

NOT DESIGNATED FOR PUBLICATION

No. 125,590

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STEVE KELLEY MOYER,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Sherman District Court; KEVIN BERENS, judge. Submitted without oral argument. Opinion filed December 8, 2023. Affirmed in part, reversed in part, and remanded with directions.

Patrick H. Dunn and *Sean P. Randall*, of Kansas Appellate Defender Office, for appellant.

Natalie Chalmers, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before MALONE P.J., GARDNER and CLINE, JJ.

PER CURIAM: Steve Kelley Moyer appeals the dismissal of his K.S.A. 60-1507 motion on procedural grounds. In his direct appeal from his convictions, Moyer alleged, among many other issues, that, because of a conflict of interest, he received ineffective assistance from his trial counsel, and the Kansas Supreme Court remanded for a *Van Cleave* hearing. On remand, Moyer's counsel at the *Van Cleave* hearing did not present evidence of any additional claims against Moyer's trial attorney—other than the conflict-of-interest claims—after he, the State, and the district court agreed that Moyer could do so later in a K.S.A. 60-1507 motion. Moyer was denied any relief at the *Van Cleave* hearing, and the Kansas Supreme Court later affirmed Moyer's convictions.

Moyer timely filed a K.S.A. 60-1507 motion, but the district court found that he was procedurally barred from doing so because (1) he could not establish exceptional circumstances to permit his filing of the motion after receiving a *Van Cleave* hearing on remand and (2) his claims were barred under the doctrine of res judicata. The district court dismissed Moyer's K.S.A. 60-1507 motion in its entirety without reaching the merits of any of the claims. For the reasons stated below, we find that not all of Moyer's claims are procedurally barred. Thus, we affirm in part, reverse in part, and remand for further proceedings as outlined in this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2009, the State charged Moyer with committing sex crimes against his minor daughter, J.M. After amending the charging document several times, the State proceeded to trial, alleging Moyer committed one count of aggravated criminal sodomy, one count of aggravated indecent liberties with a child, and three counts of criminal sodomy with a child. Following a trial, a jury found Moyer guilty as charged. The circumstances of Moyer's convictions have been thoroughly set forth by the Kansas Supreme Court in *State v. Moyer*, 302 Kan. 892, 360 P.3d 384 (2015), *as modified in* 306 Kan. 342, 410 P.3d 71 (2017) (*Moyer I*), and *State v. Moyer*, 309 Kan. 268, 434 P.3d 829 (2019) (*Moyer II*), and are largely irrelevant to his present appeal. At sentencing, the district court ordered Moyer to serve a hard 25 sentence for the aggravated criminal sodomy conviction plus 118 months' imprisonment for the remaining convictions.

Moyer appealed his convictions to the Kansas Supreme Court, arguing: (1) the trial judge was required to recuse because his son, a law enforcement officer, was involved in the investigation of the case; (2) his trial counsel had a conflict of interest that had denied him his right to a fair trial; (3) he was denied due process when the district court did not conduct a meaningful hearing on his pro se pretrial motions for new counsel; (4) the district court erred in denying his motion for an independent physical

examination of his minor victim; (5) the jury's mistaken viewing of an unredacted version of the victim's intake interview mandated a mistrial; (6) the district court failed to give a unanimity instruction on four of the counts; (7) the district court gave an erroneous limiting instruction on prior crimes or civil wrongs evidence; (8) prosecutorial error during closing argument required reversal; and (9) cumulative error denied him a fair trial. 306 Kan. at 345. Alternatively, if the Supreme Court found that none of these alleged errors required reversal, Moyer requested a remand for a *State v. Van Cleave*, 239 Kan. 117, 716 P.2d 580 (1986), hearing to determine whether he received ineffective assistance of counsel due to a conflict of interest. *Moyer I*, 306 Kan. at 345. After finding Moyer was not entitled to relief on any of his other claims, the Supreme Court conceded to his final request, ordering a "remand for the district court to determine whether Moyer was denied his Sixth Amendment right to counsel, reserving the question of cumulative error until that determination is made." 306 Kan. at 384-85.

