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IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK, COUNTY, KANSAS
CIVIL DEPARTMENT

KEVIN D. LOGGINS, SR., Movant/Petitioner,	)	
v.	)	Case No. 04 CV 2780
STATE OF KANSAS, Respondent.	)	

ORDER DENYING RELIEF PURSUANT TO K.S.A. 60-1507

NOW ON THIS 29th day of April, 2005, the motion pursuant to K.S.A. 60-1507 filed herein on July 1, 2004 and the motions to amend filed herein on August 2, 2004, October 28, 2004 and December 8, 2004, come on for evidentiary hearing pursuant to this court's Order filed on February 8, 2005. The respondent is represented by its attorney, Kristi L. Barton, Assistant District Attorney of the 18th Judicial District. The movant appears personally and is represented by his attorney, Mark Orr.

Upon hearing evidence in the matter and reviewing the motion, files and record, this court denies relief based on the evidence at the evidentiary and, in addition thereto, adopts as its own the State's Response to Movant's K.S.A. 60-1507

Motion as set forth below.

1. In Sedgwick County case number 95 CR 1859, a jury convicted the movant of two counts of aggravated kidnapping, two counts of aggravated robbery and one count each of aggravated burglary, aggravated sexual battery and criminal possession of a firearm.

   After a bench trial, the movant was convicted of aggravated robbery and criminal possession of a firearm in Sedgwick County case number 95 CR 1616. The cases were consolidated for sentencing, and the movant was sentenced to 463 months imprisonment in 95 CR 1859, to be served consecutive to his 215 months imprisonment sentence in 95 CR 1859.

2. The movant appealed and his conviction for aggravated kidnapping of Felix Green (95 CR 1859) was reversed and the remaining convictions were affirmed by our Court of Appeals in State v. Loggins, Unpublished Opinion No. 77,106 & 77, 1007 (May 8, 1998).

3. In April 2002, the movant filed a motion to correct illegal sentence. In relevant part, the movant argued his sentence was illegal because the trial court allowed the State to object to his criminal history score at sentencing. The movant's contention was rejected. See State v. Loggins, Unpublished Opinion No. 91,171 (May 15, 2004).

4. In a 1507 motion, the burden is on the movant to allege facts sufficient to warrant an evidentiary hearing to examine the claims. Mere conclusions, for which no evidentiary basis is provided or appears in the record, are not sufficient as a basis for relief of any kind. See State v. Jackson, 255 Kan. 455, 463, 874 P.2d 1138 (1994). "[T]he mere conclusory contention that a petitioner is entitled to relief, for which no factual basis appears in the record, is not sufficient to require an evidentiary hearing for post conviction relief." State v. Sullivan, 222 Kan. 222, 223-24, 564 P.2d 455 (1977).

5. Under Kansas law, where an appeal is taken from the sentence imposed and/or a conviction, the judgment of the reviewing court is res judicata as to all issues raised and those issues that could have been presented, but were not, are deemed waived. See State v. Neer, 247 Kan. 137, 795 P.2d 362 (1990).

6. Supreme Court Rule 183(c)(3) states, "[A] proceeding under K.S.A. 60-1507 cannot ordinarily be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal." In Bruner v. State,

277 Kan. 603, 607, 88 P.3d 216 (2004), our Supreme Court repeated, "[m]ere trial errors must be corrected by direct appeal unless the petitioner raises trial errors affecting his or her constitutional rights and there were exceptional circumstances excusing the petitioner's failure to raise the issue in his or her direct appeal."

7. In his current motion pursuant to K.S.A. 60-1507 and subsequent motions to amend and add to his 1507 motion, the movant raises numerous challenges to his convictions in 95 CR 1859 and 95 CR 1616. The movant's claims do not entitle him to relief for the following reasons.

8. As to **95 CR 1859**:

A. The movant claims it was error for the trial court not "inquire" into a conflict of interest between the movant and trial counsel prior to "preliminary hearing."

The movant states, as a basis for his claim a conflict of interest existed, "attorneys total disregard to petitioner's opinion on the case." The movant does not, however, explain what the actual conflict was or how it adversely affected counsel's performance. As an unfounded claim, the movant's contention cannot provide him relief. See Jackson, 255 Kan. at 463.

In addition, the preliminary hearing transcript does not show the movant advised the court of a potential conflict of interest which would have triggered the court's duty to inquire. See State v. Taylor, 266 Kan. 967, 979, 975 P.2d 1196 (1999) (stating where a trial court becomes aware of a possible conflict of interest the court has a duty to inquire).

Moreover, trial counsel's testimony shows there was not a conflict of interest in this case. Trial counsel pursued the movant's alibi defense, hired an investigator to this effect, and presented the alibi defense evidence.

B. The movant claims the trial court abused its discretion at preliminary hearing when it added a charge of aggravated sexual battery.

Contrary to the movant's assertion, the record shows an

Information was filed by the prosecution on November 27, 1995, following preliminary hearing. The Information added a charge of aggravated sexual battery. Therefore, the movant's claim the charge was added by the trial court is refuted.

A review of the preliminary hearing testimony reveals probable cause existed to charge the movant with aggravated sexual battery. In particular, at preliminary hearing Jessica Green testified while she was in her car, after being forced into her car at gunpoint, one of the men with the movant touched her in a sexual manner. (Preliminary Hearing Transcript, 14-17.)

As the movant was convicted by a jury of aggravated sexual battery and fails to allege any prejudice occurred at trial as a result of what occurred at the preliminary hearing, his claim cannot provide him relief. State v. Henry, 263 Kan. 118, 129, 947 P.2d 1020 (1997).

C. **Prosecutorial misconduct occurred when the prosecutor asked Felix Green about the "Bloods" tattoo (intentionally violating the motion in limine) and during closing argument by referring to gang affiliation, calling the movant a liar, vouching for credibility and "ridiculing" the movant.**

The movant's claim as to Felix Green's testimony in violation of the motion in limine was decided adversely to the movant on direct appeal; therefore, it cannot provide him relief. See Neer, 247 Kan. at 137.

As to the movant's remaining claims of prosecutorial misconduct, the claims are properly characterized as mere trial errors. Matters which may properly be raised by a 1507 motion are not without limitation, and it has been repeatedly stated the proceedings pursuant to this provision cannot ordinarily be used for the purpose of reviewing trial errors which might have been reviewed in the original appeal. The movant fails to identify exceptional circumstances justifying review of these claims and the movant had full opportunity to raise any and all appropriate issues attacking his convictions and sentence in his direct appeal. See Bruner, 277 Kan. at 607.

D. Insufficient evidence as to all the convictions.

These issues also attempt to obtain review of trial errors. The movant had the opportunity to raise this issue in his direct appeal. As noted above, a 1507 proceeding is not designed to serve as a second appeal. See Bruner, 277 Kan. at 607. Moreover, questions of guilt or innocence are not justiciable in a 1507 proceeding. Davis v. State, 210 Kan. 709, 715, 504 P.2d 617 (1972).

Furthermore, our Court of Appeals already considered the sufficiency of the evidence to support the convictions for the aggravated sexual battery and the aggravated kidnapping of Jessica Green in the movant's direct appeal and decided those issues adversely to him; therefore, these issues cannot provide the movant relief. See Loggins, Slip Op. at 5-7; Neer, 247 Kan. at 137.

E. Failure to give an instruction on "compulsion" because there was evidence the movant was forced to commit the crimes (the movant cites a statement he made to this effect).

This claim also raises a trial error which the movant was required to raise within his direct appeal. He is not entitled to review of the issue as part of his 60-1507 proceeding. See Bruner, 277 Kan. 607.

G. Ineffective assistance of trial counsel because trial counsel was "illiterate" in criminal law, failed to contest the adding of a charge at preliminary hearing, failed to contest the prosecutorial misconduct stated above, failed to request a compulsion instruction and violated the attorney client privilege by speaking with a co-defendant's attorney.

To prevail on a claim of ineffective assistance, the movant has the burden to demonstrate counsel's representation fell below an objective standard of reasonableness and there was a reasonable probability the result of the proceeding would have been different had the error not occurred. See Strickland v. Washington, 466 U.S. 668, 687, 80 L.Ed. 2d 674, 104 S.Ct. 2052 (1984); Chamberlain v. State, 236 Kan. 650, Syl. ¶ 3, 694 P.2d 468 (1985).

The movant's bald assertion trial counsel was "illiterate" in

criminal law cannot provide him relief. See Jackson, 255 Kan. at 463.

Moreover, the movant assertion is contradicted by trial counsel's testimony that he was experienced in the practice of criminal law.

Furthermore, trial counsel testified there was no conflict because trial counsel pursued the case consistent with the movant's decisions.

For these reasons, the movant fails to show trial counsel's performance was unreasonable. See Chamberlain, 236 Kan. at Syl. ¶ 3.

The movant's argument counsel was ineffective for failing to challenge prosecutorial misconduct also fails.

Misconduct occurs when the prosecutor makes remarks which are outside the considerable latitude he is allowed in discussing the evidence and when statements are made which are gross and flagrant so as to prejudice the jury against the defendant. State v. Hooker, 271 Kan. 52, 67, 21 P.3d 964 (2001).

The movant's first claim of prosecutorial misconduct is that the prosecutor violated the motion in limine, which prohibited references to gang involvement, by eliciting testimony from state's witness, Felix Green, that on the night in question Green told his neighbors he was robbed by the man with "Blood" tattooed on his arm.

This statement was innocuous and does not establish a link between the movant and a gang. An objection from counsel was not warranted under the circumstances. Further, trial counsel's testimony supports this conclusion because trial counsel explained he did not believe the testimony violated the motion in limine and, in any event, would not have objected because he would not have wanted to draw added attention to the comment.

According to the movant, prosecutorial misconduct also occurred during closing arguments when the prosecutor referred to the defense as liars and vouched for the credibility of the victims. The movant's claim is derived from the following portion of the State's closing:

"It is too kind and generous to call this a mistaken

identification case. Mistaken identification, no. Somebody's lying, because the Greens know Loggins. They know him. The man was in the house. He was basically invited in the house and the crime then happens a few minutes later. This isn't a 30-second purse snatching where somebody was misidentified. Misidentification, no. Either you think the Greens are lying or the defense is lying. And that's what I mean when there's no gray area." (R. X, 34.)

