NOT DESIGNATED FOR PUBLICATION

No. 123,914

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

LAURANCE L. ELNICKI,
Appellant.

MEMORANDUM OPINION

Appeal from Shawnee District Court; MARK S. BRAUN, judge. Submitted without oral argument. Opinion filed November 3, 2023. Affirmed.

Kristen B. Patty, of Wichita, for appellant.

Jodi Litfin, deputy district attorney, *Michael Kagay*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before ATCHESON, P.J., ISHERWOOD and HURST, JJ.

PER CURIAM: Laurance L. Elnicki appeals the district court's summary denial of his motions to correct an illegal sentence and to obtain relief under K.S.A. 60-1507. He contends that his sentence is illegal because the district court did not impose restitution while Elnicki was present in open court during his sentencing in 2006. But the rule he seeks to avail himself of was not implemented until 2014. Thus, the district court was not under any obligation to impose restitution in Elnicki's presence. Elnicki pursued a K.S.A. 60-1507 motion as an avenue to challenge the representation his appointed attorney provided during the sentencing proceeding. But pursuant to the plain language of K.S.A.

2022 Supp. 60-1507(f), such motions must be filed within one year of a defendant's case achieving finality or they must successfully argue that manifest injustice will result if the motion is rejected as untimely. Elnicki filed his motion long after the one-year time limitation, and he failed to establish that an extension of time is warranted. Accordingly, we detect no error in the district court's denial of Elnicki's motions and affirm those decisions.

FACTUAL AND PROCEDURAL BACKGROUND

In 2005, a jury convicted Elnicki of aggravated kidnapping, kidnapping, aggravated robbery, and aggravated burglary, crimes committed in December 2004. Before sentencing, Elnicki moved for a departure sentence. At the January 2006 sentencing hearing, the State opposed the departure motion and requested that the court impose restitution in the amount of $4,268.29. The district court granted a downward durational departure and sentenced Elnicki to serve a prison term of 500 months followed by 36 months of postrelease supervision. The court held the issue of restitution open pending any further discussion the parties deemed necessary. The following month, the sentencing journal entry was filed and included a restitution order for $4,777.13.

Elnicki pursued a direct appeal, and a panel of this court affirmed his convictions but vacated the assessment of attorney fees and remanded for further proceedings. *State v. Elnicki*, No. 96,179, 2009 WL 2242417 (Kan. App. 2009) (unpublished opinion). In 2010, Elnicki filed his first K.S.A. 60-1507 and alleged that trial counsel's representation was deficient for failing to argue that his crimes were multiplicitous. The court conducted an evidentiary hearing to fully analyze the merits of the claim but ultimately declined to grant relief. Elnicki appealed the district court's decision, but a panel of this court rejected his claim of error, and our Supreme Court likewise denied his petition for review. *Elnicki v. State*, No. 106,008, 2012 WL 718966 (Kan. App. 2012), *rev. denied* 296 Kan. 1129 (2013). Elnicki then attempted to obtain relief by virtue of a habeas corpus petition in the

United States District Court for the District of Kansas, but his efforts were similarly unsuccessful.

In August 2018, Elnicki once again set his sights on postconviction relief through the state district court and filed a motion advancing the claim that the district court's failure to impose restitution in open court resulted in an illegal sentence. He filed a supplemental motion several months later to add claims that his attorney's representation at sentencing fell below the standard of reasonableness when he failed to investigate the legitimacy of Elnicki's prior convictions or adequately defend his departure motion. The district court summarily denied Elnicki's motion to correct an illegal sentence, as well as his supplemental claims which the district court recast as a K.S.A. 60-1507 motion for ineffective assistance of counsel.

Elnicki now timely brings the matter before us to analyze whether the district court reached its conclusion in error when it denied his motions.

LEGAL ANALYSIS

Elnicki's motion to correct an illegal sentence was properly denied.

As previously stated, Elnicki filed his motion to correct an illegal sentence to pursue the theory that the district court was required to order restitution in open court, and to do otherwise risked imposition of an illegal sentence. He carries the same argument forward in this appeal. The State counters that the rule Elnicki relies on as a source for relief is not applicable to his case.