On remand, before the *Van Cleave* hearing was held, the State moved to clarify the scope of the remand, and Moyer responded. At a status conference held before the hearing, the State argued that the *Moyer I* opinion restricted the scope of the hearing to whether Moyer's trial counsel, Jeffery Mason, was ineffective because of his conflict of interest with a potentially exculpatory witness. The conflict-of-interest claim concerned an allegation that Mason served in a separate child in need of care (CINC) case as the guardian ad litem for J.T. Through Mason's representation of J.T. in the CINC case, Mason allegedly learned that J.T. had been told by J.M. (Moyer's alleged victim) that the allegations of sexual misconduct against Moyer were false.

Moyer's appellate/*Van Cleave* counsel, Robert A. Anderson Sr., agreed with the limited scope of the hearing, stating that he did not believe the Supreme Court's decision for the "remand and the *Van Cleave* hearing to be a full blown *Van Cleave*" and insisted that "[i]t's clear that Mr. Moyer, . . . will still have the availability of relief under [K.S.A. 60-]1501 and [K.S.A. 60-]1507 at some time in the future, if that's necessary." The State

reiterated the understanding that Moyer was preserving his ability to bring a K.S.A. 60-1507 motion later, stating, "I think both the State and defense are in agreement that this will not be a full blown evidentiary *Van Cleave*. If he were to get a full blown *Van Cleave*, that would basically include a 1507 and he wants to preserve his ability to raise that later." The district judge responded, underscoring the shared understanding that Moyer would not pursue additional claims of ineffective assistance of counsel claims at the *Van Cleave* hearing to preserve his right to do so later: "The narrower you can make the issues, the happier you will make the court, so that's fine with me. . . . I understand if you fire that gun today, you might not get a chance to pull the trigger a second time."

At the *Van Cleave* hearing, Moyer and Mason were the sole witnesses. Following the hearing the *Van Cleave* court issued written findings of fact and conclusions of law, in which it found that Mason had a conflict due to his concurrent representation of Moyer and an exculpatory witness, J.T., whom he failed to subpoena for Moyer's trial. But the district court found that Moyer had failed to show that he was prejudiced because Mason's conflict had not adversely affected his representation and did not change the result of the trial, and therefore Moyer was not entitled to a new trial.

Following the remand, Moyer's case returned to the Kansas Supreme Court. The *Moyer II* court reviewed the district court's findings that Mason's conflict of interest and his failure to issue a subpoena to J.T. did not result in prejudice, and it analyzed whether cumulative error deprived Moyer of his right to a fair trial. See *Moyer II*, 309 Kan. 268. Ultimately, despite identifying multiple trial errors, the Supreme Court affirmed Moyer's convictions, noting that the evidence against him was overwhelming. 309 Kan. at 287-90. The Supreme Court summarily dispensed with the additional issues Moyer tried to raise in his appeal that "were either not the subject of our remand or [were] not relevant to our task at hand." 309 Kan. at 277. After his convictions were affirmed, Moyer petitioned for writ of certiorari with the United States Supreme Court, which was denied. *Moyer v. Kansas*, 140 S. Ct. 135 (2019).

On August 18, 2020, Moyer timely filed a K.S.A. 60-1507 motion, prepared by Anderson. In the motion, Moyer included 17 allegations of ineffective assistance of his trial counsel, Mason, including: (1) his failure to timely file a motion and affidavit requesting the trial judge to recuse until weeks before the trial; (2) his failure to provide the trial court with a medical expert's additional opinion that would have caused the trial court to revisit its denial of Moyer's request for an independent medical examination of J.M.; (3) his failure to obtain a forensic electronic expert to conduct an independent examination of an incriminating audio recording; (4) his failure to ensure that a medical expert testified in person, rather than by deposition; (5) his failure to withdraw as counsel after he developed a conflict of interest; (6) his failure to preserve the testimony of an exculpatory witness, J.T.; (7) his failure to timely subpoena J.T. for trial; (8) his failure to cross-examine J.M. about her conversations with J.T.; (9) his misrepresentation to the court about speaking to J.T.; (10) his alleged lies to Moyer about whether J.T. could testify; (11) his failure to contact J.T.'s doctor about her competency to testify; (12) his failure to ask the court to conduct a hearing with J.T.'s doctor; (13) his misrepresentations during his testimony at the *Van Cleave* hearing; (14) his failure to consult Moyer about waiting until the trial had begun to subpoena J.T.; (15) his failure to notify the court when first appointed that he was unqualified to handle off-grid felony cases; (16) his failure to notify the court that he was not qualified to represent Moyer under K.A.R. 105-3-2(a)(3); and (17) his failure to notify the court on a motion for new trial that he was not qualified to represent Moyer. Moyer's K.S.A. 60-1507 motion was assigned to a different judge who had not presided over Moyer's trial or the *Van Cleave* hearing.

