MODIFIED OPINION[1]

NOT DESIGNATED FOR PUBLICATION

No. 121,992

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

DARRYL D. HUNTER,
Appellant.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; JENNIFER ORTH MYERS, judge. Original opinion filed June 19, 2020. Modified opinion filed September 4, 2020. Affirmed.

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

Daniel G. Obermeier, assistant district attorney, *Mark A. Dupree Sr.*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before POWELL, P.J., GARDNER, J., and WALKER, S.J.

PER CURIAM: Darryl D. Hunter appeals the district court's denial of his motion to correct an illegal sentence. Hunter contends that his written agreement to extend his probation was invalid, so the district court lacked jurisdiction to revoke his probation during his extended probation. In an unpublished memorandum opinion filed on June 19, 2020, we dismissed Hunter's appeal based on our finding that Hunter was no longer serving the sentence he argues is illegal. *State v. Hunter*, No. 121,992, 2020 WL 3393534

[1]**REPORTER'S NOTE**: Opinion No. 121,992 was modified by the Court of Appeals on September 4, 2020, in response to the appellant's motion for rehearing/modification.

(Kan. App. 2020) (unpublished opinion). See K.S.A. 2019 Supp. 22-3504(a) (an illegal sentence may be corrected "at any time while the defendant is serving such sentence").

Hunter timely moved for modification or rehearing, claiming he is still serving his 28-month sentence ordered in 2010. When Hunter appealed, he did not state that his sentence is presently being served. Hunter now proffers that he has an aggregated sentence that he is still serving. He states that under K.A.R. 44-6-101(b)(5), the Kansas Department of Corrections aggregated two consecutive sentences—the one now on appeal, and his much longer felony sentence in another case. That regulation provides:

> "'Aggregated controlling sentence' means a controlling sentence composed of two or more sentences. An aggregated controlling sentence has a minimum term consisting of the sum of the minimum terms and a maximum term consisting of the sum of the maximum terms. In the case of sentencing guidelines sentences, an aggregated controlling sentence has a prison term that is the sum of all the prison terms of the sentences that are aggregated, pursuant to K.S.A. 2011 Supp. 21-6819 and amendments thereto. The term 'aggregated' shall be applied only to consecutive sentences." K.A.R. 44-6-101(b)(5).

Hunter then contends that under K.S.A. 2009 Supp. 21-4608(c), his felony sentence shall be served consecutively to the sentence at issue here. Prior to its repeal in 2011, that statute provided that sentences for crimes committed while on parole for a prior felony shall be served consecutively. Because the two sentences were aggregated, Hunter asserts he is still serving the 2010 sentence that he is now appealing.

The State has not responded to Hunter's motion to modify. We have no good evidence showing whether Hunter is or is not still serving his sentence in this case. And Hunter has not addressed *Anderson v. Bruce*, 274 Kan. 37, 48-49, 50 P.3d 1 (2002), where our Supreme Court explained that when consecutive sentences are aggregated in accordance with K.S.A. 21-4608(f), those sentences do not lose their individual identities,

or how that case may apply here. So we do not necessarily agree with Hunter's position in his motion to modify.

Still, for the purpose of expediency, we grant Hunter's motion and modify our opinion. Yet we find no error and reject Hunter's claim that his sentence is illegal.

Factual and Procedural Background

In 2009, Hunter pleaded guilty to possession of cocaine. The State agreed to a downward departure of six months of incarceration for Hunter's plea. On July 10, 2009, the district court granted Hunter 12 months of probation with an underlying 28-month prison sentence. The 12 months of probation were set to expire on July 10, 2010.

On June 1, 2010, before the expiration of his probation term, Hunter agreed to extend his probation for an additional 12 months. That agreement, filed on June 21, 2010, extended Hunter's probation until July 10, 2011. Although Hunter apparently had retained counsel at that time, his counsel did not participate in the extension process. On September 20, 2010, the State moved to revoke Hunter's probation based on charges in another case of aggravated battery, aggravated assault, criminal damage, and possession of a firearm. The State also alleged that Hunter had not refrained from using illegal drugs, had not completed 40 hours of community service, and had not paid $237 in court fees. The district court revoked Hunter's probation and imposed his underlying sentence of 28 months on October 29, 2010.