The prosecutor's statement was a fair comment on the evidence. He simply advised the jury that the versions offered by the parties could not both be true - one or the other was not providing an accurate account. This was within the wide latitude the prosecutor is afforded in discussing the evidence. An objection from defense counsel was not required under these circumstances.

The movant also claims prosecutorial misconduct as it pertains to additional statements made during the State's rebuttal closing. The movant's claim is derived from the following:

> "Aren't crimes on videotapes just obvious, when people get beat on videotapes? Isn't it obvious that they're guilty? Isn't it obvious when there's blood and fibers and DNA evidence that they're guilty? We don't have any testimony from there about that, from that witness stand (indicating).
>
> And that's why I go back and tell you that I guess the lawyers are going to walk up in front of you and say about the fiber evidence, you don't know anything about it. And people who know so little about something, including attorneys, and they throw it out there. They're hoping that you'll latch onto that." (R. X, 64.)

The movant takes specific issue with the second paragraph and argues that the prosecutor ridiculed the attorneys when he made those statements. This claim does not entitle him to relief. The prosecutor was simply arguing that defense counsel's position was an attempt to distract the jury in the hope it would place undue weight on scientific issues on which the jury had not been fully educated.

The final claim of misconduct challenges the prosecutor's statements in rebuttal closing, "and they waited two days because they

knew Loggins; and Loggins said, I'll kill your kids; and Upchurch threatens, I'll kill your kids."

The testimony offered at trial by Felix Green was that when the movant stole jewelry from Sonya Ontiberos, the movant followed his demand with the threat "don't make me kill your baby." (R. XI, 86-87.) Accordingly, the prosecutor's statement was a fair comment on the evidence and did not necessitate an objection from defense counsel.

Where the issues raised by the movant fail to establish prosecutorial misconduct occurred, his claim for ineffective assistance of counsel also fails. Counsel's conduct did not fall below the objective standard of reasonableness in this capacity and there is no indication the outcome of the trial would have been different had the suggested objections been made. See Chamberlain, 236 Kan. at Syl. ¶ 3.

Compulsion is a theory which indicates a person is not guilty of a crime, other than murder or manslaughter, by reason of conduct which he performed under the compulsion of threat of imminent infliction of death or great bodily harm if he reasonably believes that death or great bodily harm will be inflicted upon him, his spouse, parent, child or sibling if he does not perform such conduct. See K.S.A. 21-3209

The statements made by Jessica Green are insufficient to demonstrate the defendant committed the crimes under the threat of death or great bodily harm to either himself or one of the other specified relatives. No other evidence was offered to support a compulsion instruction. Moreover, as testified to by trial counsel, the movant offered an alibi defense at the time of trial and throughout his petition, he refers to that defense as "indisputable." Moreover, as trial counsel testified, because the movant was pursuing an alibi defense a compulsion instruction would have been contrary to the movant's defense.

With respect to the movant's final claim of ineffective assistance of counsel for allegedly violating the attorney-client privilege, the claim is conclusory. The movant fails to specify what information counsel revealed or how he was prejudiced by the

disclosure. Conclusory contentions without evidentiary support do not establish ineffective assistance. See Jackson, 255 Kan. at 463.

Moreover, trial counsel testified he did not reveal any privileged information to co-defendant's counsel.

The movant also fails to establish prejudice with respect to the second claim as he was able to secure the necessary alibi witnesses to support his theory that he was at a different location when the crimes were committed.

H. Cumulative error.

As noted above, a 1507 petition is not the proper vehicle through which to obtain review of trial errors. The movant is not entitled to relief on this claim. See Bruner, 277 Kan. at 607.

I. Ineffective assistance of appellate counsel for failing to raise the aforementioned issues.

To establish ineffective assistance of appellate counsel the movant is required to show (1) counsel's performance, based upon the totality of the circumstances, was deficient in that it fell below an objective standard of reasonableness, and (2) the appellant was prejudiced to the extent that there is a reasonable probability that, but for counsel's deficient performance, the appeal would have been successful. State v. Smith, 278 Kan. 45, 52, 92 P.3d 1096 (2004).

As stated above, the movant's contentions do not entitle him to relief. The movant's attempt to raise the issues using the guise of ineffective assistance of appellate counsel cannot provide him relief. Moreover, on direct appeal appellate counsel was successful in having the movant's conviction of aggravated kidnapping of Felix Green reversed. See Loggins, Slip Op. at 4-5.

Therefore, the movant has failed to show appellate counsel's performance was deficient.

9. As to **95 CR 1616**:

A. **Ineffective assistance of trial counsel for failing to file pretrial motions, make an opening statement, investigate potential alibi witnesses and investigate or object to the judge because it was the same judge who presided over his jury trial.**

To prevail on a claim of ineffective assistance, the movant has the burden to demonstrate counsel's representation fell below an objective standard of reasonableness and there was a reasonable probability the result of the proceeding would have been different had the error not occurred. See Strickland v. Washington, 466 U.S. 668, 687, 80 L.Ed. 2d 674, 104 S.Ct. 2052 (1984); Chamberlain v. State, 236 Kan. 650, Syl. ¶ 3, 694 P.2d 468 (1985).

The movant's claim it was unreasonable for trial counsel not to make an opening statement is refuted by the record before this court. The record reflects counsel explained to the court he opted to waive opening statement because the evidence he intended to present was so short that the opening statement, when taken in conjunction with the evidence and closing arguments would be superfluous. (R. VI, 101.)

Moreover, trial counsel testified he did not make an opening statement because it was a bench trial.

The movant's contention trial counsel was ineffective in failing to interview potential alibi witnesses (Damien Jones, Travis Norwood, George Harvey, Gary Lowe and Kaleefa Straughter) also fails.

Damien Jones pled guilty to the crimes the movant was convicted of in 95 CR 1616 after the movant was convicted. Moreover, the record before this court shows Jones was charged with the same offenses as the movant and entered into a plea agreement.

During the jury trial, trial counsel presented an alibi defense. In fact, Elbert Costello testified the movant was with him, at home, at the time of the robberies. (Trial Transcript, 74-77.) In addition, the movant also testified he was with Elbert Costello at the time of the robberies. (Trial Transcript, 91-93.) In particular part, the movant testified he merely spoke with George Hervey, Travis Norwood and Kaleafa Straughter "in Lansing State Penitentiary." (Trial Transcript,

92.)

Under these circumstances, the movant's contention trial counsel "failed to interview" Jones, Norwood, Harvey, Lowe and Straughter fails.

Moreover, as trial counsel testified, the movant did not advise trial counsel of Jones, Norwood, Harvey, Lowe and Straughter or else trial counsel would have investigated. Therefore, as trial counsel was not advised of these people, it was reasonable for trial counsel not to present their testimony as evidence.

In addition, the movant's contention trial counsel was ineffective for failing to subpoena crucial phone records to show the movant was on the phone with friends at Lansing Correctional facility at his cousin Elbert Costello's the night the crimes occurred fails. Costello was called as an alibi witness to testify to the movant's whereabouts that evening. (R. VI, 73-89.) Contrary to the movant's assertion, the phone records would not have been useful to trial counsel, as trial counsel testified, because the records would not show the movant was on the phone.

The movant's argument trial counsel was ineffective for failing to object to the bench trial being conducted before the same judge who presided over the movant's jury trial fails. The movant fails to provide any indication the judge could not be impartial. Thus, the movant's conclusory contention cannot form the basis of an allegation of ineffective assistance of counsel. See Jackson, 255 Kan. at 463.

Moreover, as trial counsel testified, trial counsel had no reason to assume the court could not be impartial.

Similarly, the movant's claims as to waiver of his jury trial against his wishes fails. The record reflects the movant personally waived his right to a jury trial. (R. V, generally) Further, the movant specifically states in his petition that he agreed to waive his jury trial. (Movant's petition, 42.) Also as to waiver of his preliminary hearing, the movant fails to show any prejudice resulted from the waiver.
9.

In addition, the record before this court shows trial counsel was pursuing a plea agreement up to the day of trial. Then, when trial counsel discovered the movant did not want to take the plea

agreement, trial counsel moved for a continuance. (R. VI, 4-13.)

B. The trial court erred in failing to "inquire" into a conflict of interest between the movant and his attorney.

This issue constitutes a trial error which should have been raised in the movant's direct appeal. A 1507 proceeding is not designed to serve as a second appeal. The movant fails to articulate any exceptional circumstances which mandate review of this issue.

Moreover, the movant's claim is belied by the record in this case. Prior to commencement of the bench trial, the court afforded the movant the opportunity to express his dissatisfaction with his attorney and explain why alternate counsel was warranted. The court simply declined to grant the relief requested. (R. VI, 4-13.)

C. Due process violation because the case was not heard on the same day as 95 CR 1859.

This issue also raises a trial error which the movant was required to raise in his direct appeal in order to obtain review. An evidentiary hearing is not required to resolve this issue.

Nevertheless, a review of the record in this case reveals the trial in 95 CR 1616 was continued at the request of defense counsel. As trial counsel explained, 95 CR 1616 was continued because the movant was still interested in a plea agreement, and pursuing the same, up to the day of his bench trial.

D. Error to permit a State's witness to be present in courtroom during testimony from another State's witness.

Again, the movant attempts to obtain review of a trial error by virtue of a 1507 proceeding. He is not entitled to an evidentiary hearing on this issue where he had every opportunity to raise the claim in his direct appeal.

Further, as trial counsel testified, it was a bench trial; therefore, the trial court was aware of the circumstances and able to assess the circumstance accordingly.

E. Error to admit voice identification testimony because it was unreliable.

This issue suffers the same infirmity as the two preceding claims in that it raises a trial error that should have been raised as part of the movant's direct appeal. He has failed to set forth any exceptional circumstances which allow consideration of this claim and, as such, he is not entitled to an evidentiary hearing to resolve this issue.

Furthermore, the credibility, or reliability, of the voice identification was an issue for the jury to consider and trial counsel did cross-examine the credibility of the voice identification testimony. (Trial Transcript, 52-54.) In particular, trial counsel established the victim was "scared" at the time she testified she heard the movant's voice, thereby undermining the credibility of her voice identification testimony. (Trial Transcript, 54.)

