

NOT DESIGNATED FOR PUBLICATION

No. 124,594

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ROBERT D. ABNER,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; DAVID J. KAUFMAN, judge. Opinion filed March 10, 2023.
Affirmed in part, vacated in part, and remanded with directions.

David L. Miller, of The Law Office of David L. Miller, LLC, of Wichita, for appellant.

Matt J. Maloney, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before SCHROEDER, P.J., WARNER and CLINE, JJ.

PER CURIAM: Robert D. Abner appeals the district court's summary denial of his untimely K.S.A. 60-1507 motion. We find no error in the district court's decision and affirm its dismissal of Abner's motion. But we remand the matter to the district court for imposition of the correct postrelease term in Abner's presence because we find it improperly changed his postrelease term in his absence.

FACTUAL AND PROCEDURAL HISTORY

In June 2008, Abner was charged with committing six counts of rape, two counts of aggravated criminal sodomy, one count of aggravated robbery, and one count of aggravated kidnapping. His trial counsel requested a competency evaluation, but both the evaluation and the district court found Abner competent to stand trial. Abner's jury trial was originally scheduled for November 2008. But after Abner's counsel requested four trial continuances, it was ultimately held in May 2009. The jury convicted Abner on all counts as charged.

Abner moved for an acquittal and a new trial, which the district court denied. He also moved for durational departure because of "psychosis," which was similarly denied. At sentencing, the district court ordered Abner to serve a statutorily capped 570 months' imprisonment with 36 months' postrelease supervision.

Abner timely appealed his convictions, and this court affirmed them in November 2011. *State v. Abner*, No. 103,833, 2011 WL 6413618 (Kan. App. 2011) (unpublished opinion).

In October 2013, the State moved to change Abner's postrelease supervision duration in accordance with K.S.A. 22-3717(d)(1)(G) which mandated a lifetime duration rather than 36 months. The district court granted this motion and modified Abner's sentence, but Abner was not present in court for this change.

In 2018, Abner filed multiple motions related to the costs and fees he was ordered to pay because of his convictions. All these motions, including his notice of appeal on the matter, were dismissed.

In September 2019, Abner wrote to his trial counsel asking about his statutory speedy trial right. She responded soon after, telling Abner that she did not feel his speedy trial right had been violated. That same month, Abner wrote to the managing court reporter at Sedgwick County District Court, asking for the motions and hearing transcripts for the four trial continuances. The court reporter responded that no such records were made.

In September 2021, Abner moved pro se for "judicial review of due process" and reversal of his convictions. Abner admitted he filed his motion out of time but claimed "exceptional circumstances"—without identifying any such circumstances.

In his motion, Abner claimed he did not consent to the trial continuances and the delay in bringing him to trial violated his speedy trial rights. He also contended this delay "had a major effect on [his] mental and physical health," which he claimed affected his ability to participate in his own defense. And he alleged the district court's failure to maintain records of the continuances and its continuance of the trial in his absence violated various constitutional rights. He contended the violation of his speedy trial rights deprived the State of jurisdiction to prosecute him.

The district court construed Abner's motion as a K.S.A. 60-1507 motion and summarily denied it as untimely. It noted Abner could have raised his claims before trial, on postconviction motions, on direct appeal, or within one year after this court's mandate was issued. The district court held Abner provided no "legally or factually sufficient basis why his . . . claim . . . should be entertained," nor "any colorable claim of actual factual innocence."

ANALYSIS

On appeal, Abner argues the district court should have held an evidentiary hearing to explore his claims instead of summarily dismissing his motion.

An action under K.S.A. 60-1507 must be brought within one year of "[t]he final order of the last appellate court in this state to exercise jurisdiction on a direct appeal or the termination of such appellate jurisdiction." K.S.A. 2022 Supp. 60-1507(f)(1)(A). This time limitation may be extended "only to prevent a manifest injustice." K.S.A. 2022 Supp. 60-1507(f)(2)(A). The inquiry into manifest injustice is "limited to determining why the prisoner failed to file the motion within the one-year time limitation or whether the prisoner makes a colorable claim of actual innocence." K.S.A. 2022 Supp. 60-1507(f)(2)(A). "[A]ctual innocence requires the prisoner to show it is more likely than not that no reasonable juror would have convicted the prisoner." K.S.A. 2022 Supp. 60-1507(f)(2)(A). Thus, "[a] defendant who files a motion under K.S.A. 60-1507 outside the 1-year time limitation in K.S.A. 60-1507(f) and fails to assert manifest injustice is procedurally barred from maintaining the action." *State v. Roberts*, 310 Kan. 5, 13, 444 P.3d 982 (2019) (quoting *State v. Trotter*, 296 Kan. 898, Syl. ¶ 3, 295 P.3d 1039 [2013]).

Because this court issued its mandate affirming his convictions in March 2013, Abner had to file his K.S.A. 60-1507 motion by March 2014. Yet Abner filed his motion in September 2021—more than 12 years after his trial concluded and more than 8 years after his convictions were affirmed. Thus, Abner must either explain his delay or provide a colorable claim of actual innocence. He does neither.

