NOT DESIGNATED FOR PUBLICATION

No. 125,293

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

MICHAEL DEAN CURRAN,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Reno District Court; TRISH ROSE, judge. Opinion filed March 24, 2023. Affirmed.

Kristen B. Patty, of Wichita, for appellant.

Thomas R. Stanton, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ISHERWOOD, P.J., MALONE and WARNER, JJ.

PER CURIAM: Michael Dean Curran appeals the district court's summary denial of his K.S.A. 60-1507 motion and argues that an evidentiary hearing was necessary to resolve his claim that his guilty plea was tainted by ineffective assistance of counsel. Following a review of the record and the parties' arguments, we find that denial of the motion was appropriate and affirm the district court's decision.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2018, the Reno County Drug Enforcement Unit executed a search warrant at Curran's residence and seized around 835 grams of methamphetamine, 47 grams of marijuana, 892 pills labeled as oxycodone, but which contained fentanyl, drug paraphernalia, two firearms, and over $4,000 in cash. As a result, the State charged Curran with distribution of fentanyl within 1,000 feet of a school, distribution of methamphetamine, possession of marijuana with the intent to distribute, possession of drug paraphernalia with the intent to package a controlled substance for sale, and possession of amphetamine.

The State extended a plea offer before the preliminary hearing, but Curran opted to reject it. Curran was later charged with two other felonies in two separate cases. The State extended its earlier plea offer again, but Curran rejected it once more. Several months later, Curran decided to plead guilty to each of the initial charges and forego his right to appeal his sentence in exchange for the State's agreement to recommend concurrent sentences and dismiss the two remaining cases. At sentencing, Curran requested a dispositional departure to probation accompanied by substance abuse treatment but given his criminal history score of A and the severity of his convictions, the district court determined that a prison term of 200 months was more appropriate.

A year later, Curran filed a K.S.A. 60-1507 motion setting forth several claims of error. In a supporting memorandum, Curran specified that (1) he suffered a significant delay in receiving legal representation from his fourth appointed attorney, Nick Oswald, and that the brief conversation Oswald shared with Curran right before the preliminary hearing marked the full extent of Oswald's representation; (2) because the district court judge told Curran he would need to proceed to trial without a lawyer if he did not get along with his sixth appointed attorney, Monique Centeno, Curran did not feel free to challenge Centeno's decisions; (3) Centeno told Curran that his case was unwinnable

despite allegedly identifying grounds for suppression of evidence; (4) Centeno promised Curran he would receive probation; (5) Centeno failed to properly prepare Curran for sentencing; (6) Centeno never advised Curran that the terms of the plea required that he waive his right to appeal; (7) his criminal history score was not accurate because he did not learn about the concept of "decay" until he was in custody; (8) law enforcement officers improperly interrogated him without counsel during his incarceration; and (9) Curran's home was burglarized and his property was unlawfully seized after he was arrested.

The district court appointed counsel to represent Curran at a preliminary hearing on the motion and counsel filed a supplemental pleading to crystallize Curran's allegations of error. The court ultimately dismissed Curran's motion upon finding that the motion, files, and record conclusively demonstrated that Curran was not entitled to relief.

Curran timely brought the matter before us to review whether the district court erred in dismissing his motion.

LEGAL ANALYSIS

The district court did not err by denying Curran's K.S.A. 60-1507 motion without an evidentiary hearing.

Curran argues that he was entitled to an evidentiary hearing on his ineffective assistance of counsel claim because he alleged facts which, if true, would support a claim for relief. The State responds that the district court correctly determined that Curran did not establish facts warranting an evidentiary hearing.

The standard of review on denial of a K.S.A. 60-1507 motion depends on how the district court disposes of it. *Beauclair v. State*, 308 Kan. 284, 293, 419 P.3d 1180 (2018). A district court has three options when handling a K.S.A. 60-1507 motion:

"'(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]" *State v. Adams*, 311 Kan. 569, 578, 465 P.3d 176 (2020).

When, as here, a court denies a 60-1507 motion based only on the motion, files, and records after a preliminary hearing, we are in as good a position as that court to consider the merits. So, we exercise de novo review. *Sola-Morales v. State*, 300 Kan. 875, 881, 335 P.3d 1162 (2014).

A movant bears the burden of establishing entitlement to an evidentiary hearing. To meet this burden, their contentions must be more than conclusory, and either the movant must set forth an evidentiary basis to support those contentions or the basis must be evident from the record. *Thuko v. State*, 310 Kan. 74, 80, 444 P.3d 927 (2019). If this showing is made, the district court must hold a hearing unless the motion is a second or successive motion seeking similar relief. *Sola-Morales,* 300 Kan. at 881.

Curran has narrowed the scope of his claims for this appeal to focus solely on those challenging the representation he received from his appointed attorneys, Oswald and Centeno. Thus, any claims he initially raised concerning purportedly coercive statements by the judge, an improper criminal history score, impermissible interrogation by the detectives, and unlawfully seized property are not properly before us for review. See *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021) (issues not briefed are deemed waived or abandoned).

