

NOT DESIGNATED FOR PUBLICATION

No. 125,351

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

KURT A. POWELL,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; STEPHEN J. TERNES, judge. Opinion filed September 15, 2023. Affirmed.

Kristen B. Patty, of Wichita, for appellant.

Julie A. Koon, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., GREEN and HILL, JJ.

PER CURIAM: Kurt A. Powell pled guilty to aggravated indecent liberties with a child under the age of 14. After a failed direct appeal, Powell filed a motion under K.S.A. 60-1507, alleging his counsel was ineffective. The district court summarily denied Powell's motion and he now appeals. Finding no error, we affirm.

FACTUAL AND PROCEDURAL HISTORY

In April 2015, Powell pled guilty to aggravated indecent liberties with a child under the age of 14, for acts committed between February and November 2013. In exchange for his plea, two charges were dismissed, and Powell was free to argue for any lawful sentence. In a written motion, Powell requested a durational departure to 29.5 months' incarceration. The motion indicated that it included a letter from Powell's wife in support of the departure, but the letter is not included in the record. At the sentencing hearing, defense counsel provided the court with an updated letter from Powell's wife, but the updated letter is also not included in the record.

At the sentencing hearing, the State called M.L., Powell's adult stepdaughter, who testified that she lived with Powell and her mother when she was a child. M.L. testified that Powell sexually assaulted her for several years when she was a child.

The district court denied Powell's motion and imposed a life sentence without the possibility of parole for 25 years. Powell appealed his sentence. Ultimately, the Kansas Supreme Court affirmed Powell's sentence in *State v. Powell*, 308 Kan. 895, 918, 425 P.3d 309 (2018).

Powell filed a timely K.S.A. 60-1507 motion which alleged that (1) his defense attorneys were ineffective because they failed to investigate and impeach witnesses and failed to give the court a supportive letter from his wife; (2) the State committed prosecutorial error at sentencing; (3) because of the prosecutorial error the plea agreement was breached. The district court denied the motion as untimely. Powell appealed the denial of the motion. By an order dated November 22, 2021, this court reversed and remanded the case No. 123,934 after both parties agreed that the district court erred in finding the 60-1507 motion was filed out of time.

The State responded to Powell's 60-1507 motion, arguing that it should be denied without a hearing because the district court could find that Powell was not entitled to relief on the merits of his motion.

The district court summarily denied the motion, finding that the motion, files, and record conclusively showed that Powell was not entitled to relief.

Powell timely appeals.

ANALYSIS

On appeal, Powell argues that the district court erred by summarily denying his 60-1507 motion. His argument focuses solely on parts of the ineffective assistance of counsel arguments he raised in his motion. Thus, his claims of prosecutorial error and breach of the plea agreement are abandoned. See *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021).

When the district court summarily dismisses a K.S.A. 60-1507 motion, 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).

On appeal, Powell focuses on his statements in his motion that his defense attorneys failed to investigate and properly impeach M.L. and that his counsel did not give the letter from his wife to the court.

When seeking an evidentiary hearing on a K.S.A. 60-1507 motion, the movant "has the burden to prove his or her . . . motion warrants an evidentiary hearing; the movant must make more than conclusory contentions and must state an evidentiary basis

in support of the claims or an evidentiary basis must appear in the record." *Swenson v. State*, 284 Kan. 931, 938, 169 P.3d 298 (2007). To state an evidentiary basis, the movant is merely required to "set forth a factual background, names of witnesses or other sources of evidence to demonstrate that petitioner is entitled to relief." 284 Kan. at 938 (quoting *Sullivan v. State*, 222 Kan. 222, 223-24, 564 P.2d 455 (1977)).

Claims of ineffective assistance of trial counsel are analyzed under the two-prong test articulated in *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674, *reh. denied* 467 U.S. 1267 (1984), and adopted by the Kansas Supreme Court in *Chamberlain v. State*, 236 Kan. 650, 656-57, 694 P.2d 468 (1985). Under the first prong, the defendant must show that defense counsel's performance was deficient. If successful, the court moves to the second prong and determines whether there is a reasonable probability that, absent defense counsel's unprofessional errors, the result would have been different. *Khalil-Alsalaami v. State*, 313 Kan. 472, 485, 486 P.3d 1216 (2021).

To establish deficient performance under the first prong, the defendant must show that defense counsel's representation fell below an objective standard of reasonableness. Judicial scrutiny of counsel's performance in a claim of ineffective assistance of counsel must be highly deferential. 313 Kan. at 485. A fair assessment of counsel's performance requires that every effort be made to eliminate the distorting effects of hindsight, reconstruct the circumstances of the challenged conduct, and evaluate the conduct from counsel's perspective at the time. A court considering a claim of ineffective assistance of counsel must strongly presume that defense counsel's conduct fell within the wide range of reasonable professional assistance; that is, the defendant must overcome the strong presumption that, under the circumstances, counsel's action might be considered sound trial strategy. 313 Kan. at 486.

Under the second prong, the defendant must show that defense counsel's deficient performance was prejudicial. To establish prejudice, the defendant must show with

reasonable probability that the deficient performance affected the outcome of the proceedings, based on the totality of the evidence. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing a claim of ineffective assistance of counsel must consider the totality of the evidence before the judge or jury. 313 Kan. at 486.

Powell failed to show that his 60-1507 motion warranted an evidentiary hearing under the circumstances. His assertions that his counsel was ineffective for failing to investigate or impeach M.L. are conclusory. His defense counsel cross-examined M.L. after she testified at sentencing, but there is only so much defense counsel can do—especially after Powell admitted to police that he sexually assaulted M.L. when she was a child.

Powell does not offer any methods in which M.L. could have been impeached. Instead, he just says that his defense counsel should have impeached her. Nor do his arguments that M.L. should not have been allowed to testify bear weight here. The State sought to have evidence of Powell's prior crimes admitted, which Powell's defense counsel opposed. Even so, the district court admitted the evidence.

As for Powell's statements that his counsel was ineffective for failing to provide the district court with a copy of the letter from his wife, the record shows that Powell is incorrect. His wife's letter of support was attached to his motion for departure. And an updated letter was presented to the court at sentencing. The district court referenced those letters when pronouncing his sentence.

Powell failed to show that his K.S.A. 60-1507 motion warranted an evidentiary hearing. His claims that his defense counsel was ineffective were unsupported. The letter that he says was not provided to the district court was given to the judge, and the judge

referenced it during sentencing. And nothing in the record suggests that defense counsel was ineffective for failing to further investigate M.L. before her testimony at sentencing.

The district court did not err by summarily denying Powell's K.S.A. 60-1507 motion, so we affirm its decision.

Affirmed.