F. Ineffective assistance of appellate counsel for failing to raise the aforementioned issues.

As stated above, the issues raised by the movant in his 1507 motion would not have been successful on appeal and his effort to guise the claims as ineffective assistance of appellate counsel cannot provide him relief. Moreover, as previously stated, on direct appeal one of the movant's convictions was reversed; therefore, appellate counsel's performance cannot be deemed deficient. See Loggins, Slip Op. at 5-7.

G. Insufficient evidence as to all convictions in 95 CR 1616.

The movant already challenged the sufficiency of the evidence through his direct appeal and that claim was decided adversely to him by the Kansas Court of Appeals. See State v. Loggins, Nos. 77,106 and 77,107, unpublished opinion filed May 8, 1998. Moreover, a 60-1507 petition is not to be used to afford a movant a second appeal from his underlying criminal case. Supreme Court Rule 183(c). Finally, as noted above, issues of guilt or innocence or not properly justiciable in a 1507 proceeding. Davis 210 Kan. at 715.

10. In a motion to amend his petition, filed on August 2, 2004, the movant argued that the State failed to disclose exculpatory evidence, the Judge should have recused herself given her personal experience with sexually oriented offenses and he was not treated as similarly situated defendants in the State of Kansas.

The movant argues the evidence, in 95 CR 1616, which the prosecution failed to relinquish was the large quantity of cocaine and cocaine base which was seized from David Upchurch's vehicle and that evidence would have been relevant to establish when the robbery occurred and to establish that one of the victims was associated with narcotics. This issue amounts to a trial error which should have been raised as part of his direct appeal. See Bruner, 277 Kan. at 607. Furthermore, where the movant repeatedly references the drugs throughout his petition and argues the witness who identified his voice did not do so until she was implicated in the possession of drugs, it indicates he was aware of this evidence at the time of trial.

With respect to the second issue, the movant argued the Judge who presided over his criminal case was a victim of a sexual offense at one time and, as such, she could not remain unbiased and was required to recuse herself from the case. The movant does not, however, identify any instances in his cases wherein the judge acted impartially. (Movant's Motion to Amend, 1-4.)

Upon reviewing this allegation and providing movant's counsel an opportunity to provide any relevant information for in camera review, this court find the movant's contention lacks merit.

Finally, the movant's contention he was not treated as similarly situated defendants fails. As a conclusory contention, the movant's argument lacks specificity. See Jackson, 255 Kan. at 463. Furthermore, the movant received a presumptive sentence, thereby refuting his claim his sentence was dissimilar in any regard.

In addition, the record before this court shows Jones entered into a plea agreement and, as to Upchurch, the trial court addressed the issue at the movant's sentencing and, in support thereof, determined the movant was more liable than Upchurch and Jones in the offenses as the movant knew all of the victims. Further, the record does not show Upchurch's convictions were reversed on federal appeal.

11. In a subsequent motion to amend his petition, filed on October 28, 2004, the movant reasserted several of the claims mentioned above and added the following:

A. He was erroneously ordered to register as a sex offender in 95 CR 1859 because he was convicted of aggravated sexual battery under an aiding and abetting theory .

At sentencing, the movant was ordered to register as a sex offender. (Sentencing Transcript, 34.) According to K.S.A. 22-4902(9), aggravated sexual battery is one of the offenses for which a convicted offender is required to register.

A person is "criminally responsible for a crime committed by another if such person intentionally aids, abets, advises, hires, counsels or procures the other to commit the crime." K.S.A. 21-3205(1). Thus, simply because the movant was convicted of aggravated sexual battery under and aiding and abetting theory does not relieve him of full, criminal responsibility for the offense.

In State v. Wilkinson, 269 Kan. 603, 613, 9 P.3d 1 (2000) our Supreme Court explained K.S.A. 22-4902 does not provide for "individualized assessment" in determining whether an offender convicted of one of the enumerated offenses is required to register. Furthermore, in State v. Snelling, 266 Kan. 986, Syl. ¶ 2, 975 P.2d 259 (1999), the court stated, "[t]rial courts are not allowed to pick and choose when and if the public access provisions of the Kansas Offender Registration Act are applied."

Drawing from Wilkinson and Snelling, application of the requirement to register as a sex offender after being convicted of aggravated sexual battery is not subject to a trial court's inquiry into the criminal conduct for which a defendant has been convicted. 266 Kan. at 613; 266 Kan. at Syl. ¶ 2. Therefore, the movant's contention fails.

B. Trial counsel was ineffective for failing to object to the prosecution's failure to arraign him on the aggravated sexual battery charge in 95 CR 1859, ineffective at sentencing for moving to "challenge and amend petitioner's criminal history as scored in the presentence investigation based on ex parte communication between prosecution and court," and trial counsel erred in failing to object to the aggravated burglary instruction and the prosecutor's "misleading of the jury as to the

jury instructions language on the agg sexual battery and agg kidnapping of alleged victim Ms. Green."

As stated above, the movant's contention the aggravated sexual battery charge was erroneously added at preliminary hearing fails; therefore, any claim of ineffective assistance of counsel predicated upon these events must also fail.

The movant's contention as to the challenge to his criminal history score at sentencing has been decided adversely to the movant when he appealed his motion to correct illegal sentence. See Loggins, Slip Op. at 4-5. Even guised as ineffective assistance of counsel, our Court of Appeals specifically rejected any complaint when it determined "[t]he trial court did not err in allowing the State to object to Loggins' criminal history score at sentencing." Slip Op. at 5.

Moreover, the evidence before this court shows trial counsel was advised of the criminal history contention prior to sentencing and, at sentencing, trial counsel argued against the application of the movant's criminal history score to each of the movant's cases.

Further, the movant's assertion he was not arraigned it belied by trial counsel's testimony the movant was arraigned the afternoon after the preliminary hearing. Nothing in the record refutes trial counsel's testimony.

The movant has failed to identify why the aggravated burglary jury instruction was defective or how the prosecutor misled the jury as to the jury instructions. Therefore, as the movant cannot provide these details, trial counsel cannot be faulted for failing to detect these alleged deficiencies and objecting. See Jackson, 255 Kan. at 463.

Moreover, as trial counsel testified the language "enter into or remain within" was supported by the evidence, it was reasonable for trial counsel not to object to this language.

12. In another motion to amend his petition, filed on December 8, 2004, the movant solely argued his aggravated sexual battery and aggravated kidnapping convictions are multiplicitous.

This claim cannot provide the movant relief. It a mere trial error not properly before this court in a 1507 proceeding. See Bruner, 277 Kan. at 607.

Furthermore, the movant's aggravated sexual battery and aggravated kidnapping convictions were not multiplicitous. In State v. Schuette, our Supreme Court most recently confronted the issue of multiplicity and stated:

> "'[m]ultiplicity is the charging of a single offense in several counts of a complaint or information. The primary concern with multiplicity is that it creates the potential for multiple punishments for a single offense. State v. Vontress, 266 Kan. 248, 255, 970 P.2d 42 (1998). Such multiple punishments are prohibited by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights. Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977); State v. Edwards, 250 Kan. 320, 329, 826 P.2d 1355 (1992). . . .
>
> "'The concept of multiplicity in Kansas comes from two sources. The first is the traditional 'common-law' multiplicity concept. This exists where the State attempts to use a single wrongful act as the basis for multiple charges and is based on the merger of the charges. State v. Garnes, 229 Kan. 368, 372, 624 P.2d 448 (1981). This concept has been a part of Kansas law since at least our decision in State v. Colgate, 31 Kan. 511, 515, 3 P. 346 (1884), wherein we stated: 'Upon general principles a single offense cannot be split into separate parts, and the supposed offender be prosecuted for each of such separate parts, although each part may itself constitute a separate offense.' The test for whether the offenses merge and are, therefore, multiplicitous is whether each offense charged requires proof of a fact not required in proving the other; if so, then the offenses do not merge and are not multiplicitous. Garnes, 229 Kan. at 373, 624 P.2d 448. Offenses also do not merge if they are committed separately and severally at different times and at different places. 229 Kan. at 373, 624 P.2d 448.'" quoting Garcia, 272 Kan. at 143-44."

In this case, two separate offenses occurred: aggravated sexual battery occurred when Jessica Green was touched in a sexual manner inside the car and aggravated kidnapping occurred when Jessica Green was forced, at gunpoint, to get inside the car. In relevant part, our Court of Appeals explained "Mrs. Green was moved, at gunpoint, from her house to her car in order to retrieve her wallet. While in her car, Mrs. Green was fondled

against her will, with the threat of physical force, in an intentional manner." Loggins, Slip Op. at 4.

> Moreover, as the movant's contention of merger of the aggravated battery with the aggravated kidnapping conviction, the movant's contention is premised on an assumption aggravated sexual battery was the only bodily harm to Jessica Green.
>
> Contrary to the movant's assumption, the record before this court shows the bodily harm element was not specified in the jury instruction and the evidence before the jury included Jessica Green was slapped and dragged by Upchurch.

10. If it appears that a new trial conducted without the mistake complained of would in all likelihood not result in acquittal, it cannot be said there was ineffective assistance of counsel. State v. Logan, 236 Kan. 79, 83, 689 P.2d 778 (1984).

A. The movant does not show he was prejudiced by counsel's performance. The evidence at trial showed the movant was identified by the all of the victims, prior to trial, at trial and the identifications were based on personal knowledge of the movant prior to crimes. Further, as to bench trial evidence, movant was arrested in short proximity to the time of the robbery, found with a gun matching the description of the gun used during the robbery and found with a red mask, matching the description of the red mask the victims said the movant wore during the robbery.

B. In addition, the sufficiency of the evidence to support all of the convictions was thoroughly examined on direct appeal and affirmed.

C. In light of this evidence and judicial review of this evidence, there is not a reasonable probability the jury would not have found the movant guilty.

11. For these reasons, the motions, files and records and evidence before this court show the movant is not entitled to the relief requested. Supreme Court Rule 183(f).

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED the motion pursuant to K.S.A. 60-1507 filed herein is denied.

IT IS SO ORDERED.

Paul W. Clark

THE HONORABLE PAUL W. CLARK
Judge of the District Court

SUBMITTED BY:

KRISTI L. BARTON, #20772
Assistant District Attorney

APPROVED BY:

MARK ORR, #12808
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CaselawPositiveLoggins v. State, 2007 Kan. App. Unpub. LEXIS 487

Court of Appeals of Kansas

July 20, 2007, Opinion Filed

No. 94,723

Reporter

2007 Kan. App. Unpub. LEXIS 487 *

KEVIN D. LOGGINS, SR., Appellant, v. STATE OF KANSAS, Appellee.