The Sixth Amendment to the United States Constitution guarantees criminal defendants the effective assistance of an attorney. 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). To prevail on a claim of ineffective assistance of counsel, the movant must satisfy two factors: (1) counsel's performance fell below an objective standard of reasonableness under the totality of the circumstances, and (2) the movant suffered prejudice as a result. *State v. Johnson*, 307 Kan. 436, 447, 410 P.3d 913 (2018). When the allegations of error are made within the sphere of a case that resulted in a plea, the movant has the burden to show that there is a reasonable probability that, but for counsel's errors, he or she would not have pleaded guilty but would have insisted on going to trial. *State v. White*, 289 Kan. 279, Syl. ¶ 4, 211 P.3d 805 (2009). The court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional service. *State v. Butler*, 307 Kan. 831, 852-53, 416 P.3d 116 (2018).

As a preliminary matter, we have a failure-to-designate a record problem. Curran's case resulted in a plea and, at least a portion of his claims challenge the plea as invalid due to counsel's allegedly subpar representation. But the transcript from that plea hearing has not been made part of the record on appeal. Curran comes to us with a claim that prejudicial error occurred but failed to satisfy his obligation to ensure we had the resources necessary to review his claim first hand. See *State v. Walters*, 284 Kan. 1, 15, 159 P.3d 174 (2007) (litigant claiming district court erred has duty to designate record on appeal that is sufficient to support finding of error). In any event, the district court's written order denying Curran's motion recounts portions of the plea hearing that are helpful to our analysis of Curran's claims involving counsel who represented him during the plea. The parties have not provided us with any indication that the district court's account of that hearing is flawed or otherwise unreliable. Thus, we will use it to the best extent possible. See *State v. Bridges*, 297 Kan. 989, 1001, 306 P.3d 244 (2013) (Without an adequate record, an appellate court presumes the trial court's action was proper.).

Curran first argues he was entitled to an evidentiary hearing based on his allegation that he had insufficient meetings with his fourth attorney, Nick Oswald. In the supporting memorandum, Curran claimed he lacked access to legal counsel for 127 days after his arrest, Oswald never visited him in the jail, and he only discussed the case with Oswald during two brief phone calls and before the preliminary hearing.

We decline to undertake any analysis of whether Oswald's performance was deficient in the manner alleged because Curran cannot show prejudice. See *Edgar v. State*, 294 Kan. 828, 843, 283 P.3d 152 (2012) (claim of ineffective assistance of counsel can be disposed of without considering deficient performance if defendant cannot show prejudice). In *Strickland*, the Supreme Court emphasized the importance of the prejudice prong of its ineffective assistance of counsel test by providing that a claim of ineffective assistance of counsel could be disposed of solely on that ground if the defendant failed to establish that he or she suffered prejudice:

> "Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." *Strickland*, 466 U.S. at 697.

Again, Oswald was the fourth of six attorneys appointed to represent Curran, and it was not until well into the representation of that sixth attorney, Monique Centeno, that Curran opted to enter a plea. Curran has failed to show how Oswald's representation somehow corroded a plea process that occurred around two years after his representation

concluded. Thus, this claim does not advance his argument that an evidentiary hearing was needed to thoroughly resolve his motion.

Curran next argues that Centeno provided ineffective assistance when she allegedly told him that probation was not an option in his case, yet then guaranteed he would receive probation if he simply pleaded guilty under the terms offered by the State. The record available to us reflects that the State informed the district court at the plea hearing that Curran remained free to seek a downward dispositional departure, but it would oppose that request. The district court also specifically asked Curran whether he was threatened in any way or promised anything to encourage him to enter the plea, and Curran answered, "No." The district court then informed Curran that it did not have to follow the recommendations of the parties and could impose whatever sentence it found was most appropriate under the law. Curran assured the court that he understood.

Curran does not direct us to any evidence to support his claim that Centeno promised him probation. He simply contends that the allegation alone warrants an evidentiary hearing. We are not persuaded given that the aforementioned portions of the plea hearing reflect the lack of any such promises and an awareness on Curran's part that the district court was free to sentence him within the applicable range provided by law.

Curran next claims the district court declined to grant probation, in part, because Centeno's departure motion failed to persuasively present it as a palatable option. He also contends the court was not moved to grant probation because Centeno failed to adequately prepare Curran for sentencing and neglected to call any witnesses to testify on his behalf. What we have before us is a timely filed motion that reflects an effort by Centeno to illustrate the allegedly misleading nature of Curran's criminal history and which also detailed the battles he endured with various mental health related issues. As her next related step, Centeno requested probation with substance abuse treatment at sentencing, and she provided a thorough argument in support of the same. Curran fails to

specify what preparations Centeno failed to undertake, which witnesses she should have called, and what testimony they could have offered to alter the outcome of the proceeding. Thus, we are not persuaded that an evidentiary hearing is warranted as the record clarifies that Centeno's performance did not fall below an objective standard of reasonableness that resulted in prejudice to Curran.

Finally, Curran claims that Centeno neglected to inform him that the terms of the plea included a waiver of his right to appeal and that he specifically asked her to file an appeal after sentencing. But Curran's allegation is refuted by the record. That is, the State read the plea agreement into the record at the plea hearing, and it undeniably stated that Curran waived his right to directly appeal his sentence. Curran also informed the court at that hearing that he had no questions about his rights, and he was satisfied with the services of his counsel. Thus, Curran was aware he waived his right to appeal under the terms of the plea agreement. There is no justification for conducting an evidentiary hearing on this issue.

The motion, files, and record of this case conclusively show that Centeno did not provide objectively unreasonable representation that tainted Curran's plea process such that he would have otherwise opted to proceed to trial. Thus, the district court properly denied Curran's K.S.A. 60-1507 motion.

Affirmed.