NOT DESIGNATED FOR PUBLICATION

No. 120,742

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

SHAUN M. ALTOM,
Appellant,

v.

JOE NORWOOD, SECRETARY OF CORRECTIONS,
Appellee.

MEMORANDUM OPINION

Appeal from Leavenworth District Court; MICHAEL D. GIBBENS, judge. Opinion filed October 4, 2019. Affirmed.

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

Sherri Price, special assistant attorney general, of Lansing Correctional Facility, and *Derek Schmidt*, attorney general, for appellee.

Before BRUNS, P.J., LEBEN, J., and BURGESS, S.J.

PER CURIAM: Shaun M. Altom appeals the summary dismissal of his K.S.A. 60-1501 petition, arguing the district court erred in finding the petition was untimely and barred by res judicata. Because Altom's petition was untimely, the district court did not err in summarily denying it. The district court's ruling is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2018, Altom filed a petition for writ of habeas corpus with our court. Our court dismissed that petition without prejudice in March 2018, noting that the matter was more appropriate for the district court because it required specified findings of fact.

In June 2018, Altom filed his petition for habeas corpus in the district court. In his petition, Altom alleged that he had been convicted of indecent solicitation of a child in 2010. He was sentenced to 24 months in prison and lifetime postrelease supervision. Altom further alleged that his postrelease supervision was eventually revoked after a hearing before the Prisoner Review Board (PRB) in 2012. According to Altom, however, that revocation was not the result of a new criminal conviction. Instead, it was a technical violation of his postrelease provisions.

Altom argued that his incarceration was a violation of the Kansas Constitution Bill of Rights and Eighth Amendment to the United States Constitution provisions prohibiting cruel and unusual punishment. Altom asserted that under K.S.A. 2018 Supp. 75-5217(b), he was only required to serve six months in prison as a result of his postrelease supervision violation. Altom was continuously passed by the PRB from 2013 to 2017. In his appellate brief, Altom's counsel maintains that in January 2019, Altom was granted parole but is currently still imprisoned at Lansing Correctional Facility.

Appellee moved to dismiss Altom's petition for writ of habeas corpus. Appellee argued that Altom's petition was meritless, untimely, and barred by res judicata. Appellee first argued that in order for an offender to qualify under K.S.A. 2018 Supp. 75-5217(b) and the six-month incarnation period, the inmate must be serving a "specified" period of postrelease supervision. Because Altom was serving a lifetime postrelease term, Appellee argued that he was not entitled to be released after six months. Appellee also argued that Altom's petition was barred by res judicata because Altom filed a similar petition in the

same county in case 16-CV-269 and in Pawnee County in 15-CV-89. In its argument regarding timeliness, Appellee asserted that Altom was only permitted to file his petition within 30 days of his initial PRB revocation hearing, which, according to Altom, was held in January 2013.

The district court granted a hearing on Altom's petition. Altom was present and was allowed to make an argument in his favor but was not represented by counsel and no additional evidence was presented to the court. At the end of the hearing, the district court did not delve into the merits of Altom's claim but dismissed it based on res judicata and untimeliness.

Altom timely appeals.

DID THE DISTRICT COURT ERR IN SUMMARILY DISMISSING ALTOM'S PETITION FOR WRIT OF HABEAS CORPUS?

Altom argues that his continued incarceration resulting from a single probation violation in 2012 and multiple denials for parole by the PRB constitutes cruel and unusual punishment and, thus, violates his constitutional rights. Appellee asserts that Altom's claim is barred by res judicata and the untimeliness of his filing. Appellee also argues that Altom fails to state a claim upon which relief can be granted because it is the PRB's decision to release Altom, and the decision to deny parole does not constitute cruel and unusual punishment.

"To avoid summary dismissal of a K.S.A. 60-1501 petition, the petitioner's allegations must be of shocking and intolerable conduct or continuing mistreatment of a constitutional stature." *Bankes v. Simmons*, 265 Kan. 341, 349, 963 P.2d 412, *cert. denied* 525 U.S. 1060 (1998).

