

IN THE SUPREME COURT OF THE STATE OF KANSAS

ORDER

The petitions for review filed in the following cases are denied. Any responses and replies are noted.

No. 114,224, *State of Kansas v. Filip Chase Joseph Rosario*  
No. 115,711, *James Rowell v. State of Kansas*  
No. 115,762, *Scott Anderson, et al. v. Drill Baby Drill, LLC*  
No. 115,813, *State of Kansas v. Danny D. Tran*  
No. 115,938, *Daniel V. Estrada v. State of Kansas*  
No. 116,018, *Alejandro Garcia-Gomez v. State of Kansas*  
No. 116,135, *State of Kansas v. Jeremy Michael Spaur*  
No. 116,226, *State of Kansas v. Casey L. Becker*  
No. 116,240, *State of Kansas v. Brent L. Jones*  
No. 116,275, *State of Kansas v. Nicholas Alonzo Moore*  
No. 116,301, *Jeffrey R. Pendleton v. State of Kansas*  
No. 116,425, *Matthew Jaeger v. State of Kansas*  
No. 116,614, *State of Kansas v. Bradley S. Stanley*

  
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AUG 30 2018

APPELLATE DEFENDER OFFICE

BY ORDER OF THE COURT this 30th day of August 2018.

/s/ Lawton R. Nuss

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LAWTON R. NUSS, Chief Justice

## State v. Tran

Court of Appeals of Kansas

July 28, 2017, Opinion Filed

No. 115,813

### **Reporter**

2017 Kan. App. Unpub. LEXIS 626 \*; 399 P.3d 290; 2017 WL 3202966

STATE OF KANSAS, Appellee, v. DANNY D. TRAN,  
Appellant.

### MEMORANDUM OPINION

**Notice:** NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR  
CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC  
REPORTER.

**Prior History:** [\*1] Appeal from Sedgwick District Court; JEFFREY E. GOERING, judge.

*State v. Tran*, 259 P.3d 749, 2011 Kan. App. Unpub. LEXIS 748 (Kan. Ct. App., Sept. 16, 2011)

**Disposition:** Affirmed.

## Core Terms

district court, manifest injustice, evidentiary hearing, codefendants, ineffective, confession, interrogation, district judge, factors, suppressed, ineffective assistance of counsel, preliminary hearing, motion to suppress, guilty plea, credibility, parties, movant, suppression issue, insisted, sentence, merits, substantial issue, totality of the circumstances, plea negotiation, home invasion, innocence, probation, withdraw, reasons, emails

**Counsel:** Carol Longenecker Schmidt, of Kansas Appellate Defender Office, for appellant.

Lance J. Gillett, assistant district attorney, Marc Bennett, district attorney, and Derek Schmidt, attorney general, for appellee.

**Judges:** Before ARNOLD-BURGER, C.J., STANDRIDGE and SCHROEDER, JJ.

## Opinion

*Per Curiam:* In order for a movant to withdraw a guilty plea based on ineffective assistance of counsel, the movant must show that trial counsel's performance fell below the standard of reasonableness and, but for counsel's errors, the movant would have insisted on going to trial. *State v. Kelly*, 298 Kan. 965, 969-70, 318 P.3d 987 (2014). Danny D. Tran was sentenced to 228 months in prison, but was granted probation for a term of 36 months. After his probation was revoked, Tran filed a motion to withdraw his guilty pleas. Tran alleged that his trial counsel was ineffective for failing to advise him that his confession was suppressible. The district court denied Tran's motion. Substantial competent evidence supports the district court's dual findings that Tran's trial counsel was not ineffective and that Tran would have pled guilty even if he was aware of the suppression issue.

### FACTUAL AND PROCEDURAL [\*2] HISTORY

#### *Facts of the Case Underlying Tran's Motion to Withdraw Plea Based on Ineffective Assistance of Counsel*

In 2009, Tran pled guilty to aggravated robbery, kidnapping, aggravated burglary, and two counts of aggravated battery. He was 17 years old at the time of the events leading to his convictions, but was prosecuted as an adult. The factual basis for Tran's guilty plea was summarized by a panel of this court in *State v. Tran*, 338 P.3d 23, 2014 WL 6676105 (Kan. App. 2014) (unpublished opinion).

"Tran accompanied the other participants of the crimes into an occupied home in Sedgwick County, Kansas. Tran stated, '[M]y main objective was to go get the bag and put stuff in it and leave.' The group took items from the home, including DVD, video games, and a television. This occurred while someone in the group was armed with a deadly weapon. During the burglary, Tran and others

forced one of the occupants to go from room to room and assist in collecting the property. During these events, the occupant was struck in the head with a handgun, causing him to bleed. When the group went outside the house one of the members shot at and struck a neighbor in the leg." 338 P.3d 23, 2014 WL 6676105, at \*1.

