MODIFIED OPINION[1]

NOT DESIGNATED FOR PUBLICATION

No. 124,815

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

TIMOTHY W. WEBB,
Appellant.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; WESLEY K. GRIFFIN, judge. Original opinion filed March 10, 2023. Modified opinion filed April 12, 2023. Affirmed.

Kristen B. Patty, of Wichita, for appellant.

Kayla Roehler, deputy district attorney, *Mark A. Dupree Sr.*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

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

PER CURIAM: Timothy W. Webb has appealed the district court's summary denial of his second habeas corpus motion under K.S.A. 60-1507. We have carefully reviewed the record and Webb's unopposed motion for rehearing of our original opinion issued on March 10, 2023, affirming the district court. *State v. Webb*, No. 124,815, 2023 WL

[1]**REPORTER'S NOTE**: Opinion No. 124,815, State v. Webb, was modified by the Court of Appeals on April 12, 2023, in response to defendant's motion for rehearing. The modified language is incorporated throughout this opinion.

2467056 (Kan. App. 2023) (unpublished opinion). Although we have now modified our opinion to account for confusion over the content of the appellate record, we retain our initial conclusion that Webb is entitled to no relief because his central point could have been and should have been raised in his first K.S.A. 60-1507 motion. We therefore again affirm the district court's summary dismissal of Webb's impermissibly successive K.S.A. 60-1507 motion.

FACTUAL AND PROCEDURAL BACKGROUND

Webb was initially charged and tried for first-degree murder of his girlfriend and criminal possession of a firearm. The jury convicted him on the weapons charge but was unable to reach a verdict on the murder charge. Webb was retried on the murder charge, and the second jury convicted him of intentional second-degree murder. He was sentenced to 628 months in prison. Webb's conviction and sentence were affirmed by this court in *State v. Webb*, No. 119,827, 2020 WL 1969438 (Kan. App.) (unpublished opinion), *rev. denied* 312 Kan. 901 (2020).

Thereafter, Webb filed a pro se K.S.A. 60-1507 motion seeking reversal of his conviction because of improper jury instructions, which the district court summarily denied. Webb appealed, and our court summarily affirmed the district court's dismissal of the K.S.A. 60-1507 motion. *State v. Webb*, No. 123,421 (order filed January 28, 2021).

Webb next filed his second and current K.S.A. 60-1507 motion. He again seeks reversal of his conviction, but he raises a new argument. He claims that he was entitled to relief under K.S.A. 60-1507 because the prosecution violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), by withholding exculpatory photographic evidence related to Webb's self-defense claim that would have resulted in his acquittal. Specifically, Webb claims that the State knowingly and purposely withheld photographs depicting the "worst injuries of the front of his face." Webb alleges

ineffective assistance by his trial counsel for failing to assist in making the *Brady* claim during Webb's testimony in his second trial, and he contends that his appellate counsel was similarly ineffective for failing to raise the *Brady* claim in Webb's direct appeal.

Two photographs depicting injuries to Webb's face were admitted in evidence by the defense in each of Webb's trials. In his defense, Webb claimed that he was attacked by the victim, and the killing occurred in the process of defending himself. The day after killing the victim, Webb went to his mother's residence in Texas. When he arrived, his niece, using her phone, took photographs of the condition of Webb's face showing various injuries he contends were the result of the struggle with the decedent and her use of pepper spray upon him. Webb testified the admitted photographs accurately portrayed the condition of his face when he arrived in Texas, showing swollen eyes and bruising. When he was cross-examined by the prosecutor to show the bruising to his nose in the admitted photographs, Webb said there were other photographs that showed the bruising and that his niece had taken six pictures. The prosecutor and Webb had a discussion about the photographs because Webb suggested the prosecutor had additional pictures she was not showing him. Two additional photos were on defense counsel table and shown to Webb, but he contended there were other photos that showed the bruising. Ultimately, Webb agreed he had seen the other photos when he was with his previous lawyer and he did not know if the prosecutor had other pictures.

Before the first trial, Webb's trial counsel received the cell phone containing the photographs of Webb from Webb's brother. Thereafter the parties agreed to have the phone examined by the Regional Computer Forensics Lab. The record reflects only four photographs were located, and Webb introduced two into evidence in each trial. The transcript of the second trial reflects that Webb's trial counsel was in possession of four photographs of Webb's injuries. Given the issue framed in this appeal and our disposition of the appeal, what any of the photographs may have actually shown about Webb's ostensible injuries is legally and factually beside the point.

The State denies withholding any exculpatory photographs. It further contends the record shows Webb knew about the photographs because his niece took the photos with her phone, Webb's counsel in both trials had possession of the photos, and two of the photographs were admitted as defense exhibits in each trial. Additionally, although not argued in its brief before the district court, the State contends Webb's motion is successive under K.S.A. 60-1507(c) and that the motion should be summarily denied by this court for that reason. Webb contends on appeal that he established exceptional circumstances, which warrant an evidentiary hearing even if his motion is determined to be successive.