The district court held what was scheduled to be a preliminary hearing on Moyer's 60-1507 motion on November 4, 2021. By this time, Moyer was represented by new counsel. But although both parties were given opportunities to argue their respective positions, neither presented any evidence. Moyer's counsel explained that he would "not argue every part of [the] petition. [Because] the petition should—states all arguments with authorities." He proceeded to argue only two issues about Mason's ineffectiveness:

(1) that he should have ensured the testimony of the exculpatory witness and (2) that he should have done more to effectuate the trial judge's recusal.

The State responded by arguing that Moyer was barred from bringing his 60-1507 motion because he "was required to bring all of his complaints about counsel's performance in his request for the *Van Cleave* proceedings."

"He only raised the three issues which he was permitted the *Van Cleave* proceedings on, then attempted to expand it. The District Court below said no. And then he had the hearing, went back up to the Supreme Court, and they similarly said, look, this is what you requested, this is what we gave you, we're not going to expand it.

"Counsel obviously knew he had the ability to challenge the original ineffective assistance of counsel claims on direct appeal and chose not to do so. So now he has to meet the exceptional circumstances[.]"

The State also argued that Moyer could not overcome the procedural hurdle of showing exceptional circumstances, and, even if he could, the issues he was trying to raise had either already been raised in his direct appeal or failed to establish that he received ineffective assistance of counsel. Moyer's counsel addressed the State's res judicata argument, pointing out that "because the Supreme Court limited the *Van Cleave* hearing, all claims could have not been brought." He also pointed out that Moyer's related arguments in his direct appeal were that his due process rights had been violated, but he was now arguing that he received ineffective assistance of counsel. The district judge stated that he did not believe there was any need for an evidentiary hearing and informed counsel that he would take the matter under advisement and issue an order.

Almost a year later, on September 13, 2022, the district court filed its order denying Moyer's K.S.A. 60-1507 motion on two procedural grounds. First, relying on *Rice v. State*, 37 Kan. App. 2d 456, 464-65, 154 P.3d 537 (2007), the district court found that when the defendant receives a *Van Cleave* hearing during a direct appeal to

adjudicate the effectiveness of trial counsel, the defendant is procedurally barred from relitigating the effectiveness of trial counsel in a K.S.A. 60-1507 motion, absent a showing of exceptional circumstances, and Moyer failed to show exceptional circumstance to overcome this procedural bar. Second, the district court found that Moyer was precluded from raising the claims in his K.S.A. 60-1507 motion under the doctrine of res judicata. Moyer timely appealed the district court's judgment.

DID THE DISTRICT COURT ERR IN FINDING MOYER FAILED TO SHOW EXCEPTIONAL CIRCUMSTANCES PERMITTING HIM TO RELITIGATE THE EFFECTIVENESS OF HIS TRIAL COUNSEL IN HIS SUBSEQUENT K.S.A. 60-1507 MOTION?

Moyer contends the district court erred in finding that he failed to establish that exceptional circumstances justified his filing of a K.S.A. 60-1507 motion after he received a *Van Cleave* hearing as part of his direct appeal. He asks this court to reverse the district court's ruling and remand for an evidentiary hearing to address the merits of his K.S.A. 60-1507 motion. The State asserts that the district court's decision that Moyer failed to show exceptional circumstances is supported by the record.

A district court has three options when considering 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.” [Citation omitted.]” *Sola-Morales v. State*, 300 Kan. 875, 881, 335 P.3d 1162 (2014).

This court's standard of review depends on which approach the district court took. Here, the district court held a preliminary hearing but dismissed Moyer's motion without

considering additional evidence. In this situation, we review the district court's dismissal under a de novo standard. *Wilkins v. State*, 286 Kan. 971, 980, 190 P.3d 957 (2008).

