

NOT DESIGNATED FOR PUBLICATION

No. 125,481

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

ALTON R. SILVERSON JR.,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; ERIC WILLIAMS, judge. Submitted without oral argument. Opinion filed October 6, 2023. Affirmed.

Kristen B. Patty, of Wichita, for appellant.

Matt J. Maloney, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

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

PER CURIAM: Alton R. Silverson Jr. appeals the district court's summary dismissal of his K.S.A. 60-1507 motion. He argues that the district court did not sufficiently outline its findings of fact and conclusions of law. The State argues that Silverson failed to object to inadequate findings of fact and conclusions of law. The State also argues that Silverson raises trial errors which should have been raised on one of his two direct appeals and that Silverson failed to show exceptional circumstances excusing his failure to appeal those issues. We agree. Because Silverson's claims of trial error should have been raised on direct appeal, we affirm the district court's denial of his 60-5107 motion.

FACTS

Silverson appeals the district court's summary denial of his K.S.A. 60-1507 motion. This court previously laid out the facts underlying Silverson's conviction as follows:

"In December 2015, Ruth Kunkle and her mother Rita returned home from the grocery store. As Ruth was unloading the last of the groceries, she noticed a car across the street. Ruth saw a male, who she later identified as Silverson, get out of the car and yell at another person who remained in the car. Two women got out of the car. Ruth saw Silverson hit one of the women, later identified as Melanie Peterson. Peterson ran toward Ruth, seeking help. Silverson caught up to her and began beating and kicking her. The other woman and Ruth tried to calm Silverson down and deescalate the situation.

"Ruth called her father, David, who was inside the house. By the time David came outside, Silverson had left the scene and Peterson was lying in the street asking for help. A short while later, Silverson returned and threatened to shoot up the house if anyone called the police. Silverson again left, and Ruth and David helped Peterson off the ground and into their house. Ruth told Rita to go to the basement and call 911. Ruth told Peterson to go into the bathroom and lock herself in and not come out.

"Silverson returned with a large knife. He barged into the house. Silverson could not get to Peterson, who was still locked in the bathroom. Silverson was yelling that he wanted to administer 'street justice.' While yelling, he pointed the knife at Ruth and David. Rita yelled, 'Police!' and Silverson ran away.

"Two days after the incident, the police interviewed Silverson. He told police that Peterson had stolen \$10 from him and that he was demanding the return of his money. Silverson said that he followed Peterson into the Kunkle home. Silverson denied having a weapon of any kind. He also denied having touched or even threatened anyone during the incident.

"The State charged Silverson with aggravated burglary, in violation of K.S.A. 2015 Supp. 21-5807(b) and (c)(3), aggravated assault on Ruth, in violation of K.S.A. 2015 Supp. 21-5412(b)(1), aggravated assault on David, in violation of K.S.A. 2015 Supp. 21-5412(b)(1), battery, in violation of K.S.A. 2015 Supp. 21-5413(a)(1) and (g)(1), criminal threat, in violation of K.S.A. 2015 Supp. 21-5415(a)(1), and criminal possession

of a weapon by a convicted felon, in violation of K.S.A. 2015 Supp. 21-6304(a)(3)(B). Kenneth Newton, an attorney in the Sedgwick County Public Defender's Office, represented Silverson through his trial. Before trial, Silverson filed three separate complaints about Newton's representation. The trial court ruled that Silverson presented no basis for his requests for new counsel.

"At trial, the jury convicted Silverson as charged. Silverson filed a pro se motion for mistrial. In the motion, he presented claims of prosecutorial misconduct and ineffective assistance of counsel. By this time, Newton had left the public defender's office and Scott Anderson now represented Silverson. Silverson filed a new pro se motion. In this motion, he asked that Anderson be removed as his counsel. Silverson claimed that a conflict of interest existed with Anderson's representation. The trial court denied the motion to replace Anderson as his counsel, ruling that Silverson failed to show a conflict of interest. The trial court sentenced Silverson to 178 months in prison.