At sentencing, the State asked the district court to grant a departure sentence based on the [\*3] fact that Tran was the only juvenile involved in the crimes, he did not participate in the shooting, and because Tran "was essentially . . . the bag man, helped carry the property from the residence to the get-away vehicle." The district court sentenced Tran to 228 months in prison, but granted a dispositional departure to probation for a term of 36 months. In October 2010, about 1 year after sentencing, the court revoked Tran's probation and ordered him to serve the underlying sentence.

#### *Tran's First Trip to the Court of Appeals*

In March 2013, Tran filed a pro se motion to withdraw his guilty plea. He alleges that he did not knowingly plead guilty because his counsel was ineffective in failing to investigate and suppress his confession. Tran alleged that if he had known that his confession could be suppressed, he would have insisted on going to trial.

Tran gave the following version of the facts. After the home invasion, Tran and his codefendants were engaged in a high-speed car chase with law enforcement. The driver of the car stopped in a neighborhood and everyone tried to run away, but Tran was quickly arrested. An officer read Tran his *Miranda* rights. The police took him to City Hall [\*4] for questioning around 1:50 a.m., although Tran said he did not want to talk to anyone. Tran said that "[o]ver the next few hours, different officers would come to the door of the interrogation room and ask [him] if he was ready to talk yet and each time he would state 'No'." He also alleges that around 7 a.m. he asked to use the bathroom and an officer told him that he could only use the bathroom if he told the officer what happened. At that time, Tran confessed. Tran says he confessed because he was tired (he had been up since 7 a.m. the previous morning), he had to use the bathroom, and he felt he had no choice than to give a statement. Before the confession, officers again reviewed Tran's *Miranda* rights with him. Tran initialed each line of the *Miranda* form. Tran says that he then asked for an attorney and "[t]he officer just gave [him] a glare like it pissed him off"

and started the interrogation. When Tran was appointed counsel, he told his attorney about the interrogation. Tran alleges that his attorney told him that "there was no way to get it suppressed" and that he should "take a plea agreement if he wanted to out before he was an old man."

The district court held a brief preliminary [\*5] hearing on Tran's motion at which the parties presented their arguments. The court construed Tran's motion as seeking relief under both K.S.A. 2012 Supp. 22-3210 and K.S.A. 60-1507. Both statutes have 1-year time limitations, but each also has an exception to the limitation. Under K.S.A. 2012 Supp. 22-3210, a claimant must show excusable neglect; under K.S.A. 60-1507, the claimant must show manifest injustice. The district court held that Tran failed to show excusable neglect or manifest injustice. Tran appealed.

The Court of Appeals noted that manifest injustice should be determined by a totality of the circumstances. The court quoted Vontress v. State, 299 Kan. 607, 616, 325 P.3d 1114 (2014), for the following proposition:

"[C]ourts conducting a manifest injustice inquiry under K.S.A. 60-1507(f)(2) should consider a number of factors as a part of the totality of the circumstances analysis. This nonexhaustive list includes whether (1) the movant provides persuasive reasons or circumstances that prevented him or her from filing the 60-1507 motion within the 1-year time limitation; (2) the merits of the movant's claim raise substantial issues of law or fact deserving of the district court's consideration; and (3) the movant sets forth a colorable claim of actual innocence, i.e., factual, not legal, innocence." 338 P.3d 23, 2014 WL 6676105, at \*3.

The court then applied the Vontress [\*6] factors to Tran's motion. It held that Tran did not "demonstrate either a compelling reason preventing him from filing within the 1-year time limitation, or an actual innocence claim," but that his ineffective assistance of counsel claim may raise a substantial issue of law or fact. 338 P.3d 23, 2014 WL 6676105, at \*3. The court concluded that "[b]ecause Tran asserted a claim in his pro se motion that, if true, could establish ineffective assistance of counsel, the district court erred when it failed to take the issue into consideration under the totality of the circumstances in evaluating Tran's claim of manifest injustice." 338 P.3d 23, 2014 WL 6676105, at \*5. The Court of Appeals reversed and remanded the case to the district court for an evidentiary hearing. 338 P.3d 23,

2014 WL 6676105, at \*5.

### Scope of Remand

There was significant confusion over the scope of the district court's duties on remand. The district judge characterized the Court of Appeals decision as follows:

"When this issue first came before the Court, the Court made a finding that the motion filed by Mr. Tran was untimely and denied it on that basis. That went up to the appellate courts. The appellate courts then noted in the appellate opinion the Vontress factors. Basically summarizing said that, well, the district court analyzed [\*7] the first Vontress factor that it wasn't filed within a year and no reasons were stated as to why it couldn't have been filed in a year, but that the other two Vontress factors weren't considered, and there is no record for the appellate court to be able to consider the other two factors. So then there was a remand.

So I guess I was operating under the presumption that the scope of the remand is to determine whether the other two Vontress factors are met, such that manifest injustice can be demonstrated such that we then, I suppose, get to a timely filing and then off we go. So—I mean, am I wrong about that scope?"

