

NOT DESIGNATED FOR PUBLICATION

No. 126,526

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

DAQUANTRIUS S. JOHNSON,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; CHRISTOPHER M. MAGANA, judge. Submitted without oral argument. Opinion filed May 31, 2024. 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 COBLE, P.J., SCHROEDER and CLINE, JJ.

PER CURIAM: Daquantrius S. Johnson timely appeals from the district court's summary denial of his K.S.A. 60-1507 motion. Johnson argues the district court erred in failing to grant an evidentiary hearing on his claim that trial counsel was ineffective for failing to argue Johnson's underlying convictions of robbery, aggravated burglary, and theft were multiplicitous. Our thorough review of the record reflects Johnson's convictions are not multiplicitous. Thus, we find no error in the district court's summary denial of Johnson's K.S.A. 60-1507 motion. Accordingly, we affirm the district court.

FACTUAL AND PROCEDURAL BACKGROUND

Johnson was convicted of aggravated burglary, robbery, and theft for acts committed in December 2013. The facts underlying Johnson's convictions and sentences are well-known to the parties, and the full factual and procedural background was set forth by the panel on direct appeal. *State v. Johnson*, No. 113,906, 2017 WL 3947304, at *1 (Kan. App. 2017) (unpublished opinion). We need not repeat those facts here as they are unnecessary to our analysis. Relevant to the issue before us, Johnson timely filed a K.S.A. 60-1507 motion after his convictions and sentences were affirmed on direct appeal. Among other claims, Johnson asserted his trial counsel was ineffective for failing to argue his convictions were multiplicitous. However, we need not address the other issues raised in Johnson's motion as he makes no arguments about those points in the present appeal.

The district court summarily denied Johnson's K.S.A. 60-1507 motion, finding his convictions were not multiplicitous because they required different elements be proven.

ANALYSIS

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."

"The standard of review depends upon which of these options a district court used. [Citations omitted.]" *State v. Adams*, 311 Kan. 569, 577-78, 465 P.3d 176 (2020).

When, as occurred here, the district court summarily denies the motion, we conduct de novo review to determine whether the motion, files, and records of the case conclusively establish that the movant is not entitled to relief. *Beauclair v. State*, 308 Kan. 284, 293, 419 P.3d 1180 (2018).

Johnson argues the district court erred in summarily denying his motion. The only point from his motion that Johnson advances on appeal is his claim trial counsel erred in failing to argue his convictions were multiplicitous. All other claims raised in his motion are waived and abandoned for failing to brief them. See *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021). The State asserts summary denial was appropriate because Johnson's multiplicity argument is a claim of trial error. The State is correct.

Supreme Court Rule 183(c)(3) (2024 Kan. S. Ct. R. at 240-41) 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 defendant must raise all available issues on direct appeal).

We observe Johnson's multiplicity argument, although not raised by trial counsel, is a claim that could have been raised on direct appeal as it is a pure question of law and would be finally determinative of the case. See *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021) (noting exceptions to preservation rule). However, Johnson does not argue or explain why the issue was not raised on direct appeal, nor does he assert his direct appeal counsel was ineffective for failing to raise the issue. Thus, Johnson has not

established exceptional circumstances excusing his failure to raise the issue on direct appeal.

Moreover, Johnson appears to concede his arguments are unavailing even if considered on the merits. Specifically, Johnson acknowledges his argument is contrary to *State v. Schoonover*, 281 Kan. 453, 495, 133 P.3d 48 (2006), wherein our Supreme Court held charges stemming from the same act are not multiplicitous if each crime charged requires proof of an element not necessary to prove the other crime(s). Johnson further acknowledges there are distinct elements for each of his crimes of conviction which are not required to be proven to establish the other crimes. Compare K.S.A. 2013 Supp. 21-5420(a) (defining robbery) with K.S.A. 2013 Supp. 21-5801(a) (defining theft) and K.S.A. 2013 Supp. 21-5807(b) (defining aggravated burglary). Thus, even though the district court considered the substance of Johnson's argument, summary denial was still appropriate because Johnson was not entitled to relief as a matter of law. Accordingly, we find no error in the district court's summary denial of Johnson's K.S.A. 60-1507 motion.

Affirmed.