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

Subsequent History: Reported at Loggins v. State, 162 P.3d 65, 2007 Kan. App. LEXIS 722 (Kan. Ct. App., 2007)

Prior History: [*1] Appeal from Sedgwick District Court; PAUL W. CLARK, judge.

State v. Loggins, 278 Kan. 850, 2004 Kan. LEXIS 508 (2004)

Disposition: Affirmed.

Core Terms

district court, direct appeal, ineffective, appellate counsel, trial counsel, argues, trial court, aggravated, fail to raise, sexual battery, trial error, convictions, aggravated kidnapping, fails, prosecutorial misconduct, trial strategy, circumstances, witnesses, burglary, cases

Counsel: Michael P. Whalen, of the Law Office of Michael P. Whalen, of Wichita, for appellant, and Kevin D. Loggins, Sr., appellant Pro se.

Kristi L. Barton, assistant district attorney, Nola Tedesco Foulston, district attorney, and Phill Kline, attorney general, for appellee.

Judges: Before HILL, P.J., McANANY, J., and BRAZIL, S.J.

Opinion

MEMORANDUM OPINION

Per Curiam: Following his convictions at the trial of two cases, Kevin D. Loggins, Sr., pursued a direct appeal. This court reversed one conviction of aggravated kidnapping but affirmed his other aggravated kidnapping conviction, along with his convictions of aggravated robbery, aggravated burglary, aggravated sexual battery, and criminal possession of a firearm. State v. Loggins, Nos. 77,106 and

77,107, unpublished opinion filed May 8, 1998. We need not recount the facts which are adequately described in this court's prior opinion.

Loggins then moved to correct an illegal sentence which the district court summarily denied. He appealed that decision, and this court found that Loggins' sentence was legal and affirmed the district court's action. State v. Loggins, No. 90,171, unpublished opinion [*2] filed May 15, 2004. He then filed the instant motion pursuant to K.S.A. 60-1507 in which he asserted claims of ineffective assistance of trial and appellate counsel. The district court held an evidentiary hearing and denied relief. Loggins now appeals that ruling, raising a multitude of issues in the brief filed by his counsel and in his pro se "Supplement Brief." We will address the issues in the order presented.

1. Error by the Trial Court in Failing to Appoint New Trial Counsel

Loggins claims there was insufficient evidence to support the district court's finding following the K.S.A. 60-1507 hearing that there was no conflict between Loggins and his trial counsel. The underlying complaint is that the trial court erred by denying Loggins' request to discharge his trial counsel and appoint new counsel. Kansas Supreme Court Rule 183(c)(3) (2006 Kan. ct. R. Annot. 227) prohibits using K.S.A. 60-1507 proceedings as a substitute for a direct appeal from trial errors absent exceptional circumstances. Loggins fails to allege any exceptional circumstances that would justify allowing him to raise this issue in his 60-1507 motion. The issue is not whether there was a conflict between Loggins [* 3] and his counsel. The issue is whether the trial court committed some reversible error in its handling of any conflict that arose. This issue should have been raised on direct appeal, not in this 60-1507 motion.

2. Error by the Trial Court in Ordering the State to Add a Charge of Aggravated Sexual Battery

Loggins claims the district court hearing his 60-1507 motion erred in finding that the trial court did not err in ordering the prosecution to add a charge of aggravated sexual battery at his preliminary hearing. First, his underlying claim regarding the actions of the trial court should have been raised in his direct appeal, not in these 60-1507 proceedings. Second, the claim, in any event, lacks merit since Loggins went to trial, was convicted of this charge, and waived any claim of irregularity in the preliminary hearing by failing to object prior to trial. See Palmer v. State, 199 Kan. 73, 75, 427 P.2d 492 (1967).

3. Error by the District Court Hearing the 60-1507 Motion in Finding that Claims of Prosecutorial Misconduct were Improperly Raised

Loggins argues that his appellate counsel was ineffective for failing to raise the issue of prosecutorial misconduct in his direct appeal. He [*4] claims the issue would have been raised in his direct appeal but for his appellate counsel's deficient performance and, therefore, he should now be allowed to raise the issue in his 60-1507 motion. Did Loggins have viable prosecutorial misconduct claims which his appellate counsel should have raised on his direct appeal?

"To establish ineffective assistance of counsel on appeal, defendant must show '(1) counsel's performance, based upon the totality of the circumstances, was deficient in that it fell below an objective standard of reasonableness, and (2) the appellant was prejudiced to the extent that there is a reasonable probability that, but for counsel's deficient performance, the appeal would have been successful.' [Citation omitted.]" State v. Smith, 278 Kan. 45, 51-52, 92 P.3d 1096 (2004).

Our review of counsel's performance is highly deferential and predicated upon the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. In evaluating this claim we consider the totality of the evidence before the factfinder. Further, Loggins must show prejudice, i.e., a reasonable probability that there would have been an outcome more favorable [*5] to him but for counsel's unprofessional errors. See State v. Betts, 272 Kan. 369, 387-88, 33 P.3d 575 (2001).

The failure of Loggins' appellate counsel to raise an issue on appeal is not, per se, ineffective assistance of counsel. See Tomlin v. State, 35 Kan. App. 2d 398, 404, 130 P.3d 1229 (2006). Loggins has the burden to establish that his counsel's representation was ineffective. See State v. Davis, 277 Kan. 309, 314, 85 P.3d 1164 (2004). Mere conclusory statements do not satisfy this burden. State v. Jackson, 255 Kan. 455, 463, 874 P.2d 1138 (1994).

Loggins complains about the prosecutor raising the issue of gang affiliation. However, he provides no record cites to this conduct. He fails to meet the burden to furnish a record which affirmatively shows the claimed prejudicial error. See State v. Holmes, 278 Kan. 603, 612, 102 P.3d 406 (2004).

Next, he argues that prosecutorial misconduct occurred when the prosecutor made the following statements:

"And that's why I go back and tell you that I guess the lawyers are going to walk up in front of you and say about the fiber evidence, you don't know anything about it. And people who know so little about something, including attorneys, and [*6] they throw it out there. They're hoping that you'll latch on to that."

These comments were in response to the closing argument of Loggins' codefendant, David Upchurch. Upchurch argued that the State had not taken hair and fiber samples from the crime scene for analysis. The prosecutor's response was within the wide latitude allowed in discussing the evidence.

Next, Loggins claims the prosecutor acted improperly in saying in closing, "Somebody's lying." The prosecutor did not call any specific person a liar, but simply argued that this was not a case of mistaken identification because the victims knew Loggins; therefore, someone was lying. This comment was not outside the wide latitude that the prosecutor is allowed in discussing the evidence.

Next, Loggins complains about this statement in closing: "And Don Loggins - - by the way, the answer to my question was, got no reason to lie. Which really begs the next question, Don Loggins. Well, would you have a reason to lie, Mr. Loggins?" The prosecutor did not call the witness a liar, he simply questioned whether the witness had a reason to lie. This was not outside the wide latitude the prosecutor is allowed in discussing the evidence.

Loggins' [*7] appellate counsel was not ineffective for failing to raise on direct appeal these unfounded claims of prosecutorial misconduct. Thus, the district court was correct in rejecting these claims as a basis for relief.

4. Error by the District Court Hearing the 60-1507 Motion in Finding that Claims of Insufficient Evidence were Improperly Raised

In his direct appeal, Loggins challenged the sufficiency of the evidence supporting his convictions in two cases. He may not reassert those claims in this 60-1507 motion. See State v. Neer, 247 Kan. 137, 140-41,

795 P.2d 362 (1990). The district court did not err in finding these claims were improperly raised in his 60-1507 motion.

Loggins argues he should be permitted to raise these claims now since his ineffective appellate counsel either failed to raise them on his direct appeal or failed to adequately argue them. He fails to tell us which convictions appellate counsel failed to challenge or which arguments were deficient. An argument made in passing, with no argument or citation to authority, is waived. State v. Harned, 281 Kan. 1023, 1048, 135 P.3d 1169 (2006).

Finally, Loggins claims that the district court erred by failing to make sufficient [*8] findings of facts and conclusions of law on the merits of this claim. The district court found that this court had already considered Loggins' insufficient evidence arguments on direct appeal. Since Loggins has not told us what claims were not made or were inadequately argued on his direct appeal, we are unable to determine the matters he believes the district court should have addressed but failed to do so in its findings and conclusions.

The district court did not err in finding that Loggins' claims of insufficient evidence were improperly raised in his 60-1507 motion.

5. Error by the District Court Hearing the 60-1507 Motion in Finding that Claim of Error in the Jury Instructions was Improperly Raised

Loggins argued in his 60-1507 motion that the trial court should have given a jury instruction on compulsion. He claims he should have been allowed to raise this issue because his trial counsel was ineffective for failing to raise it on his direct appeal.

Loggins makes no argument in his brief as to why a compulsion instruction was warranted, nor does he provide any record cites or legal authority to support his position. Further, he fails to provide any support for his claim that his [*9] appellate counsel was ineffective for failing to raise this issue on direct appeal. Accordingly, this issue has been abandoned. See Harned, 281 Kan. at 1048.

Loggins again challenges the adequacy of the district court's findings of facts and conclusions of law on this issue. Whether the district court's findings and conclusions are adequate on this issue is now moot since Loggins has abandoned this issue on appeal.

6. Error by the District Court Hearing the 60-1507 Motion in Finding that Loggins' Trial Counsel was not Ineffective

The same standards discussed earlier regarding claims of ineffective appellate counsel apply here. In addition, Loggins bears the burden of establishing that his trial counsel's alleged deficiencies were not the result of trial strategy. See State v. Gleason, 277 Kan. 624, 644, 88 P.3d 218 (2004).

Citing his testimony at the hearing on his 60-1507 motion, Loggins first argues that his trial counsel was ineffective because he had never before tried a case of this seriousness and complexity and he failed to make appropriate motions or objections. Loggins' trial counsel had been practicing criminal law for 14 years before representing Loggins. Though he had not previously [*10] tried an aggravated kidnapping or kidnapping case, he had handled cases of aggravated robbery and other similar cases. We do not accept the notion that a lawyer's first client charged with a particular crime gets an automatic "Get out of

Jail Free" card based upon ineffective assistance of counsel. Loggins' other observations about his trial counsel's conduct are mere conclusions which do not satisfy his burden of proof.

