NOT DESIGNATED FOR PUBLICATION

No. 112,131

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

VIVIAN L. MUNDY,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Lyon District Court; W. LEE FOWLER, judge. Opinion filed September 18, 2015. Affirmed.

Kristen B. Patty, of Wichita, for appellant.

Stefani K. Hepford, assistant attorney general, and *Derek Schmidt*, attorney general, for appellee.

Before GREEN, P.J., HILL, J., and TIMOTHY G. LAHEY, District Judge., assigned.

Per Curiam: Vivian L. Mundy appeals the trial court's summary denial of her K.S.A. 60-1507 motion alleging ineffective assistance of trial counsel. Moreover, for the first time on appeal, Mundy alleges that her K.S.A. 60-1507 counsel provided ineffective assistance of counsel. Although this court has jurisdiction to address whether the trial court erred in summarily denying Mundy's K.S.A. 60-1507 motion, this court does not have jurisdiction to address Mundy's new allegation of ineffective assistance of K.S.A. 60-1507 counsel. Furthermore, even though this court has jurisdiction to address Mundy's arguments why the trial court erred in summarily denying her K.S.A. 60-1507 motion,

none of her arguments are persuasive. Accordingly, we affirm the trial court's summary denial of Mundy's K.S.A. 60-1507 motion.

In 2010, a jury convicted Mundy of five counts of making a false claim to the Medicaid program, a severity level 7 nonperson felony, in violation of K.S.A. 21-3846(a)(1) and one count of obstruction of a Medicaid fraud investigation, a severity level 9 nonperson felony, in violation of K.S.A. 21-3856. The trial court sentenced Mundy to 24 months' probation with an underlying prison term of 18 months. Additionally, the trial court ordered that Mundy pay $158,024.13 in restitution.

Mundy appealed her convictions to this court. In *State v. Mundy*, No. 104,958, 2012 WL 2045298, at *11 (Kan. App. 2012) (unpublished opinion), *rev. denied* 296 Kan. 1134 (2013), this court reversed and vacated Mundy's convictions for three of the five counts of making a false claim to the Medicaid program as multiplicitous, but this court otherwise affirmed her remaining convictions.

In April 2012, community corrections requested that Mundy's probation be revoked for failure to pay restitution. Although the trial court did not revoke Mundy's probation, the trial court extended Mundy's probation term by 1 year.

On April 16, 2013, Mundy filed a pro se K.S.A. 60-1507 motion alleging that her trial counsel, Thomas Haney, provided deficient counsel. In her motion, Mundy asserted that Haney provided ineffective assistance of counsel for the following reasons: (1) Haney had not subpoenaed all the witnesses because he believed that the trial judge would grant him a continuance; (2) Haney had not interviewed certain people that she had asked him to interview as potential witnesses because he believed that those people, who were brain trauma patients, would not make good witnesses; (3) Haney had received legal advice from her nonattorney friend; (4) Haney had a nonattorney helping him work on her case; (5) Haney had been preoccupied working on another case; (6) Haney had not

cared about her case after he got paid; and (7) Haney had refused to give her money back when she requested it. When Mundy filed her K.S.A. 60-1507 motion, Mundy also moved to proceed in forma pauperis. The trial court appointed Frederick Meier to represent Mundy on her K.S.A. 60-1507 motion.

On April 23, 2013, Mundy completed her probation. Upon completion of her probation, Mundy still owed $156,399.13 in restitution. On July 1, 2013, a hearing was scheduled on Mundy's K.S.A. 60-1507 motion. The very next day, however, this hearing was cancelled. The appearance docket indicates that the hearing was cancelled because the parties were negotiating. In August 2013, the State filed a response to Mundy's K.S.A. 60-1507 motion. In the State's response, the State asked that the trial court summarily deny Mundy's motion.

In February 2014, the trial court issued a memorandum decision summarily denying Mundy's K.S.A. 60-1507 motion. The trial court found that "[a]lthough allegations [were] made, they [were] not supported by facts sufficient [for the] court to proceed to hearing." Regarding Mundy's argument that Haney did not subpoena certain witnesses, the trial court found that Haney had subpoenaed numerous witnesses. Moreover, regarding the witnesses Haney allegedly never interviewed, the trial court found that without the names of the witnesses or the information the witnesses would testify to, Mundy could not overcome the presumption that Haney provided adequate representation.

Does This Court Have Jurisdiction?