Basically, the district court thought that the point of the evidentiary hearing was to determine whether manifest injustice existed. Then, if the court determined that manifest injustice existed, it would initiate another inquiry into whether Tran's claims are meritorious.

The State's attorneys agreed with the district court's explanation of the scope of the remand. Tran's attorney did not. He did not think that the district court had to make separate findings on the Vontress factors and on the K.S.A. 60-1507 motion. He equated a finding of manifest injustice to "a finding that we've met [\*8] our burden under the 1507 itself" because "we would basically be putting on the same evidence when we're trying to prove ineffective assistance of counsel." He thought that the Court of Appeals remanded the case for an evidentiary hearing on the Vontress factors because the record (which consisted of Tran's affidavit) was insufficient to determine whether the merits of Tran's claim raised substantial issues of law or fact. One of the State's attorney's replied that he thought "the Court of Appeals overstepped its bounds by remanding this for an evidentiary hearing." He did not "think that Vontress

requires an evidentiary hearing to review the second step." He thought the Court of Appeals should have remanded to the district court with instructions to apply the Vontress factors and that "forc[ing] an evidentiary hearing clouds this issue." The district court thought that Tran's argument regarding the scope of the remand was circular. The district judge stated, "[I]f I can't determine whether or not there's manifest injustice absent a trial of the defendant's claims, then the defendant gets a trial on his claims regardless of the time."

Despite the disagreement, the parties concluded that they had [\*9] to do what they believed the Court of Appeals told them to do, which was to conduct an evidentiary hearing. But it is important to note that this appeal is premised on the belief that the purpose of the evidentiary hearing was to determine whether manifest injustice existed to permit the court to consider the substance of Tran's motion.

### Evidentiary Hearing on Tran's Motion

Pursuant to the Court of Appeals' mandate, the district court conducted an evidentiary hearing. Tran recounted the facts of his arrest, interrogation, and confession as set out in his motion. Tran said that he told his trial counsel, Glen C. Robinson, about the interrogation. According to Tran, Robinson said "Did they threaten you or beat you? If not, then it was fine." This caused Tran to believe that there was no problem with the interrogation. Tran said that Robinson never discussed a possible motion to suppress with him. In fact, Tran had never heard of a motion to suppress until after his conviction. Tran said that if he had been aware of the possibility of suppressing his confession to the police he would have wanted to pursue a suppression motion and go to trial.

Tran acknowledged that he was arrested near the [\*10] vehicle that fled the scene of the home invasion. He was also aware that some of his codefendants had confessed and that the State was prosecuting at least one codefendant who had not confessed. As part of the plea offer, the State asked Tran to testify against his codefendants. But, Tran said that he did not think that the State would make similar offers to his other codefendants.

Robinson also testified at the evidentiary hearing. The juvenile court appointed Robinson to represent Tran on a motion for adult prosecution. Robinson could not recall many details of the Tran case. Robinson had marked Tran's files for archiving, but the files had instead been

destroyed. Robinson did not specifically remember reviewing the interrogation transcript or the incident report on Tran's case, but said that it was his habit and custom to review such things. When asked if he remembered discussing the suppression issue with Tran, Robinson answered, "Well, I guess I'd have to answer this way: I examined all the issues that I thought were important in the defense of Mr. Tran and we discussed them. And that's the best explanation I can give you." Robinson also remembered that Tran's primary objective [\*11] was to avoid prison. Robinson noted that even if he had secured a motion to suppress, the State still could have built a case against Tran without the confession.

The State's attorney gave Robinson some emails from July 2009 to refresh his recollection. Robinson then recalled that the plea negotiations were time sensitive because the State was engaging in plea negotiations with other codefendants. Robinson "believed that the other codefendants might be lining up to exonerate themselves by pointing the finger at Mr. Tran." He also recalled that he discussed the suppression issue with the State and his client. Robinson could not remember whether a transcript of the interrogation existed in August 7, 2009—the date on which Tran entered his plea. But, Robinson recalled listening to an audio recording of the interrogation.

At the conclusion of the evidentiary hearing, the district judge adjourned the proceedings for a couple of weeks. The judge took that time to review various exhibits introduced at the hearing. This included a transcript and audio recording of Tran's interrogation, transcripts of Tran's testimony at the preliminary hearings of his codefendants, a transcript of Tran's testimony [\*12] at the trial of another codefendant, and email correspondence between Robinson and the State. These exhibits were not made a part of the record on appeal.

Before ruling, the district judge reiterated his belief that the Court of Appeals remanded the case for the district court to consider all of the Vontress factors and to determine, under the totality of the circumstances, whether manifest injustice existed to permit Tran's untimely filing. The district judge then reviewed the three nonexclusive Vontress factors. The first Vontress factor did not support a finding of manifest injustice because Tran did not provide a persuasive reason for failure to timely file his motion. The third Vontress factor did not apply because Tran was not making a claim of actual innocence. Then the district judge addressed the

second Vontress factor—whether the merits of Tran's claim raised substantial issues of law and fact deserving of the district court's attention.