Next, Loggins argues that trial counsel was ineffective for failing to object to a reference to Loggins' "Bloods" tattoo. However, his lawyer testified that he did not object because it was not clear the jury caught this brief reference to the tattoo and he did not want to highlight it. Loggins has not overcome the presumption that trial counsel's failure to object was the result of sound trial strategy. See Gleason, 277 Kan. at 644.

Next, Loggins argues that his trial counsel was ineffective for failing to object to statements made by the prosecutor during closing argument. We have addressed this issue earlier in connection with the claim of ineffective appellate counsel. This claim is without merit.

Next, Loggins raises in passing the argument that his lawyer should [*11] have objected to the prosecutor's violation of the order in limine regarding reference to Loggins' tattoo. Again, he fails to overcome the presumption that his lawyer's actions were the result of an appropriate trial strategy. Further, his lack of argument on this issue constitutes an abandonment of it. Harned, 281 Kan. at 1048.

Loggins next argues that his trial counsel should have requested a compulsion instruction at trial. However, Loggins' strategy at trial was that he had an alibi, and his lawyer made a strategic decision not to pursue a compulsion defense. While his lawyer could have asserted this inconsistent defense, Loggins fails to establish that choosing not to do so was a baseless trial strategy. He fails to overcome the presumption that trial counsel acted based on a sound trial strategy. See Gleason, 277 Kan. at 644.

7. Error by the District Court Hearing the 60-1507 Motion in Finding that the Claim of Cumulative Trial Errors was Improperly Raised

The cumulative trial errors argument was a matter for Loggins' direct appeal, not these 60-1507 proceedings. Further, Loggins fails to state what errors he is challenging and provides no legal support for his argument. He has [*12] waived this issue. See Harned, 281 Kan. at 1048.

8. Error by the District Court Hearing the 60-1507 Motion in Finding that Trial Counsel was not Ineffective for Failing to Interview Potential Alibi Witnesses

Loggins claims he was on the phone with three individuals in prison at the time of the robberies in one of his cases and that telephone records would have supported this claim. Loggins' attorney denied any knowledge of Loggins telling him about the phone records issue before the beginning of the trial. He testified that Loggins gave him the name of one alibi witness whom he could not locate until the Friday before trial. Loggins fails to prove that his trial counsel's performance fell below an objective standard of reasonableness, and he fails to overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance.

9. Error by the District Court Hearing the 60-1507 Motion in Finding that Claims of Error by the Trial Court in Failing to Inquire about a Possible Conflict between Loggins and his Counsel was Improperly Raised

Loggins argues that the district court erred in finding that this was a mere trial error that should have been [*13] raised on direct appeal, since the failure to raise it on direct appeal was the fault of his

ineffective appellate counsel. Appellate counsel's failure to raise the issue on direct appeal was because the claim had no merit. Before trial, the court allowed Loggins to explain his dissatisfaction with trial counsel but denied his request to appoint new counsel. Loggins' claim that the trial court failed to inquire is contradicted by the record.

10. Error by the District Court Hearing the 60-1507 Motion in Finding that Loggins' Trial Counsel was not Ineffective for Failing to Sequester the Two Witnesses at Trial

Trial counsel testified that both of the witnesses had been interviewed by the police more than once and the parties had the police reports, so each had little leeway to tailor trial testimony based on the testimony of the other witness. Further, Loggins does not allege that either of the witnesses changed testimony as a result of not being sequestered. Thus, he shows no prejudice.

11. Error by the District Court Hearing the 60-1507 Motion in Finding that his Claim of Improperly Admitted Evidence at Trial was Improperly Raised

Loggins complains about the admission of voice identification [*14] evidence at trial which, he claims, would have been raised on direct appeal but for his ineffective appellate counsel. Loggins does not state why he believes the voice identification evidence was erroneously admitted, and he does not state how he was prejudiced by its admission. An argument made in passing, with no argument or citation to authority, is deemed waived. Harned, 281 Kan. at 1048.

12. Error by the District Court Hearing the 60-1507 Motion in Finding that Loggins' Appellate Counsel was Effective

We dealt earlier with numerous attacks upon Loggins' appellate counsel, which we will not reconsider here. Loggins' argument on this point of error consists of several conclusory statements, including that appellate counsel had a "lapse in basic, legal, common sense." Such conclusory statements do not carry the day.

13. Error by the District Court Hearing the 60-1507 Motion in Finding that the Trial Court was not Biased Against Loggins

Loggins argues that the district court erred in finding that this contention lacked merit. Loggins argues that the district court failed to make sufficient findings of fact and conclusions of law on this issue when it denied his 60-1507 motion.

At the evidentiary [*15] hearing on Loggins' 60-1507 motion, Loggins presented an affidavit from David Silvers, stating why Silvers believed that the trial judge who heard Loggins' case, Judge Rebecca Pilshaw, should have recused herself. In the affidavit, Silvers stated that a motion to recuse was filed by another individual, Roland Rudd, in his criminal case, and that Judge Pilshaw recused herself from that case. At the evidentiary hearing, Loggins admitted that he did not know why Judge Pilshaw recused herself in that case.

Loggins fails to state how Judge Pilshaw was biased against him. Loggins' conclusory statement is insufficient to present a justiciable issue under 60-1507. See Potts v. State, 214 Kan. 369, 520 P.2d 1259 (1974).

14. Error by the District Court Hearing the 60-1507 Motion in Finding that the Trial Court did not err in Requiring Loggins to Register as a Sex Offender

Loggins argues that the Kansas Sex Offender Registration Act, K.S.A. 2006 Supp. 22-4901 et seq., should not apply to him because he was convicted of aggravated sexual battery under an aiding and abetting theory.

"[A] proceeding under K.S.A. 60-1507 cannot ordinarily be used as a substitute for direct appeal involving mere trial [*16] errors or as a substitute for a second appeal. Mere trial errors are to be corrected by direct appeal, but trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal, provided there were exceptional circumstances excusing the failure to appeal." Kansas Supreme Court Rule 183(c)(3) (2006 Kan. Ct. R. Annot. 227).

At his sentencing, Loggins did not object to the trial court ordering him to register as a sex offender. He did not raise this issue on direct appeal. He did not raise it in his motion to correct illegal sentence. Loggins does not allege any exceptional circumstances that would allow him to raise this trial error in his 60-1507 motion. Therefore, this issue was not properly before the district court, nor properly before this court.

15. Error by the District Court Hearing the 60-1507 Motion in Finding that Loggins was Properly Arraigned on All Charges

The district court found that Loggins was arraigned on the afternoon of his preliminary hearing based upon his trial counsel's testimony. Though not particularly compelling, counsel testified that while he had no independent recollection of the arraignment, he was sure it took [*17] place. We do not reweigh the evidence or the credibility of witnesses. State v. Corbett, 281 Kan. 294, 310, 130 P.3d 1179 (2006). There was sufficient competent evidence to support the district court's finding that Loggins was properly arraigned on all charges.

16. Error by the District Court Hearing the 60-1507 Motion in Finding that Loggins' Convictions for Aggravated Sexual Battery and Aggravated Kidnapping are not Multiplicitous

In a pro se supplement brief, Loggins argues he should be allowed to raise this issue since it would have been raised on direct appeal but for his ineffective appellate counsel.

Appellate counsel was not ineffective for failing to raise this multiplicity issue on appeal. The test for multiplicity is "whether each offense requires proof of an element not necessary to prove the other offense. If so, the charges stemming from a single act are not multiplicitous and do not constitute a double jeopardy violation." State v. Schoonover, 281 Kan. 453, Syl. ¶ 12, 133 P.3d 48 (2006). An examination of the statutory elements of aggravated sexual battery, K.S.A. 21-3518, and aggravated kidnapping, K.S.A. 21-3421, demonstrates that each requires proof of elements not necessary [*18] to prove the other crime. Hence, they are not multiplicitous and appellate counsel was not ineffective in failing to raise the issue.

17. Error by the District Court Hearing the 60-1507 Motion in Finding that Claims of Insufficient Evidence were Improperly Raised

In his pro se supplement brief, Loggins challenges the sufficiency of the evidence to support his

convictions for aggravated burglary and aggravated kidnapping of J.G. This issue was raised on direct appeal, but Loggins claims his appellate counsel was ineffective for failing to raise certain arguments on the issue.

K.S.A. 21-3716 defines aggravated burglary to include "knowingly and without authority entering into or remaining within any building ... in which there is a human being, with intent to commit a felony, theft or sexual battery therein." Loggins seems to argue that the trial court erred in removing the phrase "entering into or" from the jury instruction on aggravated burglary. Aggravated burglary includes remaining within any building. There was ample evidence that Loggins remained in the building with the intent to commit a felony, theft, or sexual battery therein. Loggins' counsel was not ineffective for failing [*19] to raise this bogus issue on appeal.

Loggins also argues that there was insufficient evidence to support his conviction for aggravated kidnapping of J.G. This issue was raised and rejected on his direct appeal. The issue is res judicata and we will not review it. See Neer, 247 Kan. at 140-41.

18. Violation of Loggins' Constitutional Rights by the District Court Hearing the 60-1507 Motion Denying Relief

Finally, Loggins argues that the district court violated his constitutional rights by denying his 60-1507 motion. We conclude that the factual findings of the district court are supported by substantial competent evidence and its findings are sufficient to support its conclusions of law. See Jenkins v. State, 32 Kan. App. 2d 702, 703, 87 P.3d 983, rev. denied 278 Kan. 845 (2004). Since Loggins' claims of error have been determined to be without merit, the district court did not violate Loggins' constitutional rights by its ruling.

Affirmed.

APPENDIX-(G)

State v. Loggins, 2011 Kan. App. Unpub. LEXIS 631

Court of Appeals of Kansas

August 26, 2011, Opinion Filed

No. 103,345

Reporter

2011 Kan. App. Unpub. LEXIS 631 * | 258 P.3d 387

STATE OF KANSAS, Appellee, v. KEVIN D. LOGGINS, SR., Appellant.