Whether a sentence is illegal is a question of law over which an appellate court has unlimited review. Similarly, because we enjoy the same degree of access to the motions, records, and files as the district court had, we exercise unlimited review of its decision

that those documents conclusively demonstrated that Elnicki was not entitled to relief on his illegal sentence claim. See *State v. Mitchell*, 315 Kan. 156, 158, 505 P.3d 739 (2022).

An illegal sentence is statutorily defined and consists of those judgments which (1) are imposed by a court without jurisdiction; (2) do not conform to the applicable statutory provision, either in character or punishment; or (3) are ambiguous with respect to the time and manner in which they are to be served at the time of pronouncement. A sentence does not fall under the umbrella of what is classified as "illegal" merely because of a change in the law that occurs after the sentence is pronounced. K.S.A. 2022 Supp. 22-3504(c)(1). A "change in the law" is defined as "a statutory change or an opinion by an appellate court of the state of Kansas, unless the opinion is issued while the sentence is pending an appeal from the judgment of conviction." K.S.A. 2022 Supp 22-3504(c)(2).

Elnicki relies on the first of the three possible classifications and essentially argues the district court lacked jurisdiction to order restitution outside the confines of the sentencing hearing. He directs us to *State v. Hall*, 298 Kan. 978, 319 P.3d 506 (2014), as support for this proposition. In *Hall*, the Kansas Supreme Court held that because restitution constitutes a part of the defendant's sentence, the district court can only set the amount while the defendant is present in open court. 298 Kan. at 986. Here, the district court did not continue sentencing, it merely left the determination regarding restitution open to allow for further discussion of the matter between the parties. A final restitution figure was then included in its journal entry of sentencing.

But it was not until the Kansas Supreme Court issued its mandate in *Hall* that its holding in that case regarding the imposition of restitution became a rule. See *State v. Frierson*, 298 Kan. 1005, 1021, 319 P.3d 515 (2014). By contrast, Elnicki's restitution order was imposed in 2006, and his case became final well before the mandate was filed in *Hall*. See *State v. Moncla*, 301 Kan. 549, 554, 343 P.3d 1161 (2015) (holding finality of sentence occurred when journal entry memorializing restitution amount was filed).

Elnicki acknowledges the *Hall* and *Frierson* holdings but does not bestow us with an argument that serves to illustrate how his case is distinguishable. And also seeing none by virtue of our own research, we are obligated to follow the dictates of the Supreme Court on this issue. See *State v. Rodriguez*, 305 Kan. 1139, 1144, 390 P.3d 903 (2017) ("The Kansas Court of Appeals is duty bound to follow Kansas Supreme Court precedent unless there is some indication that the Supreme Court is departing from its previous position."). There is no such indication here. Because *Hall* is inapplicable, the record conclusively establishes that the manner in which the district court instituted Elnicki's restitution order did not give rise to an illegal sentence. Thus, we find no error in the district court's summary denial of Elnicki's motion to correct an illegal sentence.

The district court properly denied Elnicki's K.S.A. 60-1507 motion.

Like the district court, we conclude that Elnicki's second motion is properly characterized as an independent K.S.A. 60-1507 motion, rather than a mere addendum to his motion to correct an illegal sentence. As support for that conclusion, we note that the substance of the motion does not address allegations that his sentence was imposed without jurisdiction, that it fails to conform to the applicable law, or that it was ambiguous, as would be required for it to fall within the parameters of an illegal sentence, as defined by the Legislature in K.S.A. 2022 Supp. 22-3504(c)(1). Rather, he contends he is entitled to have his sentence vacated because it is attributable, at least in part, to the deficient representation counsel rendered during the sentencing hearing. Thus, we will analyze it through the lens we deem most appropriate, which is a motion challenging his sentence under K.S.A. 60-1507. See *Mitchell*, 315 Kan. 156, Syl. ¶ 4 ("Appellate courts have discretion to construe an improper motion to correct an illegal sentence as a motion challenging a sentence under K.S.A. 60-1507.").