To begin with, Abner offered no reason for his filing delay to the district court. While he asserted there were "exceptional circumstances," he did not explain what those circumstances were. This court's job is to examine the propriety of the district court's decision, which is necessarily limited to the circumstances presented to the district court

at the time. See *Wilkerson v. State*, 38 Kan. App. 2d 732, Syl. ¶ 2, 171 P.3d 671 (2007) ("[c]laims of manifest injustice under K.S.A. 60-1507[f][2] must be asserted in the motion itself or presented in district court or such claims will not be considered on appeal"). Abner had the burden to show a manifest injustice would occur if the district court did not excuse his filing delay and he failed to satisfy this burden. The district court did not err in dismissing his motion.

On appeal, Abner now alleges manifest injustice because he claims his "significant mental health issues . . . may constitute a reason" why he failed to file his motion within the one-year deadline. He also claims "legal innocence" since he contends the State prosecuted him in violation of his speedy trial rights. Yet even if we were to consider Abner's newly raised claims on appeal, he fails to properly support them.

First, Abner provides no specifics about his alleged mental health issues, nor does he explain how they impacted his filing delay. Instead, he simply refers to his departure motion, in which he claimed a history of "psychosis" and "psychological disorders" with no allegations tying those concerns to the reason he waited more than eight years to file his motion. And as the State notes, Abner does not allege he suffered any mental health issues in the relevant one-year period.

Next, the federal cases he cites in support of his manifest injustice claim address equitable tolling of the one-year deadline for federal habeas corpus relief under 28 U.S.C. § 2254 (1996), not a claim for relief under K.S.A. 60-1507. Even if we ceded to Abner's request and applied the federal equitable tolling concept here, he does not satisfy its requirements. A litigant seeking equitable tolling of the federal habeas corpus deadline must establish that (1) he or she has been pursuing his or her rights diligently and (2) some extraordinary circumstance stood in his or her way. *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005). Yet Abner offers no allegations to

satisfy either of these requirements. Without more specifics, his mental health allegations cannot carry his burden to show manifest injustice.

Aside from failing to explain his delay, Abner also does not provide a colorable claim of actual innocence. Below, he never mentioned actual innocence, and on appeal he does not claim factual innocence. Instead, he claims he is "legally innocent" because his speedy trial right was violated. He cites two Kansas Court of Appeals cases in support of his contention that actual innocence means legal or factual innocence. See *Stafford v. State*, No. 121,545, 2020 WL 5083858 (Kan. App. 2020) (unpublished opinion); *Avila v. State*, No. 119,800, 2019 WL 4123090 (Kan. App. 2019) (unpublished opinion).

Neither of these cases support Abner's proposition. Instead, they focus on whether the defendant in those cases met the revised statutory standard of actual innocence, defined as "requir[ing] the prisoner to show it is more likely than not that no reasonable juror would have convicted the prisoner in light of new evidence." K.S.A. 2022 Supp. 60-1507(f)(2)(A); *Stafford*, 2020 WL 5083858, at *2; *Avila*, 2019 4123090, at *4. Further, our Supreme Court has determined actual innocence encompasses only factual innocence. *Vontress v. State*, 299 Kan. 607, 616, 325 P.3d 1114 (2014), *superseded by statute on other grounds in Hayes v. State*, 307 Kan. 9, 404 P.3d 676 (2017); *Aguilera v. State*, No. 112,929, 2016 WL 299078, at *3 (Kan. App. 2016) (unpublished opinion).

As Abner fails to argue his factual innocence—i.e., that it is more likely than not that no reasonable juror would have convicted him in light of new evidence—he has not shown manifest injustice under this path, either.

The State correctly notes that exceptions to the one-year time limitation should remain "'rare' and be applied only in the 'extraordinary' case." *Beauclair v. State*, 308 Kan. 284, 302, 419 P.3d 1180 (2018). Manifest injustice means "'obviously unfair'" or "'shocking to the conscience.'" *Thuko v. State*, 310 Kan. 74, 81, 444 P.3d 927 (2019).

Abner fails to allege circumstances that warrant such a rare exception be made. Accordingly, we find the district court did not err in dismissing Abner's K.S.A. 60-1507 motion as untimely.

That said, we do find the district court made a mistake which requires remand. When Abner was sentenced, K.S.A. 22-3717(d)(1)(G) required a lifetime postrelease duration for persons convicted of a sexually violated crime. Here, rape and aggravated criminal sodomy are defined as sexually violent crimes. K.S.A. 22-3717(d)(2)(A), (d)(2)(E); *State v. Herrmann*, 53 Kan. App. 2d 147, 154, 384 P.3d 1019 (2016). Thus, the original 36 months' postrelease that the district court imposed was illegal.

While we find the district court was correct to modify Abner's postrelease supervision, we also find the court erred when modifying it in Abner's absence. See K.S.A. 22-3504(1); *State v. Mossman*, 294 Kan. 901, 906, 281 P.3d 153 (2012). A defendant has the right to be present when a district court modifies a term of postrelease supervision. *State v. Simpson*, 25 Kan. App. 2d 639, 640, 969 P.2d 905 (1998). After a review of the record, the district court appears to have modified Abner's postrelease supervision duration outside of his presence. Nor is there any indication that Abner waived his right to be present. The State concedes this mistake occurred.

We therefore affirm the district court's dismissal of Abner's motion but remand the matter for imposition of the correct lifetime postrelease supervision term in Abner's presence.

Affirmed in part, vacated in part, and remanded with directions.