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

Subsequent History: Review denied by State v. Loggins, 2012 Kan. LEXIS 96 (Kan., Feb. 3, 2012)

US Supreme Court certiorari denied by Loggins v. Kan., 2012 U.S. LEXIS 7076 (U.S., Oct. 1, 2012)

Prior History: [*1] Appeal from Sedgwick District Court; J. PATRICK WALTERS, judge.

Loggins v. Kan. Supreme Court, 2010 U.S. Dist. LEXIS 37461 (D. Kan., Apr. 14, 2010)

Disposition: Affirmed.

Core Terms

sentence, district court, sexual battery, aggravated, preliminary examination, illegal sentence, district judge

Counsel: Chris A. Garcia, of Wichita, for appellant.

Lesley A. Isherwood, assistant district attorney, Nola Tedesco Foulston, district attorney, and Derek Schmidt, attorney general, for appellee.

Judges: Before ATCHESON, P.J., MALONE and MCANANY, JJ.

Opinion

MEMORANDUM OPINION

Per Curiam: In October 1995, Kevin Loggins was charged with various kidnapping, robbery, burglary, and firearms crimes. During his preliminary examination, the district judge found probable cause to believe that Loggins also committed aggravated sexual battery. Thereafter, the State filed an amended information which added the aggravated sexual battery charge. Loggins was convicted of these charges,

and the district court imposed a controlling sentence of 463 months in prison.

Loggins has unsuccessfully attacked his convictions and sentences numerous times. We addressed Loggins' direct appeal in State v. Loggins, 960 P.2d 269, unpublished opinion filed 1998, rev. denied 265 Kan. 888 (1998). We then reviewed Loggins' first motion to correct illegal sentence in State v. Loggins, 89 P.3d 662, unpublished opinion filed 2004, rev. denied 278 Kan. 850 (2004), [*2] cert. denied 543 U.S. 1170, 125 S. Ct. 1355, 161 L. Ed. 2d 148 (2005). We addressed Loggins' first K.S.A. 60-1507 motion in Loggins v. State, 162 P.3d 65, unpublished opinion filed 2007, rev. denied 285 Kan. 1174 (2007), cert. denied 555 U.S. 840, 129 S. Ct. 73, 172 L. Ed. 2d 66 (2008), then his second K.S.A. 60-1507 motion in Loggins v. State, 231 P.3d 587, unpublished opinion filed 2010.

In April 2009, Loggins filed a second motion to correct illegal sentence pursuant to K.S.A. 22-3504. He claimed that the trial court lacked jurisdiction to sentence him because of a violation of the separation of powers doctrine of the United States Constitution. He argued that the judge's actions at the preliminary examination exceeded the scope of her authority as a member of the judicial branch, which thereby divested the district court of jurisdiction over both him and the case because of this constitutional violation.

The district court denied Loggins' motion. Loggins filed a motion to reconsider which the district court summarily denied. Loggins appeals.

An illegal sentence is a sentence imposed by a court that lacks jurisdiction, a sentence that does not conform to the statutory provision, either in character or the length of the [*3] punishment authorized, or as a sentence that is ambiguous concerning the time and manner in which it is to be served. State v. Nash, 281 Kan. 600, 601, 133 P.3d 836 (2006). A sentence must meet this definition to be classified an illegal sentence. State v. Gayden, 281 Kan. 290, 293, 130 P.3d 108 (2006). Whether a defendant's sentence is illegal is a question of law over which this court's review is unlimited. State v. Hoge, 283 Kan. 219, 221, 150 P.3d 905 (2007).

Loggins argues that the judge's addition of the aggravated sexual battery charge at the preliminary examination violated K.S.A. 22-2301(2), which states:

"(2) A judge of the district court may in extreme cases, upon affidavits filed with such judge of the commission of a crime, order the county attorney to institute criminal proceedings against any person, but any such judge shall be disqualified from sitting in any case wherein such order was entered and is further prohibited from communicating about such case with any other judge appointed to preside therein."

Loggins contends that under K.S.A. 22-2301(2), the judge should have recused herself from presiding over any further matters in his case because she, rather than the [*4] prosecutor, added the aggravated sexual battery charge. This point was not raised below. (Loggins sought the recusal of a different district judge on different grounds, but the ruling on that motion has not been argued in this appeal.) Issues not raised before the trial court cannot be raised on appeal. State v. Warledo, 286 Kan. 927, 938, 190 P.3d 937 (2008).

Nevertheless, we conclude that K.S.A. 22-2301 does not control. The statute relates to the commencement of prosecution. Prosecution commences with the filing of the complaint. K.S.A.

22-2301(1). Here, the complaint/information was filed October 17, 1995. The matter at issue here came up at the preliminary examination held on November 15, 1995. "Under K.S.A. 22-2902, a magistrate may bind a defendant over on any felony he or she has probable cause to believe has been committed whether or not that particular felony has been charged in the information upon which the preliminary hearing was held." State v. Pioletti, 246 Kan. 49, Syl. ¶ 4, 785 P.2d 963 (1990). Further, K.S.A. 22-2902(5) provides that "a district judge may preside at the trial of any defendant even though such judge presided over the preliminary examination of such [*5] defendant." Thus, on either procedural or substantive grounds, this recusal issue fails.

The argument that Loggins did raise before the district court is that the district judge violated the separation of powers doctrine. Loggins claims that by ordering the addition of the aggravated sexual battery charge, the district judge overstepped her authority as a member of the judicial branch and usurped the powers of the prosecutor, a member of the executive branch. Because the judge lacked authority to order the addition of the aggravated sexual battery charge, Loggins contends the trial court lacked jurisdiction.

Pioletti disposes of this issue. Further, if Loggins contends that the predicate legislation in Pioletti, K.S.A. 22-2902, is unconstitutional under the separation of powers doctrine, he never argues the point. In fact, he never mentioned K.S.A. 22-2902 in his appellate brief or in oral argument. Thus, this issue is not before us.

We further note that K.S.A. 22-3504 is only applicable if a defendant's sentence is illegal. State v. Davis, 283 Kan. 767, 768, 156 P.3d 665 (2007). The relief available in a motion to correct illegal sentence under K.S.A. 22-3504 is correction of the defendant's [*6] sentence, rather than reversal of a conviction. 283 Kan. at 770.

The charging document—the complaint, indictment, or information—provides the district court with subject matter jurisdiction over the crimes charged. State v. Minor, 197 Kan. 296, 299-301, 416 P.2d 724 (1966); State v. Horn, 20 Kan. App. 2d 689, 692, 892 P.2d 513, rev. denied 257 Kan. 1094 (1995). After Loggins' preliminary examination, the State filed an amended information charging Loggins with all the charges he was eventually convicted of, including the aggravated sexual battery charge. The trial court obtained jurisdiction over the added aggravated sexual battery charge upon the filing of the amended information.

The district court did not err in denying Loggins' motion.

Affirmed.

Loggins v. State, 2007 Kan. LEXIS 779

Supreme Court of Kansas

November 6, 2007, Decided

CASE NO. 05-94723-A

Reporter

2007 Kan. LEXIS 779 * | 285 Kan. 1174

KEVIN D. LOGGINS, SR., APPELLANT, v. STATE OF KANSAS, APPELLEE.

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: [*1] DISTRICT CASE NO. 04CV2780 SG.

Loggins v. State, 162 P.3d 65, 2007 Kan. App. LEXIS 722 (Kan. Ct. App., 2007)

Opinion

SUPREME COURT ORDER

THE COURT HAS TAKEN THE FOLLOWING ACTION:

PETITION FOR REVIEW BY KEVIN LOGGINS.

CONSIDERED BY THE COURT AND DENIED.

State v. Loggins, 2012 Kan. LEXIS 96

Supreme Court of Kansas

February 3, 2012, Filed

Case No. 103,345

Reporter
2012 Kan. LEXIS 96 * | 293 Kan. 1111

State v. Kevin D. Loggins

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: State v. Loggins, 258 P.3d 387, 2011 Kan. App. Unpub. LEXIS 631 (Kan. Ct. App., 2011)

Opinion
[*1]
Petition for review denied.

State v. Loggins, 2016 Kan. App. Unpub. LEXIS 666

Court of Appeals of Kansas

August 12, 2016, Opinion Filed

No. 114,578

Reporter

2016 Kan. App. Unpub. LEXIS 666 *

STATE OF KANSAS, Appellee, v. KEVIN D. LOGGINS, Appellant.

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

Subsequent History: Review denied by State v. Loggins, 2017 Kan. LEXIS 769 (Kan., Sept. 28, 2017)

Prior History: [*1] Appeal from Sedgwick District Court; JAMES R. FLEETWOOD and WARREN M. WILBERT, judges.

State v. Loggins, 1998 Kan. LEXIS 410 (Kan., July 8, 1998)

Disposition: Affirmed.

Core Terms

aggravated, convictions, sentence, district court, motion to vacate, unpublished opinion, sexual battery

Counsel: Kevin D. Loggins Sr., appellant, Pro se.

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

Judges: Before GARDNER, P.J., BUSER AND STANDRIDGE, JJ.

Opinion

MEMORANDUM OPINION

Per Curiam: Kevin D. Loggins has previously pursued multiple avenues of relief from his multiple convictions. He now appeals the district court's summary denial of his pro se motion to vacate his convictions and sentence pursuant to K.S.A. 2015 Supp. 60-260(a), and the court's denial of his motion to reconsider that ruling. Finding Loggins cannot obtain relief from his criminal conviction and sentence pursuant to K.S.A. 2015 Supp. 60-260(b), we affirm.

Factual and Procedural Background

In February 1996, a jury convicted Loggins of two counts each of aggravated kidnapping and aggravated robbery and one count each of aggravated burglary, aggravated sexual battery, and criminal possession of a firearm in case No. 95CR1859. In April 1996, following a bench trial, Loggins was convicted of aggravated robbery and criminal possession of a firearm in case No. 95CR1616. The district court sentenced Loggins to a controlling term [*2] of 678 months' imprisonment.

Following his convictions, Loggins pursued a consolidated direct appeal. This court reversed one conviction of aggravated kidnapping but affirmed the remaining aggravated kidnapping conviction, as well as his convictions of aggravated robbery, aggravated burglary, aggravated sexual battery, and criminal possession of a firearm. State v. Loggins, 960 P.2d 269, unpublished opinion filed May 8, 1998 (Kan. App.), rev. denied 265 Kan. 888 (1998).

