NOT DESIGNATED FOR PUBLICATION

No. 126,548

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

MICHAEL A. ALLEN,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Shawnee District Court; STEVEN R. EBBERTS, judge. Submitted without oral argument. Opinion filed May 3, 2024. Affirmed.

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

Carolyn A. Smith, assistant district attorney, *Michael Kagay*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before BRUNS, P.J., GARDNER and ISHERWOOD, JJ.

PER CURIAM: Michael A. Allen appeals the district court's denial of his K.S.A. 60-1507 motion. A jury convicted Allen of aggravated burglary in July 2017. Three years later, Allen filed a K.S.A. 60-1507 motion and made several allegations of ineffective assistance of counsel relating to his trial counsel's failure to obtain certain evidence related to his involuntary intoxication defense. After holding a preliminary, nonevidentiary hearing, the district court denied Allen's K.S.A. 60-1507 motion. On appeal, Allen argues, for the first time, that his trial counsel's failure to file a timely notice under K.S.A. 22-3219 to allow him to pursue a mental disease or defect defense

amounted to constitutionally deficient and prejudicial representation. Because Allen did not raise this issue before the district court as part of his K.S.A. 60-1507 motion, we decline to address the merits of the claim and affirm the district court's decision.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2017, a Shawnee County jury convicted Allen of one count of aggravated battery. Allen pursued a direct appeal, and a panel of this court summarized the facts underlying his conviction:

> "On January 17, 2017, Allen entered the Kanza building at Stormont Vail Hospital. He remained in a hallway for about a half hour. Christopher Buesing, an employee of Stormont Vail Health, was in the Kanza building awaiting delivery of food for a catered lunch meeting. When the food arrived, Buesing walked toward the back door while looking at his phone. Allen walked up to him and punched him in the face. Buesing fell to the floor, in great pain, and later remembered someone digging in the pockets of his pants and claiming Buesing had bumped into that person. Buesing began to yell for help. Allen's blow had broken Buesing's jaw and three of his teeth.
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> "There were no witnesses to the attack, but video surveillance cameras recorded the incident. Seconds after he had been hit, Buesing became aware that Allen had attacked him and still was standing over him. Steve McGrath responded to Buesing's cries for help. He testified that when he got to Buesing, Allen was standing over Buesing, who was holding his jaw. Buesing said Allen had hit him, which Allen denied. Allen said he and Buesing had bumped into each other and 'cracked heads.' McGrath asked Allen why he was there, and Allen replied he was there to visit a friend in 'neuro' who had an appointment. McGrath testified Allen communicated clearly and coherently in this interaction.
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> "Officers from the Topeka Police Department were called to the scene. Believing that Allen may have attacked Buesing, therapists working in the Kanza building detained Allen until police arrived. Officer William Thompson responded first. Thompson found Allen sitting on a bench and Buesing in a separate room. Allen told Thompson he did not

know why police were there since he and Buesing had only bumped into each other accidentally as Allen was going around the corner to go see his friend Snoop. The recording from a bodycam showed Allen's interaction with officers and Kanza building staff. In Thompson's opinion, Allen responded coherently to his questions and, based on his experience, Allen did not appear to be intoxicated or impaired. At the end of their conversation, police took Allen to Valeo Behavioral Health Care, because he told Thompson he was tired of feeling the way he did." *State v. Allen*, No. 118,824, 2019 WL 2063901, at *1 (Kan. App. 2019) (unpublished opinion).

Allen relied on an involuntary intoxication defense and took the stand to explain his recollection of the events preceding the incident that gave rise to the charges against him:

"He said on the day of the attack he had been homeless for two days. He had been sitting in a park cold and tired, and he got up to move around. He said he saw a man smoking and asked to bum a cigarette but received a partially smoked 'cigar/cigarette' instead. Allen said he walked for about a block, smoking what he was given, but then noticed '[his] body and [his] mental starting changing.' Allen admitted having smoked marijuana but testified this did not feel like that. He said that he then started panicking and seeking help, knocking on doors, and eventually ended up inside a business on Topeka Boulevard. Allen asked the employees in the store to call 911, which they did, and he began seeing things others were not seeing and he was 'going in and out of cloudy consciousness,' 'becoming mentally confused.'