The district judge found significant issues with Tran's credibility and denied the motion on the basis that "manifest injustice has not been shown." The district judge provided a detailed analysis of his holding. He began by noting "that much [\*13] of what Mr. Tran sets forth in his affidavit, which was cited by the Court of Appeals as a reason to remand this back to the trial court for evidentiary hearing, is inconsistent with the record that was produced in his underlying case." Tran's allegations were also inconsistent with his testimony at the preliminary hearings of one of his codefendants and his testimony at the jury trial of another codefendant.

Tran testified at the trial of Alex Louis, one of his codefendants. At the trial, Louis' counsel impeached Tran's testimony by pointing out that Tran only agreed to testify after he was offered a deal by the State. The inference that defense counsel was trying to draw was that Tran would say "whatever it is he needs to say in order to get probation." The State rehabilitated Tran's credibility by pointing out that Tran's trial testimony was consistent with the statements made during his interrogation. Thus, "the circumstances under which those statements were given were important material issues in the Alex Louis case." At Louis' trial, Tran testified that he voluntarily agreed to talk to police after they told him he could potentially be charged with attempted murder. This is [\*14] inconsistent with Tran's allegation that he only confessed because the police wore him down and made him feel like he had no other choice but to confess.

The district judge also questioned Tran's credibility on the issue of whether he would have insisted on going to trial if he had known about the possibility of suppressing his confession. A preliminary hearing for one of his codefendants occurred only hours after Tran entered his guilty plea. At this preliminary hearing, Tran testified that he had read the police reports and was aware of what his codefendants had told the police about Tran's involvement in the home invasion. The judge also concurred with Robinson that, even if the confession had been suppressed, the State would still have a strong case. The evidence showed that Tran knew that the State had a strong case. So Tran's allegation that he would not have entered a guilty plea had he known about the potential for suppression was simply not believable.

Finally, the judge considered whether Robinson was ineffective for failing to pursue a suppression motion. The judge did not think that the interrogation provided "such a cut-and-dry case" that Robinson could predict how the district [\*15] court would have ruled. The judge noted that Tran invoked his right to silence, but 3 minutes later, Tran changed his mind and decided to talk when the police told him he could be charged with attempted murder. By reading the email communications between Robinson and the State, the judge was able to confirm that the plea offer was time sensitive as the State was engaging in the same negotiations with other codefendants. The judge concluded that Robinson was not ineffective for advising Tran that the plea offer was a good deal.

Based on his findings that Tran was not credible and that Robinson was not ineffective, the district court concluded by holding that "based on a totality of the circumstances, that manifest injustice has not been shown and that the motion should be denied."

Tran appealed.

#### ANALYSIS

The issues that the parties briefed for appeal relate to the K.S.A. 2016 Supp. 60-1507(f) manifest injustice standard. After the district court issued its opinion, the legislature amended K.S.A. 60-1507(f). L. 2016, ch. 58, sec. 2. The revised statute has essentially eliminated the second *Vontress* factor from the manifest injustice consideration. K.S.A. 2016 Supp. 60-1507(f)(2). Now, the manifest injustice inquiry is limited to determining why a movant failed to file [\*16] the motion within the 1-year limitation or whether the movant presents a claim of actual innocence. K.S.A. 2016 Supp. 60-1507(f)(2). Tran's basis for arguing the existence of manifest injustice was based on the second *Vontress* factor—whether the merits of his claim raise substantial issues of law or fact deserving of the district court's consideration. The State argues that K.S.A. 2016 Supp. 60-1507(f)(2) should be retroactively applied to dismiss Tran's motion. Alternatively the State argues that Tran failed to show manifest injustice under the second *Vontress* factor. Tran argues that K.S.A. 2016 Supp. 60-1507(f)(2) should not be applied retroactively and that the district court erred in its application of the *Vontress* factors.

We do not need to determine whether K.S.A. 2016 Supp. 60-1507(f)(2) applies retroactively. In Tran's first appeal, a panel of this court determined that his motion

did show manifest injustice warranting an exception to the 1-year time limit. The panel concluded that Tran showed manifest injustice because he "asserted a claim in his pro se motion that, if true, could establish ineffective assistance of counsel." *Tran*, 338 P.3d 23, 2014 WL 6676105, at \*5. Based on this finding, the Court of Appeals panel held that "the district court erred in denying Tran's request for an evidentiary hearing to determine whether his counsel [\*17] was ineffective." 338 P.3d 23, 2014 WL 6676105, at \*5. Thus, the manifest injustice inquiry was final at that point and the parties should not have attempted to relitigate it at the district court. The only purpose of the remand was to conduct an evidentiary hearing on the merits of Tran's ineffective assistance of counsel claim in his K.S.A. 60-1507 motion.

