

NOT DESIGNATED FOR PUBLICATION

No. 125,631

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

TERRY L. BOWEN,  
*Appellant,*

v.

STATE OF KANSAS,  
*Appellee.*

MEMORANDUM OPINION

Appeal from Marion District Court; COURTNEY D. BOEHM, judge. Opinion filed June 16, 2023.  
Affirmed.

*Joseph A. Desch*, of Law Office of Joseph A. Desch, of Topeka, 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: Terry Bowen appeals the district court's summary denial of his K.S.A. 60-1507 motion. After reviewing the parties' arguments and the record, we agree with the district court that Bowen's motion was filed outside the time frame permitted by K.S.A. 60-1507, and Bowen has not provided an explanation that would allow the courts to consider his untimely motion. We thus affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 2011, a jury found Bowen guilty of two counts of rape, one count of aggravated criminal sodomy, and one count of aggravated kidnapping. The district court sentenced

him to life imprisonment without the possibility of parole for one of the rape convictions and concurrent 155-month prison terms for his other three convictions.

Bowen's convictions arose from the rape of a 14-year-old girl by Bowen and another man. The Kansas Supreme Court described the circumstances surrounding this incident in its opinion in Bowen's direct appeal. See *State v. Bowen*, 299 Kan. 339, 341, 323 P.3d 853 (2014). In that opinion, our Supreme Court affirmed Bowen's convictions but vacated a no-contact order that exceeded the scope of the district court's authority. 299 Kan. at 359. The mandate was issued that same year.

Bowen filed his first K.S.A. 60-1507 motion in 2015. He argued, among other things, that his trial attorney provided ineffective assistance by not objecting to the admission of character evidence under K.S.A. 60-447. *Bowen v. State*, No. 116,875, 2017 WL 6625378, at \*1 (Kan. App. 2017) (unpublished opinion), *rev. denied* 308 Kan. 1593 (2018). The district court appointed counsel to represent Bowen and held an evidentiary hearing where Bowen's trial attorney testified. The district court later denied Bowen's motion, finding the trial attorney was not ineffective. This court affirmed the district court's decision. 2017 WL 6625378, at \*3.

Bowen filed a second K.S.A. 60-1507 motion—which is the subject of this appeal—in 2022. The second motion again claimed that Bowen's trial attorney provided ineffective assistance, but for different reasons. Bowen claimed that his trial attorney did not strike six jury members for cause, did not cross-examine the victim's forensic interviewer about her use of leading questions during the interview, and did not hire an expert to challenge the interviewer's techniques. Bowen's motion also asserted that the cumulative effect of these alleged errors deprived him of a fair trial. He argued that, absent these deficiencies by his attorney, other evidence presented at his trial would have shown that he was innocent of the crimes for which he was convicted. In particular, he pointed out that a nurse and doctor testified about the absence of physical injuries to the

victim and that the victim changed her story several times. And he noted that there was no DNA evidence found on the victim's clothing to corroborate her story.

Bowen's second K.S.A. 60-1507 motion attributed his failure to raise these claims in his direct appeal or his first K.S.A. 60-1507 motion to the ineffectiveness of his attorneys in those proceedings. He asserted that his direct-appeal attorney provided deficient representation by not raising two of his claims during his direct appeal. And he asserted that the attorney who represented him for his first K.S.A. 60-1507 motion was ineffective for failing to include another of Bowen's present claims in that motion.

The district court denied Bowen's second K.S.A. 60-1507 motion as untimely under K.S.A. 60-1507(f)'s one-year filing deadline, reaching this decision without holding an evidentiary hearing. The court noted that "[a]lmost four years exactly have passed since the Kansas Supreme Court denied [Bowen's] request for review, and the judgment of the district court regarding [Bowen's] first K.S.A. 60-1507 motion was affirmed." The court found that Bowen had not shown that the consideration of his untimely motion was necessary to prevent manifest injustice under K.S.A. 60-1507(f)(2). Bowen appeals.

#### DISCUSSION

Bowen argues that the district court erred in denying his second K.S.A. 60-1507 motion as untimely because he showed that dismissing it would result in manifest injustice. Bowen alleges that he should receive an evidentiary hearing even though his motion was untimely because his claims raise substantive issues that should be considered. And he preemptively asserts that his motion was not successive, although the district court dismissed his motion solely on untimeliness grounds. We are not persuaded by Bowen's arguments.

Through K.S.A. 60-1507, our legislature provides incarcerated people with a right to seek habeas corpus relief, but places certain limitations on doing so to avoid abuse of remedy. Accord *Manco v. State*, 51 Kan. App. 2d 733, 741, 354 P.3d 551 (2015) (finding that K.S.A. 60-1507's provisions about successive motions and filing deadlines are reasonable, constitutional procedural limitations), *rev. denied* 304 Kan. 1017 (2016). Relevant here, K.S.A. 2022 Supp. 60-1507(f)(1) requires a person to bring a motion under K.S.A. 60-1507 within one year of:

"(A) The final order of the last appellate court in this state to exercise jurisdiction on a direct appeal or the termination of such appellate jurisdiction;

"(B) the denial of a petition for writ of certiorari to the United States supreme court or issuance of such court's final order following granting such petition; or

"(C) the decision of the district court denying a prior motion under this section, the opinion of the last appellate court in this state to exercise jurisdiction on such prior motion or the denial of the petition for review on such prior motion, whichever is later."