When a defendant has litigated a claim of ineffective assistance of trial counsel on direct appeal through a *Van Cleave* remand hearing, "Supreme Court Rule 183(c)(3) [2023 Kan. S. Ct. R. at 243] bars the use of a K.S.A. 60-1507 motion to raise additional claims of trial counsel's deficient performance, unless there were exceptional circumstances excusing the failure to make the additional claims at the remand hearing." *Rice*, 37 Kan. App. 2d 456, Syl. ¶ 2. In his direct appeal, Moyer alleged that he received ineffective assistance of counsel at trial, and he asked the Supreme Court to remand for a *Van Cleave* hearing. *Moyer I*, 306 Kan. at 376; *Moyer II*, 309 Kan. 269. Moyer asserted that his trial counsel, Mason, had a conflict of interest with a potential exculpatory witness, J.T. The Supreme Court granted his request and remanded for a hearing on those specific allegations. *Moyer I*, 306 Kan. at 384-85.

At the *Van Cleave* hearing, Moyer was not permitted to raise any additional claims of ineffective assistance of counsel. And when Moyer appealed the *Van Cleave* court's ruling and raised the additional allegations of his trial counsel's ineffectiveness, the Supreme Court declined to reach them: "Moyer's attempt to identify other instances of deficient performance, . . . exceed the scope of the remand issues and need no further discussion." *Moyer II*, 309 Kan. at 278.

Because he raised the issue of ineffective assistance of his trial counsel in his direct appeal and received a *Van Cleave* hearing, Moyer is precluded from using a K.S.A. 60-1507 motion to raise *additional* claims of ineffective assistance of his trial counsel. This procedural bar could be sidestepped only if Moyer demonstrated exceptional circumstances excusing his failure to assert those claims in his direct appeal. Supreme Court Rule 183(c)(3) (2023 Kan. S. Ct. R. at 243); *Moncla v. State*, 285 Kan. 826, 831, 176 P.3d 954 (2008). ""Exceptional circumstances are unusual events or intervening

changes in the law which prevent a movant from reasonably being able to raise all of the trial errors in the first post-conviction proceeding." [Citation omitted.]" *State v. Kelly*, 291 Kan. 868, 872, 248 P.3d 1282 (2011). Exceptional circumstances may include a showing that appellate counsel was ineffective for failing to raise the issue on direct appeal. See *Bledsoe v. State*, 283 Kan. 81, 88-89, 150 P.3d 868 (2007).

Moyer argues that two interrelated factors establish exceptional circumstances permitting him to bring the additional claims in his K.S.A. 60-1507 motion. First, there was an agreement between the parties at the *Van Cleave* hearing—approved by the district court—that he would be permitted to bring a K.S.A. 60-1507 motion alleging ineffective assistance of counsel after the remand hearing. Second, Moyer received ineffective assistance of counsel from his appellate/*Van Cleave* counsel. In response, the State argues (1) that nothing in the record supports that any such agreement existed, and even if it did, such an agreement would not circumvent the rule barring relitigation of the effectiveness of his counsel and (2) that Moyer cannot raise an ineffective assistance of counsel claim against his appellate/*Van Cleave* counsel for the first time in this appeal.

Agreement that Moyer could bring a K.S.A. 60-1507 motion after the Van Cleave hearing

Moyer contends there was an agreement between the parties, approved by the district court, that the scope of the *Van Cleave* hearing would be limited to the conflict-of-interest claim against Mason and that Moyer could raise additional ineffective assistance of counsel claims against Mason in a later K.S.A. 60-1507 proceeding, assuming that Moyer's convictions were upheld. Moyer argues that this agreement was an "unusual event" amounting to an exceptional circumstance that prevented him from raising all his claims in the earlier proceedings. See *Kelly*, 291 Kan. at 872 (finding exceptional circumstances include *unusual events* preventing a movant from reasonably raising all claims in earlier proceedings).

In addressing this contention, the district court found that the record did not support that the parties had an agreement that Moyer would be permitted to bring a subsequent K.S.A. 60-1507 motion. But the district court's decision is belied by the transcript of the *Van Cleave* proceedings.