A district court reviewing a 60-1507 motion has three options, depending on what the motion, files, and records of the case show: (1) If they "'conclusively show that the

[movant] is entitled to no relief,'" the court should summarily deny the motion; (2) if they show a "'substantial issue,'" the district court should order a full evidentiary hearing; and (3) if they show "'a potentially substantial issue or issues of fact,'" the district court should hold a preliminary hearing. *Stewart v. State*, 310 Kan. 39, 46-47, 444 P.3d 955 (2019) (quoting *Lujan v. State*, 270 Kan. 163, 170-71, 14 P.3d 424 [2000]). Here, the district court chose the first option, so 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 any relief.'" 310 Kan. at 52.

When individuals under sentence desire to pursue relief through a K.S.A. 60-1507 motion, subsection (f) of that statutory provision requires that they file such motions within one year of (1) the termination of state appellate jurisdiction over a direct appeal, or (2) the United States Supreme Court's denial of a petition for writ of certiorari. K.S.A. 2022 Supp. 60-1507(f)(1); see *Noyce v. State*, 310 Kan. 394, 399, 447 P.3d 355 (2019). Elnicki filed the present K.S.A. 60-1507 motion in 2019, roughly 10 years after the final appellate order in his direct appeal. Thus, the district court properly found that his motion was untimely.

K.S.A. 2022 Supp. 60-1507(f)(2) does offer an avenue of relief in this regard in that the statutory time limit "may be extended by the court" but "only to prevent a manifest injustice," which the Kansas Supreme Court has defined to mean "'obviously unfair'" or "'shocking to the conscience.'" *State v. Roberts*, 310 Kan. 5, 13, 444 P.3d 982 (2019). Courts weighing a request to extend the statutory time limit for a K.S.A. 60-1507 motion are "'limited to considering (1) a movant's reasons for the failure to timely file the motion and (2) a movant's claims of actual innocence.'" *Sherwood v. State*, 310 Kan. 93, 100, 444 P.3d 966 (2019); see *White v. State*, 308 Kan. 491, 496, 502, 421 P.3d 718 (2018). In this context, "the term actual innocence requires the prisoner to show it is more likely than not that no reasonable juror would have convicted the prisoner in light of new evidence." K.S.A. 2022 Supp. 60-1507(f)(2)(A).

Elnicki bore "the burden to establish manifest injustice by a preponderance of the evidence" because he is the one seeking an extension of the time limit. See *White,* 308 Kan. at 496. But he made no such argument. Rather, in his motion he simply alleged that his counsel on direct appeal and those appointed to assist with the litigation of his habeas matter failed to raise "actionable claims." He pares that down a bit in his briefing to simply allege that "he was constructively denied his right to counsel due to his attorney's conflict of interests, and he effectively had no legal representation at his 2006 sentencing hearing," which demonstrated "exceptional circumstances." Exceptional circumstances is the standard a movant must show to justify review of a *successive* K.S.A. 60-1507 motion, not an *untimely* one. See *Mitchell*, 315 Kan. at 160.

Even if we liberally construed Elnicki's motion to claim that his previous counsel's failure to perform in the manner Elnicki believed most appropriate for the circumstances, the claim still falls short in that it provides no justification for Elnicki's failure to timely file the motion within one year from when his sentence became final. He simply directs our attention to a series of letters he exchanged with his appellate counsel, and with another attorney that he attempted to retain, who opined that after reviewing his case, they were unable to identify any issues with his sentencing. For rather obvious reasons this is not sufficient to clear the procedural bar he faces as a result of the untimely filing. Because Elnicki failed to show by a preponderance of the evidence that extension of the time to file his motion was required to prevent a manifest injustice, K.S.A. 2022 Supp. 60-1507(f) bars his motion as untimely filed, and the district court properly found as much. We have no qualms in affirming that conclusion.

CONCLUSION

Elnicki has long endeavored to challenge the validity of his 2006 convictions for a series of violent crimes but to no avail. The current case yields a similar result. The rule he highlights as the foundation for his claim that his sentence is illegal was not

established until long after his case became final. As a result, he cannot avail himself of its applicability. His K.S.A. 60-1507 motion was untimely, and he failed to fulfill his burden to establish that the statutorily recognized exception for that shortcoming was satisfied and paved the way for consideration of the merits of his claim. We find the district court properly denied both of Elnicki's motions and affirm those decisions.

Affirmed.