To be fair, the Court of Appeals' opinion was not a model of clarity. One portion of the opinion states: "[W]e are unable to determine based on the existing record whether Tran's ineffective assistance of counsel claim raises a substantial issue of law or fact." 338 P.3d 23, 2014 WL 6676105, at \*3. This could have caused the district judge and parties to believe that the record was insufficient to determine whether the second *Vontress* factor applied. However, right after that statement the court said: "As such, that claim must be remanded to the district court for an evidentiary hearing." *Tran*, 338 P.3d 23, 2014 WL 6676105, at \*3. This shows that the panel intended to remand Tran's claim of ineffective assistance of counsel for an evidentiary hearing, not Tran's claim that manifest injustice exists. Later in the opinion, the court states that because "the record is devoid of evidence on the issue [of ineffective assistance of counsel] other than Tran's own [\*18] affidavit, the record is insufficient to enable meaningful appellate review." 338 P.3d 23, 2014 WL 6676105, at \*5. This may have caused the parties to believe that the record was insufficient to show manifest injustice. But, it seems that the court was implying that it could not engage in meaningful appellate review of whether Tran's counsel was in fact ineffective, not that it could not engage in meaningful review of the manifest injustice claim. This is supported by the following sentence, which says: "As such, the district court erred in denying Tran's request for an evidentiary hearing to determine whether his counsel was ineffective." 338 P.3d 23, 2014 WL 6676105, at \*5. This should have put the parties on notice that the scope of the remand was an evidentiary hearing on Tran's substantive claim of ineffective assistance of counsel.

Despite the confusion over the purpose of the

evidentiary hearing, the district judge still made sufficient findings of fact and law regarding the merits of Tran's ineffective assistance of counsel claim to enable appellate review. In order to set aside his guilty plea, Tran had to show that Robinson's "performance fell below the standard of reasonableness and that there is a reasonable probability that, but for counsel's [\*19] errors, [Tran] would not have pled guilty and would have insisted on going to trial." State v. White, 289 Kan. 279, Syl. ¶ 4, 211 P.3d 805 (2009). The district judge made specific findings on whether Robinson's performance fell below the standard of reasonableness and whether Tran would have pled guilty but for the alleged errors. This court can review those findings to determine whether the district court's dismissal of Tran's motion was right for the wrong reasons. See State v. Prine, 297 Kan. 460, 481, 303 P.3d 662 (2013) (affirming district court as right for the wrong reasons).

While Tran's motion was labeled as a motion to withdraw a plea, it has been construed as a motion made under K.S.A. 60-1507. When a district court conducts an evidentiary hearing on a K.S.A. 60-1507 motion, this court employs a bifurcated standard of review. This court reviews the district court's findings of fact to determine whether they are supported by substantial competent evidence. Appellate review of the district court's ultimate conclusions of law is de novo. State v. Adams, 297 Kan. 665, 669, 304 P.3d 311 (2013).

The district court began its analysis by noting that Tran's credibility was questionable. This court can "not pass on the credibility of witnesses or reweigh conflicting evidence." Johnson v. State, 42 Kan. App. 2d 1057, 1067, 221 P.3d 1147 (2009). Furthermore, the district court's credibility determination was premised on inconsistencies between [\*20] Tran's motion and Tran's testimony at the preliminary hearings of two codefendants and the trial of another codefendant. The preliminary hearing and trial transcripts were not made a part of the record on appeal. An appellant "has the burden of furnishing a record which affirmatively shows that prejudicial error occurred in the trial court. In the absence of such a record, an appellate court presumes that the action of the trial court was proper." State v. Moncla, 262 Kan. 58, 68, 936 P.2d 727 (1997).

The district court held that Robinson was not ineffective for failing to pursue a motion to suppress Tran's confession. After examining the interrogation, the district judge concluded that it was not so "cut-and-dry" that Robinson would have been able to predict with certainty

whether a motion to suppress would have been granted. While Tran's motion alleged that he confessed because he felt like he had no other options, the judge found that Tran chose to confess after learning that he might be charged with attempted murder. Additionally, emails between Robinson and the State showed that the plea negotiations were time sensitive. Neither the emails nor the interrogation are part of the record on appeal, so this court must presume that the [\*21] district court's findings were proper. See Moncla, 262 Kan. at 68.

"Strategic choices based on a thorough investigation of the law and facts are virtually unchallengeable. Strategic choices based on less than a complete investigation are reasonable to the extent that reasonable professional judgment supports the limitation on the investigation." Flynn v. State, 281 Kan. 1154, 1157, 136 P.3d 909 (2006). Here, Robinson made a strategic choice. Even if Robinson did not make a full investigation into the suppression issue, reasonable professional judgment would support the limitation on his investigation because Robinson was working within the time constraints of the plea negotiations. Either Robinson could investigate and pursue a potentially unsuccessful motion to suppress or he could work out a very favorable plea agreement that would accomplish Tran's goal of avoiding prison. The uncertainty of successfully pursuing a motion to suppress coupled with the time-sensitive nature of the plea negotiations support the district court's conclusion that Robinson was not ineffective.

