NOT DESIGNATED FOR PUBLICATION

No. 125,690

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ENRIQUE PERALES,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; SETH L. RUNDLE, judge. Submitted without oral argument. Opinion filed December 15, 2023. Affirmed.

Sam S. Kepfield, of Hutchinson, for appellant.

Lance J. Gillett, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before WARNER, P.J., ATCHESON, J., and MARY E. CHRISTOPHER, S.J.

PER CURIAM: Enrique Perales asks us to recognize a procedural device that would permit defendants to represent themselves in second direct appeals of their criminal convictions after their lawyers have completed unsuccessful initial appeals. This request has arisen in a quirky way and rests on similarly quirky and essentially faulty legal arguments that even if credited would not warrant the unprecedented relief Perales outlines. Perales has crafted his "second appeal" claim to get around the Sedgwick County District Court's ruling rejecting his attempt to appeal the denial of his motions for a new trial and judgment of acquittal some five years after a jury convicted him of

aggravated criminal sodomy and aggravated battery and after the Appellate Defender Office (ADO) handled a direct appeal of those convictions. We find Perales' position to be without merit and affirm the district court.

FACTUAL AND PROCEDURAL BACKGROUND

Given the narrow issue in front of us, we may quickly sketch the underlying factual and procedural path to this point. In May 2017, Perales represented himself in the jury trial resulting in the two felony convictions. The underlying facts are irrelevant. Perales then drafted and filed a timely motion for judgment of acquittal and an untimely motion for a new trial. Upon Perales' request, the district court appointed a lawyer to represent him on those posttrial motions. The lawyer filed supplemental motions and argued for Perales in the district court. The district court denied the motions as untimely and alternatively found them to be without merit.

Perales appealed, and the ADO represented him in that appeal. We affirmed the convictions. *State v. Perales*, No. 119,815, 2019 WL 5089857, at *1 (Kan. App. 2019) (unpublished opinion). In the appeal, the ADO argued some of the points raised in the motions for judgment of acquittal and new trial but did not treat the denial of those motions as distinct issues or grounds for reversing the convictions. Perales has since unsuccessfully filed motions for DNA testing under K.S.A. 21-2512, for habeas corpus relief under K.S.A. 60-1507, and for correction of illegal sentences under K.S.A. 22-3504. *State v. Perales*, No. 122,778, 2021 WL 2283698, at *1 (Kan. App. 2021) (unpublished opinion) (affirming denial of DNA testing); *Perales v. State*, No. 124,695, 2023 WL 596664, at *3 (Kan. App. 2023) (unpublished opinion) (affirming denial of 60-1507 motion); *State v. Perales*, No. 124,684, 2023 WL 582129, at *6 (Kan. App. 2023) (unpublished opinion) (affirming denial of motion to correct sentences).

While the denials of his motions under 60-1507 and for correction of illegal sentences were on appeal, Perales drafted and filed a motion in the district court for leave to file an out-of-time appeal from the denial of his motions for judgment of acquittal and for a new trial—about five years after those rulings. The district court summarily denied the motion because Perales, with the assistance of an ADO lawyer, had already concluded a direct appeal. Perales then filed his own notice of appeal, and the district court granted his request for an appointed lawyer to handle the appeal—the matter now in front of us. Lawyers for Perales and the State have submitted their respective briefs.

ANALYSIS

The outcome here seems straightforward. Perales' motion to appeal out of time is without merit precisely because he *did* appeal timely with the assistance of the ADO. And we considered all of the issues presented in his direct appeal, though without the favorable result Perales undoubtedly wished for. In that appeal, Perales' appellate lawyer assessed the potential issues and prepared a brief raising what were, in his professional judgment, the best of them. See *Baker v. State*, 243 Kan. 1, 10, 755 P.2d 495 (1988); *State v. Torrence*, No. 120,078, 2020 WL 6930802, at *3 (Kan. App. 2020) (unpublished opinion) ("Appellate lawyers are expected to pick and choose among potential issues, thereby selecting the best points and discarding lesser or wholly meritless ones."). As we have said, the lawyer opted not to raise the district court's denial of the posttrial motions as discrete points on appeal. If Perales concluded that choice amounted to substandard representation compromising his substantive rights, his remedy lay in asserting his claim as a ground for relief in his 60-1507 motion. See *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (To obtain habeas corpus relief, convicted defendants must show both that their legal representation "fell below an objective standard of reasonableness" guaranteed by the right to counsel in the Sixth Amendment to the United States Constitution and that absent the substandard lawyering there is "a reasonable probability" the result in their criminal cases would have been

different.); see also *Sola-Morales v. State*, 300 Kan. 875, 881-82, 335 P.3d 1162 (2014) (recognizing and applying *Strickland* standard to 60-1507 motions). But Perales made no such claim in the 60-1507 motion he filed in 2021. *Perales*, 2023 WL 596664, at *1.