Whether a district court erred by summarily dismissing a K.S.A. 2018 Supp. 60-1501 petition raises a question of law. An appellate court exercises unlimited review of the summary dismissal of a 60-1501 petition, without any deference to that decision. *Johnson v. State*, 289 Kan. 642, 649, 215 P.3d 575 (2009). A district court may summarily dismiss a petition for a writ of habeas corpus if the allegations establish no basis for relief or if the uncontroverted facts in the record show "no cause for granting a writ exists." 289 Kan. at 648-49. The petition should be construed in a light favoring the inmate. *Shepherd v. Davies*, 14 Kan. App. 2d 333, 335, 789 P.2d 1190 (1990). The reviewing court generally must credit the factual assertions in the petition when examining a summary dismissal. See *Schuyler v. Roberts*, 285 Kan. 677, 679, 175 P.3d 259 (2008). Likewise, our courts "broadly construe" petitions from inmates representing themselves to determine if the papers state some basis for relief. *Laubach v. Roberts*, 32 Kan. App. 2d 863, 868, 90 P.3d 961 (2004).

Timeliness of Altom's Petition

The district court held that Altom's petition was filed out of time. The district court did not, however, make a finding regarding the date that Altom's time to file began to toll. In its motion to dismiss, Appellee argued that the clock started after Altom's first parole hearing in June 2013. However, Altom now argues that each time the PRB passed him for parole was a "distinct and discrete action lengthening his incarceration sanction for a single [postrelease supervision] violation/revocation." As such, Altom asserts that because the last time his parole was denied occurred "sometime in December 2017," his petition "likely was timely under K.S.A. 60-1501(b)." Appellee, however, points out that Altom's petition was not filed until June 7, 2018. Acknowledging this lapse in time, Altom asserts that the district court should have also considered the timeliness of his petition in conjunction with the insufficiencies of the mail system in Kansas prisons, Altom's mental conditions, and other challenges inherit in the prison environment. From

this, Altom argues that the district court should have considered both the "mailbox rule" and manifest injustice considerations before finding Altom's petition untimely.

Our appellate courts view the 30-day time limit in K.S.A. 60-1501(b) as a statute of limitations for habeas corpus petitions. Interpretation and application of a statute of limitations is a question of law over which an appellate court has unlimited review. *Law v. Law Company Building Assocs.*, 295 Kan. 551, 566, 289 P.3d 1066 (2012).

An inmate wanting to file a habeas petition must do so "within 30 days from the date an action becomes final." K.S.A. 2018 Supp. 60-1501(b). This deadline is extended while the inmate timely tries to exhaust his or her administrative remedies. K.S.A. 2018 Supp. 60-1501(b). An inmate's failure to file a petition within 30 days, plus the extension while the inmate exhausts administrative remedies, bars the petition. *Peters v. Kansas Parole Board*, 22 Kan. App. 2d 175, 180, 915 P.2d 784 (1996).

As an initial matter, Altom's arguments regarding timeliness are raised for the first time on appeal. Generally, issues not raised before the trial court cannot be raised on appeal. *State v. Carter*, 305 Kan. 139, 159, 380 P.3d 189 (2016). An appellate court may consider a new argument on appeal only if the newly asserted theory involves a pure question of law arising on proved or admitted facts that is finally determinative of the case or if consideration of the new theory is necessary to serve the ends of justice or to prevent denial of fundamental rights. *State v. Northern*, 304 Kan. 860, 864-65, 375 P.3d 363 (2016).

Altom does not acknowledge that his arguments here were not raised below. However, Kansas Supreme Court Rule 6.02(a)(5) (2019 Kan. S. Ct. R. 34) requires an appellant to explain why an issue not raised below should be considered for the first time on appeal. Altom failed to comply with this rule and, as a result, his argument is considered waived or abandoned. *State v. Williams*, 298 Kan. 1075, 1085, 319 P.3d 528

(2014); see also *State v. Godfrey*, 301 Kan. 1041, 1044, 350 P.3d 1068 (2015) (requiring Supreme Court Rule 6.02[a][5] to be strictly enforced). Regardless of this finding, Altom's appeal fails on its merits. Altom's motion for habeas corpus was not timely filed.

Altom argues his incarceration was continued because the PRB repeatedly denied him parole. According to Altom, the PRB last denied his parole "sometime in December 2017" which was the date the action became final. Assuming for purposes of this analysis that Altom is correct, his claim still fails in that he did not file his appeal within 30 days of the date "sometime in December 2017."

Altom seemingly claims that the prison mailbox rule justifies his late filing. "[U]nder the prison mailbox rule, a habeas petition is considered filed when it is delivered to prison authorities for mailing—not on the date it is eventually filed with the court clerk—since those prison authorities control what happens after the paper is delivered to them. [Citations omitted.]" *Sauls v. McKune*, 45 Kan. App. 2d 915, 916, 260 P.3d 95 (2011).

