

NOT DESIGNATED FOR PUBLICATION

No. 124,938

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

JONATHAN M. BETH,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Neosho District Court; ROBERT J. FLEMING, judge. Submitted without oral argument. Opinion filed December 1, 2023. Affirmed.

Michael P. Whalen, of Law Office of Michael P. Whalen, of Wichita, for appellant.

Linus A. Thuston, county attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before ATCHESON, P.J., MALONE and PICKERING, JJ.

PER CURIAM: Jonathan M. Beth appeals from the district court's denial of his K.S.A. 60-1507 motion after an evidentiary hearing. Beth's K.S.A. 60-1507 motion raised ineffective assistance of counsel claims against three attorneys. The proceedings in district court on Beth's K.S.A. 60-1507 motion extended for over seven years. In this appeal, Beth argues that procedural deficiencies in how his motion was handled in district court prevented him from fully litigating his claims against two of those attorneys. For the reasons stated below, we reject Beth's claims and affirm the district court's judgment.

FACTS

In 2009, Beth pleaded guilty to one count of aggravated kidnapping for which the facts are not relevant to this appeal. The district court granted Beth's motion for a downward durational departure and sentenced him to 180 months' imprisonment with 36 months' postrelease supervision. During these proceedings, Beth was represented by his counsel, David Clark.

In 2010, Beth moved to withdraw his plea. The motion was prepared by Beth's newly appointed counsel, John J. Gillett. In the motion, Beth alleged that his plea counsel, Clark, was ineffective for failing to communicate with Beth about the case and for not visiting Beth in jail. The proceedings on the plea withdrawal motion extended for several years. Gillett later withdrew as counsel, and Daniel Schowengerdt was appointed to represent Beth on March 6, 2013.

The plea withdrawal motion was ultimately set for hearing in April 2013. At the hearing, Beth called himself, Clark, and the trial prosecutor, Melissa Dugan, as witnesses. The district court entered its memorandum decision denying Beth's motion on June 11, 2013. In the memorandum decision, the district court found that Clark had effectively represented Beth throughout the plea and sentencing. Beth appealed the denial of his motion to withdraw plea but later voluntarily dismissed his appeal.

Beth filed a pro se K.S.A. 60-1507 motion on July 25, 2014. In his motion, Beth alleged that Gillett was ineffective in preparing the plea withdrawal motion and in representing Beth on the motion until Gillett withdrew a few weeks before the hearing. Beth also alleged that Clark provided ineffective assistance of counsel for much of the same reasons offered in his motion to withdraw plea—that Clark had failed to discuss the case or generally communicate with him and also that Clark had reviewed no discovery. Beth also alleged that Schowengerdt provided ineffective assistance for, among other

things, not contacting witnesses to establish facts or to testify, canceling a witness subpoena, not reviewing discovery, and not conducting a meaningful cross-examination. The motion also alleged that Beth's appellate counsel was ineffective.

The K.S.A. 60-1507 proceedings extended for several years, and the district court ultimately held a preliminary hearing on November 21, 2017. At that hearing, Beth withdrew his claim against his appellate counsel. After speaking to the parties, the district court found that the case should proceed to an evidentiary hearing on the claims against Schowengerdt and Clark. Beth's claims of ineffective assistance against Gillett were not referenced during the hearing.

On January 2, 2018, Beth moved to alter or amend the judgment and claimed that the district court's order limiting an evidentiary hearing to the claims against Clark and Schowengerdt was error in that it "seemingly dismissed [his] claims against John Gillett." The record on appeal does not show that the district court addressed or ever ruled on Beth's motion to alter or amend the judgment.

The State moved to dismiss on May 18, 2018, and argued that claims against Clark's effectiveness were barred by res judicata because they were already litigated in Beth's motion to withdraw plea proceedings. On May 6, 2019, the district court entered a written order denying the State's motion to dismiss and finding that Beth had raised two ineffective assistance of counsel claims in his K.S.A. 60-1507 motion—one against Clark and one against Schowengerdt. The district court further found that Beth's claim against Clark was not barred by the doctrine of res judicata because the Kansas Supreme Court had held in *Bogguess v. State*, 306 Kan. 574, 395 P.3d 447 (2017), that an ineffective assistance of counsel claim in a K.S.A. 60-1507 motion is not barred by res judicata when it did not receive a complete review under the Sixth Amendment. The district court's order did not reference a claim against Gillett for ineffective assistance of counsel.

