

NOT DESIGNATED FOR PUBLICATION

No. 126,364

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ROBERT L. WILSON,
Appellant.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; DANIEL CAHILL, judge. Submitted without oral argument. Opinion filed December 15, 2023. Affirmed.

Joseph A. Desch, of Law Office of Joseph A. Desch, of Topeka, for appellant.

Garett C. Relph, deputy district attorney, *Mark A. Dupree Sr.*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

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

PER CURIAM: Robert L. Wilson appeals the district court's summary denial of his K.S.A. 60-1507 motion on the grounds that the motion was successive with no showing that justice would be served by reaching the merits of the motion. For the reasons stated below, we affirm the district court's judgment.

FACTS

In 2011, Wilson was convicted of rape and aggravated criminal sodomy and was sentenced to a total controlling term of 586 months' imprisonment. The full factual and procedural background was stated by this court in Wilson's direct appeal. *State v. Wilson*, No. 108,274, 2013 WL 6726263, at *1-3 (Kan. App. 2013) (unpublished opinion). In the direct appeal, Wilson argued that evidence that he was accused of a prior rape in Missouri should not have been admitted under K.S.A. 2012 Supp. 60-455(d). This court disagreed and affirmed his convictions and sentence. 2013 WL 6726263, at *7, 11.

Wilson later filed a K.S.A. 60-1507 motion, arguing that his trial counsel was ineffective for "fail[ing] to obtain a transcript of the Missouri trial and fail[ing] to effectively cross-examine the victim from the Missouri case when she was called as a witness for the State in the Kansas case." *Wilson v. State*, No. 116,128, 2017 WL 2709846, at *2 (Kan. App. 2017) (unpublished opinion). The district court summarily denied his motion, finding that the proceeding could not be used as a substitute for a second appeal and that the files and records of the case conclusively showed that Wilson was entitled to no relief. On appeal, this court held the district court properly found that Wilson's claim was barred under the doctrine of res judicata. 2017 WL 2709846, at *2.

In September 2021, Wilson filed a pro se motion to correct illegal sentence, arguing the use of his full criminal history of B for the first count of his conviction and a criminal history of I for the second count resulted in an illegal sentence. Then, in January 2022, Wilson filed a second K.S.A. 60-1507 motion from which this appeal arises, arguing that evidence of the prior Missouri rape allegation was admitted in his trial as a result of prosecutorial error. The district court denied the motion to correct illegal sentence. In the same written order, the district court summarily denied Wilson's K.S.A. 60-1507 motion as successive with no showing "that justice would be served by reaching

the merits of his motion." Wilson timely appealed the district court's judgment. The district court appointed counsel to represent Wilson in this appeal.

ANALYSIS

On appeal, Wilson claims the district court erred in summarily denying his K.S.A. 60-1507 motion. Wilson reasserts his claim that evidence of the prior Missouri rape allegation was admitted in his trial as a result of prosecutorial error. Wilson argues that "the district court failed to consider that his motion set forth specific arguments which included exceptional circumstances, including the violation of fundamental rights (as exceptional circumstances) which demands the interests of justice require a decision on the merits." The State argues that the district court was correct in summarily denying the K.S.A. 60-1507 motion as successive. Wilson admits in his brief that he is not pursuing the illegal sentence claim on appeal. An issue not briefed is waived or abandoned. *In re Adoption of Baby Girl G.*, 311 Kan. 798, 803, 466 P.3d 1207 (2020).

A district court has three options when reviewing 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.]" *White v. State*, 308 Kan. 491, 504, 421 P.3d 718 (2018).

Here, the district court exercised the first option. When the district court summarily denies a K.S.A. 60-1507 motion, this court conducts a de novo review to

decide whether the motions, files, and records of the case conclusively show the movant is entitled to no relief. *Beauclair v. State*, 308 Kan. 284, 293, 419 P.3d 1180 (2018).

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." K.S.A. 2022 Supp. 60-1507(c). Still, our Supreme Court has clarified this rule is not without exception. See *Dunlap v. State*, 221 Kan. 268, 270, 559 P.2d 788 (1977) ("The sentencing court should not entertain a second or successive motion for relief under K.S.A. 60-1507 on behalf of the same person unless the errors affect constitutional rights and there are exceptional circumstances which justify entertaining a second or successive motion."). Exceptional circumstances that will permit review include unusual events or intervening changes in the law that prevented the movant from raising the issue in a previous K.S.A. 60-1507 motion. *Upchurch v. State*, 36 Kan. App. 2d 488, 492, 141 P.3d 1175 (2006). The movant has the burden of showing exceptional circumstances exist that permit this court's review. *Wimbley v. State*, 292 Kan. 796, 805, 275 P.3d 35 (2011).

Wilson's brief admits "there is no question that [his motion] is successive, and does request similar relief on similar grounds [raised in his prior proceedings]." Still, Wilson focuses his arguments on his claim of prosecutorial error, asserting: (1) the State knowingly offered perjured testimony; (2) the State was ethically obligated to offer transcripts from the prior Missouri case to place the K.S.A. 2012 Supp. 60-455(d) evidence in context for the jury; and (3) the State erred in arguing the jury should consider evidence of the prior Missouri rape allegation with the same weight as the current crimes even though Wilson had been acquitted in the prior Missouri case.

This is the third time Wilson has tried to challenge the admission of the same evidence at his trial, this time under the guise of prosecutorial error. But prosecutorial error is a claim of trial error that Wilson could have raised in his direct appeal. See Supreme Court Rule 183(c)(3) (2023 Kan. S. Ct. R. at 243); see *State v. Neal*, 292 Kan.

625, 630, 258 P.3d 365 (2011). Wilson argues the fact he is alleging a different violation of his rights based on the same evidence constitutes exceptional circumstances. But Wilson offers no pertinent authority to support his point and fails to explain why his argument is otherwise sound. Failure to support a point with pertinent authority or failure to show why a point is sound despite a lack of supporting authority or in the face of contrary authority is akin to failing to brief the issue. *State v. Meggerson*, 312 Kan. 238, 246, 474 P.3d 761 (2020).

The district court correctly dismissed Wilson's K.S.A. 60-1507 motion as successive. Nothing in Wilson's motion establishes exceptional circumstances to permit a successive motion. Wilson is attacking the same evidence for the third time in a postconviction proceeding. No matter how he has repackaged his claim, Wilson fails to show that anything alleged in his motion was learned after his direct appeal or his first K.S.A. 60-1507 motion. Thus, Wilson has not met his burden to show that any unusual events or intervening changes in the law prevented him from raising his prosecutorial error claim in the prior proceedings. See *Wimbley*, 292 Kan. at 805. Thus, the district court properly dismissed Wilson's K.S.A. 60-1507 motion because a successive motion without a showing of exceptional circumstances constitutes "an abuse of remedy." *Nguyen v. State*, 309 Kan. 96, 108, 431 P.3d 862 (2018).

Affirmed.