Altom placed his petition in the prison mail system on May 30, 2018. But according to the facts alleged in Altom's petition, he would have needed to deliver his petition to the prison mail authorities sometime in January 2018 based on his claim that the 30-day time limit was based on his most recent parole hearing held "sometime in December 2017." Under these circumstances, Altom's petition was filed out of time because it was not filed in the district court until June 7, 2018. Even if our court considered the fact that Altom also filed a petition with this court on February 23, 2018, that petition was also untimely.

Altom attempts to bolster his argument here by emphasizing that his petition was filed pro se while he was incarcerated. Although Altom is correct that the 30-day time limit does not impose a jurisdictional bar, his argument is nevertheless unpersuasive. See

Battrick v. State, 267 Kan. 389, 401, 985 P.2d 707 (1999) (characterizing 30-day period in K.S.A. 60-1501 as statute of limitations); *Knittel v. Kansas Prisoner Review Board*, No. 111, 552, 2014 WL 6777450, at *3 (Kan. App. 2014) (unpublished opinion) (finding omission of jurisdictional language in K.S.A. 60-1501[b] supports conclusion that 30-day filing period is a statute of limitations).

A panel of this court rejected an argument similar to Altom's in *Knittel*:

> "Knittel relies on caselaw recognizing that courts should give a generous or liberal construction to petitions or other papers filed by nonlawyers representing themselves. *State v. Kelly*, 291 Kan. 563, 565, 244 P.3d 639 (2011); *Bank of America v. Inda*, 48 Kan. App. 2d 658, 662, 303 P.3d 696 (2013). But that undeniably beneficial rule does not extend to compliance with substantive law or rules governing procedure or evidence. *O'Neill v. Herrington*, 49 Kan. App. 2d 896, 906, 317 P.3d 139 (2014); *Mangiaracina v. Gutierrez*, 11 Kan. App. 2d 594, Syl. ¶¶ 1, 2, 730 P.2d 1109 (1986). For example, nonlawyer litigants still must prove all of the elements of their claims and cannot rely on inadmissible hearsay to do so. Nor are they excused if they come close to filing within the appropriate statute of limitations. See *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006) (self-represented litigant not excused from complying with time limitation for filing federal habeas corpus petition); *Felder v. Johnson*, 204 F.3d 168, 170-71 (5th Cir. 2000) (same). Accordingly, Knittel cannot plead ignorance of the law as a valid reason for filing his petition late." 2014 WL 6777450, at *3.

Following this reasoning, Altom's argument that because he was unrepresented he should be afforded greater leniency with regard to the applicable statute of limitations must fail.

Manifest Injustice

Altom argues that the district court should have considered manifest injustice before finding that Altom's petition was time barred. However, Altom did not allege manifest injustice in his K.S.A. 60-1501 petition. He does not argue that an exception to

the general rule requiring preservation of the issue exists here. See Kansas Supreme Court Rule 6.02(a)(5) (requiring explanation for arguments first made on appeal). Altom makes only a conclusory statement that manifest injustice applies here and fails to support his argument with any pertinent authority. Failure to support a point with pertinent authority or show why it 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. Pewenofkit*, 307 Kan. 730, 731, 415 P.3d 398 (2018). Likewise, a point raised incidentally in a brief and not argued therein is also deemed abandoned. *Russell v. May*, 306 Kan. 1058, 1089, 400 P.3d 647 (2017); *State v. Sprague*, 303 Kan. 418, 425, 362 P.3d 828 (2015). Altom's unsupported and conclusory claim is deemed waived or abandoned.

Res Judicata

Altom also argues that the district court erred in applying res judicata to his claims. Since we have already concluded that the district court properly dismissed Altom's claims as untimely filed, we need not address this issue.

Failure to State a Claim

Appellee argues that Altom fails to state a claim upon which relief may be granted. Regardless of the validity of any other argument made by Altom, there is no basis in law for the relief he requests.

Under K.S.A. 2018 Supp. 75-5217(b), an inmate serving a "specified period of postrelease" is required to serve "a six-month period of confinement from the date of the revocation hearing before the board or the effective date of waiver of such hearing by the offender pursuant to rules and regulations promulgated by the board, if the violation does not result from a conviction for a new felony or misdemeanor." However, in *Davis v. Simmons*, 31 Kan. App. 2d 556, 559-60, 68 P.3d 160 (2003), this court held that the six-

month limitation provision in K.S.A. 2002 Supp. 75-5217(b) was not applicable to a petitioner who was on lifetime postrelease supervision, rather than for a specific period.

Because Altom was serving a lifetime term of postrelease supervision when he violated its terms, the PRB was not required to release him after the six-month limitation under K.S.A. 2018 Supp. 75-5217(b).

Affirmed.