawyer.

Although Clark seeks to discredit trial counsel by pointing out inconsistencies between her testimony at the K.S.A. 60-1507 hearing and some of her statements at trial, those fall under the header of credibility questions. We are expressly prohibited from reweighing evidence and reassessing credibility. The district court weighed trial counsel's testimony against Clark's and found her more credible because Clark had a much stronger motivation to testify in a self-serving manner. Likewise, the court agreed that calling alibi witnesses after Clark's admission would suborn perjury and violate ethical rules, so it was not improper to abandon the alibi defense.

Put simply, the record supports a finding that trial counsel's decision was a deliberate and strategic one that stemmed from Clark's admission to participating in the murder rather than out of an inadequate investigation as he suggests. Thus, we find that Clark failed to fulfill his obligation under the *Strickland* test to establish that trial counsel's representation fell below the objective standard of reasonableness. Arriving at

this conclusion we find it unnecessary to filter Clark's claim through the prejudice prong of the *Strickland* analysis. Clark's K.S.A. 60-1507 motion was properly denied.

Affirmed.