The district court summarily denied Webb's second K.S.A. 60-1507 motion, determining that the motion, files, and case records conclusively showed Webb was not entitled to relief. The district court found that no *Brady* violation occurred and that Webb's ineffective assistance of counsel claims, which were based on the alleged *Brady* violation, were without merit.

Webb timely appeals.

ANALYSIS

Standard of Review

When the district court summarily dismisses a K.S.A. 60-1507 motion, an appellate court conducts 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). When applying de novo review, this court owes no deference to the district court's decision. *Bellamy v. State*, 285 Kan. 346, 354, 172 P.3d 10 (2007).

Exceptional circumstances have not been established to overcome the procedural bar for a successive K.S.A. 60-1507 motion.

Under K.S.A. 2022 Supp. 60-1507(c), district courts need not consider more than one habeas motion seeking similar relief filed by the same prisoner. See Kansas Supreme Court Rule 183(d) (2023 Kan. S. Ct. R. at 243). In this appeal, the State contends that Webb's K.S.A. 60-1507 motion is successive and argues that it should be denied for that reason. Webb responds by contending there are exceptional circumstances which permit this successive motion. The district court did not address whether the motion was successive as that issue was not raised or addressed by the parties before the district court. Nonetheless, our review is de novo, and we begin by analyzing whether the motion is successive and whether the grounds for relief alleged in the present motion could have been raised in Webb's initial K.S.A. 60-1507 motion.

Webb is presumed to have listed all grounds for relief in his first K.S.A. 60-1507 motion, and his subsequent motion need not be considered in the absence of a showing of circumstances justifying the original failure to list a ground. *State v. Trotter*, 296 Kan. 898, Syl. ¶ 2, 295 P.3d 1039 (2013). Because this is Webb's second attempt under K.S.A. 60-1507 to overturn his conviction, he must present "exceptional circumstances to justify reaching the merits of the motion, factoring in whether justice would be served by doing so." *Littlejohn v. State*, 310 Kan. 439, 446, 447 P.3d 375 (2019). To avoid dismissal of his motion, Webb bears the burden of establishing exceptional circumstances. See *Beauclair*, 308 Kan. at 304.

Exceptional circumstances include "unusual events or intervening changes in the law which prevent[ed] a movant from reasonably being able to raise all of the trial errors in the first postconviction proceeding." *State v. Kelly*, 291 Kan. 868, Syl. ¶ 2, 248 P.3d 1282 (2011). Exceptional circumstances can include ineffective assistance of counsel

claims. *Rowland v. State*, 289 Kan. 1076, 1087, 219 P.3d 1212 (2009). Webb contends on appeal that his trial and appellate counsel were ineffective for failing to raise the *Brady* issue at the time of trial and in his direct appeal. He maintains that ineffective assistance of counsel prevented him from raising the *Brady* issue and constitutes the exceptional circumstance that defeats the procedural bar of K.S.A. 60-1507(c). His argument is unpersuasive.

Webb's "exceptional circumstance" argument is that "he had been prevented from raising the issue earlier" due to ineffective assistance from counsel. But Webb filed his K.S.A. 60-1507 motion pro se, without the assistance or hindrance of counsel. Webb does not explain how counsel prohibited him from raising the *Brady* issue in his pro se motion. And as noted by the district court, the record is clear that Webb was aware of the issue with the photographs before he filed his initial K.S.A. 60-1507 motion. Webb testified his niece used her phone to take the photos when Webb went to Texas the day following his girlfriend's death. In his trial testimony, Webb was able to describe the different angles of various photos taken by the niece, as well as testify about the injuries he contends were displayed in the pictures. Webb acknowledges that his lawyer in the first trial had possession of the pictures, and Webb saw them at the time of his first trial. Two of the photographs taken by Webb's niece were admitted in the first trial as defense exhibits, and Webb testified that the exhibits accurately depicted his injuries.

Two photographs were also admitted as defense exhibits in his second trial, and Webb again testified the photos showed "the way I looked when I got to Houston" and were the "result of the pepper spray and the struggle." Webb testified he had bruises all over his face and nose. When the prosecutor challenged Webb to show her the bruises in the admitted photos, Webb said, "It's in another picture." Webb said he had seen the other pictures and indicated his attorney had them. When shown two additional photos from defense counsel table, Webb said, "[N]ot these two." He then described a photo and said he had seen it "back when this happened" and "it had the bruise on my nose and

everything." Webb contended the pictures in evidence showed bruising, but when asked, "Where's the cut on your nose and the bruise?" Webb replied, "It's in the other pictures that you all aren't showing the jury," thereby suggesting the State was suppressing exculpatory evidence—by not showing pictures which would reveal the extent of Webb's injuries. The prosecutor followed up on that contention with Webb, who ultimately testified he did not know what pictures the State had and that the pictures he had seen previously were with Steve Alexander (Webb's attorney in the first trial). The import of this testimony is not just that it undercuts Webb's *Brady* claim—it shows that Webb was aware of the issue over the photographs well before he filed his first K.S.A. 60-1507 motion and therefore could have asserted the claim in that motion.

