

NOT DESIGNATED FOR PUBLICATION

No. 124,311

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

OSIEL OROZCO,  
*Appellant,*

v.

STATE OF KANSAS,  
*Appellee.*

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JEFFREY E. GOERING, judge. Opinion filed March 31, 2023. Affirmed in part and dismissed in part.

*Gerald E. Wells*, of Jerry Wells Attorney-at-Law, of Lawrence, for appellant.

*Kristi D. Allen*, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before HURST, P.J., BRUNS and SCHROEDER, JJ.

PER CURIAM: This is an appeal from the district court's order denying Osiel Orozco's K.S.A. 60-1507 motion, which was filed after his rape conviction was affirmed in his direct appeal. In his K.S.A. 60-1507 motion, Orozco argued that his trial counsel was ineffective for various reasons surrounding the admission of his confession at trial after the district court's denial of his motion to suppress. After an evidentiary hearing, the district court denied all issues raised in Orozco's K.S.A. 60-1507 motion. On appeal, Orozco continues to claim that his trial counsel was ineffective—albeit for reasons not

raised below—and claims—for the first time—that his appellate counsel was ineffective. For the reasons stated in this opinion, we affirm in part and dismiss in part.

## FACTS AND PROCEDURAL HISTORY

On April 4, 2014, the State charged Orozco with one count of rape. His conviction was affirmed by a panel of this court in his direct appeal and the underlying facts were summarized in that opinion. *State v. Orozco*, No. 114,439, 2016 WL 7428358, at \*1-2 (Kan. App. 2016) (unpublished opinion). Accordingly, we will not repeat them here but will instead focus on those facts that are material to the issues presented in this appeal.

Prior to trial, Orozco's trial counsel sought to suppress the statement that his client gave to the police during an interview. At a pretrial hearing, trial counsel questioned the officers who had interviewed his client regarding the voluntariness of Orozco's statement. These questions focused on factors such as the duration of the interview; Orozco's physical, mental, and emotional state; and his ability to speak and understand the English language. After hearing the evidence and considering the arguments of the attorneys, the district court found that Orozco's statement to the police was freely and voluntarily given based on the totality of the circumstances.

Subsequently, Orozco filed a pro se motion for a bench trial. The district court conducted a hearing on the motion and found that he had voluntarily waived his right to a jury trial. As a result, the case proceeded to a bench trial on April 1, 2015, and the district court found Orozco to be guilty as charged. The following month, the district court sentenced Orozco to life in prison without eligibility for parole for 25 years to be followed by lifetime postrelease supervision.

After sentencing, Orozco timely filed a direct appeal. The Appellate Defender's Office was appointed to represent Orozco in his direct appeal and an experienced

appellate attorney served as his counsel. Ultimately, a panel of this court found that the district court had not committed reversible error in denying Orozco's motion to suppress. *Orozco*, 2016 WL 7428358, at \*2-4. The panel also found that the evidence presented at the bench trial was sufficient to support the district court's verdict. *Orozco*, 2016 WL 7428358, at \*4-5. On September 22, 2017, the Kansas Supreme Court denied Orozco's petition for review.

About one year later, Orozco timely filed a pro se K.S.A. 60-1507 motion in which he claimed his trial counsel had been ineffective for a variety of reasons, including not properly challenging the admission of Orozco's statement to the police. The district court appointed an attorney to represent Orozco on his motion and his counsel filed a supplemental statement of issues. On April 15, 2021, the district court held an evidentiary hearing on the K.S.A. 60-1507 motion. At the hearing, both Orozco and his trial counsel testified. The former prosecutor who had handled Orozco's rape case also testified. In addition, the transcript of Orozco's interview with the police was admitted into evidence.