The district court also held that Tran would not have insisted on going to trial if he had known about the suppression issue. Tran's testimony at his codefendants' hearings revealed that, at [\*22] the time Tran entered his plea, Tran knew that the State had built a fairly strong case against him. Tran was arrested near the car that fled the scene of the home invasion. His codefendants had told the State about Tran's involvement in the home invasion. Again, the preliminary hearing and trial transcripts were not made a part of the record on appeal so this court must assume that the district court made proper findings. See Moncla, 262 Kan. at 68. A condition of Tran's plea agreement was that he would have to testify against his codefendants—it is reasonable to believe that the State was making a similar offer to others. This would have provided even more strength to the State's case. While Tran testified at the evidentiary hearing that he did not think that the State would ask his codefendants to testify against him, the district court found that Tran's credibility was questionable. In light of these facts, substantial competent evidence supported the district court's

holding that Tran would not have insisted on going to trial if he had been fully informed of the suppression issue before he took his plea.

After the district court made its findings on the merits of Tran's claim, the court held that Tran [\*23] failed to show manifest injustice. This was an unnecessary holding, as the manifest injustice issue had already been determined by the Court of Appeals. But, this court can affirm the district court's dismissal as right for the wrong reasons. As Tran's attorney noted at the evidentiary hearing, a finding that manifest injustice existed would be akin to a finding that Tran met his "burden under the 1507 itself" because the parties "would basically be putting on the same evidence when [they are] trying to prove ineffective assistance of counsel." The converse is also true. The district court found that manifest injustice did not exist because the evidence presented did not support a finding of ineffective assistance of counsel. Substantial competent evidence supports the district court's findings that Robinson was not ineffective and that Tran would not have insisted on going to trial if he had known about the suppression issue. Accordingly, we affirm the district court's decision to deny Tran's motion.

Affirmed.

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## State v. Tran

Court of Appeals of Kansas

November 21, 2014, Opinion Filed

No. 110,475

### **Reporter**

2014 Kan. App. Unpub. LEXIS 973 \*; 338 P.3d 23; 2014 WL 6676105

STATE OF KANSAS, Appellee, v. DANNY D. TRAN,  
Appellant.

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**Prior History:** [\*1] Appeal from Sedgwick District  
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*State v. Tran, 259 P.3d 749, 2011 Kan. App. Unpub.  
LEXIS 748 (Kan. Ct. App., Sept. 16, 2011)*

**Disposition:** Reversed and remanded.

## **Core Terms**

district court, manifest injustice, confession, ineffective, sentence, substantial issue, time limit, circumstances, aggravated, probation, assistance of counsel, preliminary hearing, untimely filing, questioning, suppressed, alleges, movant, talk

**Counsel:** Richard Ney, of Ney, Adams, of Wichita, for appellant.

Matt J. Maloney, assistant district attorney, Marc Bennett, district attorney, and Derek Schmidt, attorney general, for appellee.

**Judges:** Before GREEN, P.J., STEGALL, J., and HEBERT, S.J.

## **Opinion**

### **MEMORANDUM OPINION**

**Per Curiam:** Danny Tran pled guilty to aggravated robbery, kidnapping, two counts of aggravated battery, and aggravated burglary. At the plea hearing, the district

court questioned Tran directly to obtain the underlying facts in support of his plea. Tran accompanied the other participants of the crimes into an occupied home in Sedgwick County, Kansas. Tran stated, "[M]y main objective was to go get the bag and put stuff in it and leave." The group took items from the home, including DVD, video games, and a television. This occurred while someone in the group was armed with a deadly weapon. During the burglary, Tran and others forced one of the occupants to go from room to room and assist in collecting the property. During these events, the occupant was struck in the head with a handgun, causing him to bleed. When the group went outside the house one of the members [\*2] shot at and struck a neighbor in the leg. The district court found Tran guilty of aggravated robbery, kidnapping, two counts of aggravated battery, and aggravated burglary.

Pursuant to the plea agreement, the State requested that the court grant Tran a dispositional departure from his potentially lengthy sentence to probation. The State relied on Tran's young age of 17, his role in the crimes as the "bag man" rather than the shooter, and his criminal history, which would have required that he "serve a great deal more time than any of the other people involved in this incident." Tran also agreed to testify truthfully in the hearings of the others involved in the crimes. The district court sentenced Tran to 36 months of probation with an underlying 228 month sentence. The district court warned Tran, "This is one time and one time only for you to demonstrate you can be successful on probation." On October 7, 2010, the district court revoked Tran's probation after he stipulated to violating the conditions of his probation and ordered him to serve the remainder of his 228 month sentence. This court affirmed Tran's probation revocation. *State v. Tran, 259 P.3d 749, 2011 WL 4357858 (Kan. App. 2011) (unpublished opinion), rev. denied 293 Kan. 1113 (2012)*.