At the beginning of the status conference before the *Van Cleave* hearing, Moyer's counsel stated that he did not expect to call many witnesses because he "certainly [did not] expect to have a full blown *Van Cleave* hearing in the traditional sense." Later in the hearing, Moyer's counsel reiterated that he did not believe that the remand included a "full blown *Van Cleave*" where he would be permitted to fully present evidence of every alleged instance of Mason's ineffectiveness. He also stated that "[i]t's clear that, . . . Mr. Moyer will still have the availability of relief under 1501 and 1507 at some time in the future, . . . I mean there's a lot of things that would be subject to a full *Van Cleave* hearing, but I am not intending on going into them, so."

The State echoed this same understanding of the situation, "[B]oth the State and defense are in agreement that this will not be a full blown evidentiary *Van Cleave*. If he were to get a full blown *Van Cleave*, that would basically include a 1507 and he wants to preserve his ability to raise that later." And it appears that the district court was under the same impression. In response to Moyer's counsel's statement that he would not address additional claims of Mason's ineffectiveness at the *Van Cleave* hearing, the judge stated, "The narrower you can make the issues, the happier you will make the court, so that's fine with me. . . . I understand if you fire that gun today, you might not get a chance to pull the trigger a second time." In short, the record reflects that the parties and the *Van Cleave* court were operating under an agreed assumption that Moyer later would be permitted to bring a K.S.A. 60-1507 motion raising additional claims of ineffective assistance of counsel.

The State argues that any such agreement would not be legally enforceable. But the sole question we must decide is whether the apparent agreement or understanding is unusual enough to support Moyer's argument that it amounts to an exceptional circumstance allowing him to bring his additional claims in this proceeding. We believe that it is. Had simply the State and Moyer's counsel agreed that the scope of the *Van Cleave* hearing would be limited to the conflict-of-interest claim, allowing Moyer to bring additional claims at a later hearing, contrary to the holding in *Rice*, then we might find that the agreement between the parties did not amount to exceptional circumstances. But here, the district court sanctioned the agreement on the record during the *Van Cleave* proceedings. We conclude the district court's approval of the agreement on the record is important and amounts to exceptional circumstances allowing Moyer to bring his additional ineffective assistance of counsel claims in this proceeding.

Ineffective assistance of appellate/Van Cleave counsel

For the first time on appeal, Moyer argues that the ineffective assistance of his appellate counsel (who also served as his *Van Cleave* counsel and wrote his K.S.A. 60-1507 motion) constituted an exceptional circumstance. The State argues that this court should not address Moyer's argument because he failed to raise it below.

A K.S.A. 60-1507 movant can overcome the failure to raise an issue at trial or on direct appeal and show exceptional circumstances by persuading a court that there was ineffective assistance of trial counsel in failing to object regarding an issue or that there was ineffective assistance of direct appeal counsel in failing to raise an issue. *Bledsoe*, 283 Kan. at 88-89, 91. Though appellate courts generally require the grounds for exceptional circumstances to be raised before the district court, Kansas courts have considered a claim of ineffective assistance of counsel for the first time on appeal. See *Trotter v. State*, 288 Kan. 112, 128-29, 200 P.3d 1236 (2009).

To establish ineffective assistance of appellate counsel as an exceptional circumstance under Supreme Court Rule 183(c)(3), the movant must show that (1) counsel's representation fell below an objective standard of reasonableness, considering all the circumstances; and (2) but for counsel's deficient performance there is a reasonable probability that the outcome of the proceeding would have been more favorable to the defendant. *Moncla*, 285 Kan. at 831. While appellate counsel's failure to raise an issue on appeal may be considered in evaluating exceptional circumstances, the mere failure of appellate counsel to assert an issue on appeal is not, in and of itself, sufficient to establish exceptional circumstances. *Rice*, 37 Kan. App. 2d at 464-65 (suggesting that an appellate attorney may strategically choose to forgo issues that could "[divert] the reviewing court's attention from much more meritorious arguments").

Moyer argues that his appellate counsel was ineffective for failing to realize that his *Van Cleave* hearing would preclude raising further ineffective assistance of counsel claims against his trial attorney in a subsequent K.S.A. 60-1507, absent a showing of exceptional circumstances. The State skips the deficient performance prong and proceeds directly to whether Moyer's counsel prejudiced Moyer.