Orozco testified that he only met with his trial counsel two or three times, and his trial counsel did not explain to him the difference between a bench trial and a jury trial. He also claimed that trial counsel did not discuss the advantages and disadvantages of either option with him. Conversely, trial counsel testified that he met with Orozco about eight times. Significantly, trial counsel testified that he did discuss the difference between a bench trial and a jury trial with Orozco after receiving his pro se motion for a bench trial. Likewise, trial counsel testified that he did not advise Orozco to proceed with a bench trial. Regarding one of Orozco's claims of ineffectiveness, trial counsel also testified that he objected to a note written by the victim during the bench trial.

Trial counsel further testified that the district court ordered the interpreter's office to prepare a transcript of Orozco's interview with police at his request. After receiving the transcript, trial counsel filed a motion to suppress the statement because a certified

interpreter was not present during the interview and because the statement was not voluntarily made. However, the district court denied the motion and this ruling was affirmed on direct appeal. The former prosecutor also testified regarding trial counsel's efforts to suppress Orozco's statement to the police as well as regarding the unavailability of the victim to testify as a witness at trial.

After considering the testimony, reviewing the exhibit, and hearing the arguments of counsel, the district court denied Orozco's K.S.A. 60-1507 motion. In doing so, the district court found that Orozco had not met his burden to establish that his trial counsel's performance was deficient or that his rights had been prejudiced. Thereafter, Orozco filed this appeal.

#### ANALYSIS

The only issue presented on appeal is whether the district court erred in denying Orozco's K.S.A. 60-1507 motion following an evidentiary hearing. After an evidentiary hearing on a K.S.A. 60-1507 motion, we review the district court's findings of fact to determine whether they are supported by substantial competent evidence and are sufficient to support the district court's conclusions of law. However, our review of the district court's ultimate conclusions of law is *de novo*. *Balbirnie v. State*, 311 Kan. 893, 897-98, 468 P.3d 334 (2020). The burden of proof in establishing ineffective assistance of counsel is on the movant. *Fuller v. State*, 303 Kan. 478, 486, 363 P.3d 373 (2015).

Although Orozco asserted that his trial counsel was ineffective in his K.S.A. 60-1507, he now asserts different grounds to support his claim than the ones that he raised before the district court. Claims of ineffective assistance of counsel, as a general rule, cannot be raised for the first time on appeal. See *Trotter v. State*, 288 Kan. 112, Syl. ¶ 2, 200 P.3d 1236 (2009). Nevertheless, we may consider a claim of ineffective assistance for the first time on appeal if: (1) there are no factual issues in dispute, and (2) the test

for ineffective assistance of counsel can be resolved as a matter of law based on the record. *State v. Salary*, 309 Kan. 479, 483-84, 437 P.3d 953 (2019).

The allegation that trial counsel was ineffective in dealing with the statement that Orozco made to the police was raised below. Although his new argument that trial counsel was ineffective regarding his handling of the statement based on the totality of the circumstances was not raised below, it arises out of the same conduct. See K.S.A. 2021 Supp. 60-215(c)(2). Accordingly, we will consider Orozco's new argument on the merits even though it is raised for the first time on appeal.

On the other hand, a review of the record on appeal reveals that Orozco has not previously asserted a claim that his appellate counsel was ineffective. As such, this claim does not arise out of the same conduct as set forth in Orozco's K.S.A. 60-1507 motion or addressed at the evidentiary hearing. Although vaguely related to the claim asserted against trial counsel, the factual basis is different, and we do not have the benefit of testimony from appellate counsel regarding his representation of Orozco on appeal. Consequently, we find that the claim of ineffective assistance of appellate counsel was not preserved for appeal and should be dismissed.

Turning to Orozco's claim of ineffectiveness of trial counsel, we note that on appeal, Orozco does not challenge the district court's ruling on any of the claims or arguments asserted below. Rather, Orozco raises a new argument. Specifically, he now argues that trial counsel was ineffective for failing to assert that the statement he gave to the police should be deemed involuntary under the totality of the circumstances.