This one-year period may be extended only to prevent a manifest injustice. K.S.A. 2022 Supp. 60-1507(f)(2). And this exception is a narrow one. K.S.A. 2022 Supp. 60-1507(f)(2)(A) limits the scope of "manifest injustice" to two considerations—whether the movant has explained why he or she "failed to file the motion within the one-year time limitation" and whether the person "makes a colorable claim of actual innocence."

On appeal, this court has unlimited review over a K.S.A. 60-1507 motion that was dismissed or denied without an evidentiary hearing. *Bellamy v. State*, 285 Kan. 346, 354, 172 P.3d 10 (2007). This is because an appellate court is in the same position as the district court to determine whether "the motion and the files and records of the case conclusively show that [Bowen] is entitled to no relief." See K.S.A. 2022 Supp. 60-1507(b); *Beauclair v. State*, 308 Kan. 284, 293, 419 P.3d 1180 (2018).

No one disputes that Bowen's latest K.S.A. 60-1507 motion was untimely. His direct appeal concluded in 2014, and the appeal of his previous K.S.A. 60-1507 concluded in 2018. Bowen filed his current motion on August 29, 2022. Regardless of whether we view Bowen's latest motion as raising solely trial errors or concerning the actions of his attorneys in his previous K.S.A. 60-1507 litigation, Bowen brought his current motion well outside the one-year filing deadline.

Bowen must therefore show that one of the considerations in K.S.A. 2022 Supp. 60-1507(f)(2)(A) permits the courts to reach the merits of his untimely motion. See *White v. State*, 308 Kan. 491, 496, 421 P.3d 718 (2018). If he does not show that further review of his motion is necessary to prevent manifest injustice under either consideration, the courts must dismiss his motion. K.S.A. 2022 Supp. 60-1507(f)(3). Bowen has not shown that either consideration applies here.

*First*, Bowen has not provided persuasive reasons for his delay in filing his latest motion. He asserts that the reason he brought his second K.S.A. 60-1507 motion outside of the statutory deadline was because his appellate attorneys—both during his direct appeal and in his appeal of his first postconviction motion—provided constitutionally deficient representation. But even if Bowen's previous attorneys were ineffective as he claims, he has not explained why he waited nearly four years after the appeal of his previous K.S.A. 60-1507 motion to correct his attorneys' alleged deficiencies. In short, Bowen's conclusory statements about why his latest motion was untimely do not show that dismissing it would result in manifest injustice. See *White*, 308 Kan. at 496.

*Second*, Bowen has not presented a colorable claim of actual innocence within the meaning of K.S.A. 2022 Supp. 60-1507(f)(2)(A). For an innocence claim to warrant extending the filing deadline for a K.S.A. 60-1507 motion, a movant must show that "it is more likely than not that no reasonable juror would have convicted the prisoner *in light of*

*new evidence.*" (Emphasis added.) K.S.A. 2022 Supp. 60-1507(f)(2)(A). In the context of an ineffective-assistance claim, new evidence can include evidence available but not presented at trial or exculpatory evidence an attorney failed to discover or present to the jury, showing actual innocence. *Skaggs v. State*, 59 Kan. App. 2d 121, Syl. ¶ 7, 479 P.3d 499 (2020), *rev. denied* 313 Kan. 1042 (2021).

Bowen argues that there was overwhelming evidence presented at his trial to show his innocence, but the jury convicted him because his trial attorney fell short in the attorney's attempts to counter or mitigate the effect of other evidence presented. The fundamental problem with these assertions, for purposes of the threshold showing required to permit consideration of an untimely motion under K.S.A. 2022 Supp. 60-1507(f)(2)(A), is that all the evidence that Bowen cites *was presented at his trial*. As such, Bowen has not identified new or untested evidence that would justify consideration of his untimely K.S.A. 60-1507 motion under K.S.A. 2022 Supp. 60-1507(f)(2)(A). See *Beauclair*, 308 Kan. at 299.

Bowen has not sufficiently explained his delay in filing his latest K.S.A. 60-1507 motion or pointed to new evidence that would justify its consideration. Kansas law thus required the district court to dismiss Bowen's motion. See K.S.A. 2022 Supp. 60-1507(f)(3). Because Kansas law did not allow further consideration of Bowen's untimely motion, we need not reach Bowen's arguments that his claims could not have been raised in his previous K.S.A. 60-1507 motion. See K.S.A. 2022 Supp. 60-1507(c) (stating that a court is "not . . . required to entertain a second or successive motion for similar relief" filed by the same person). And we do not reach the merits of his substantive claims.

The district court did not err when it summarily denied Bowen's untimely K.S.A. 60-1507 motion.

Affirmed.