In considering whether Moyer's appellate/*Van Cleave* attorney's performance was deficient, this court must presume that his conduct falls within the wide range of reasonable professional conduct and make every effort to eliminate the distorting effects of hindsight. *Moncla*, 285 Kan. at 832. Here, the thrust of Moyer's argument is that his appellate/*Van Cleave* counsel's apparent misunderstanding of well-established caselaw regarding the preclusive effect of a *Van Cleave* remand on later habeas proceedings was objectively unreasonable. Essentially, he asserts that his counsel's misunderstanding of the caselaw, which led to his failure to raise all of his present claims against his trial attorney, constituted deficient performance.

Moyer's appellate counsel's failure to raise additional claims of ineffectiveness—whether in his direct appeal or at the remand hearing—cannot be categorized as a strategic decision. It appears that his appellate counsel's decision not to present, or attempt to preserve, his additional ineffective assistance claims was not based on a strategic calculation but on a misunderstanding of the law. Accord *Bergstrom v. Noah*, 266 Kan. 847, 878, 974 P.2d 531 (1999) ("[A] client is entitled to the benefit of an informed judgment. When the issue is one that is settled and can be identified through ordinary research and investigation techniques, an attorney should not be able to avoid liability by claiming the error was one of judgment.").

As Moyer points out, the interplay between a *Van Cleave* hearing and a subsequent motion filed under K.S.A. 60-1507 has been settled law for over a decade. See *Rice*, 37 Kan. App. 2d at 464. Moyer's appellate counsel's misunderstanding of the law—or his reliance on the alleged agreement between himself, the State, and the district court—was objectively unreasonable. His failure to present all of Moyer's claims at the *Van Cleave* hearing, or to raise all those claims in his request for the hearing in his direct appeal, assuming that Moyer would later be able to raise them in a later K.S.A. 60-1507 motion amounted to deficient performance.

Turning to whether Moyer was prejudiced by his appellate counsel's deficient performance, the dispositive question is whether his appellate counsel's failure to raise the additional issues at the remand hearing denied Moyer the opportunity to later raise them—that is, but for his appellate counsel's performance, would Moyer now be procedurally barred from bringing his K.S.A. 60-1507 claim. Moyer argues that because of his appellate counsel's performance, no argument or evidence about his additional allegations of ineffective assistance of trial counsel were presented at the *Van Cleave* hearing and were subsequently not reviewed by the Kansas Supreme Court in *Moyer II*.

The State argues that Moyer's claim of prejudice is misplaced because the *Moyer II* court held that the scope of the *Van Cleave* hearing was restricted to his conflict-of-interest-based ineffective assistance claim. It is true that the *Moyer II* court stated that the additional allegations of ineffective assistance of counsel included in his appeal from the *Van Cleave* panel were beyond the scope of that hearing. But it is also apparent that, due to his appellate counsel's deficient performance, neither the *Van Cleave* court nor the *Moyer II* court ever considered Moyer's claims additional claims of ineffective assistance of his trial counsel. Due to his appellate counsel's performance, Moyer was not permitted to present his additional claims of ineffective assistance of trial counsel in his K.S.A. 60-1507 motion. We conclude that Moyer has established sufficient prejudice because, but for his appellate counsel's deficient performance, he would have been able to fully litigate his claims of his trial counsel's ineffective assistance.

In sum, Moyer has established exceptional circumstances allowing him to bring his additional claims in his K.S.A. 60-1507 motion. First, there was an agreement between the parties at the *Van Cleave* hearing—approved by the district court—that he would be permitted to bring a K.S.A. 60-1507 motion alleging ineffective assistance of counsel after the remand hearing. Second, Moyer received ineffective assistance of counsel from his appellate/*Van Cleave* counsel. As a result, the district court erred in finding that Moyer failed to show exceptional circumstances permitting him to relitigate the effectiveness of his trial counsel in his subsequent K.S.A. 60-1507 motion.

DOES RES JUDICATA PRECLUDE THE CLAIMS RAISED
IN MOYER'S K.S.A. 60-1507 MOTION?