Whether jurisdiction exists is a question of law over which this court's scope of review is unlimited. *State v. Charles*, 298 Kan. 993, 1002, 318 P.3d 997 (2014). Moreover, this court has a duty to question jurisdiction on its own initiative. *State v. J.D.H.*, 48 Kan. App. 2d 454, 458, 294 P.3d 343, *rev. denied* 297 Kan. 1251 (2013).

In her brief, Mundy argues that this court has jurisdiction over her appeal even though she has completed her probation. Citing *Rawlins v. State*, 39 Kan. App. 2d 666, 182 P.3d 1271 (2008), *rev. denied* 286 Kan. 1176 (2008), Mundy argues that her continuing obligation to pay restitution is a "significant additional collateral consequence" that prevents her case from being moot. The State agrees that this court continues to have jurisdiction over Mundy's appeal. Nevertheless, parties cannot confer jurisdiction by consent. *State v. Hoffman*, 45 Kan. App. 2d 272, 275, 246 P.3d 992 (2011). Furthermore, neither Mundy nor the State addresses whether this court has jurisdiction over Mundy's argument that her K.S.A. 60-1507 counsel was ineffective.

As discussed later, although this court has jurisdiction to consider the summary denial of Mundy's K.S.A. 60-1507 motion alleging ineffective assistance of trial counsel, this court does not have jurisdiction to consider Mundy's allegation of ineffective assistance of K.S.A. 60-1507 counsel.

This Court Has Jurisdiction to Review Mundy's Argument That the Trial Court Erred in Summarily Denying Her K.S.A. 60-1507 Motion Alleging Ineffective Assistance of Trial Counsel.

Under K.S.A. 60-1507(a), "[a] prisoner in custody under sentence of a court of general jurisdiction" may move to vacate, set aside, or correct his or her sentence. A person on probation is in custody and can move for relief under K.S.A. 60-1507. *Rawlins*, 39 Kan. App. 2d 666, Syl. ¶ 2. Additionally, in *Rawlins*, this court held:

> "Once a K.S.A. 60-1507 motion has been filed while a prisoner is in custody, the court will not lose jurisdiction because the prisoner is later released before the court has ruled on the motion, if possible adverse collateral consequences arising from the conviction keep the issue from becoming moot." 39 Kan. App. 2d 666, Syl. ¶ 4.

Adverse collateral consequences of an appellant's convictions include the possibility of deportation, and the inability to attain citizenship, vote, serve on a jury, or hold public office. *Rawlins*, 39 Kan. App. 2d at 671-72.

Again, Mundy asserts that this court has jurisdiction because she was in custody when she filed the K.S.A. 60-1507 motion and because she still pays restitution. A review of the record reveals that Mundy filed her K.S.A. 60-1507 motion on April 16, 2013. Mundy completed her probation 7 days later on April 23, 2013. Thus, Mundy was in custody when she moved for relief under K.S.A. 60-1507. Moreover, Mundy still owes $156,399.13 in restitution. Restitution constitutes a part of a defendant's sentence. *State v. Hall*, 298 Kan. 978, 986, 319 P.3d 506 (2014). As a result, the restitution order is an adverse direct consequence, not an adverse collateral consequence, of Mundy's sentence.

Given that the *Rawlins* court held that a person's K.S.A. 60-1507 motion is not moot, even when that person is out of custody, so long as that person moved for relief while in custody and that person still faces possible adverse collateral consequences from his or her conviction, this court should retain jurisdiction when a similarly situated person has a continuing obligation to pay restitution as part of his or her sentence after completing probation. Consequently, this court has jurisdiction to consider Mundy's argument that the trial court erred when it summarily denied her K.S.A. 60-1507 motion alleging that her trial counsel, Haney, provided ineffective assistance of counsel.

This Court Does Not Have Jurisdiction to Review Mundy's Argument Concerning Ineffective Assistance of K.S.A. 60-1507 Counsel.

For the first time on appeal, Mundy argues that Meier, her K.S.A. 60-1507 counsel, provided ineffective assistance of counsel. In her brief, Mundy asserts that Meier provided deficient counsel because Meier never amended her K.S.A. 60-1507 motion. Mundy further asserts that Meier was ineffective because he never responded to the

State's response to her K.S.A. 60-1507 motion. Ultimately, however, this court does not have jurisdiction to consider Mundy's arguments because she did not identify this issue in her notice of appeal.