"Allen's counsel offered into evidence a recording of the 911 call from Allen's stop at the business. It was admitted and published without objection. The recording included Allen making statements about receiving messages from God. Allen was able to identify his voice, but testified he had no recollection of talking on the phone or saying the things in the recording. Allen testified that he only recalled bits and pieces of the events that took place after the phone call, but he did recall going to and leaving Valeo prior to the attack on Buesing.

> "Allen testified that he was 'scared,' 'paranoid,' and 'seeing things' when he went to the Kanza building. He claimed he was terrified and was trying to avoid the things he was seeing. Allen said that he was not aware that he struck Buesing and believed that he had accidentally bumped into him while trying to get away from what he was seeing. Allen explained that he did not attempt to leave the area because he was unaware he had done anything wrong." *Allen*, 2019 WL 2063901, at *4.

Despite opposition from the State, the district court instructed the jury on involuntary intoxication. Nonetheless, the jury found Allen guilty of aggravated battery, and the district court sentenced him to serve 162 months imprisonment. Allen then raised six claims of error on direct appeal, but the panel declined to find reversible error occurred and affirmed Allen's conviction. *Allen*, 2019 WL 2063901, at *6-14.

In June 2020, Allen filed a pro se K.S.A. 60-1507 motion and supporting memorandum. He claimed that ineffective assistance of counsel denied him the right to a fair trial because his trial counsel failed to subpoena witnesses in a timely manner or adequately investigate his defense and failed to obtain and offer evidence in support of his defense. The district court appointed counsel for Allen, who filed a supplemental memorandum. The State responded that Allen's motion should be summarily denied because he failed to state any claims that entitled him to relief.

In May 2021, the district court held a preliminary hearing and afforded both parties the opportunity to present arguments in support of their respective positions. The district court declined to find an evidentiary hearing was warranted to resolve Allen's claims and denied his motion. In support of its conclusion, the district court explained that even if it were assumed that trial counsel's performance fell short of an objective standard of reasonableness, Allen failed to carry his burden to demonstrate that he suffered prejudice as a result. That is, if the proposed evidence had been introduced, Allen could not show it would have persuaded the jury to accept his theory of involuntary intoxication and return a verdict of not guilty.

Allen now brings his case to our court and requests that we analyze the district court's denial of his K.S.A. 60-1507 motion.

LEGAL ANALYSIS

Allen argues for the first time on appeal that his trial counsel rendered deficient representation when he neglected to file a timely notice of a mental disease or defect defense as required under K.S.A. 22-3219, which then deprived Allen of the opportunity to introduce any evidence bearing on that issue. The State responds that Allen failed to properly preserve this issue for appeal by first litigating it before the district court, and that he otherwise fails to demonstrate how the absence of that evidence was prejudicial.

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, 577-78, 465 P.3d 176 (2020).

The standard of review depends upon which of these options the district court used. *Adams*, 311 Kan. at 578. Here, the district court exercised the second option. If the district court holds a preliminary hearing after the appointment of counsel, the reviewing court must give deference to any factual findings made by the district court and apply a finding of fact and conclusions of law standard of review to determine whether the findings are supported by substantial competent evidence and whether those findings are sufficient to support its conclusions of law. *Bellamy v. State*, 285 Kan. 346, 354, 172 P.3d 10 (2007). But appellate courts exercise unlimited review over the district court's

conclusions of law and its decision whether to grant or deny a K.S.A. 60-1507 motion. *Adams*, 311 Kan. at 578.

Claims of ineffective assistance of counsel are analyzed under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (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 of that test, a defendant bears the burden to show that defense counsel's performance was deficient or fell below an objective standard of reasonableness. If that step is satisfied, the district court moves to the second prong and determines whether there is a reasonable probability that, absent defense counsel's unprofessional errors, the result of the proceeding at issue would have been different. *Khalil-Alsalaami v. State*, 313 Kan. 472, 485, 486 P.3d 1216 (2021).

Allen raised multiple claims of ineffective assistance of counsel in his K.S.A. 60-1507 motion. Those issues are not part of the appeal he brings to our court. Accordingly, each of those claims is properly considered abandoned. *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021) (issues not briefed by an appellant are considered waived or abandoned).