Over eight years later, in March 2019, Hunter filed a motion to correct an illegal sentence. Hunter argued that the district court lacked jurisdiction to revoke his probation because he had been coerced into agreeing to extend his probation. Hunter alleged that because his agreement to extend his probation was invalid and because his original probation should have expired in July 2010, the district court lacked authority to revoke

his probation in October 2010. Hunter also argued that the State's attorney violated a Kansas Rule of Professional Conduct by contacting him, instead of his attorney, about the extension agreement. In response, the State argued that Hunter was not entitled to counsel during the extension proceedings and that Hunter's coercion argument should have been raised, if at all, in 2010 by appealing his probation revocation.

The district court summarily denied Hunter's motion to correct an illegal sentence. It found that Hunter's coercion argument was unsupported by the record, as Hunter had signed a waiver in which he agreed he did not have a right to counsel during the extension proceeding.

Hunter then moved to amend and to alter or amend, but the district court denied those motions as well. Hunter timely appeals.

Did the District Court Err in Summarily Denying Hunter's Motion to Correct an Illegal Sentence?

Hunter argues that his sentence is illegal because the district court lacked jurisdiction to revoke his probation. This argument is based on Hunter's claim that he was coerced into agreeing to extend his probation. The State asserts that Hunter's arguments are unpreserved and unpersuasive, citing *State v. McDonald*, 272 Kan. 222, 32 P.3d 1167 (2001), and *State v. Gordon*, 275 Kan. 393, 66 P.3d 903 (2003). The State asserts that Hunter cannot try to breathe new life into a coercion claim that he should have raised in a direct appeal from his revocation hearing.

Under K.S.A. 22-3504, a defendant may move to correct an illegal sentence at any time while the defendant is serving that sentence. K.S.A. 2019 Supp. 22-3504(a). A sentence is illegal if it (1) is imposed by a court lacking jurisdiction, (2) fails to conform to the applicable statutory provisions, or (3) is ambiguous with respect to the time and

manner in which it is to be served. K.S.A. 2019 Supp. 22-3504(c)(1). Whether a sentence is an "illegal sentence," under the statute, is a question of law over which we have unlimited review. *State v. Bryant*, 310 Kan. 920, 921, 453 P.3d 279 (2019).

Under K.S.A. 22-3504, when "the motion and the files and records of the case conclusively show that the defendant is entitled to no relief," the defendant has no right to a hearing. In that event, the district court may deny the motion summarily. See *State v. Redding*, 310 Kan. 15, 21-22, 444 P.3d 989 (2019). And when a district court summarily denies a motion to correct an illegal sentence, we apply a de novo standard of review because we have the same access to the motion, records, and files as the district court. *State v. Gray*, 303 Kan. 1011, 1013-14, 368 P.3d 1113 (2016).

Although Hunter's arguments blend together, they fall into these three claims:

- He was coerced into extending his probation;
- he was denied a right to representation during the extension proceeding; and
- he was denied a hearing before his probation was extended.

We address these separately below.

Coerced

Hunter first asserts that he was coerced into signing the probation extension agreement. In his motion to correct an illegal sentence, Hunter claimed that someone in the Wyandotte County probation office told him he would go to prison if he did not sign the agreement:

> "I was asked: 'Are you ready to go to prison to serve your 28 month underlying sentence?' I stated 'NO, why?' Sherry L. Dowden, stated: 'Because you have not paid

> your court obligations.' Mrs. Dowden then slid a [piece] of paper in front of me and stated to sign it to 'Agree to probation, otherwise you are going to prison.'
>
> "I stated I wanted 'my Lawyer Lawrence Long.' The tall African American, stated 'we are prepared to take you into custody right now and you will be going to prison if you do not sign.'
>
> "I stated in response: 'Don't I have the right to have m[y] attorney Mr. Long here?' Mrs. Dowden stated, I 'had the right to sign or go to prison.'"

Hunter then claimed that because he feared going to prison, he signed the agreement.