"On appeal, this court reversed Silverson's conviction for criminal possession of a weapon due to insufficient evidence. *State v. Silverson*, No. 117,047, 2018 WL 3404080, at *3 (Kan. App. 2018) (unpublished opinion). This court also ruled that Silverson was denied the right to conflict-free representation on his posttrial motions. This court remanded the case, directing the trial court to appoint new counsel on Silverson's motion for a new trial. 2018 WL 3404080, at *9.

"On remand, Casey Cotton represented Silverson on his posttrial motions. Silverson moved to replace Cotton as his counsel. The trial court denied his motion to remove Cotton and set a hearing date for Silverson's motion for a new trial. Both Silverson and Newton testified at the hearing.

"Silverson testified that Newton failed to highlight inconsistencies in the testimonies of Ruth, Rita, and David Kunkle. Silverson also testified that he wanted to pursue a defense that he was guilty of only criminal trespass, which Newton failed to present. For his part, Newton testified that he did not challenge the Kunkles at the preliminary hearing so that he could use their inconsistent statements at trial. At trial, Newton chose not to object to the admission of the 911 call 'because it was just one additional prior inconsistent statement that we wanted to exploit' Newton felt that he did attack the Kunkles' testimony at trial on their inconsistent statements. Newton testified that he presented the defense that Silverson wanted to pursue.

"The trial court denied Silverson's motion for a new trial, ruling that Silverson had not demonstrated ineffective assistance of counsel. The trial court then sentenced

Silverson to 169 months in prison." *State v. Silverson*, No. 122,055, 2021 WL 935740, at *1-2 (Kan. App. 2021) (unpublished opinion).

Silverson appealed, arguing ineffective assistance of trial counsel. This court rejected his arguments and affirmed his convictions. 2021 WL 935740, at *3-4. This court's mandate issued in September 2021.

In February 2022, Silverson filed the K.S.A. 60-1507 motion that is the subject of this appeal. He claimed that he was prejudiced by a constructive amendment to the charge of criminal threat because the complaint alleged that he threatened R.K., R.N.K., and D.K., but the jury was instructed on threats to R.N.K. and/or D.K. He alleged prosecutorial misconduct for presenting false evidence because R.N.K. and D.K. changed their descriptions of events. He alleged prosecutorial error for statements made during opening and closing arguments. And finally, he asserted that his trial counsel, counsel on his first appeal, and counsel on remand were ineffective. The district court summarily denied the motion.

Silverson timely appeals.

ANALYSIS

Did the district court properly deny Silverson's K.S.A. 60-1507 motion?

Silverson argues that the district court's summary denial failed to provide adequate findings of fact and conclusions of law. He asks this court to remand for further proceedings on his K.S.A. 60-1507 motion. The State argues that Silverson's claims are trial errors which should have been raised on direct appeal and that Silverson fails to provide exceptional circumstances explaining why he raises them in a 60-1507 motion instead.

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).

The standard of review depends upon which of these options a district court used. 311 Kan. at 578.

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. *State v. Vasquez*, 315 Kan. 729, 731, 510 P.3d 704 (2022).

Whether the district court's findings of fact and conclusions of law comply with Supreme Court Rule 183(j) (2023 Kan. S. Ct. R. at 244) is a question of law that is reviewed de novo. See *Requena v. State*, 310 Kan. 105, 110, 444 P.3d 918 (2019).

Supreme Court Rule 183(j) requires the district court to make findings of fact and conclusions of law after a preliminary or full evidentiary hearing on all issues presented in a K.S.A. 60-1507 motion. See *Bellamy v. State*, 285 Kan. 346, 354, 172 P.3d 10 (2007). Rule 183(j) also requires a district court to make findings of fact and conclusions of law supporting its decision when it summarily denies a K.S.A. 60-1507 motion. *Breedlove v. State*, 310 Kan. 56, 60, 445 P.3d 1101 (2019). If, taken together, the district court's findings and conclusions in the journal entry and its oral expressions at the time of

the hearing are sufficient for an appellate court to discuss and act on movant's arguments, then remand is not required. *Phillips v. State*, 282 Kan. 154, 178, 144 P.3d 48 (2006); see *Robertson v. State*, 288 Kan. 217, 233, 201 P.3d 691 (2009). Boilerplate journal entries stating only that the motions, files, and records of the case did not show a manifest injustice or that movant's conclusory allegations did not entitle him or her to relief do not comply with Supreme Court Rule 183(j). *Nguyen v. State*, 309 Kan. 96, 112, 431 P.3d 862 (2018).