While ineffective assistance of counsel claims can be considered exceptional circumstances, Webb's ineffective assistance claims, which are based solely on the purported *Brady* violation, occurred *before* Webb filed his first K.S.A. 60-1507 motion. Webb's direct appeal was complete before the habeas motion was filed. Thus, any ineffectiveness of counsel claims, like the *Brady* claim, predate Webb's first K.S.A. 60-1507 motion and are not intervening events or exceptional circumstances that explain or justify Webb's failure to raise those issues in his initial motion. See *State v. Mitchell*, 315 Kan. 156, 160-62, 505 P.3d 739 (2022) (ineffective assistance of counsel claim which arose before movant's first K.S.A. 60-1507 motion did not rise to the level of exceptional circumstances justifying a successive motion).

In wrapping up, we briefly discuss how we have handled Webb's motion for reconsideration. In our original opinion, we stated that none of the photographs depicting Webb's injuries are in the appellate record. *Webb*, 2023 WL 2467056, at *1. That is and remains an accurate characterization of the record in the possession of the Clerk of the Appellate Courts made available to us. Webb's motion asserts that he (through his lawyer) made a timely request to the Wyandotte County District Court Clerk to supplement the record with the photographs of Webb admitted as trial exhibits. As

attachments to the motion, Webb included a copy of the request, an amended table of contents for the appellate record that the district court clerk's office apparently prepared reflecting additions, copies of the two photographs of Webb admitted as defense exhibits during the trial, and other materials. As we have indicated, the State filed no response to Webb's motion for reconsideration.

In the absence of some objection from the State, we assume that Webb sought to amend the record on appeal, although the record provided to the Clerk of the Appellate Courts does not contain Webb's request. To extend to Webb every procedural accommodation in our reconsideration, we have treated the photographs attached to his motion for reconsideration as if they were formally part of the appellate record. Our review of the photographs does not change the reasoning or result in our disposition of this appeal.

In his request to supplement the record, Webb also asked the district court clerk to include two additional photographs that the State purportedly marked as exhibits, but those photographs were not offered or admitted at the second trial. Evidentiary materials neither offered nor admitted would not be part of the trial record unless they were otherwise filed with the district court and could not be made part of the appellate record through a request to the clerk of the district court. See Supreme Court Rule 3.01(a) (2023 Kan. S. Ct. R. at 20); Supreme Court Rule 3.02(d)(3) (2023 Kan. S. Ct. R. at 22). Even if the record had contained those additional photographs, their presence would not change our analysis.

In his motion, Webb also suggests two volumes of transcript he relied on in his brief, Nos. 35 and 36, were not reviewed by the panel because those volume numbers do not appear on the official table of contents. His suggestion is incorrect. Those transcripts are part of the record on appeal we have had throughout our review. They were simply renumbered in the amended table of contents Webb attached to his motion. Volumes 35-

37 referred to in the amended table of contents appear in Volumes 32-34 in the official table of contents.

A comparison of the amended table of contents with the official table of contents shows that the amended table added two additional volumes containing transcripts of the preliminary hearing from 2013. These additional volumes are reflected as Volumes 7 and 8 in the amended table of contents, but the official table of contents does not contain those preliminary hearing transcripts. The absence of the preliminary hearing transcripts from the official record helps explain the difference in the number of volumes in the record but it does not alter our analysis or conclusion. Neither Webb nor the State has referred to, let alone relied on, any of those materials in arguing this appeal.

Although the confusion over the record is unfortunate, we have endeavored to adequately responded to the substantive concerns Webb has raised in his motion for reconsideration without attempting to determine the precise cause of the confusion—an exercise that might well require a remand to the district court for a hearing without demonstrably advancing the resolution of the points Webb has raised in this appeal. Given the very limited issue framed in this appeal—whether Webb could and should have raised the claimed Brady violation in his first habeas motion—the presence or absence of the actual photographs in the record does not alter the fact that Webb knew of the purportedly missing photographs before he filed his first habeas motion.

Conclusion

We find Webb's motion is procedurally barred by K.S.A. 2022 Supp. 60-1507(c) because it is successive and he fails to show exceptional circumstances justifying his failure to include the *Brady* and ineffective counsel claims in his first K.S.A. 60-1507 motion. Though our rationale differs from that of the district court, we affirm the district court's summary denial of Webb's second K.S.A. 60-1507. See *State v. Smith*, 309 Kan.

977, 986, 441 P.3d 1041 (2019) (Judgment of the district court is affirmed as right for the wrong reasons.).

Affirmed.