Even if we assume that Hunter's allegation is true, other facts of record are also relevant to a coercion analysis. We make this determination by considering the totality of the circumstances. See *State v. Guein*, 309 Kan. 1245, 1260, 444 P.3d 340 (2019) (finding courts employ a case-by-case evaluation to determine whether impermissible coercion was present and whether that coercion overbore the defendant's free and independent will).

Chief among the facts here is that Hunter signed the agreement which unambiguously informed him of his right not to sign the agreement and to instead have a hearing about his probation extension:

> "I, Darryl D. Hunter, understand that I can refuse to agree to this probation extension. If I refuse, I know that I have the right to an open hearing on the extension of my probation before the District Court of Wyandotte County, Kansas. At that hearing I can require that the State prove to the Judge why there is the necessity of extending my probation under K.S.A. 21-4611.
>
> "I hereby knowingly, with full understanding, waive my rights to: an open hearing on the extension of my Order of Probation; my right to be represented by counsel in signing this waiver; my right to be represented by counsel at the probation extension hearing; my right to court appointed counsel if I am unable to employ counsel; and my rights to call witnesses and present evidence for my benefit at the hearing on the issue of the necessity

> for the extension under K.S.A. 21-4611. Further, I knowingly and with full understanding agree to the extension of my Order of Probation for a period of **12 Months**, until the 10th day of July, 2011."

Hunter does not claim that he failed to understand this agreement or that it failed to notify him of his right to a hearing.

Instead, Hunter suggests coercion resulting from some nefarious threat of prison based solely on his failure to pay court costs. But the record shows other reasons why a probation officer may have given Hunter the option to extend his probation rather than go to jail, as a matter of grace. At the time Hunter signed the agreement to extend probation, he had done acts which could easily have warranted his going to jail:

- Hunter had failed urine analysis tests;
- Hunter had been arrested for aggravated assault;
- Hunter had been arrested for battery;
- Hunter had been arrested for disorderly conduct; and
- Hunter had been arrested for battery of a police officer.

The facts show neither a motive to coerce Hunter into signing the extension agreement, nor a coercive effect.

Hunter tacitly implies that the violations the State relied on in moving to revoke his probation were the same violations the probation officer relied on in giving Hunter the option to extend his probation. But Hunter merely refers to this potential issue in the fact section of his appellate brief and fails to brief the issue more. Thus, we find any such argument to be waived or abandoned. See *State v. Salary*, 309 Kan. 479, 481, 437 P.3d 953 (2019).

Lastly, Hunter does not dispute that he failed to raise the issue of coercion in the district court during his probation revocation hearing. That would have been the proper time to raise any coercion argument. Nor does Hunter explain why he did not raise this argument at any other time before moving to correct his sentence—more than eight years after the district court revoked his probation. This lapse of time does not assist Hunter's claim that he was coerced into signing the agreement to extend his probation.

Nothing about the choice to extend probation given to Hunter, or how it was presented to him, shows physical or mental coercion by the State. That Hunter reasonably feared going to prison does not show impermissible coercion by the State. Cf. *Williams v. State*, 197 Kan. 708, 711, 421 P.2d 194 (1966) ("Every man charged with crime is influenced by personal considerations which may later not appear valid to him, but psychological self-coercion is not the coercion necessary in law to destroy an otherwise voluntary plea of guilty.").

For these reasons, we find no coercion invalidating Hunter's voluntary agreement to extend his probation.

No consultation with counsel

Next, Hunter claims that he was denied his right to consult with counsel before signing the extension agreement.

The State cites our Supreme Court's decision in *McDonald*. There, our Supreme Court held there is neither a statutory nor a constitutional requirement for counsel to be present when a probationer faces the choice of voluntarily extending probation or forcing the court to order the extension after a modification hearing and judicial finding of necessity. Hunter tries to distinguish *McDonald* by noting that his retained counsel was still actively representing him when he signed the agreement, while McDonald's counsel

was not. But nothing in *McDonald*'s rationale suggests that that fact makes any difference. So even if we assume that a probation officer told Hunter he had no right to speak to his attorney when choosing to extend probation, Hunter fails to show that advice was wrong, or that he had any right to counsel at that time. See 272 Kan. at 227.