In a hearing on August 12, 2020, the district court referenced that Beth and the State had stipulated to a bifurcated evidentiary hearing in which the parties would first address Beth's claim against Schowengerdt and then address his claim against Clark only if the district court found that Schowengerdt had provided ineffective assistance. Later in that same hearing the district court more formally ruled from the bench that it would first hold a hearing on Beth's claim against Schowengerdt and if it found that Schowengerdt provided ineffective assistance of counsel, then the State would have seven days to respond to Beth's request for production of documents on the claim against Clark, and the court would later hold a hearing on that claim.

The district court held an evidentiary hearing on October 13, 2021. Beth represented himself at this hearing with standby counsel. For reasons not explained by either party or the record, the district court did not bifurcate the evidentiary hearing as it had previously ordered and, instead, proceeded to consider evidence on both Schowengerdt's and Clark's effectiveness as counsel. Beth did not object to this procedure at the hearing. We need not detail the evidence presented at the hearing to address the issues raised in this appeal. Interestingly, in his opening statement, Beth stated that he intended to call Gillett, who was under subpoena, as a witness at the hearing. But at the end of the hearing, when the district court asked Beth about whether he wanted to call Gillett or prepare a motion for citation of contempt against him, Beth responded, "No. I'm going to—I'm going to waive that, Your Honor." Beth then rested his case.

After hearing the evidence, the district court issued its memorandum decision on November 19, 2021, where it denied Beth's K.S.A. 60-1507 motion and found that Clark and Schowengerdt had provided effective assistance of counsel. Beth timely appealed the district court's judgment.

ANALYSIS

On appeal, Beth does not challenge any of the findings of fact or conclusions of law reached by the district court in its memorandum decision. Instead, Beth raises two issues on appeal, both concerning alleged procedural deficiencies in how his K.S.A. 60-1507 motion was handled in district court. Beth first claims the district court prevented him from presenting his ineffective assistance of counsel claim against Clark, depriving him of his right to due process. At the hearing on August 12, 2020, it appears the parties and the district court agreed to bifurcate the evidentiary hearing on the claims against Schowengerdt and Clark and proceed first with a hearing on the claims against Schowengerdt. Only if the district court found Schowengerdt to be ineffective would the district court proceed with a hearing on the claims against Clark. But when the evidentiary hearing was held on October 13, 2021, the district court heard evidence on the claims against both Schowengerdt and Clark. Beth did not object to this procedure at the hearing. But now on appeal, Beth argues that he "appeared at the evidentiary hearing with the belief that he was only trying the case against Schowengerdt and that any rulings on Clark's effectiveness would be held at a later time." Beth argues on appeal that this procedure effectively prevented him from fully litigating his claims against Clark, depriving him of his right to due process.

"The basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner. Whether an individual's due process rights were violated is a question of law subject to de novo review." *In re Adoption of B.J.M.*, 42 Kan. App. 2d 77, 81, 209 P.3d 200 (2009).

Beth's assertion fails because he does not show that the district court's action denied him his right to due process. Beth argues that the district court should have bifurcated the hearing but failed to do so. But Beth does not contest the district court's order that his claim against Clark was only to be heard at an evidentiary hearing if

Schowengerdt was found to have given ineffective assistance. Beth also does not contest the district court's finding that Schowengerdt provided effective assistance. As a result, Beth essentially concedes that his claim against Clark would not have been heard even if the district court had bifurcated the hearing as it originally ordered. Because the district court would not have reached Beth's claims against Clark had the hearing been bifurcated, Beth's claim on appeal that he was denied due process fails.

Moreover, the district court's finding that Schowengerdt competently handled the motion to set aside the guilty plea necessarily precluded a finding that Clark had legally prejudiced Beth in negotiating the plea in the first instance. At the evidentiary hearing on the K.S.A. 60-1507 motion, Beth called Schowengerdt as a witness and presented all the evidence he wanted the district court to consider on that point.