Loggins has repeatedly challenged his convictions and sentence. See State v. Loggins, 277 P.3d 448, 2012 Kan. App. Unpub. LEXIS 4412012 WL 2045362 (Kan. App. 2012) (unpublished opinion), rev. denied 297 Kan. 1252 (2013); State v. Loggins, 258 P.3d 387, 2011 Kan. App. Unpub. LEXIS 631, 2011 WL 3795236 (Kan. App. 2011) (unpublished opinion), cert. denied 133 S. Ct. 125, 184 L. Ed. 2d 60 (2012); Loggins v. State, 231 P.3d 587, 2010 Kan. App. Unpub. LEXIS 360, 2010 WL 2217105 (Kan. App. 2010) (unpublished opinion); Loggins v. State, No. 94,723, 2007 WL 2080359 (Kan. App. 2007) (unpublished opinion), cert. denied 555 U.S. 840, 129 S. Ct. 73, 172 L. Ed. 2d 66 (2008); State v. Loggins, 89 P.3d 662, 2004 Kan. App. LEXIS 484, 2004 WL 1086970 (Kan. App. 2004) (unpublished opinion), cert. denied 543 U.S. 1170, 125 S. Ct. 1355, 161 L. Ed. 2d 148 (2005). Loggins now appeals rulings made on his pro se motion to vacate his convictions and sentence.

In July 2014, Loggins filed a pro se motion "to vacate the judgment and sentence due to the nullity for want of jurisdiction," arguing he was entitled to relief under K.S.A. 60-260(b)(4). The district court summarily denied that motion. Following the denial of his motion to vacate, Loggins filed numerous pro se motions attacking his convictions and sentence as well as motions requesting the right to be present at [*3] any hearings held by the district court. Included in these filings was Loggins' "affidavit of truth in pursuit of right of action by way of reconsideration pursuant to K.S.A. 60-260(b)(4) & K.S.A. 22-3504," in which Loggins asked the district court to reconsider its denial of his July 2014, motion to vacate. After the State filed its responses and the district court denied Loggins' motions, Loggins filed additional motions, which the district court also summarily denied. The district court ultimately held: "Request for any relief is denied. The court adopts the State's responses as its findings of fact and conclusions of law." Loggins appeals.

Jurisdiction

Before we address the merits, we address the State's argument that this court lacks jurisdiction over this appeal because Loggins' appeal is untimely. It contends that Loggins is appealing the July 18, 2014, denial of his motion to vacate, thus Loggins' notice of appeal filed in April 2015 is well beyond the 30-day period permitted by statute. See K.S.A. 2015 Supp. 60-2103(a).

The filing of a timely notice of appeal is a prerequisite to appellate jurisdiction. State v. Smith, 303 Kan. 673, 677, 366 P.3d 226 (2016). Whether jurisdiction exists is a question of law over which this court's scope of review is unlimited. State v. Looney, 299 Kan. 903, 906, 327 P.3d 425 (2014).

Because Loggins has not cited [*4] to the record, as required by Supreme Court Rule 6.02(a)(4) (2015

Kan. Ct. R. Annot. 41), it is difficult to determine which of the many rulings made in his case he seeks to appeal. We believe the relevant facts are as follows. On July 18, 2014, the district court denied Loggins' motion to vacate the judgment. Loggins then filed a motion for reconsideration of that decision in August 2014, but a journal entry that arguably denies that motion was filed on April 8, 2015. We thus find Loggins' notice of appeal, filed within 30 days of that date, to be timely. This court therefore has jurisdiction to consider this appeal.

60-260(b) Relief

We first address Loggins' argument that relief under K.S.A. 2015 Supp. 60-260(b) provides a means for a criminal defendant to challenge his or her conviction or sentence. He argues this relief is available when the judgment of a conviction is void and that a judgment is void when it is imposed by a court lacking subject matter jurisdiction. Loggins claims the district court lacked subject matter jurisdiction in his case because he was never properly arraigned, therefore the judgment is void. Loggins seeks relief under K.S.A. 2015 Supp. 60-260(b) only, and not under K.S.A. 60-1507, which he contends cannot cure a void judgment.

We have unlimited review [*5] over the determination of whether K.S.A. 2015 Supp. 60-260(b) can be used by a criminal defendant to raise a postconviction challenge to one's conviction or sentence, after the generally exclusive remedy under K.S.A. 60-1507 has been foreclosed. That determination involves questions of statutory and caselaw interpretation and is therefore a question of law subject to unlimited review. State v. Mitchell, 297 Kan. 118, 121, 298 P.3d 349 (2013).

This question is not one of first impression. The Kansas Supreme Court has squarely rejected the claim that K.S.A. 2015 Supp. 60-260(b) is available in this context, holding: "K.S.A. 60-1507 provides the exclusive statutory procedure for collaterally attacking a criminal conviction and sentence. Therefore, neither K.S.A. 2011 Supp. 60-260(b) nor K.S.A. 60-2606 can be used for that purpose." State v. Kingsley, 299 Kan. 896, Syl. ¶ 1, 326 P.3d 1083 (2014). Although Kingsley cited the 2011 version of K.S.A. 60-260(b), the language is identical in K.S.A. 2015 Supp. 60-260(b). Therefore, the holding in Kingsley governs Loggins' appeal.

We find no evidence that our Supreme Court is departing from its previous decision, thus we are duty bound to follow Kansas Supreme Court precedent. State v. Vrabel, 301 Kan. 797, 809-10, 347 P.3d 201 (2015). Accordingly, we affirm the district court's summary denial of Loggins' motion to vacate and its denial of the motion to reconsider and hold that Loggins cannot obtain relief from his criminal convictions and sentence pursuant to K.S.A. 2015 Supp. 60-260(b). Because Loggins sought [*6] a remedy to which he is not entitled, we need not address his remaining issues.

Res Judicata

If, however, we were to reach the merits of the issues on appeal, we would find them unsuccessful under the doctrine of res judicata. "The essence of the doctrine of res judicata is that issues 'once finally determined . . . cannot afterwards be litigated.' [Citation omitted.]" Kingsley, 299 Kan. at 901. Four elements are required for application of this preclusive doctrine: "(1) same claim; (2) same parties; (3) claims were or could have been raised; and (4) a final judgment on the merits." State v. Martin, 294 Kan. 638, 641, 279 P.3d 704 (2012); see State v. Neer, 247 Kan. 137, Syl. ¶ 2, 795 P.2d 362 (1990). These

elements are met in this case as to the three claims Loggins raises.

First, Loggins raises a claim of multiplicity, arguing that the incorrect version of K.S.A. 21-3107 was applied in his case and that this court's analysis of the issue violated ex post facto protections. We have previously addressed this issue and held that Loggins' convictions for aggravated sexual battery and aggravated kidnapping are not multiplicitous. Loggins, 2007 WL 2080359, at *7.

Second, Loggins claims the district court erred by failing to look at the record to determine whether he was properly arraigned on all charges. But we have previously held that Loggins was properly arraigned on [*7] all charges. Loggins, 2010 Kan. App. Unpub. LEXIS 360, at *2, 2010 WL 2217105, at *3; Loggins, 2007 WL 2080359, at *6.

Third, Loggins argues he was denied a neutral and detached "adjudicator" because the district court judge, at the conclusion of the preliminary hearing, prompted the State to add the aggravated sexual battery charge. We have previously held that Loggins' recusal issue fails on both procedural and substantive grounds. We also resolved Loggins' claim that the district court violated the separation of powers doctrine by prompting the State to add the aggravated sexual battery charge. Loggins, 2011 Kan. App. Unpub. LEXIS 631, at *5, 2011 WL 3795236, at *2.

Conclusion

We affirm the district court's summary denial of Loggins' motion to vacate and its denial of the motion to reconsider because Loggins cannot obtain relief from his criminal convictions and sentence pursuant to K.S.A. 2015 Supp. 60-260(b). To the extent we can consider Loggins' remaining issues on appeal, they are barred by the doctrine of res judicata.

Affirmed.

Order

Supreme Court of Kansas

301 SW 10th Ave.
Topeka, KS 66612
785.296.3229

***** FLAT FILE COPY *****

Appellate Case No. 18-119110-S

KEVIN D. LOGGINS SR., PETITIONER,
V.
STATE OF KANSAS, RESPONDENT.

THE COURT HAS TAKEN THE FOLLOWING ACTION:

PETITION FOR WRIT OF HABEAS CORPUS FILED BY KEVIN D. LOGGINS, SR.

CONSIDERED BY THE COURT AND DISMISSED FOR LACK OF JURISDICTION.

Date: April 26, 2018

Douglas T. Shima
Clerk of the Appellate Courts

FILED
United States Court of Appeals
Tenth Circuit

August 7, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: KEVIN D. LOGGINS, SR.,

Movant.

No. 19-3142
(D.C. No. 5:99-CV-03102-DES)
(D. Kan.)

ORDER

Before **HARTZ**, **KELLY**, and **BACHARACH**, Circuit Judges.

Kevin D. Loggins, Sr., a Kansas state prisoner proceeding pro se, moves for authorization to file a second or successive 28 U.S.C. § 2254 habeas application challenging his 1996 convictions for aggravated kidnapping, aggravated burglary, aggravated sexual battery, and criminal possession of a firearm. He filed a first § 2254 application in 1999. The district court denied relief, and we denied a certificate of appealability. Loggins has filed three previous motions for authorization, all of which were denied.

Loggins' habeas application cannot proceed in the district court without first being authorized by this court. *See* 28 U.S.C. § 2244(b)(3). We may authorize a claim only if the prisoner has not raised it in a previous § 2254 habeas application. *See id.* § 2244(b)(1). And we may not authorize a new claim unless it satisfies one or both of the requirements specified in § 2244(b)(2). Specifically, a new claim must rely on (1) "a new rule of constitutional law, made retroactive to cases on collateral review by the

Supreme Court, that was previously unavailable," or (2) a factual predicate that "could not have been discovered previously through the exercise of due diligence" and that, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *Id.* § 2244(b)(2)(A)-(B).

Loggins must make a prima facie showing that he can satisfy these gate-keeping requirements. *See Case v. Hatch*, 731 F.3d 1015, 1028 (10th Cir. 2013). "If in light of the documents submitted with the application it appears reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive petition, we shall grant the application." *Id.* (internal quotation marks omitted).

