

NOT DESIGNATED FOR PUBLICATION

No. 125,348

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

LEE HILL JR.,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; AARON T. ROBERTS, judge. Opinion filed April 7, 2023.
Affirmed.

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

Garett C. Relph, assistant district attorney, *Mark A. Dupree Sr.*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ISHERWOOD, P.J., MALONE and WARNER, JJ.

PER CURIAM: Lee Hill Jr. appeals the district court's denial of his second K.S.A. 60-1507 motion as successive. Following a review of the record and the parties' arguments, we conclude that denial of Hill's motion was proper, but our reasoning varies from that of the district court. Hill's motion set forth two separate claims challenging the representation he received from counsel appointed to litigate his first K.S.A. 60-1507 motion. The issues are not properly disposed of as successive because Hill's second motion was the first opportunity he had to challenge the representation provided by his first 60-1507 counsel. Even so, denial of the claims was appropriate because Hill failed to

satisfy his burden to substantiate the issues as required to obtain an evidentiary hearing. The district court's denial of Hill's second K.S.A. 60-1507 motion is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Hill stands convicted of aggravated criminal sodomy and aggravated indecent liberties with a child and is currently serving a prison term of 438 months. He pursued a direct appeal, and a panel of this court affirmed his convictions. *State v. Hill*, No. 100,030, 2009 WL 2762458 (Kan. App. 2009) (unpublished opinion).

In 2011, Hill filed a pro se K.S.A. 60-1507 motion claiming he was denied his right to effective assistance from counsel at trial because his attorney did not call Dr. Sanders to testify as an expert witness regarding the suggestive nature of child witness interviews. The district court denied Hill's K.S.A. 60-1507 motion following an evidentiary hearing. Hill appealed and a panel of this court determined that the district court properly denied the motion because Hill failed to show how Dr. Sanders' testimony would have altered the outcome of his case given the rigorous testing his trial counsel subjected the evidence to through other avenues. *Hill v. State*, No. 107,847, 2013 WL 5870038, at *1, 6-8 (Kan. App. 2013) (unpublished opinion).

In December 2020, Hill filed his second K.S.A. 60-1507 motion along with a supporting memorandum alleging that the attorney appointed to assist him with his first K.S.A. 60-1507 motion provided deficient representation. Hill claimed counsel was ineffective because (1) he did not amend Hill's pro se K.S.A. 60-1507 motion to include "several meritorious issues" concerning the representation appellate counsel provided; and (2) he failed to introduce expert testimony from Dr. Sanders at the evidentiary hearing. Hill also attached a two-page memorandum purportedly setting forth a claim of actual innocence. The district court summarily denied Hill's motion as successive and

found that Hill failed to establish exceptional circumstances as required to review his claims.

Hill timely brings the matter before us for an analysis of whether the district court properly denied his motion.

LEGAL ANALYSIS

Hill's second K.S.A. 60-1507 motion was properly denied.

On appeal, Hill argues the district court erred in denying his second K.S.A. 60-1507 motion as successive because his claims challenged the representation that counsel provided during his first K.S.A. 60-1507, which are issues that necessarily could not have been raised in his first K.S.A. 60-1507 motion. The State responds that Hill's K.S.A. 60-1507 motion was properly denied as successive because he sought to relitigate his earlier claims that he received deficient representation from his trial counsel.

A district court has three options when handling a K.S.A. 60-1507 motion:

"(1) The court may determine that the motion, files, and case records conclusively show the prisoner is entitled to no relief and deny the motion summarily; (2) the court may determine from the motion, files, and records that a potentially substantial issue exists, in which case a preliminary hearing may be held. If the court then determines there is no substantial issue, the court may deny the motion; or (3) the court may determine from the motion, files, records, or preliminary hearing that a substantial issue is presented requiring a full hearing.' [Citations omitted.]" *State v. Adams*, 311 Kan. 569, 578, 465 P.3d 176 (2020).

The standard of review depends on which of these options the district court used. *Adams*, 311 Kan. at 578. When the district court summarily dismisses a K.S.A. 60-1507 motion, as it did here, an appellate court conducts a de novo review to determine whether

the motion, files, and records of the case conclusively establish that the movant is not entitled to relief. *Beauclair v. State*, 308 Kan. 284, 293, 419 P.3d 1180 (2018).

As noted above, Hill filed a K.S.A. 60-1507 motion in 2011 challenging trial counsel's representation. The matter was fully litigated by virtue of an evidentiary hearing and an appeal to this court following the district court's finding that Hill was not entitled to relief. In 2020, Hill filed his second K.S.A. 60-1507 motion, the motion which is the subject of this appeal. The district court determined the motion was successive and that its successive nature deprived the district court of jurisdiction to review Hill's claims, but that nevertheless, Hill failed to assert exceptional circumstances as required to overcome the procedural bar attached to successive filings. Yet the court's ruling was flawed. First, according to K.S.A. 2020 Supp. 60-1507(c), a district court need not entertain a second or successive motion *for similar relief* on behalf of the same prisoner. Supreme Court Rule 183(d) provides:

"A sentencing court may not consider a second or successive motion for relief by the same movant when:

- (1) the ground for relief was determined adversely to the movant on a prior motion;
- (2) the prior determination was on the merits; and
- (3) justice would not be served by reaching the merits of the subsequent motion."

Supreme Court Rule 183(d) (2023 Kan. S. Ct. R. at 243).

