NOT DESIGNATED FOR PUBLICATION

No. 124,883

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

DALE M.L. DENNEY,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; STEPHEN J. TERNES, judge. Opinion filed May 12, 2023. Affirmed.

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

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

Before BRUNS, P.J., GREEN and WARNER, JJ.

PER CURIAM: Dale Denney was convicted of various crimes in 1993. Roughly 28 years later, Denney filed a motion under K.S.A. 60-1507, largely alleging errors related to his trial and various postconviction motions he filed in 2018. The district court denied Denney's requested relief without an evidentiary hearing, finding his claims were raised outside the statutory time frame, had been presented multiple times before, and did not otherwise warrant relief. After reviewing the record and the parties' arguments, we agree that an evidentiary hearing was not necessary to resolve Denney's claims. We thus affirm the district court's summary denial of Denney's motion.

FACTUAL AND PROCEDURAL BACKGROUND

A jury convicted Denney of sex and weapons crimes in consolidated cases in 1993. The Kansas Supreme Court affirmed his convictions in 1995, and the appellate mandate issued in 1996. See *State v. Denney*, 258 Kan. 437, 905 P.2d 657 (1995). Since 1993, Denney has filed many postconviction motions and has appealed several of the district court's decisions. See *State v. Denney*, No. 110,336, 2015 WL 326432, at *1 (Kan. App.) (unpublished opinion) (collecting many of Denney's appeals to that point), *rev. denied* 302 Kan. 1013 (2015).

In March 2018, Denney filed additional postconviction motions, challenging various aspects of his trial in 1993 as well as the results of DNA testing conducted in 2005. Denney argued that the district court violated his due-process rights before his trial by ordering a psychiatric examination without holding a hearing to determine whether Denney was competent to stand trial. Denney also asserted that the court failed to orally instruct the jury at the close of his case. And he claimed that the district court had violated his rights based on alleged issues with the 2005 DNA test results. Denney argued that these alleged errors violated his constitutional rights, thus voiding his convictions and depriving the courts of jurisdiction over his case.

The district court denied most of Denney's claims but appointed counsel and set a hearing for the competency issue. Denney's attorney reviewed the record, spoke to Denney's trial attorney from 1993, and argued the issue to the district court. The court denied relief, finding that the competency claim was untimely, successive, and unsupported in the record. Denney filed a notice of appeal but never docketed the appeal.

Shortly after the hearing, Denney filed a claim asserting that his attorney in the 2018 case had provided ineffective assistance of counsel. The district court appointed

another attorney and held a hearing on the ineffectiveness claim along with various other motions Denney had filed in the meantime. At that hearing, Denney's new attorney reargued the competency and jury-instruction issues. The court denied Denney relief on his claims.

Denney appealed the district court's denial of his ineffective-assistance-of-counsel claim. See *State v. Denney*, No. 122,105, 2021 WL 3701164 (Kan. App. 2021) (unpublished opinion), *rev. denied* 315 Kan. 969 (2022). In reviewing that decision, this court found that key documents—like Denney's 2018 motions and the transcript of the associated hearing—were missing from the record, and the absence of these documents prevented the court from meaningfully reviewing Denney's claims. 2021 WL 3701164, at *4. At the same time, however, we suggested that the claims in Denney's 2018 motions relating to his competency and the jury instructions were untimely and successive. Thus, his attorney's performance did not affect the outcome of the hearing. 2021 WL 3701164, at *4. We also found that Denney's jury-instruction and competency claims lacked evidentiary support and were conclusory. 2021 WL 3701164, at *5-6.

In November 2021, Denney filed a new K.S.A. 60-1507 motion. He raised seven claims, arguing:

1. K.S.A. 60-1507 provides an inadequate remedy to challenge Denney's custody, so it is unconstitutional;
2. The trial court could not convict Denney without holding a competency hearing;
3. There is nothing in the record to show that the trial judge orally instructed the jury (rather than merely providing written jury instructions before deliberations);
4. The court lacks jurisdiction over Denney's cases because his convictions are void;

5. The district court and this court prevented Denney from appealing his 2018 motions;

6. Denney's attorney in his 2021 ineffectiveness appeal provided ineffective assistance of counsel by failing to include key documents in the record; and

7. The State's DNA expert altered 2005 test results to implicate Denney.

The district court denied these claims without a hearing, finding them untimely and successive. Denney appeals this decision.

In June 2022, this court allowed Denney to docket his appeal of the denial of his 2018 motions. That case has now been briefed and is awaiting a docket assignment. See case No. 125,250. Denney also has a third DNA-related appeal pending. See case No. 125,436.

DISCUSSION

K.S.A. 2022 Supp. 60-1507(a) provides a collateral vehicle for people convicted of crimes to challenge their convictions and sentences. When a district court dismisses a K.S.A. 60-1507 motion without an evidentiary hearing—as the district court did here—the appellate court is in just as good a position as the district court to consider the motion. This court's review of the district court's ruling is thus unlimited. *Grossman v. State*, 300 Kan. 1058, 1061, 337 P.3d 687 (2014).

