

NOT DESIGNATED FOR PUBLICATION

No. 125,545

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

CORNELIUS DEVON OLIVER,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JEFFREY E. GOERING, judge. Submitted without oral argument. Opinion filed December 1, 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 BRUNS, P.J., PICKERING, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: This is an appeal from the dismissal of Cornelius Oliver's fifth K.S.A. 60-1507 motion. The district court denied the motion as both untimely and successive. In this appeal, Oliver fails to establish that manifest injustice excuses his untimely filing or that exceptional circumstances excuse his successive filing. Consequently, we affirm the district court's ruling.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2001, a jury convicted Oliver of two counts of first-degree premeditated murder and two counts of first-degree felony murder. The district court sentenced Oliver to two consecutive hard 50 life sentences and two consecutive life sentences. Oliver's direct appeal was unsuccessful, and the Kansas Supreme Court affirmed his convictions. *State v. Oliver*, 280 Kan. 681, 124 P.3d 493 (2005). The facts of his case are detailed extensively in that case and are not restated here.

Oliver filed a K.S.A. 60-1507 motion in 2007 alleging that his attorney was ineffective for failing to adequately cross-examine two witnesses. In 2011, while his first motion was still being resolved, Oliver filed a second K.S.A. 60-1507 motion raising additional issues. The district court found Oliver's first motion failed to provide grounds for relief. The court declined to consider the additional allegations added by the second motion on the basis that the motion was untimely and did not relate back to the claims in the first motion. This court affirmed the district court's decision. *Oliver v. State*, No. 106,532, 2013 WL 2395273, at *1 (Kan. App. 2013) (unpublished opinion). The record suggests that Oliver filed two more K.S.A. 60-1507 motions, one in June 2014 and another in September 2016, but he did not appeal either of those rulings.

Oliver filed his fifth K.S.A. 60-1507 motion in June 2022, quickly followed by an amended motion and supporting memorandum in which he details numerous claims. One of his primary claims was that there was newly discovered evidence that a Wichita Police Department (WPD) detective had credibility issues that should have been disclosed under *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), and *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

In support of his claim, Oliver explained that there had been a news story on FactFinder Channel 12 that reported two WPD detectives had been caught leading

witnesses in a deposition. And Oliver asserts that he only recently learned that he could request an officer's *Brady/Giglio* status. Oliver said he requested *Brady/Giglio* information for the officers involved in his case, but his request was ignored. He also had friends and family members try to find the Channel 12 story, but they were unsuccessful. His mother saw the story and specifically recalled the name of one detective with alleged credibility issues, but when she thought to screenshot it the following day the story had disappeared. Oliver's mother executed an affidavit consistent with this allegation, and Oliver attached it to his motion. Related to this allegation, Oliver claimed that his trial counsel was ineffective because there was no evidence that trial counsel attempted to investigate the credibility of, or gather evidence concerning the past history of, the WPD officers in his case.

Oliver also raised several claims regarding a diagram that he drew during his interrogation that was lost by the State. According to Oliver, the diagram was exculpatory evidence because it showed that he did not know what happened at the crime scene. He contended that the district court erred in refusing to grant a mistrial based on the State's failure to produce this evidence. He also alleged ineffective assistance of appellate counsel on direct appeal. He explained that he asked his appellate attorney to raise the diagram issue on appeal, but she said she did not want to do so because the court did not like when too many issues were raised. Finally, he asserted prosecutorial error for the State's failure to produce the diagram.

In his motion, Oliver raised other assorted claims: the trial court erred by barring Oliver from presenting expert evidence relevant to the credibility of his confession; trial court erred by failing to suppress Oliver's custodial statement as the product of an illegal arrest; trial court erred by allowing the State to introduce Oliver's videotaped interrogation, which Oliver alleged contained fabricated evidence; prosecutorial error for presenting evidence of the interrogation; insufficient evidence to support his convictions; and his convictions were unconstitutional.

Oliver addressed the untimeliness of his motion in his memorandum in support of the motion. He said the news story on the detectives' credibility was newly discovered evidence that could not have been produced at trial because the story was not released until some unknown time after the trial. He also asserted, without elaboration, that exceptional circumstances existed, which permitted consideration of his motion despite it being successive.

The district court summarily dismissed Oliver's motion on the grounds that it was successive and untimely, and he appeals.

ANALYSIS

Oliver argues that the district court erred in dismissing his motion. He contends that the court could have considered his motion, despite it being untimely, because the evidence forming the basis for his claims was newly discovered. He further contends that his successive motion is permissible because he demonstrated that exceptional circumstances existed that would permit review of his claims.

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).

Untimeliness

A motion brought pursuant to K.S.A. 60-1507 must be made within one year of the final action in a case. The one-year time limitation may be extended by the district court only to prevent a manifest injustice. K.S.A. 2022 Supp. 60-1507(f)(2). Oliver bears

the burden of establishing manifest injustice by a preponderance of the evidence. *White v. State*, 308 Kan. 491, 496, 421 P.3d 718 (2018); see Supreme Court Rule 183(g) (2023 Kan. S. Ct. R. at 244). "Manifest injustice" in the context of habeas corpus means "obviously unfair" or "shocking to the conscience." *State v. Roberts*, 310 Kan. 5, 13, 444 P.3d 982 (2019). In examining whether manifest injustice exists, courts are "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).