Moyer next argues that the district court erred by finding that his K.S.A. 60-1507 motion was barred under the doctrine of res judicata. The State maintains that the district court was correct to find that the claims in Moyer's motion were barred because they were raised in his direct appeal. Whether the doctrine of res judicata applies in a certain

case is a question of law over which appellate courts exercise unlimited review. *State v. Salary*, 309 Kan. 479, 481, 437 P.3d 953 (2019).

The doctrine of res judicata provides that "where an appeal is taken from the sentence imposed and/or a conviction, the judgment of the reviewing court is res judicata as to all issues actually raised, and those issues that could have been presented, but were not presented, are deemed waived." *State v. Kingsley*, 299 Kan. 896, 901, 326 P.3d 1083 (2014). The doctrine applies to a K.S.A. 60-1507 movant who seeks to raise issues which have been resolved by a final appellate court order in their criminal case. *Drach v. Bruce*, 281 Kan. 1058, Syl. ¶ 12, 136 P.3d 390 (2006); *Quinn v. State*, 62 Kan. App. 2d 640, 652, 522 P.3d 282 (2022) (finding res judicata barred the defendant's 60-1507 motion because he had brought claims of ineffective assistance of counsel in his direct appeal), *vacated on other grounds* 317 Kan. ___, 537 P.3d 94 (2023).

There are four requirements to apply res judicata: (1) same claim; (2) same parties; (3) claims were or could have been raised; and (4) a final judgment on the merits. *State v. Bailey*, 315 Kan. 794, 799-800, 510 P.3d 1160 (2022). Yet "a court must conduct a case-by-case analysis that moves beyond a rigid and technical application to consider the fundamental purposes of the rule in light of the real substance of the case at hand." *Boguess v. State*, 306 Kan. 574, 580, 395 P.3d 447 (2017). The fundamental purpose of preclusive doctrines such as res judicata is to "avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts." *Bailey*, 315 Kan. at 802.

As we stated earlier, Moyer's K.S.A. 60-1507 motion included 17 allegations of ineffective assistance of his trial counsel, Mason, including: (1) his failure to timely file a motion and affidavit requesting the trial judge to recuse until weeks before the trial; (2) his failure to provide the trial court with a medical expert's additional opinion that would

have caused the trial court to revisit its denial of Moyer's request for an independent medical examination of J.M.; (3) his failure to obtain a forensic electronic expert to conduct an independent examination of an incriminating audio recording; (4) his failure to ensure that a medical expert testified in person, rather than by deposition; (5) his failure to withdraw as counsel after he developed a conflict of interest; (6) his failure to preserve the testimony of an exculpatory witness, J.T.; (7) his failure to timely subpoena J.T. for trial; (8) his failure to cross-examine J.M. about her conversations with J.T.; (9) his misrepresentations to the court about speaking to J.T.; (10) his alleged lies to Moyer about whether J.T. could testify; (11) his failure to contact J.T.'s treating doctor about her competency to testify; (12) his failure to ask the court to conduct a hearing with J.T.'s doctor; (13) his misrepresentations during his testimony at the *Van Cleave* hearing; (14) his failure to consult Moyer about waiting until the trial had begun to subpoena J.T.; (15) his failure to notify the court when first appointed that he was not qualified to handle off-grid felonies; (16) his failure to notify the court that he was not qualified to represent Moyer under K.A.R. 105-3-2(a)(3); and (17) his failure to notify the court on a motion for new trial that he was not qualified to represent Moyer.

We find that the first four ineffective assistance of counsel claims in Moyer's K.S.A. 60-1507 motion are entirely new claims that were not addressed in Moyer's direct appeal including the *Van Cleave* hearing. Granted, the first claim involves the issue about the trial judge's refusal to recuse himself because his son was a law enforcement officer involved in the investigation of the case, and this issue was raised and resolved in Moyer's direct appeal. But Moyer is now raising the issue in the context of an ineffective assistance of counsel claim, and no final judgment on the merits has been made on this claim in Moyer's prior proceedings. The next three claims involve Mason's failure to obtain an independent medical examination of J.M., his failure to obtain a forensic electronic expert to examine an audio recording, and his failure to ensure that a medical expert testified in person rather than by deposition. These claims were not addressed in Moyer's direct appeal, and no final judgment on the merits has been made on any of these

claims. Although Moyer possibly *could* have raised these claims in his *Van Cleave* hearing, there was the agreement by the parties approved by the court that he would wait to raise these claims in a later K.S.A. 60-1507 motion if his convictions were upheld. As a result, we conclude that Moyer should not be precluded from bringing these four claims in his K.S.A. 60-1507 motion under the doctrine of res judicata.