Generally, a person must file a K.S.A. 60-1507 motion within one year after his or her direct appeal concludes. K.S.A. 2022 Supp. 60-1507(f)(1)(A). But for movants like Denney, whose claims preexist the statutory amendment that created this deadline, the deadline for filing a timely K.S.A. 60-1507 motion was June 30, 2004. See L. 2003, ch. 65, § 1; *Noyce v. State*, 310 Kan. 394, 399, 447 P.3d 355 (2019).

A court may only consider a K.S.A. 60-1507 motion filed outside the one-year period if the movant shows that consideration is necessary "to prevent a manifest injustice." K.S.A. 2022 Supp. 60-1507(f)(2). This exception is a narrow one. K.S.A. 2022 Supp. 60-1507(f)(2)(A) limits the scope of "manifest injustice" to two considerations—whether the movant has explained why he or she "failed to file the motion within the one-year time limitation" and whether the person "makes a colorable claim of actual innocence." If the movant has not shown that dismissal will result in manifest injustice under either of these definitions, the court must dismiss an untimely motion. K.S.A. 2022 Supp. 60-1507(f)(3).

1. *Most of Denney's claims are untimely.*

Denney filed the current motion in November 2021—25 years after the mandate issued in his direct appeal in 1996 and long after the 2004 deadline for claims predating the statutory time limit. There is no question that his motion is outside the one-year time limit in K.S.A. 60-1507. And Denney has shown no reason to extend this time limit—he has not explained why he "failed to file the motion within the one-year time limitation." K.S.A. 2022 Supp. 60-1507(f)(2)(A).

The record reveals no reason why Denney could not have raised his first three claims—K.S.A. 60-1507's constitutionality, the absence of a competency hearing, and his allegation that the court did not read the instructions to the jury at trial—within the one-year time limit. Nor does he explain why he could not have raised his last claim related to the 2005 DNA testing within a year after that litigation concluded in 2007. See *State v. Denney*, 283 Kan. 781, 784-85, 156 P.3d 1275 (2007). These claims are untimely, and Denney has not shown how considering them would prevent a manifest injustice.

Instead of explaining why he could not have raised his claims within the statutory time frame or explaining why some manifest injustice would result absent their consideration, Denney asserts that these claimed errors render his convictions void, thus depriving the courts of jurisdiction—an issue that can be raised at any time. See, e.g., *Miller v. Glacier Development Co.*, 293 Kan. 665, 672, 270 P.3d 1065 (2011) ("[T]he passage of time cannot cure the defect of a void judgment."). Thus, he argues, the one-year time limit does not apply because his convictions are void. The fourth claim in Denney's motion raises this jurisdiction argument as a freestanding claim.

We question Denney's assertions that these matters may deprive the court of jurisdiction. See, e.g., *State v. Ford*, 302 Kan. 455, Syl. ¶ 4, 353 P.3d 1143 (2015) (failure to comply with K.S.A. 22-3302's requirements for competency hearings does not deprive the court of jurisdiction). But even so, framing these issues as jurisdictional does not circumvent K.S.A. 60-1507's procedural requirements. "On a basic level, before a party may argue the merits of a jurisdictional claim, there must be a procedural mechanism for presenting the question to the court." *Loggins v. State*, No. 116,716, 2019 WL 4126472, at *3 (Kan. App. 2019) (unpublished opinion) (citing *State v. Trotter*, 296 Kan. 898, 905, 295 P.3d 1039 [2013]), *rev. denied* 312 Kan. 892 (2020). A party must still comply with the procedural requirements for that mechanism—even when bringing a jurisdictional challenge. See *Loggins*, 2019 WL 4126472, at *3.

The proper mechanism for bringing postconviction challenges like Denney's is a motion under K.S.A. 60-1507. Denney used the correct mechanism, but for most of his claims, he did not follow its requirement to bring them within one year. The district court thus did not err in dismissing the claims that Denney could have brought—but did not—within the one-year statutory period.

Denney asserts that exceptional circumstances warrant considering his DNA-related claim—that the State's expert changed the 2005 results to implicate Denney—

because he was unaware of it until a 2021 hearing. But that hearing is not in the record. See *State v. Vonachen*, 312 Kan. 451, Syl. ¶ 2, 476 P.3d 774 (2020) (appellant has the burden to designate a record establishing claimed error). And more importantly, Denney does not explain why he could not, with some diligence, have discovered this alleged error within a year of the conclusion of the DNA testing or why he waited over 15 years to raise this claim. See *Denney*, 283 Kan. at 789 (noting the 2005 results were "obviously unfavorable to Denney").