In ruling on a motion to set aside a plea, the district court focuses on what are commonly known as the *Edgar* factors: (1) whether the defendant was represented by competent counsel; (2) whether the defendant was misled, coerced, mistreated, or unfairly taken advantage of; and (3) whether the plea was fairly and understandingly made. *State v. Adams*, 311 Kan. 569, 575, 465 P.3d 176 (2020); *State v. Edgar*, 281 Kan. 30, 36, 127 P.3d 986 (2006). Despite ably representing Beth at the hearing in April 2013, Schowengerdt could not show that the plea was deficient under the *Edgar* factors. In turn, that means Beth was not disadvantaged, i.e., prejudiced, by Clark's representation in handling the plea. So Beth could not have shown that Clark's performance would have entitled him to relief on his K.S.A. 60-1507 motion. See *Sola-Morales v. State*, 300 Kan. 875, 882, 335 P.3d 1162 (2014) (to prevail on ineffective assistance claim under K.S.A. 60-1507, party must show lawyer provided constitutionally inadequate representation and resulting legal prejudice).

Beth next claims that the district court erred by implicitly dismissing his claims of ineffective assistance against Gillett. Beth's K.S.A. 60-1507 motion alleged that Gillett

was ineffective in preparing the plea withdrawal motion and in representing Beth on the motion until Gillett withdrew a few weeks before the hearing. At the preliminary hearing on November 21, 2017, the district court heard discussion on Beth's claims against Clark, Schowengerdt, and his appellate counsel and determined that only the claims against Clark and Schowengerdt should proceed to an evidentiary hearing. There was no discussion at the hearing about Beth's claims against Gillett. A few weeks later, Beth moved to alter or amend the judgment and claimed that the district court "seemingly dismissed [his] claims against John Gillett." The record does not reflect that the district court ever ruled on this motion. The case remained pending for another four years.

At the hearing on August 12, 2020, the district court referenced the stipulation between the parties that the evidentiary hearing would be bifurcated to first address the claims against Schowengerdt and only if Schowengerdt were found to be ineffective would the court proceed with a hearing on the claims against Clark. The district court held an evidentiary hearing on October 13, 2021. The district court found that Schowengerdt and Clark provided effective assistance of counsel and filed its memorandum decision denying Beth's K.S.A. 60-1507 motion on November 19, 2021.

On appeal, Beth asserts that he was "wrongfully deprived of his opportunity to challenge the effectiveness of John Gillett." He asks that the case be remanded to district court to hold a hearing on the claims against Gillett. The State argues that Beth waived and abandoned any claims against Gillett when he stipulated to the bifurcated hearing against only Schowengerdt and Clark. Beth did not reply to the State's waiver argument.

We interpret Beth's argument as a claim that he was denied due process and a right to a hearing on his ineffective assistance of counsel claims against Gillett. Whether an individual's due process rights were violated is a question of law subject to unlimited appellate review. *In re Adoption of B.J.M.*, 42 Kan. App. 2d at 81.

We agree with the State that Beth waived and abandoned any claims against Gillett when he stipulated to the bifurcated hearing against only Schowengerdt and Clark. Stipulations limiting issues to be addressed are generally allowed so long as the issues are not jurisdictional. *Manhattan Bible College v. Stritesky*, 192 Kan. 287, 290, 387 P.2d 225 (1963) ("Parties are bound by stipulations fixing the issues, or eliminating particular issues, and will not be permitted to depart therefrom on appeal."). And although a waiver must be knowing and intentional, intent may be inferred from the conduct of the parties. *Lyons v. Holder*, 38 Kan. App. 2d 131, 138, 163 P.3d 343 (2007).

At the hearing on August 12, 2020, the district court referenced the stipulation between the parties that the case would proceed to a bifurcated evidentiary hearing only on the claims against Schowengerdt and Clark. Beth did not object to the district court's reference to this stipulation and does not refute—or even try to refute—the existence of the stipulation on appeal. The case proceeded to an evidentiary hearing. Beth stated in his opening statement that he would call Gillett as a witness at the hearing, but in the end, he expressly waived his right to do so. After the hearing, the district court denied Beth's K.S.A. 60-1507 motion in its entirety. Based on the stipulation between the parties as to the scope of the issues to be addressed at the final hearing, we agree with the State that Beth waived or abandoned any ineffective assistance of counsel claims against Gillett.

In addition, the district court's finding that Schowengerdt competently represented Beth on the motion to withdraw plea after replacing Gillett substantively undercuts the claim against Gillett. Whether Gillett represented Beth well or poorly could not have affected the outcome on the motion to withdraw the plea precisely because Schowengerdt afforded Beth constitutionally competent representation leading up to and during the hearing on the motion.

Affirmed.