Moyer's next 10 claims are a different matter. These claims are all interwoven into the conflict-of-interest claim involving Mason's representation of J.T. that were addressed in the *Van Cleave* hearing and in the Supreme Court's last decision affirming Moyer's convictions. *Moyer II*, 309 Kan. 268. The timeliness with which J.T. was subpoenaed for trial and Mason's failure to take steps before trial to preserve J.T.'s testimony were thoroughly discussed and analyzed by the Supreme Court in Moyer's direct appeal. 309 Kan. at 285-87. The Supreme Court's disposition of these issues could not have been clearer: "In sum, Moyer failed to meet his burden of establishing that Mason's performance with regard to J.T.'s testimony was deficient." 309 Kan. at 286. And as the Supreme Court observed, the *Van Cleave* court found that even if J.T. had testified at Moyer's trial, it would not have affected the verdict. Thus, the court has already found that nothing about Mason's handling of J.T. prejudiced Moyer or changed the result of his trial. Moyer has received a final judgment on the merits of these claims. As a result, we conclude that Moyer is barred from relitigating these claims in his K.S.A. 60-1507 proceeding under the doctrine of res judicata.

Moyer's last three claims all involve Mason's lack of qualifications to handle off-grid felonies. These claims were not part of the *Van Cleave* remand. But as the Supreme Court discussed in *Moyer II*, Mason's failure to meet the qualifications under K.A.R. 105-3-2 to handle off-grid felonies is not an independent ground for bringing an ineffective assistance of counsel claim without a showing that counsel's performance was somehow deficient. 309 Kan. at 277-78; see *State v. Cheatham*, 296 Kan. 417, 432-33, 292 P.3d 318 (2013) (holding defense counsel's failure to meet ABA guidelines for death penalty

counsel did not itself render counsel ineffective); *Flynn v. State*, 281 Kan. 1154, 1161-62, 136 P.3d 909 (2006) ("K.A.R. 105-3-2 does not short circuit the application of the two-part [*Strickland*] test or abolish the defendant's burden to identify specific acts or omissions that fall outside the range of reasonable professional judgment and demonstrate prejudice based on the deficient performance."). Thus, we find that Moyer has no right to any relief on his last three claims of ineffective assistance of counsel, not because of the doctrine of res judicata, but simply because these claims fail to constitute independent grounds for relief as a matter of law.

The State implicitly recognizes that Moyer's K.S.A. 60-1507 motion brings four new claims not barred by res judicata, and it asserts in its brief that "[t]his case can easily be resolved by rejecting the merits of Moyer's four new claims." The State then devotes an entire section of its brief by addressing the merits of Moyer's first four ineffective assistance of counsel claims against Mason and argues that this court should reject each claim as lacking merit based on the record on appeal. We reject the State's invitation to address the merits of Moyer's four new claims based on the appellate records because it is not this court's function to do so and because we should not cut off Moyer's opportunity from making any arguments he wants to make on these claims on remand.

In sum, we find the district court erred by rejecting the first four claims in Moyer's K.S.A. 60-1507 motion on procedural grounds without addressing the merits of these claims. But we agree with the State that remand for an evidentiary hearing is unwarranted at this stage of the proceedings. Instead, we should return the parties to their same posture before the district court dismissed the case on procedural grounds. Now that we have identified the four issues in Moyer's K.S.A. 60-1507 motion that survive any procedural bar, we remand Moyer's case to the district court to hold a preliminary non-evidentiary hearing for the district court to address the merits of the claims and decide whether an evidentiary hearing is warranted. See *Sola-Morales*, 300 Kan. at 881. The district court

must appoint counsel to represent Moyer at all further proceedings in district court unless he expressly waives his statutory right to counsel. See K.S.A. 22-4506(b).

Affirmed in part, reversed in part, and remanded with directions.