

NOT DESIGNATED FOR PUBLICATION

No. 125,131

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

WILSON R. NORIEGA,  
*Appellant,*

v.

STATE OF KANSAS,  
*Appellee.*

MEMORANDUM OPINION

Appeal from Jackson District Court; NORBERT C. MAREK JR., judge. Opinion filed May 19, 2023.  
Affirmed.

*Nicholas A. Hayes*, of The David Law Office LLC, of Lawrence, for appellant.

*Ryan J. Ott*, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before WARNER, P.J., COBLE and PICKERING, JJ.

PER CURIAM: Wilson Noriega appeals the district court's decision denying his postconviction motion, arguing that the court erred in construing it as a K.S.A. 60-1507 motion, rather than a motion to withdraw his plea. After reviewing the record and the parties' arguments, we find that the district court correctly construed Noriega's motion and, even so, construing it as a plea-withdrawal motion would not have changed the district court's decision. We thus affirm the district court's judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

Noriega pleaded no contest to voluntary manslaughter in 2017. As part of Noriega's plea agreement, the State reduced a first-degree murder charge to voluntary manslaughter, dismissed other charges against him, and recommended a mitigated sentence to be served concurrently with his sentence in a separate Shawnee County case.

After his plea, Noriega received an 84-month sentence in the Shawnee County case. Then, in the voluntary-manslaughter case, the district court did not follow the plea agreement's sentencing recommendations, imposing an aggravated sentence—247 months in prison—and ordering Noriega to serve this sentence consecutively to the Shawnee County sentence. Noriega unsuccessfully appealed this sentence, with a mandate issuing in August 2018.

In July 2019, Noriega filed "a petition for writ of h[a]beas corpus (1507)." He raised several arguments regarding the proceedings leading up to his plea, asserting:

- His attorney failed to investigate his case;
- The district court violated Rule 11 of the Federal Rules of Criminal Procedure (which concerns the federal plea process) by telling Noriega that the State followed its agreements in plea negotiations, but then imposing a higher sentence than what the parties agreed to recommend in the plea agreement;
- His plea was not knowing and voluntary;
- His attorney during the plea negotiations and accompanying court proceedings provided constitutionally defective representation; and
- His defective plea agreement resulted in manifest injustice.

At Noriega's request, the district court appointed an attorney to represent him. His attorney then filed a "Motion to Supplement Defendant's Pro Se 60-1507 Motion," which reiterated two of Noriega's pro se claims: ineffective assistance of counsel for failing to investigate and provide competent advice about the plea.

The district court summarily denied the first three of Noriega's claims—that his attorney failed to investigate, that the plea process violated the Federal Rules of Criminal Procedure, and that his plea was not knowing and voluntary. The court determined that the remaining two claims—related to his attorney's performance surrounding the plea and sentencing—warranted an evidentiary hearing.

The court held an evidentiary hearing in November 2021. Noriega and his plea-stage attorney testified. Most of the testimony involved the order in which Noriega was sentenced in this case and the Shawnee County case, and whether a special sentencing rule applied to require consecutive sentences. After taking the matter under advisement, the district court denied Noriega's remaining claims.

The court found that Noriega had not shown that his attorney committed any error surrounding the plea or a reasonable probability that his attorney's actions had affected his sentence. And the court determined it did not matter whether the special sentencing rule discussed at the hearing applied because the sentencing court had discretion to impose consecutive sentences and it did so here based on that discretion, not a special rule. The court also found it was reasonable not to try to have Noriega sentenced in a different order (imposing the sentence here before the Shawnee County sentence) and Noriega's attorney did not rush him into the plea agreement. The court thus denied Noriega's motion.

## DISCUSSION

On appeal, Noriega does not directly challenge any of the district court's findings after the evidentiary hearing. Rather, his argument is procedural. Noriega argues that the district court erred in construing his motion as a request for relief under K.S.A. 60-1507, rather than as a motion to withdraw his plea. According to Noriega, construing his filing as a plea-withdrawal motion would have required an analysis of "manifest injustice," which he believes would have led to a better outcome for him, including an evidentiary hearing on the claims the district court summarily denied.

Appellate courts have unlimited review when determining whether a district court properly construed a pro se pleading. *State v. Gilbert*, 299 Kan. 797, Syl. ¶ 5, 326 P.3d 1060 (2014). Courts liberally construe pro se pleadings, relying on their content rather than labels and forms. 299 Kan. 797, Syl. ¶ 4. But when a pro se movant is appointed an attorney who then adopts or supplements an earlier pro se motion, courts are no longer construing a pro se pleading. See *State v. Edwards*, No. 115,612, 2017 WL 4081449, at \*1 (Kan. App. 2017) (unpublished opinion) (finding a motion "lost its character as a pro se motion when counsel was appointed, chose to proceed on [the movant's] already filed motions, and filed a response to the State's motion to dismiss" on the same grounds as the pro se motion), *rev. denied* 308 Kan. 1597 (2018); *State v. Miller*, No. 111,734, 2015 WL 5009656, at \*2 (Kan. App. 2015) (unpublished opinion) ("[T]he district court was not construing a pro se pleading. Although Miller filed his initial motion pro se, he was appointed counsel who filed a subsequent motion which was the subject of the proceedings herein."), *rev. denied* 304 Kan. 1020 (2016).