In a Rule 6.09 letter, (2020 Kan. S. Ct. R. 39), Hunter asserts that a representative of the State violated the Kansas Rules of Professional Conduct by communicating with him without first contacting his attorney. See KRPC 4.2 (2020 Kan. S. Ct. R. 366). But as above, Hunter's argument is conclusory and unsupported by pertinent authority, so we need not consider it. See *Salary*, 309 Kan. at 481. Hunter does not explain how a violation of an attorney's ethical rule would help his case, as an ethics rule does not impose a legal duty on attorneys. See *OMI Holdings, Inc. v. Howell*, 260 Kan. 305, 325, 918 P.2d 1274 (1996); Supreme Court Rule 226, Scope [20] (2020 Kan. S. Ct. R. 287) (A violation of an ethical rule "should not itself give rise to a cause of action against a lawyer" or "necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation."). Nor does Hunter argue that the State's attorney contacted him without first contacting his attorney, as this ethical rule would prohibit. Instead, Hunter asserts that a probation officer approached him and offered the agreement to extend his probation. The cited KRPC rule does not apply to these facts.

We find no merit to Hunter's claim that he was illegally denied his right to counsel.

Denial of a hearing

Hunter's final claim is that he was denied a hearing in violation of K.S.A. 2019 Supp. 21-6608. Here, Hunter relies on *State v. Freeman*, 32 Kan. App. 2d 1027, 93 P.3d 1223 (2004).

We find *Freeman* distinguishable from the facts here. Like Hunter, Freeman was an appellant who signed an order extending his probation before his probation was ultimately revoked. And Freeman's case turned on whether the district court lacked jurisdiction to revoke Freeman's probation after he signed an agreement to extend his probation without a hearing or a finding of necessity. Yet unlike Hunter, Freeman directly appealed from the revocation of his probation rather than wait several years to file a collateral motion arguing the district court lacked jurisdiction. Freeman was not notified that he was entitled to a hearing. And Freeman's agreement did not reference "the statutory language requiring a hearing and a judicial finding of necessity." 32 Kan. App. 2d at 1029. As a result, a panel of this court found that the record did not show that Freeman knowingly and voluntarily waived his statutory right to a hearing and judicial finding of necessity as required by K.S.A. 2003 Supp. 21-4611(c)(8). So it remanded the case with directions to release Freeman from custody. 32 Kan. App. 2d at 1030.

Hunter's case does not demand the same result. Hunter signed an agreement that explained he had the right to refuse to extend his probation, to then have a hearing, and to require a judicial finding of necessity, as provided under the relevant statute:

> "If I refuse, I know that I have the right to an open hearing on the extension of my probation before the District Court of Wyandotte County, Kansas. At that hearing I can require that the State prove to the Judge why there is the necessity of extending my probation under K.S.A. 21-4611."

Considering all of this, we find Hunter was not improperly denied a hearing.

We note the State's citation to *Gordon* as support for its argument that Hunter's right to a hearing was not violated. But the *Gordon* court did not—as the State suggests—find that a hearing was never required before a defendant's probation is extended. Instead, our Supreme Court held that "[t]he failure of the legislature to provide for a hearing prior to extensions of probation under K.S.A. 2002 Supp. 21-4611(c)(7) does not violate a

probationer's due process or equal protection rights, nor does it render the provisions of the statute unconstitutional." 275 Kan. 393, Syl. ¶ 8. K.S.A. 2002 Supp. 21-4611(c)(7)—now K.S.A. 2019 Supp. 21-6608(c)(7)—refers to those who are on probation with pending child support obligations:

> "[I]f the defendant is convicted of nonsupport of a child, the period may be continued as long as the responsibility for support continues. If the defendant is ordered to pay full or partial restitution, the period may be continued as long as the amount of restitution ordered has not been paid."

Because this case does not turn on whether Hunter's probation could be extended without a hearing under K.S.A. 2019 Supp. 21-6608(c)(7), the State's assertion that a hearing is never required is unsupported.

In conclusion, because Hunter's written agreement to extend his probation was valid, the district court had jurisdiction to revoke his probation during his extended probation. It properly denied Hunter's motion to correct his sentence.

Affirmed.