Allen concedes, and the State agrees that his current claim that counsel provided subpar representation by failing to pursue a defense based on mental disease or defect was not included among those claims and, therefore, was not presented to the district court for consideration. Our review of the record confirms there was no mention of or reference to the manner in which trial counsel did or did not pursue a mental disease or defect claim. This includes the supplemental memorandum submitted by counsel appointed to represent Allen in this matter before the district court. Although that document makes multiple references to Allen's "state of mind," "competency," and "mental capacity" when discussing trial counsel's alleged failure to subpoena medical records, we find it is without question that counsel intended to communicate that such

evidence would have been beneficial to the involuntary intoxication defense and whether Allen possessed the requisite mental culpability to commit the crime.

Generally, issues and legal theories not raised before the district court cannot be raised on appeal. See *State v. Green*, 315 Kan. 178, 182, 505 P.3d 377 (2022). There are several exceptions to this general rule, including the following: (1) the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights; and (3) the district court was right for the wrong reason. *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021).

Allen asserts that we can address his claim for the first time on appeal under the first two exceptions. He believes the record on appeal, standing alone, leaves us adequately positioned to resolve not only whether his trial counsel's failure to pursue a mental disease or defect defense was constitutionally deficient under the facts of his case but also that it was prejudicial. Allen contends that because K.S.A. 22-3219 requires a defendant to provide notice of their intent to raise a mental disease or defect defense within 30 days of arraignment, then consideration of trial counsel's failure to follow the statute is a purely legal question and requires no further factual development. Additionally, Allen argues the panel must reach his claim to prevent the denial of his right to a fair trial and to present a meaningful defense.

Typically, appellate courts will not consider an allegation of ineffective assistance of counsel for the first time on appeal. *State v. Salary*, 309 Kan. 479, 483, 437 P.3d 953 (2019). Several reasons exist for this rule, including situations where trial counsel no longer represents the defendant on appeal, and thus, there is "no chance to develop facts and present evidence in support of or in derogation of the quality of the trial representation will have been afforded to counsel or to the defendant." *Rowland v. State*, 289 Kan. 1076, 1084, 219 P.3d 1212 (2009). Additionally, "the district court judge who

presided over the proceedings below, who usually is in the best position to judge the merits of many such claims, will not have had a chance to consider and rule upon the issue." 289 Kan. at 1084. As a result, the factual aspects of ineffective assistance of counsel claims generally require that the matter be resolved by the district court because it "is best equipped to deal with the analysis required for such claims because it observed counsel's performance and competence first-hand and can apply that knowledge to the facts." *State v. Levy*, 292 Kan. 379, 388-89, 253 P.3d 341 (2011) (citing *Rowland*, 289 Kan. at 1084).

We acknowledge there are those rare instances when reviewing courts have considered the issue for the first time on appeal. But we note those situations arise when there are no factual issues to resolve, and the two-prong ineffective assistance of counsel test can be readily applied as a matter of law based on the appellate record. See *Salary*, 309 Kan. at 483-84. That is not this case. Despite Allen's assertion to the contrary, his claim is too factually intensive to fit within this very narrow exception. He asks us to opine whether mental disease or defect was a valid defense his trial counsel should have pursued. But there has been no opportunity on the record to develop evidence that illumines the question of whether such a defense was even viable. Nor is there anything in the record to indicate whether the absence of a K.S.A. 22-3219 notice was the product of counsel's trial strategy or if it truly was a matter of carelessness and disregard as Allen contends. Allen's suggestion that the failure to file K.S.A. 22-3219 notice can be resolved as a matter of law turns a blind eye to the various factual nuances that must be weighed and balanced to adequately resolve an ineffective assistance of counsel claim. Thus, we decline to delve into the merits of the issue.

