NOT DESIGNATED FOR PUBLICATION

No. 118,910

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

HARLAN E. MCINTIRE,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Kingman District Court; LARRY T. SOLOMON, judge. Opinion filed March 8, 2019. Affirmed.

Daniel O. Lynch, of Johnston, Eisenhauer, Eisenhauer & Lynch, LLC, of Pratt, for appellant.

Natalie Chalmers, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before MALONE, P.J., HILL, J., and WALKER, S.J.

PER CURIAM: Harlan E. McIntire appeals the district court's summary dismissal of his successive K.S.A. 60-1507 motion. After reviewing the record, we hold the court did not err because McIntire failed to prove "exceptional circumstances" that would allow a successive motion. The evidence that he claims is "newly discovered" was actually admitted at his trial. We affirm.

When McIntire was convicted of two counts of rape of a child under 14 in February 2006, he appealed and a panel of this court, in an order granting summary disposition, vacated his sentence and remanded his case to the district court for

resentencing. Upon remand, the district court imposed a 248-month prison sentence. He did not appeal.

In June 2008, McIntire filed a K.S.A. 60-1507 motion in which he claimed ineffective assistance of both trial and appellate counsel. The district court held an evidentiary hearing and found that trial counsel "'investigated all possible defenses'" and no evidence was found that could have assisted McIntire. The district court held that both trial and appellate counsel provided constitutionally adequate representation, and McIntire was not entitled to relief. McIntire appealed this ruling in *McIntire v. State*, No. 102,267, 2010 WL 1078468, at *3 (Kan. App. 2010) (unpublished opinion) (*McIntire I*), which affirmed the district court.

Two years later, he filed another K.S.A. 60-1507 motion. The district court noted that Mclntire again raised issues of ineffective assistance of his trial and appellate counsel. When the district court denied relief on the motion it found:

- That Mclntire's motion raised the "'*exact same claims* (perhaps in more detail) as the first'" K.S.A. 60-1507 motion;
- that the prior determination was on the merits; and
- the ends of justice would not be served by reaching the merits of the second motion.

Mclntire appealed and argued that his second motion was not successive because the grounds were not "'exactly the same'" as in his first motion. *McIntire v. State*, No. 105,134, 2012 WL 223922, at *1 (Kan. App. 2012) (unpublished opinion) (*McIntire II*). Citing K.S.A. 60-1507(c), the *McIntire II* panel found that a second 60-1507 motion need not be identical to the first motion to be found successive. While affirming the district court, the panel stated: "'The sentencing court shall not be required to entertain a second or successive motion for *similar relief* on behalf of the same prisoner.'" *McIntire II*, 2012 WL 223922, at *1.

Almost five years later, in January 2017, McIntire filed a "Motion to Correct an Illegal Sentence," in which he raised issues about his criminal charges. The district court found they were the same issues he raised unsuccessfully in his 2008 K.S.A. 60-1507 motion. The district court interpreted McIntire's January 2017 motion as a third motion for relief under K.S.A. 60-1507, even though he filed it under his criminal case number. The district court held that this motion had "no validity or merit . . . [and] does not present substantial questions of law or triable issues of fact." The district court denied McIntire's motion "in all respects" in February 2017. McIntire did not appeal.

Then in May 2017, McIntire filed a "Writ of Habeas Corpus" under K.S.A. 2016 Supp. 60-1507 in which he again claimed ineffective assistance of trial counsel and "factual innocence" because of new evidence. He attached a document addressed to the State and electronically signed by Ruth Green, a physician assistant, on July 25, 2005.

The district court denied relief and dismissed McIntire's motion. The court noted that the motion amounted to a fourth 60-1507 motion that brought up the same subjects as his prior motions:

> "6. . . . His current motion, while framed in different language, raises the same issues he has complained of on direct appeal and in prior 60-1507's (i.e., ineffective assistance of Counsel [. . .]; lack of medical evidence of rape, etc.).
> "7. [McIntire's] twenty-one (21) page Motion is merely a rehash/restatement of prior arguments he has made regarding ineffective assistance of Counsel and the lack of evidence supporting his guilt (or alleging his actual innocence)."

We must decide one question.

The parties have framed one issue for us to resolve. McIntire contends that the district court erred in summarily denying his motion for relief under K.S.A. 60-1507. He argues that the district court should have conducted a preliminary hearing into the

ineffectiveness of trial counsel for failing to introduce Green's correspondence at trial and because the letter presents a colorable claim of actual innocence.

The State persuasively contends that the district court's summary dismissal of McIntire's motion was appropriate because McIntire's claim of innocence was not based on any new evidence. Instead, the evidence was presented to the jury through defense counsel's cross-examination of Green at McIntire's trial. Consequently, defense counsel's performance at trial about the information cannot be deficient or prejudicial.

A brief review of the law is helpful at this point. When a district court summarily denies 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. *Sola-Morales v. State*, 300 Kan. 875, 881, 335 P.3d 1162 (2014).