To avert those seemingly insurmountable legal barriers, Perales now asserts criminal defendants have a freestanding right to bring a second appeal challenging their convictions if they had legal representation in the initial appeal and represent themselves in the successive appeal. And, according to Perales, that purported right warrants an out-of-time appeal of the district court's denial of his posttrial motions. The notion might be charitably described as "creative"—a sometime judicial euphemism for a meritless assertion. See, e.g., *State v. Solis*, 305 Kan. 55, 68, 378 P.3d 532 (2016) (dismissing as "creative" argument dependent upon inapplicable statute); *State v. Griffin*, No. 102,620, 2011 WL 767842, at *2 (Kan. App. 2011) (unpublished opinion) (defendant's "creative argument" afflicted by "a fatal flaw"); see also *City of Creve Coeur, Missouri v. DirecTV LLC*, 58 F.4th 1013, 1016 (8th Cir. 2023) ("Though creative, the argument is without merit for multiple reasons.").

In fashioning his claim for a second appeal, Perales tries to weave together two arguments neither of which helps him. And taken together they afford Perales nothing that would breathe any legal life into his motion for an out-of-time appeal.

First, Perales alludes to the Kansas Supreme Court's recognition in *State v. Ortiz*, 230 Kan. 733, 735-36, 640 P.2d 1255 (1982), that criminal defendants may request out-of-time appeals if a district court fails to inform them of their right to appeal or fails to provide lawyers to undertake the appeal or if the lawyer provided them fails to perfect and complete an appeal. The *Ortiz* exceptions to the statutory time bar for criminal appeals have become a commonplace of Kansas law. See *State v. Smith*, 315 Kan. 717, 718-21, 510 P.3d 696 (2022); *State v. Gardner*, No. 125,513, 2023 WL 6324001, at *1 (Kan. App. 2023) (unpublished opinion). But *Ortiz* has no obvious application here

because Perales had a lawyer who completed an appeal for him. Perales tacitly admits as much and never explains how *Ortiz* supports the idea he should be given a *second* appeal.

For his second argument, Perales contends criminal defendants have a right to represent themselves in the direct appeals of their convictions. This position can't be as quickly dispatched as his misplaced reliance on *Ortiz*, but it is equally unavailing. Even if Perales had such a right, he never asserted it in the first appeal and was apparently content to have the ADO represent him. His inaction amounted to a forfeiture of any right to self-representation on appeal and not—as he would now have us find—a legal basis for a second appeal in which he could represent himself. In other words, Perales gave up whatever right he had to self-representation on appeal when he acquiesced in the ADO's representation of him.

Perales identifies no clear foundation for his premise that criminal defendants have a defined right to self-representation on appeal. Criminal defendants, of course, do have a right to represent themselves at trial grounded in the Sixth Amendment. *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); *State v. Jones*, 290 Kan. 373, 377, 228 P.3d 394 (2010). They do not, however, have a comparable federal constitutional right to self-representation on appeal. *Martinez v. Court of Appeal of California*, *Fourth Appellate Dist.*, 528 U.S. 152, 163, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000). The *Martinez* Court recognized that a state constitution might grant criminal defendants such a right. 528 U.S. at 163. But the Kansas Supreme Court has held "the Kansas Constitution does not directly grant a right to appeal in any circumstance." *In re I.A.*, 313 Kan. 803, 806, 491 P.3d 1291 (2021). The right to appeal a criminal conviction in Kansas is purely statutory. *State v. Rocheleau*, 307 Kan. 761, 763, 415 P.3d 422 (2018). The directly applicable statutes governing criminal appeals do not provide for self-representation. See K.S.A. 2022 Supp. 22-3601 (appellate jurisdiction); K.S.A. 22-3606 (generally applying procedural statutes for civil appeals to criminal appeals); K.S.A.

2022 Supp. 60-2103 (procedures for civil appeals). We have been informed of no Kansas statute permitting criminal defendants to represent themselves on appeal.

The Kansas appellate courts have sometimes, if infrequently, permitted criminal defendants to represent themselves in direct appeals of their felony convictions. See, e.g., *State v. Brown*, 311 Kan. 527, 528, 464 P.3d 938 (2020) (defendant permitted to self-represent after court granted State's petition for review); *State v. Auch*, 39 Kan. App. 2d 512, 185 P.3d 935 (2008); *State v. Guebara*, No. 120,994, 2023 WL 2194542 (Kan. App.) (unpublished opinion), *rev. granted* 317 Kan. ___ (June 23, 2023); *State v. Solton*, No. 123,356, 2021 WL 4496188 (Kan. App. 2021) (unpublished opinion). The legal basis for doing so is not obvious and may be no more than an exercise of the court's general common-law authority in regulating its docket. Cf. *Martinez*, 528 U.S. at 163 ("Courts, of course, may still exercise their discretion to allow a lay person to proceed *pro se* [on appeal]."). Without wading deeper into this aspect of Perales' theory, we necessarily acknowledge that a criminal defendant in Kansas has a common-law option to request self-representation on direct appeal that may be granted in some circumstances, subject to case-by-case judicial review balancing "the overriding state interest in the fair and efficient administration of justice" with an appellant's limited "interest in self-representation." 528 U.S. at 163. But our rather wan acknowledgment doesn't get Perales very far.