K.S.A. 60-1507 motions are also governed by a precise set of rules which, in and of themselves, further counsel against consideration of this claim for the first time on appeal. The plain language of K.S.A. 60-1507 and that of its corresponding rule, Supreme Court Rule 183 (2023 Kan. S. Ct. R. at 242), make clear that the proper forum in which

to initiate such claims is the district court. That is, when a movant wishes to challenge the lawfulness or constitutionality of his or her sentence through this avenue such complaints must be filed in the district court, on a form which substantially complies with that specifically drafted by the judicial council for 60-1507 purposes, and it is the district court which then bears the responsibility of presiding over any subsequent hearing deemed necessary to resolve the movant's claims. K.S.A. 60-1507(a); Rule 183(e) (2023 Kan. S. Ct. R. at 243). Thus, in raising this issue for the first time before our court, Allen essentially attempts to sidestep the fundamental rules by which other potential K.S.A. 60-1507 litigants are bound.

Of greater concern, however, is that if we allow Allen to raise his claim for the first time on appeal, then we are also enabling him to circumvent those limitations the Legislature has placed upon the filing of successive K.S.A. 60-1507 motions and how those limitations have been interpreted by Kansas courts. Specifically, K.S.A. 60-1507(c) addresses this issue and directs that "[t]he sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." As such, a movant is presumed to have listed all grounds for relief in his or her initial K.S.A. 60-1507 motion. *State v. Mitchell*, 315 Kan. 156, 160, 505 P.3d 739 (2022).

Supreme Court Rule 183(d) likewise addresses restrictions on successive motions:

> "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).

In *Nguyen v. State*, 309 Kan. 96, 431 P.3d 862 (2018), our Supreme Court discussed the interplay between K.S.A. 60-1507(c) and Rule 183(d) and explained that

when read in tandem, the two authorities intended to communicate that the district court must at least read the motion and consider the merits before dismissing it as successive. In so doing, the question of whether justice will be served by contemplating the merits of the claim must be part of the equation when analyzing the exceptional nature of the circumstances. 309 Kan. at 111.

This limitation is not without exception. Rather, caselaw spanning more than three decades makes clear that successive motions may be reviewed, and potentially avoid dismissal as an abuse of remedy, where the sentencing infirmity complained of affects the movant's constitutional rights and there are *exceptional circumstances* which justify affording the motion a measure of consideration. See *Drennan v. State*, 315 Kan. 228, 230, 506 P.3d 277 (2022); *Dunlap v. State*, 221 Kan. 268, 270, 559 P.2d 788 (1977). "Exceptional circumstances are unusual events or intervening changes in the law that prevented the defendant from raising the issue in a preceding [K.S.A.] 60-1507 motion." *Mitchell*, 284 Kan. 374, Syl. ¶ 5. But it is the movant's burden to establish that such circumstances exist in order to avoid dismissal through this procedural bar. See *Wimbley v. State*, 292 Kan. 796, 805, 275 P.3d 35 (2011). For all intents and purposes, by raising this issue for the first time on appeal, Allen is essentially raising a second K.S.A. 60-1507 motion for ineffective assistance of counsel, and review of his claim would allow him to bypass the procedural hurdle litigants filing successive motions would otherwise be required to clear. Any review given to his claim would run afoul of the purpose and reasoning behind these rules.

Finally, a problem arises with the timing of Allen's new claim. K.S.A. 2023 Supp. 60-1507(f) requires defendants to file their motion within one year of that date on which their conviction became final. This one-year time limitation may be extended by the district court but only upon the defendant's ability to demonstrate that manifest injustice will result if their untimely motion is not considered. K.S.A. 2023 Supp. 60-1507(f)(2). "'A defendant who files a motion under K.S.A. 60-1507 outside the 1-year time limitation

in K.S.A. 60-1507(f) and fails to assert manifest injustice is procedurally barred from maintaining the action.'" *State v. Roberts*, 310 Kan. 5, 13, 444 P.3d 982 (2019) (quoting *State v. Trotter*, 296 Kan. 898, Syl. ¶ 3, 295 P.3d 1039 [2013]). Because Allen's new ineffective assistance of counsel claim is essentially a new action under K.S.A. 60-1507, he must raise this claim within one year from his conviction date. Allen was convicted in July 2017 and did not raise this claim until filing his appellate brief in August 2023. There is no authority that allows us to bypass this rule.

Allen's claim that his trial counsel provided deficient representation in failing to pursue a mental disease or defect defense was not preserved and is not properly before this court for review. Accordingly, we uphold the district court's denial of his K.S.A. 60-1507 motion.

Affirmed.