To avoid the summary denial of such a motion, a movant bears the burden of establishing entitlement to an evidentiary hearing. To meet this burden, a movant's 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. If such a showing is made, the court must hold a hearing unless the motion is a "second" or "successive" motion seeking similar relief. *Sola-Morales*, 300 Kan. at 881.

"Exceptional circumstances" can lead to a hearing on a second or successive motion. They have been defined to include "'unusual events or intervening changes in the law which prevent a movant from reasonably being able to raise all of the trial errors in the first post-conviction proceeding.' [Citations omitted.]" *State v. Mitchell*, 297 Kan. 118, 123, 298 P.3d 349 (2013). Exceptional circumstances can include ineffective assistance of counsel. *Rowland v. State*, 289 Kan. 1076, 1087, 219 P.3d 1212 (2009).

McIntire suggests that there has been such a denial or infringement of his constitutional rights that his criminal conviction is vulnerable to collateral attack. See K.S.A. 60-1507(a); Supreme Court Rule 183(g) (2017 Kan. S. Ct. R. 222).

We review the district court's holding.

In its summary dismissal of McIntire's motion, the district court found:

- the motion was successive;
- the motion, files, and records of the case did not conclusively show he was entitled to a hearing;
- he failed to meet his burden by a preponderance of the evidence;
- his claim was insubstantial;
- he failed to make a "colorable" claim of actual innocence; and
- an appellate court already determined that there was sufficient evidence to convict him of the offenses.

To us, McIntire contends that the district court erred because defense counsel was ineffective for failing to introduce Green's letter at trial. He argues his motion contains a colorable claim of actual innocence—based on Green's letter—sufficient to extend the one-year time limit for filing a 60-1507 motion and to allow for a successive motion. See K.S.A. 2017 Supp. 60-1507(f)(2)(A).

To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish:

- that the performance of defense counsel was deficient under all the circumstances; and
- prejudice that there is a reasonable probability the finder of fact would have reached a different result without the deficient performance. *Sola-Morales*,

300 Kan. at 882-83 (relying on *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674, *reh. denied* 467 U.S. 1267 [1984]).

Judicial scrutiny of counsel's performance in a claim of ineffective assistance of counsel is highly deferential and requires consideration of all the evidence before the judge or jury. The reviewing court must strongly presume that counsel's conduct fell within the broad range of reasonable professional assistance. *State v. Kelly*, 298 Kan. 965, 970, 318 P.3d 987 (2014). To establish prejudice, the defendant must show a reasonable probability that—but for counsel's deficient performance—the outcome of the proceeding would have been different. A "reasonable probability" means a probability that is enough to undermine confidence in the outcome. *State v. Sprague*, 303 Kan. 418, 426, 362 P.3d 828 (2015).

In his brief, McIntire argues his defense counsel was deficient for failing to introduce Green's letter into evidence because the document contained evidence of his innocence. In her July 2005 letter, Green stated she examined the child earlier that month. Green wrote, in part, that *no hymen was present in the girl*, and "[t]he findings on this child's exam are *consistent with typical teenage exams* and it is not uncommon to find a lack of hymen *on young girls* in general. I *cannot appreciate any physical wrongdoing based on the exam*." (Emphases added.)

When Green testified for the State at McIntire's trial, under cross-examination by defense counsel, she stated the same opinion:

"[DEFENSE COUNSEL]: And as I understand it, the fact that *the hymen was not intact*, that is *consistent with a typical teenage examination*?
"[GREEN]: Correct.
"[DEFENSE COUNSEL]: Okay. *In young girls*?
"[GREEN]: Yes.

"[DEFENSE COUNSEL]: And as a result *you could not appreciate any physical wrong doing based on your physical examination*?
"[GREEN]: I could not." (Emphases added.)

On redirect, Green revealed that it would have been helpful had she been able to perform the examinations on the victim shortly after the alleged incident. Defense counsel then asked on recross, "But again *your findings are not inconsistent with young girls*?" (Emphasis added.) Green answered that defense counsel was correct.

Basically, McIntire suggests that Green's letter—which mirrored her testimony under cross-examination—would affect the jury far more favorably than her live testimony. Thus, according to McIntire, his defense counsel was deficient for not introducing it, and that deficiency was prejudicial to his defense at trial. But McIntire does not give us any authority that a piece of paper is more powerful and persuasive than live testimony in affecting a jury's deliberations. We are not so convinced.

Thus, our logic becomes manifest. McIntire has not met his burden to show his trial counsel was ineffective. Defense counsel's cross-examination of Green presented the same information to the jury as that in her letter. Thus, counsel's performance was not deficient and McIntire's right to a fair trial was not prejudiced. This means that McIntire's claims do not show exceptional circumstances that can justify another successive or out-of-time 60-1507 motion. The motion, files, and records conclusively establish that McIntire was not entitled to relief. The district court did not err in summarily dismissing McIntire's K.S.A. 60-1507 motion.

Affirmed.