As we have indicated, Perales did not ask to represent himself in the direct appeal of his convictions and left the task to the ADO lawyer appointed to handle the case. Perales cannot now recapture and exercise an opportunity for self-representation when he failed to avail himself of that opportunity at the appropriate time in the appellate process. By statute, a criminal defendant is entitled to one direct appeal that must be initiated within 14 days after the district court's judgment. K.S.A. 2022 Supp. 22-3602(a) (defendant may take "an appeal" as "a matter of right" from district court judgment); K.S.A. 2022 Supp. 22-3608(c) (defendant must appeal within 14 days after judgment);

see *State v. Howard*, 44 Kan. 508, 511, 513, 238 P.3d 752 (2010) ("There is no statutory provision authorizing a second direct appeal[,]" so district court lacks authority to order second appeal of original judgment.). In short, Perales had to exercise his right to self-representation in the statutorily permitted direct appeal. Having failed to do so, he cannot demand a second direct appeal simply to reclaim that right.

In wrapping up, we make two additional observations. First, criminal defendants are not entitled to hybrid representation, especially at the trial level, where the defendant effectively functions as cocounsel with a lawyer. *State v. Holmes*, 278 Kan. 603, 620, 102 P.3d 406 (2004); *Kleypas v. State*, 62 Kan. App. 2d 654, 666, 522 P.3d 304 (2022). Nonetheless, the appellate courts regularly receive and consider "supplemental" briefs criminal defendants write themselves to augment the briefing their appointed lawyers have filed. See, e.g., *State v. Frantz*, 316 Kan. 708, 521 P.3d 1113 (2022) (direct appeal); *State v. Gleason*, 315 Kan. 222, 505 P.3d 753 (2022) (appeal from denial of motion to correct illegal sentence); *State v. Waterman*, 63 Kan. App. 2d ___, 2023 WL 8102827 (No. 124,725 filed November 22, 2023) (direct appeal). Perales did not file a supplemental brief in his direct appeal. Perales' inaction—he made no attempt to personally address the issues and legal arguments framed in his direct appeal either through self-representation or supplemental briefing—amounted to a forfeiture of any right he had to do so. See *Yakus v. United States*, 321 U.S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834 (1944) ("[A] constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right . . . ."); *State v. Jones*, 287 Kan. 559, Syl. ¶ 4, 197 P.3d 815 (2008) (criminal defendant's course of conduct may create forfeiture of even constitutional rights); *McPherson v. State*, 38 Kan. App. 2d 276, 285, 163 P.3d 1257 (2007) (defendant entering into favorable plea agreement forfeits any right to attack infirmity of underlying charge); see also *United States v. Brasher*, 962 F.3d 254, 271 (7th Cir. 2020) (recognizing defendant's dilatory assertion of constitutional right may result in waiver or forfeiture).

Second, neither the district court nor the appellate courts had any obligation to inform Perales of any right (or option) he might have to self-representation on appeal. Courts have overwhelmingly, if not universally, recognized that criminal defendants need not be affirmatively advised of their Sixth Amendment right to self-representation leading up to and during a trial. *Munkus v. Furlong*, 170 F.3d 980, 983 (10th Cir. 1999); *United States v. Nissen*, 555 F. Supp. 3d 1174, 1197 (D.N.M. 2021); *State v. Martin*, 171 N.H. 590, 597, 200 A.3d 365 (2018); *Abbott v. State*, 611 S.W.3d 144, 151 (Tex. App. 2020); see 3 LaFave, Criminal Procedure § 11.5(b) (4th ed. 2022) ("Lower courts have uniformly assumed that there is no constitutional obligation to inform the defendant of his constitutional right to proceed pro se in the absence of a clear indication on his part that he desires to consider that option."); 21A Am. Jur. 2d Criminal Law § 1135 ("There is no requirement that a defendant be advised of the right of self-representation at any stage of a criminal proceeding or under any circumstances."). Although those cases and scholarly commentary address constitutionally based self-representation at trial, they represent compelling legal and logical authority for an identical rule governing a more limited common-law right to self-representation on appeal. We treat them that way. So Perales could not claim to have been shortchanged if he were never informed of a right to represent himself on appeal.

Without belaboring matters, Perales has not shown the district court erred in denying his motion to file an out-of-time appeal.

Affirmed.