Supreme Court Rule 183(c)(3) (2023 Kan. S. Ct. R. at 243) provides:

"A proceeding under K.S.A. 60-1507 ordinarily may not be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal. Mere trial errors must be corrected by direct appeal, but trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal, provided exceptional circumstances excuse the failure to appeal."

See *State v. Neal*, 292 Kan. 625, 630, 258 P.3d 365 (2011) (acknowledging general rule that defendant must raise all available issues on direct appeal); see also *Rowland v. State*, 289 Kan. 1076, 1087, 219 P.3d 1212 (2009) (stating K.S.A. 60-1507 motion cannot serve as vehicle to raise issue that should have been raised on direct appeal unless movant demonstrates exceptional circumstances excusing failure to raise it earlier).

Exceptional circumstances are unusual events or intervening changes in the law that prevented the movant from reasonably being able to raise the issue in the first postconviction motion. *State v. Mitchell*, 315 Kan. 156, 160, 505 P.3d 739 (2022). Exceptional circumstances can include ineffective assistance of counsel claims. *Rowland*, 289 Kan. at 1087. In deciding whether a district court erred in summarily denying a K.S.A. 60-1507 motion as an abuse of remedy, the appellate court's test should be whether the movant "presented 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).

Here, the district court's summary denial was inadequate. The district court's one page order combined typed, prewritten language with one specific finding. The district court's typewritten language reads as follows:

"Pursuant to K.S.A. 60-1507(b) the Court finds the files and records of this case (15CR3481) conclusively show that the prisoner is entitled to no relief—Mr. Silverson is not appointed counsel and no hearing is scheduled to resolve this case.

"The Court finds that defendant's sentence was not imposed in violation of the constitution or laws of the United States, or the constitution or laws of the state of Kansas, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.

"Silverson's arguments were unsuccessful on appeal in *State v. Silverson*, [2021 WL 935740,] 482 P.3d 634 (2021)[.]"

Then, after the typewritten language, the district court completed the last sentence in pen with the following handwritten language: "Court found Silverson's counsel was not ineffective." Thus, it would appear that the district court's order was mostly boilerplate language and the only unique finding was a seven-word summary of this court's holding on Silverson's second appeal.

As our Supreme Court instructed in *Nguyen*, boilerplate entries do not comply with Supreme Court Rule 183(j). 309 Kan. at 112. Here, the district court simply stated that Silverson's previous counsel was not ineffective, without recognizing that in his current motion he raises new claims about why his trial counsel was ineffective which differ from his previous claims. So, Silverson asks us to remand for further findings of fact and conclusions of law. But in this case, we determine that remand is unnecessary.

Our standard of review is de novo. Because the district court summarily dismissed the motion, we are in as good of a position to determine from the motion, files, and records whether Silverson is not entitled to relief. See *Vasquez*, 315 Kan. at 731. Silverson's motion raises a new claim about constructive amendment which was not previously raised, and he faults his previous counsel for not raising the issue. He also argues that at trial the prosecutor erred and committed misconduct, and that his previous counsel was ineffective for missing those issues. He further contends that his counsel on remand from his first appeal failed to raise an issue related to his aggravated assault conviction.

In short, Silverson raises mere trial errors which must be corrected by direct appeal. See *Rowland*, 289 Kan. at 1087. Silverson could raise these issues in a K.S.A. 60-1507 motion only if exceptional circumstances excuse his failure to raise them in his first two appeals. See *Neal*, 292 Kan. at 630. But Silverson has failed to show, or even allege, exceptional circumstances which would explain why he is raising these issues for the first time here instead of during his two direct appeals. Although the district court's findings were inadequate, it did not err in summarily denying Silverson's K.S.A. 60-1507 motion because Silverson has failed to present exceptional circumstances to justify reaching the merits of his motion. See *Littlejohn*, 310 Kan. at 446. Because Silverson's claims of trial error should have been raised on direct appeal, we conclude that remand is unnecessary. Thus, we affirm the district court's denial of his K.S.A. 60-5107 motion.

Affirmed.