We thus agree with the district court that these five claims—Denney's claims about K.S.A. 60-1507's constitutionality, the competency issue, the oral jury instructions, the trial court's jurisdiction, and the 2005 DNA testing—were untimely. As such, K.S.A. 2022 Supp. 60-1507(f)(3) required that the claims be dismissed.

The district court also found these claims were successive, as Denney has brought or could have brought them in the dozens of postconviction motions he has previously filed. K.S.A. 2022 Supp. 60-1507(c) clarifies that a court is "not . . . required to entertain a second or successive motion for similar relief" filed by the same person. The district court's decision to evaluate successiveness is understandable given Denney's serial, overlapping filings, which complicate a court's ability to sort through the issues he raises. The better course for someone pursuing postconviction remedies is to raise and litigate issues in one line of motions, rather than repeatedly raising the same issues in overlapping filings without waiting for the courts to resolve them.

Unlike timeliness, which is a statutory prerequisite to consideration of a K.S.A. 60-1507 motion, a district court has discretion whether to consider successive filings. Because we have already determined that these five issues were untimely, and thus affirm the district court's judgment on that basis, we need not consider further whether they were also successive. The district court did not err when it summarily denied these claims.

2. *Denney's other claims did not warrant an evidentiary hearing.*

Denney's two remaining claims assert that the district court and appellate courts prevented him from appealing the 2018 motions and that his attorney on the related ineffectiveness appeal was himself ineffective. Some further discussion of these remaining claims is necessary.

After the district court denied Denney's 2018 motions, he filed timely notices of appeal in February 2019. The court appointed counsel in April 2019 but no one docketed the appeal, resulting in the dismissal of his notice of appeal. Denney later moved to reinstate his appeal, and the district court denied this request in June 2020. At that point, filing deadlines were suspended because of the pandemic. See Kansas Supreme Court Administrative Order 2020-PR-047, effective May 1, 2020. The deadlines under K.S.A. 60-1507 did not resume until August 2021. See Kansas Supreme Court Administrative Order 2021-PR-100, effective August 2, 2021. Denney then filed the current motion in November 2021.

Given this timeline, the State concedes that Denney's claim relating to the effectiveness of his attorney in the 2021 ineffectiveness appeal is timely. We find that Denney's efforts to appeal the district court's denial of his 2018 motions also fall within the statutory time frame. And neither of these claims is successive because Denney has not—nor could he have—brought them before.

Because these claims were raised within the one-year period in K.S.A. 2022 Supp. 60-1507(f) and could not have been raised in previous filings, the district court erred in rejecting them on those grounds. Thus, K.S.A. 2022 Supp. 60-1507(b) instructs that the district court was required to hold an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show[ed] that [Denney] was entitled to no relief." After reviewing Denney's allegations and the record, we find that summary denial

of these claims was appropriate, albeit for different reasons than the district court discussed. Accord *State v. Overman*, 301 Kan. 704, 711-12, 348 P.3d 516 (2015) (affirming the district court's decision on a suppression motion as right for the wrong reason).

To prevail on claims alleging ineffective assistance of counsel, one must show error and prejudice. That is, a person must demonstrate that his or her attorney's representation was objectively unreasonable and that this deficient representation affected the outcome of the proceeding. See U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Our review of the record shows that Denney cannot make this second showing—prejudice—on either of his remaining claims.

Denney claims that due to various errors, he has been unable to appeal the denial of his 2018 postconviction motions. But Denney has since received the remedy he seeks—he has been permitted to docket that appeal. While nothing in the record suggests that the district or appellate courts prevented Denney from appealing the denial of his 2018 motions, the issue is moot. See *State v. Roat*, 311 Kan. 581, Syl. ¶ 1, 466 P.3d 439 (2020) (issue is moot when a judgment "would be ineffectual for any purpose" and "would not have an impact on any of the parties' rights"). A hearing is unnecessary to resolve this claim and could provide no greater relief than the appeal Denney is already pursuing in case No. 125,250.

Denney also cannot show prejudice on his ineffectiveness claim about the failure to include key documents in the record in his 2021 appeal. See *Denney*, 2021 WL 3701164, at *4. Even if it were deficient for Denney's attorney not to ensure that key documents were included in the appellate record, Denney cannot establish that including those records would have allowed him to prevail in that appeal. As this court noted in the 2021 appeal, "[w]hether Denney was seeking to raise claims of trial error or ineffective

assistance of trial counsel in his March 2018 motion, all roads would have led to the same outcome." 2021 WL 3701164, at *4. The issues at the root of Denney's ineffectiveness claims—the competency, jury-instruction, and DNA-related issues—were untimely in 2018, just as they are now. And Denney has not explained why he could not have raised these issues within the applicable time limit. Thus, regardless of the missing records, the courts could not have granted Denney's claims for relief.

The record shows that Denney has not demonstrated that relief is available or warranted for any of his claims. The district court reached the correct result by summarily denying his K.S.A. 60-1507 motion.

Affirmed.