Oliver claimed that he satisfied the manifest injustice requirement because the news story was not produced until after Oliver's conviction. And Oliver contends he was not aware of the *Brady/Giglio* issue until after his trial.

Oliver's arguments are wholly unpersuasive. His broad and vague allegation is that a television news story aired on some unspecified date, which cannot be located and was not presented to the district court, contains some (again unspecified) negative information about the credibility of some members of the WPD, including a detective apparently involved in his case. Conclusory contentions such as Oliver makes here are insufficient to establish the basis for an evidentiary hearing. See *Thuko v. State*, 310 Kan. 74, 82, 444 P.3d 927 (2019).

A nearly identical claim was rejected by this court in *Woods v. State*, No. 121,466, 2020 WL 4250651 (Kan. App. 2020) (unpublished opinion), *rev. denied* 313 Kan. 1046 (2021). There, the district court denied Clint Woods' K.S.A. 60-1507 motion as untimely and successive. Like Oliver, Woods claimed that his trial counsel was ineffective for failing to obtain impeachment evidence about a Wichita police detective and another officer. Woods also claimed that the prosecutors erred in failing to disclose the evidence about the same detective involved in Oliver's case. In support of his argument, Woods attached a screenshot of an article titled, "The top ten most corrupt officer in t[sic]."

2020 WL 4250651, at *5. The article stated a WPD detective engaged in illegal interrogation tactics. Woods claimed he did not bring his claim about the impeachment evidence within the one-year time limit because he had only recently received the article and he had only recently learned about *Brady/Giglio* issues.

A panel of this court affirmed the district court's dismissal of Woods' K.S.A. 60-1507 motion. 2020 WL 4250651, at *9. This court found two primary issues with Woods' argument. First, his claim was too vague, and "Woods failed to allege in his motion with any specificity what 'impeachment evidence' the State failed to disclose about [the police detective and another officer] that would have led to dismissal of the charges against him." 2020 WL 4250651, at *6. Second, Woods' lack of understanding about *Brady/Giglio* issues was not a valid excuse because recent discovery of a legal concept is not newly discovered evidence. 2020 WL 4250651, at *6 (citing *State v. Woodward*, 288 Kan. 297, 304, 202 P.3d 15 [2009]). Because Woods failed to "articulat[e] when he received the information or even clearly what the information [was], Woods failed to prove by a preponderance of the evidence that he did not have the information during any of his previous K.S.A. 60-1507 proceedings or that it could not have been discovered until now." 2020 WL 4250651, at *6. We apply the same reasoning here.

Oliver presents no information detailing the specifics of the television news story, when it aired, or whether any of the unknown and unexplained credibility issues existed before or at the time of Oliver's trial. We find Oliver failed to establish the existence or details of any new information that excuse his failure to timely assert his claims, and he failed to establish that the purported story would have had an impact on his case.

Oliver also made a conclusory claim of actual innocence in his K.S.A. 60-1507 motion. He briefly mentions this claim in his appellate brief. Oliver's claim that a detective may have had credibility issues at some unknown time is not a claim of actual innocence. To establish actual innocence, Oliver had to show that it was "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). In *Woods*, this court described a similar claim as "at best, a hybrid claim of prosecutorial misconduct and ineffective assistance of trial counsel." 2020 WL 4250651, at *7. And as in *Woods*, Oliver failed to articulate when he learned about the alleged impeachment evidence. See 2020 WL 4250651, at *7. Accordingly, Oliver failed to support his claim of actual innocence by a preponderance of the evidence.

Successiveness

"[U]nder K.S.A. 2020 Supp. 60-1507(c), district courts need not consider more than one habeas motion seeking similar relief filed by the same prisoner." *State v. Mitchell*, 315 Kan. 156, 160, 505 P.3d 739 (2022); see Supreme Court Rule 183(d) (2023 Kan. S. Ct. R. at 243). A movant is presumed to have listed all grounds for relief in an initial K.S.A. 60-1507 motion and, therefore, "must show exceptional circumstances to justify the filing of a successive motion." 315 Kan. at 160. 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. 315 Kan. at 160.

In his motion and appellate brief, Oliver admits that many of his claims in the present motion are similar to claims he raised in prior K.S.A. 60-1507 motions, but he argues that these claims are "now suspect and subject to reconsideration if [the detective] were found to be dishonest." Even if true, however, Oliver fails to establish that exceptional circumstances allowing a successive filing.

As with his argument regarding the timeliness of his motion, Oliver's claim of newly discovered evidence is vague and conclusory. Oliver was convicted in 2001, more than 20 years ago. There is no indication in his motion when the alleged news story aired

or when his mother saw it, and no indication that the credibility issues alleged to have been discussed in the news story predated Oliver's trial. As in *Woods*, Oliver has not sufficiently articulated the timing or details of the alleged impeachment evidence either in the district court or here on appeal. He has not established by a preponderance of the evidence that exceptional circumstances prevented him from raising the *Brady/Giglio* issue in one of his prior K.S.A. 60-1507 motions.

We find the district court properly dismissed Oliver's K.S.A. 60-1507 motion as both untimely and successive.

Affirmed.