Following an unsuccessful [\*3] attempt to file a direct appeal of his sentence out of time, Tran filed a motion to withdraw his plea based upon ineffective assistance of counsel. Tran argued that his counsel was ineffective for

telling him prior to the plea agreement that there was no possibility his confession to the police could be suppressed. Tran supplemented this motion with an argument that his failure to file within the 1-year time limit generally granted for motions to withdraw a guilty plea was excusable neglect and, alternatively, he requested that the district court construe his motion as a K.S.A. 60-1507 motion filed outside the 1-year time limit applying the manifest injustice standard.

The district court granted a preliminary hearing for the parties to make legal arguments. Following the preliminary hearing, the district court held that Tran had failed to show any reason for the untimely filing and denied his motion. In the journal entry of denial, the district court noted that no exceptions excused the untimely filing under either the excusable neglect or manifest injustice standards. Tran then filed this appeal.

On appeal, Tran argues the district court erred in denying his request for an evidentiary hearing for [\*4] failing to show that the 1-year time limit for a K.S.A. 60-1507 motion must be extended to prevent manifest injustice. To be entitled to K.S.A. 60-1507 relief:

"[T]he movant must establish by a preponderance of the evidence either: (1) 'the judgment was rendered without jurisdiction'; (2) 'the sentence imposed was not authorized by law or is otherwise open to collateral attack'; or (3) 'there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack.'" Labrum v. State, 322 P.3d 1028, 2014 WL 1707942 at \*3 (Kan. App. 2014) (unpublished opinion) (citing K.S.A. 60-1507(b); Supreme Court Rule 183(g) [2013 Kan. Ct. R. Annot. 278]).

In evaluating a defendant's K.S.A. 60-1507 motion the district court has three procedural options:

"(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 [\*5] hearing." Fischer v. State, 296 Kan. 808, 822-23, 295 P.3d

560 (2013).

The standard of review of the district court's actions depends upon which procedural steps the district court performed. Here, the district court granted a preliminary hearing to consider the case and decided the matter based on the record. In that situation, an appellate court utilizes a bifurcated standard of review, first looking at the lower court's factual determinations applying "a findings 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).

"Ultimately, the district court's legal conclusion regarding whether the [petitioner] has established that (1) 'the judgment was rendered without jurisdiction,' (2) 'the sentence imposed was not authorized by law or is otherwise open to collateral attack,' or (3) 'there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack' is reviewed as a conclusion of law using a de novo standard. [Citations omitted]." Bellamy, 285 Kan. at 354.

A K.S.A. 60-1507 motion may generally only be brought within 1 year of the final order of the [\*6] last appellate court to exercise jurisdiction. However, this time limit may be extended "to prevent manifest injustice." K.S.A. 60-1507(f)(2). Our Supreme Court has said that manifest injustice in the context of a habeas motion means "obviously unfair" or "shocking to the conscience." State v. Kelly, 291 Kan. 868, 873, 248 P.3d 1282 (2011) ([quoting Ludlow v. State, 37 Kan. App. 2d 676, 686, 157 P.3d 631 (2007)]). Our Supreme Court recently clarified that the manifest injustice analysis extends not only to the time-limit issue, but to the merits as well:

"Accordingly, courts conducting a manifest injustice inquiry under K.S.A. 60-1507(f)(2) should consider a number of factors as a part of the totality of the circumstances analysis. This nonexhaustive list includes whether (1) the movant provides persuasive reasons or circumstances that prevented him or her from filing the 60-1507 motion within the 1-year time limitation; (2) the merits of the movant's claim raise substantial issues of law or fact deserving of the district court's consideration; and (3) the movant sets forth a colorable claim of

actual innocence, *i.e.*, factual, not legal, innocence." Vontress v. State, 299 Kan. 607, 616, 325 P.3d 1114 (2014).

Tran alleges the existence of all three of the *Vontress* factors. Here, the district court denied Tran's motions based entirely on the untimely filing of the combined K.S.A. 60-1507 motion and the motion [\*7] to withdraw his plea. While the district court was correct that the circumstances of Tran's untimely filing failed to show a manifest injustice or excusable neglect, we must, pursuant to *Vontress*, look to substantive factors that may show a manifest injustice that were not part of the district court's analysis. While Tran's motion fails to demonstrate either a compelling reason preventing him from filing within the 1-year time limitation, or an actual innocence claim, we are unable to determine based on the existing record whether Tran's ineffective assistance of counsel claim raises a substantial issue of law or fact. As such, that claim must be remanded to the district court for an evidentiary hearing.