Loggins asserts that he has a new claim that is based on a newly discovered factual predicate. He asserts that the trial judge violated his right to due process and a fair trial by acting in the capacity of a prosecutor. More specifically, Loggins claims that the trial judge stated on the record at his preliminary examination that she was interested in adding charges against him that the prosecutor was not pursuing. The judge then added the charge of aggravated sexual battery.

Loggins contends this claim is based on a new factual predicate because the trial judge ordered the court reporter to withhold the relevant portion of the hearing transcript from the record, such that it was not included in the record on appeal or in the record on which Loggins' first § 2254 application was decided. Loggins asserts that this portion of

the transcript was concealed until two days after the district court denied relief in his first § 2254 proceedings. He maintains that he asked his trial counsel to raise this issue in his direct appeal, but counsel was unable to do so because of the unavailable portion of the transcript.

Loggins' description of his proposed claim demonstrates that the factual predicate it is based upon is not newly discovered. His claim rests on statements and actions by the trial judge during his preliminary hearing. And he acknowledges that he was aware of these facts when he filed his direct appeal because he asked his counsel to raise this claim at that time.

Accordingly, Loggins' motion for authorization is denied. This denial of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

Loggins v. State, 2010 Kan. App. Unpub. LEXIS 360

Court of Appeals of Kansas

May 21, 2010, Opinion Filed

No. 101,435

Reporter

2010 Kan. App. Unpub. LEXIS 360 * | 231 P.3d 587

KEVIN D. LOGGINS, SR., Appellant, v. STATE OF KANSAS, Appellee.

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; ANTHONY J. POWELL, JR, judge.

Loggins v. State, 162 P.3d 65, 2007 Kan. App. LEXIS 722 (Kan. Ct. App., 2007)

Disposition: Affirmed.

Core Terms

district court, arraignment, exceptional circumstances, manifest injustice

Counsel: Kevin D. Loggins, Sr., appellant Pro se, and Roger L. Falk, and Casey J. Cotton, of Law Office of Falk & Cotton, P.A., of Wichita, for appellant.

Julie A. Koon, assistant district attorney, Nola Tedesco Foulston, district attorney, and Steve Six, attorney general, for appellee.

Judges: Before LEBEN, P.J., CAPLINGER and BUSER, JJ.

Opinion

MEMORANDUM OPINION

Per Curiam: Kevin D. Loggins, Sr., appeals the denial of his pro se K.S.A. 60-1507 motion. The district court held the motion was untimely and successive. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1996 Loggins was convicted in two criminal cases, 95 CR 1616 and 95 CR 1859, and sentenced to 678 months' imprisonment. This court has reviewed the convictions and sentences on three separate occasions. We considered Loggins' direct appeal in State v. Loggins, 960 P.2d 269, unpublished opinion

filed 1998, rev. denied 265 Kan. 888 (1998). We reviewed his motion to correct an illegal sentence in State v. Loggins, 89 P.3d 662, unpublished opinion filed 2004, rev. denied 278 Kan. 850 (2004), cert. denied 543 U.S. 1170, 125 S. Ct. 1355, 161 L. Ed. 2d 148 (2005). Finally, we decided Loggins' first [*2] K.S.A. 60-1507 motion in Loggins v. State, 162 P.3d 65, unpublished opinion filed 2007, rev. denied 285 Kan. 1174 (2007), cert. denied 555 U.S. 840, 129 S. Ct. 73, 172 L. Ed. 2d 66 (2008).

On February 21, 2008, before the first K.S.A. 60-1507 proceedings were final, Loggins filed his current K.S.A. 60-1507 motion claiming newly discovered evidence. The evidence, attached to his motion, consisted of transcript excerpts from Loggins' preliminary hearing and arraignment on November 15, 1995. These excerpts showed that Loggins had personally addressed the district court at the preliminary hearing. At arraignment before a different judge, however, his counsel announced Loggins' personal appearance, waived reading of the charges, entered a plea of not guilty, and requested a jury trial. Notably, only one page of the arraignment transcript was attached to the motion, and the transcript is not in the record, so it is unknown what, if anything, happened during the remainder of the hearing. Based on these excerpts, however, Loggins argued: "Though it is stated by [c]ounsel in the record Movant is present [at the arraignment], it is obvious from the statement of [a]ppearance and the Court never addressing Movant at anytime [*3] [sic] that, Movant was not present."

On March 31, 2008, Loggins filed a motion to amend his K.S.A. 60-1507 motion. He asked the district court to consider issues he had raised in his "prior 60-1507 pleadings." On May 2, 2008, Loggins filed another motion to amend. In this motion, he attacked the decisions in "a prior proceeding," presumably the first K.S.A. 60-1507 action. Loggins anticipated the State's argument "that these issues have already been disposed of by this [district] court and the Kansas Court of Appeals" by maintaining that such a "response can not stand for the [m]isapplication of facts and [l]aw." Loggins contended "[h]ad the courts reviewed the issue and applied the correct Kansas law . . . the courts would have been bound by Kansas Supreme Court [p]recedent, to grant relief."

The district court appointed counsel, and on May 23, 2008, held a preliminary hearing. The district court asked Loggins' counsel to identify any new issues that Loggins had not previously raised. Counsel identified only the "Fisher issue," meaning State v. Fisher, 257 Kan. 65, 891 P.2d 1065 (1995). In Fisher, a kidnapping conviction was reversed where the "forced direction" of employees through [*4] a restaurant to obtain a key to the safe did not "facilitate" a crime as required by the statute. 257 Kan. at 75-78; see K.S.A. 21-3420. Loggins argued that an aggravated kidnapping in his case was similarly for "mere convenience" and not to facilitate a crime.

The district court rejected Loggins' motion and amendments, holding they were untimely and successive. The district court concluded that Loggins had not shown "either manifest injustice or exceptional circumstances" to justify a second K.S.A. 60-1507. Loggins appeals.

DISCUSSION

We have before us an appellate brief written by Loggins' appointed counsel, and a supplemental pro se brief written by Loggins. We have considered both briefs which address substantive issues, but no substantive decision was made by the district court. The district court made a procedural decision, which frames the questions on appeal.

Loggins' motion, filed about 3 1/2 years after July 1, 2004, was clearly beyond the 1-year time limitation

of K.S.A. 60-1507(f). See Hayes v. State, 34 Kan. App. 2d 157, 162, 115 P.3d 162 (2005) (1-year limitation at K.S.A. 60-1507(f) began running on July 1, 2003, for preexisting claims). And with the exception of the so-called [*5] Fisher and arraignment issues, the motion was also a second or successive K.S.A. 60-1507 motion, contrary to Supreme Court Rule 183(d) (2009 Kan. Ct. R. Annot. 251).

Still, the district court could have considered the motion to "prevent a manifest injustice." K.S.A. 60-1507(f)(2). This court has interpreted manifest injustice to mean obviously unfair or shocking to the conscience. See Toney v. State, 39 Kan. App. 2d 944, 946, 187 P.3d 122, rev. denied 287 Kan. 769 (2008). The district court also could have considered the motion to serve "the ends of justice," Rule 183(d)(3), or if Loggins had shown "exceptional circumstances." Tillman v. State, 215 Kan. 365, 367, 524 P.2d 772 (1974). This court has defined exceptional circumstances as "unusual events or intervening changes in the law that prevented [an inmate] from reasonably being able to raise [the] claim in [a] previous K.S.A. 60-1507 motion." Toney, 39 Kan. App. 2d 944, 187 P.3d 122, Syl. P 3.

The district court found none of these exceptions were applicable. Because the district court ruled on the arguments of counsel and the files and records of the case, we are in as good a position as the district court to decide the procedural questions. [*6] Our review is, therefore, de novo. See Barr v. State, 287 Kan. 190, 196, 196 P.3d 357 (2008).

We will address the Fisher issue first. Although this issue could have been raised on direct appeal, it was not. Perhaps this is because, unlike in Fisher, the aggravated kidnapping in the present case facilitated another crime. The opinion from the direct appeal shows that one of Loggins' accomplices took a woman from a house where her husband was being held at gunpoint to a car in order to obtain the woman's wallet. 257 Kan. 65, Slip op. at 2. The woman was dressed in panties and a t-shirt, and while in the car the accomplice fondled her. 257 Kan. 65, Slip op. at 2.

Loggins' counsel on direct appeal reasonably did not argue precedent from Fisher but instead contended that the sex crime committed by the codefendant was not foreseeable under the circumstances of the commission of aggravated robbery or burglary. 257 Kan. 65, Slip op. at 3. This was a more appropriate legal argument, and neither counsel's representation of Loggins nor the conviction itself were manifestly unjust. 257 Kan. 65, Slip op. at 3. Moreover, Loggins does not establish exceptional circumstances for the omission of this issue from his prior K.S.A. 60-1507 motion.

Next, we [*7] consider Loggins' "newly discovered evidence" regarding arraignment. Loggins' counsel did not argue this point in the district court, and his appointed counsel on appeal modified Loggins' argument to an assertion that his client was not consulted regarding arraignment. In his pro se appellate brief, however, Loggins returns to his original argument:

"As the record exclusively show [sic], [Loggins] was not present at the mock hearing of arraignment . . . . Though the record attempts to portray [Loggins] as being present, the contents of the record contradict said allegation. Not once is [Loggins] in any matter addressed, but referred to by the court as if [Loggins] is absent [sic]."

We have reviewed the transcript excerpts provided by Loggins, and they do not raise an issue regarding his presence at arraignment. The district court did not refer to Loggins as being absent, and neither the district court nor the prosecutor corrected Loggins' counsel when he announced that his client was

personally present in court for the arraignment. With respect to a lack of consultation, there is simply no evidence at all. Loggins has failed to establish any manifest injustice or exceptional circumstances [*8] justifying this untimely and successive K.S.A. 60-1507 motion.

With regard to the balance of Loggins' claims, he attempts to establish manifest injustice and exceptional circumstances by arguing against the decisions already rendered against him in prior litigation. But our Supreme Court has observed that "[a]t some point in a case litigation must end if the judicial system is to function smoothly, effectively and expeditiously." Tillman, 215 Kan. at 367. The district court did not err in holding Loggins' second K.S.A. 60-1507 motion was procedurally barred.

Affirmed.

Additional material from this filing is available in the Clerk's Office.