To prevail on a claim of ineffective assistance of trial counsel, the movant must establish (1) that trial counsel's performance was deficient under the totality of the circumstances, and (2) that the criminal defendant suffered prejudice because of that performance. To prove prejudice, the movant must show a reasonable probability that the

outcome would have been different absent the alleged deficient performance by trial counsel. *Salary*, 309 Kan. at 483.

Judicial review of legal representation provided by attorneys to their clients is highly deferential. It is not the role of courts to review an attorney's performance based on the distorting effects of hindsight. Instead, we must assess an attorney's performance based on counsel's perspective when the professional services were rendered. As a result, to establish deficient representation, a movant must overcome a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. See *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2050, 80 L. Ed. 2d 674 (1984); see also *State v. Dinkel*, 314 Kan. 146, 148, 495 P.3d 402 (2021) (quoting *Fuller v. State*, 303 Kan. 478, 488, 363 P.3d 373 [2015]).

An ineffective assistance of counsel claim fails if the movant cannot establish sufficient prejudice to the outcome. See *Edgar v. State*, 294 Kan. 828, 843-44, 283 P.3d 152 (2012).

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697.

For that reason, even if a movant's legal representation were inadequate, a movant has no right to relief if the result would not have been different with effective counsel.

Here, Orozco alleges that his trial counsel was ineffective for failing to argue that his statement to the police was not freely, knowingly, and voluntarily given under the totality of the circumstances. Orozco suggests that the trial counsel should have provided the district court "a letter brief" providing the Kansas Supreme Court's decisions in *State*

*v. Zuniga*, 237 Kan. 788, 791-92, 703 P.2d 805 (1988), and *State v. Garcia*, 243 Kan. 662, Syl. ¶ 9, 763 P.2d 585 (1988), *disapproved of on other grounds by State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992). These cases find that in determining the voluntariness of a confession, a court must make that determination based on the totality of the circumstances. See *Zuniga*, 237 Kan. at 791-92; *Garcia*, 243 Kan. 662, Syl. ¶ 9.

A review of the record shows that trial counsel did challenge the voluntariness of Orozco's statement to the police and attempted to suppress it prior to trial. The record also reflects that at the suppression hearing, the district court analyzed the voluntariness of Orozco's statement under the totality of the circumstances standard. Later, the district court's decision not to suppress the statement was affirmed on direct appeal to this court, the Kansas Supreme Court denied a petition for review, and a mandate was issued.

At the suppression hearing, the State advised the district court that the purpose of the hearing was to determine "whether [Orozco's] statements [to the police] were . . . freely, knowingly and voluntarily given." The district court was further advised that the fact that a certified interpreter was not present during the police interview was one factor that may be considered in determining the voluntariness of the statement under the totality of the circumstances. In denying the motion to suppress, the district court found that there was no indication that Orozco had comprehension issues or diminished capacity other than indicating he "was tired and hungry."

In ruling on the suppression motion, the district court also found that there was nothing in the manner of the police questioning or in Orozco's responses during the interview to establish coercion. The district court found that in applying factors including "the mental condition of a defendant, the manner, duration of interrogation, the ability of the accused to communicate with the outside world, the defendant's age, intellect and background and the fairness of the officers, all combined with the totality of the circumstances," led it to the conclusion that Orozco's statement to the police was freely

and voluntarily made. Thus, the record establishes that the district court properly considered the totality of the circumstances in determining the voluntariness of Orozco's statement and, as a result, Orozco has not demonstrated prejudice.

Orozco also argues that his trial counsel was ineffective for failing to properly object to the statement at trial—either during the State's opening statement or when the State moved to admit the transcript into evidence—based on it being involuntarily given under the totality of the circumstances. But a review of the record does not support this argument. At trial, trial counsel objected to the contents of the transcript being admitted into evidence and only stipulated to the accuracy of the translation. The district court overruled trial counsel's objection based on its pretrial rulings. Again, because the district court based its overruling of trial counsel's objection on its pretrial rulings in which it considered the voluntariness of the statement based on the totality of the circumstances, Orozco has not established prejudice.

Affirmed in part and dismissed in part.