*Vontress* requires that courts consider a number of nonexclusive factors in a totality of the circumstances analysis, including whether "the merits of the movant's claim raise substantial issues of law or fact deserving of the district court's consideration." 299 Kan. at 616. Tran argued in his motion that manifest injustice exists, as he alleges that the police illegally obtained a confession and that his counsel was ineffective for failing to investigate that allegation and file a motion to suppress [\*8] his confession.

Tran attached an affidavit to his motion. In the affidavit, Tran stated that once arrested he was placed into a squad car and read his *Miranda* rights. Tran stated he told the police he had nothing to say and "just take me to JDF." Tran said he did this because his attorney from a previous case told him "all [he] had to do was say [he did not] want to talk take me to JDF, and they had to." When Tran arrived at JDF, however, an officer told him they would take him to "City Hall," despite Tran repeating that he had nothing to say. Once taken to City Hall, at around 1:50 a.m., Tran was handcuffed to a table and an officer asked if he had changed his mind yet about talking. Tran stated that over the next few hours different officers would come to the door and ask if Tran was ready to talk yet and Tran would say no. During this time the officers did not bring Tran food or drink. Around 7 a.m. an officer came to the door and Tran said he needed to use the bathroom. The officer responded that he could use the bathroom if he told them what happened. Tran stated:

"That at that time, I felt as though they would leave me in the interrogation room indefinitely. I had been up since [\*9] 7:00 a.m on May 17, 2009. I was scared, wanted to talk to my mom, confused, intimidated by my surroundings, and needed to use the bathroom. So, even though I did not want to talk to him, I believed I had to, so I agreed."

The affidavit goes on to allege that the officer began going through a *Miranda* waiver with Tran, and "[w]hen he read that I have a right to have an attorney present during questioning, I clearly told the officer that, I want one." Tran stated that then "[t]he officer gave me a dirty look like I had just pissed him off. He then began asking me questions." It was only after the questioning that Tran was allowed to use the bathroom, Tran stated, "I had to go so bad, I was fidgeting, and could barely hold it." Tran then claims that he subsequently related these allegations to his attorney and asked if his confession could be thrown out. Tran's counsel allegedly "asked if they hit me or threatened me" and when Tran said they did not, he told Tran that the confession would not be thrown out. Tran stated that he would not have pled guilty had he known that his confession could be suppressed, but trial counsel convinced him he had to plea.

To show ineffective assistance of counsel, a [\*10] party must show that (1) counsel's performance was so constitutionally deficient that it was less than that guaranteed by the *Sixth Amendment*, to the *United States Constitution*, and (2) the deficient performance prejudiced the defense. State v. Cheatham, 296 Kan. 417, 431, 292 P.3d 318 (2013). In the context of a plea agreement, to show prejudice a defendant must show that but for counsel's errors, the "defendant would not have entered a plea but would have insisted on going to trial." State v. Morris, 298 Kan. 1091, 1103-04, 319 P.3d 539 (2014).

Tran argues that the police officers did not scrupulously honor his rights to remain silent and that he was unable to overcome the coercive pressures of the custodial setting. "[A] juvenile's confession requires courts to use the 'greatest care' in assessing the validity of the confession" State v. Robinson, 261 Kan. 865, 888, 934 P.2d 38 (1997). "[T]he admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'" Michigan v. Mosley, 423 U.S. 96, 104, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975). Further, if a suspect requests counsel at any time during the interview, the interview

must cease until a lawyer has been made available to the suspect or he or she reinitiates the conversation. Davis v. United States, 512 U.S. 452, 458, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994); see also State v. Walker, 276 Kan. 939, 945, 80 P.3d 1132 (2003) (recognizing *Davis v. United States*).

Here, Tran alleges facts which, if true, would establish numerous violations of his [\*11] rights. If Tran's counsel was informed of these facts, as Tran claims, counsel would, at a minimum have a duty to investigate those claims further and pursue suppression. Certainly advising Tran that such facts, if true, would not be sufficient to have the confession suppressed would amount to ineffective assistance of counsel. If Tran's allegations are true, it is likely that but for the deficient performance of counsel Tran would have gone to trial rather than accept a plea agreement.

Because Tran asserted a claim in his pro se motion that, if true, could establish ineffective assistance of counsel, the district court erred when it failed to take the issue into consideration under the totality of the circumstances in evaluating Tran's claim of manifest injustice. As the record is devoid of evidence on the issue other than Tran's own affidavit, the record is insufficient to enable meaningful appellate review. As such, the district court erred in denying Tran's request for an evidentiary hearing to determine whether his counsel was ineffective.

Because the manifest injustice analysis for untimely filing of a K.S.A. 60-1507 motion requires the district court to consider the totality of the circumstances, [\*12] and because Tran's claims, if true, raise substantial issues of law or fact deserving of the district court's consideration, we reverse the decision of the district court denying Tran's motion and remand the matter to the district court for an evidentiary hearing.

Reversed and remanded.