Applying these principles here, the district court—at Noriega's request—appointed an attorney to represent him. This attorney then filed a "Motion to Supplement Defendant's Pro Se 60-1507 Motion," adopting two of the issues from Noriega's "petition for writ of h[a]beas corpus (1507)." At that point, the court was no longer construing a

pro se motion. Thus, the court had no duty to liberally construe the filings. Noriega's attorney was explicitly proceeding with Noriega's claims under K.S.A. 60-1507.

Noriega relies on *State v. Kelly*, 291 Kan. 563, 564, 244 P.3d 639 (2010), in which the Kansas Supreme Court found that the district court should have construed a pro se "Motion to Withdraw Plea and to Correct Illegal Sentence and to Vacate Sentence" as a motion to withdraw plea. The district court had construed Kelly's filing as a K.S.A. 60-1507 motion and denied it as untimely. The defendant in that case never had an attorney during his postconviction proceedings, thus requiring a liberal construction of his pro se motion. 291 Kan. at 566.

But unlike *Kelly*, Noriega received an attorney who supplemented his pro se motion, so he was no longer entitled to liberal construction. The district court here also did not deny Noriega's claims as untimely based on the procedural limitations of K.S.A. 60-1507 motions; it decided them on their merits—some after an evidentiary hearing, others based just on the filings. The district court did not err in evaluating Noriega's claims under K.S.A. 60-1507.

Further, we note that even if the district court had construed Noriega's motion as one to withdraw his plea, such a construction would have made no difference in this case. Noriega asserts that under that construction, the court would have had to examine whether his allegations demonstrated "manifest injustice" had resulted from his plea. He suggests that evaluating his motion under this standard would have required an evidentiary hearing on his claims that the court summarily denied. We disagree.

A court may grant a postsentencing motion to withdraw a plea "[t]o correct manifest injustice." K.S.A. 2022 Supp. 22-3210(d)(2). When evaluating manifest injustice, courts consider factors including: "(1) whether the defendant was represented by competent counsel, (2) whether the defendant was misled, coerced, or unfairly taken

advantage of, and (3) whether the plea was fairly and understandingly made." *Kelly*, 291 Kan. at 566.

The district court here made findings after the evidentiary hearing that are as applicable under a plea-withdrawal analysis as they were under K.S.A. 60-1507. For example, the court found that Noriega's plea counsel acted reasonably in advising Noriega about the plea. And the court found that Noriega understood the plea deal—which benefitted him as it eliminated the first-degree murder charge and possible life sentence—and entered into it knowingly, voluntarily, and without pressure from his attorney. As an appellate court, we cannot reweigh this evidence or assess the credibility of Noriega or his former attorney. See *State v. Talkington*, 301 Kan. 453, Syl. ¶ 3, 345 P.3d 258 (2015). Even under a plea-withdrawal standard, the district court's findings show there would be no manifest injustice if Noriega could not withdraw his plea.

Nor would evaluating Noriega's summarily denied claims under a plea-withdrawal standard have warranted a hearing on them. See *State v. Fritz*, 299 Kan. 153, 154-55, 321 P.3d 763 (2014) (appellate courts apply the same standard to summarily denied plea-withdrawal and K.S.A. 60-1507 motions, asking "whether the motion, records, and files conclusively show that the defendant is entitled to no relief").

- Noriega asserted a violation of the Federal Rules of Criminal Procedure related to the district court's participation in the plea-bargaining process and the State's failure to follow the agreement. But these federal rules do not apply to a state criminal case. Noriega points to nothing in the record to support his allegation that the district court participated in the plea-bargaining process. And the record shows that the State followed the agreement in making its sentencing recommendations. It was the district court, not the State, that did not follow the agreement—and the district court is not bound by the parties' sentencing recommendations. See *State v. McNabb*, 312 Kan. 609, 614, 478 P.3d 769 (2021). An evidentiary hearing was not

necessary to resolve this allegation, whether considered as a request for habeas relief or as a motion to withdraw a plea.

- A plea-withdrawal standard also would not have changed the result of Noriega's claim that his plea was not knowing or voluntary. The district court ended up evaluating this claim—centering on whether a special sentencing rule applied—at the evidentiary hearing, noting that it did not matter whether the rule applied because the sentencing court explicitly stated that it was imposing an aggravated sentence under its discretion, not because of a special rule.

In sum, the district court had no duty to construe Noriega's postconviction motion—which Noriega and his appointed counsel described as requesting relief under K.S.A. 60-1507—as a motion to withdraw his plea. And even though those motions involve different standards for review and relief, Noriega has not shown that construing his motion as one to withdraw his plea would have changed the outcome for any of his claims. The district court did not err in construing Noriega's motion as a request for relief under K.S.A. 60-1507 and denying his request under that statute's legal standards.

Affirmed.