What we can glean from this language is that an assessment of whether a motion is successive involves more than a simple accounting of the number of motions previously filed by a litigant. It demands an analysis of the contents of the motion at issue. "A movant in a K.S.A. 60-1507 motion is presumed to have listed all grounds for relief, and a subsequent motion need not be considered in the absence of a showing of circumstances justifying the original failure to list a ground." *State v. Trotter*, 296 Kan. 898, Syl. ¶ 2, 295 P.3d 1039 (2013). The Kansas Supreme Court has held that the prohibition against

successive motions under K.S.A. 60-1507(c) bars not only claims actually raised in prior motions, but also those that could have been raised in that earlier filing. *Penn v. State*, No. 107,703, 2013 WL 3970176, at *3 (Kan. App. 2013) (unpublished opinion) (citing *Dunlap v. State*, 221 Kan. 268, 269-70, 559 P.2d 788 [1977]). Movants can avoid having successive motions dismissed by establishing that exceptional circumstances existed. *Beauclair*, 308 Kan. at 304; *Sexton v. State*, No. 109,830, 2014 WL 702550, at *2 (Kan. App. 2014) (unpublished opinion). It is in that context that the principle of exceptional circumstances applies.

That is not this case, and the district court erred when it essentially concluded to the contrary. We first note the district court erroneously determined that what it perceived to be the successive nature of the motion deprived it of jurisdiction to review Hill's claims. Procedural bars are not jurisdictional. See *State v. Wheeler*, No. 111, 245, 2015 WL 1947196, at *2 (Kan. App. 2015) (unpublished opinion). Next, through his second motion, Hill sought to challenge the representation counsel provided during his first K.S.A. 60-1507 motion. That claim is wholly separate and distinct from the ineffective assistance of trial counsel issues that were fully teased out and litigated in his first K.S.A. 60-1507 motion. It is also not one that could have reasonably been raised as part of that earlier proceeding. Thus, it has not already been determined on the merits against Hill in a prior motion. See *Nichols v. State*, No. 123,043, 2021 WL 5445354, at *4 (Kan. App. 2021) (unpublished opinion). Because the district court was never presented with, analyzed, or ruled on any claims regarding the representation Hill's 60-1507 counsel provided, it cannot be said that Hill is seeking similar relief that is barred in a second K.S.A. 60-1507 motion.

Because the district court summarily denied Hill's second motion, we analyze the claims raised therein anew given that we are equally positioned to review the motion and corresponding record. *Bellamy v. State*, 285 Kan. 346, 354, 172 P.3d 10 (2007). In so doing, we consider that a 60-1507 motion cannot rest on conclusory or speculative

assertions. Rather, a movant bears the burden to allege facts buttressed by an evidentiary foundation in order to secure a substantive hearing on their motion. Mere personal conclusions cannot by themselves raise a substantial issue of fact when no factual basis is alleged or appears from the record. *Mundy v. State*, 307 Kan. 280, 304, 408 P.3d 965 (2018).

Turning to Hill's claims, he first contends that 60-1507 counsel's representation was constitutionally deficient because he failed to formally amend Hill's first K.S.A. 60-1507 motion to allege that Hill's appellate counsel was ineffective. The record reflects that counsel informed the district court during the evidentiary hearing that Hill also wanted to address claims he had concerning his appellate counsel. The State objected and argued the allegations were not set forth in the motion, thus it was not prepared to offer any argument related to those issues. The district court declined to consider the matter, and Hill now claims he suffered prejudice as a result because the district court was not afforded the opportunity to analyze what Hill classifies as meritorious issues. But Hill failed to sustain his burden to provide any support for that contention. His motion merely concludes, with no apparent justification, that his challenge to appellate counsel's representation would have persuaded the district court to reach a different outcome on his first K.S.A. 60-1507 motion. On appeal, Hill again fails to explain the evidentiary foundation of his claims against his appellate counsel, and the basis of this claim is not evident from the record. Because there is no substantive foundation for the allegations concerning his appellate counsel, correspondingly his assertion that motion counsel's representation fell short when he neglected to amend the motion to include those claims likewise lacks the necessary evidentiary support. Hill has failed to establish that an evidentiary hearing is warranted to resolve this claim.

The second prong of Hill's challenge to 60-1507 counsel's assistance consists of the claim that counsel rendered deficient representation when he failed to call Dr. Sanders to testify at the evidentiary hearing. Hill contends that Sanders' expert testimony was a

critical component in enabling the district court to properly weigh the impact the lack of Sanders' testimony had on his trial. Hill made a similar claim in his first K.S.A. 60-1507 motion when he argued that trial counsel's performance was subpar because she failed to call Dr. Sanders to testify at trial. A panel of this court found that the district court did not err in denying this claim because Hill failed to explain how the testimony was beneficial to his case. *Hill*, 2013 WL 5870038, at *4-6. A similar deficiency is present here as Hill again fails to explain how Sanders' testimony would have produced a different outcome for his first K.S.A. 60-1507 motion. Without a detailed evidentiary basis which bolsters the claims, or information in the record that arguably verifies the allegations, there is no justification for holding an evidentiary hearing to resolve this issue. An evidentiary hearing is not merely a vehicle for a movant to embark on a fishing expedition so that he or she "might catch a fact that could lead to something favorable." *Stewart v. State*, 310 Kan. 39, 54, 444 P.3d 955 (2019). Instead, "it is incumbent upon the movant to show that a triable issue of fact already exists and is identifiable at the time of the motion." 310 Kan. at 54-55. As it stands, the motion, files, and records of Hill's case conclusively show that he was not entitled to relief on his claims that counsel for his prior 60-1507 motion provided ineffective assistance.

The district court's decision on the K.S.A. 60-1507 motion is affirmed.

Hill's motion did not merit an evidentiary hearing and the district court did not err in summarily dismissing the motion. Hill comes to us with only underdeveloped assertions with no corresponding evidentiary basis or material information in the record that lends support or credibility to his claims. Even liberally construed, Hill's motion did not entitle him to an evidentiary hearing.

Affirmed.