Under K.S.A. 2014 Supp. 60-2103(b), a notice of appeal must "designate the judgment or part thereof appealed from." Thus, "[a]n appellate court only obtains jurisdiction over the rulings identified in the notice of appeal." *State v. Bogguess*, 293 Kan. 743, 756, 268 P.3d 481 (2012) (citing *State v. Ehrlich*, 286 Kan. 923, 926, 189 P.3d 491 [2008]; *State v. Huff*, 278 Kan. 214, 217, 92 P.3d 604 [2004]). Appellate courts must liberally construe notices of appeal to "'assure justice in every proceeding.'" *State v. Wilkins*, 269 Kan. 256, 270, 7 P.3d 252 (2000) (quoting *State v. Griffen*, 241 Kan. 68, 70, 734 P.2d 1089 [1987]). Nevertheless, "there is still a substantive minimum below which a notice cannot fall and still support jurisdiction." *State v. Laurel*, 299 Kan. 668, 673, 325 P.3d 1154 (2014).

Mundy's notice of appeal states: "Comes Now the Petitioner, Vivian Mundy, by and through her attorney, Frederick L. Meier, II, and appeals the decisions made by the trial court to the Court of Appeals of the State of Kansas." Accordingly, Mundy's notice of appeal contains a very broad statement that she is appealing the decision of the trial court. Because Mundy raises this issue for the first time on appeal, however, the trial court never decided whether Meier provided ineffective assistance of counsel. Furthermore, Mundy's docketing statement merely states that she is appealing "[w]hether the trial court properly denied [her] motion pursuant to K.S.A. 60-1507." Thus, even if this court liberally construed Mundy's notice of appeal, this court would not have jurisdiction over Mundy's argument that Meier provided ineffective assistance of counsel.

Did the Trial Court Err When It Summarily Denied Mundy's K.S.A. 60-1507 Motion?

Under K.S.A 60-1507(b), the trial court may summarily deny a motion without a hearing if "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." See also *Bellamy v. State*, 285 Kan. 346, 354, 172 P.3d 10 (2007). When the trial court summarily denies a motion under K.S.A. 60-1507 without conducting a hearing, the standard of review on appeal is de novo. *Bellamy*, 285 Kan. at 354.

To establish ineffective assistance of counsel, the defendant must show that

> """(1) counsel's performance was deficient, which means counsel made errors so serious that counsel's performance was less than that guaranteed by the Sixth Amendment, and (2) the deficient performance prejudiced the defense, which requires showing counsel's errors were so serious they deprived the defendant of a fair trial."""" *Cheatham*, 296 Kan. 417, 431, 292 P.3d 318 (2013) (quoting *Robertson v. State*, 288 Kan. 217, 225, 201 P.3d 691 [2009]).

When reviewing counsel's performance in an ineffective assistance of counsel claim, there is a strong presumption that counsel's conduct fell within the broad range of reasonable professional assistance. *State v. Kelly*, 298 Kan. 965, 970, 318 P.3d 987 (2014). To establish prejudice, the defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *Miller v. State*, 298 Kan. 921, 934, 318 P.3d 155 (2014).

On appeal, Mundy asserts that the trial court erred when it summarily denied her K.S.A. 60-1507 motion without a hearing. Specifically, Mundy asserts that the trial court erred when it summarily denied her K.S.A. 60-1507 motion for the following reasons: (1) that the trial court had already determined that her K.S.A. 60-1507 motion raised issues requiring a hearing because the trial court had appointed her an attorney; (2) that the trial

court had already determined that her K.S.A. 60-1507 motion raised issues requiring a hearing because the trial court had originally scheduled a hearing; and (3) that her arguments regarding Haney failing to subpoena and interview witnesses had presented substantial issues requiring a hearing.

Mundy Has Abandoned Her Argument That the Trial Court Was Required to Hold a Hearing on Her K.S.A. 60-1507 Motion Because It Had Already Appointed K.S.A 60-1507 Counsel

Mundy asserts that the trial court must have found that her K.S.A. 60-1507 motion presented substantial or potentially substantial questions of law and triable issues of fact because the trial court appointed her an attorney. Yet, Mundy has failed to cite any pertinent authority and has made a conclusory argument. Moreover, Mundy cannot establish that the trial court erred because the trial court's appointment of counsel was not a reflection of the quality of her arguments.

Although Mundy argues that the trial court was required to have a hearing on her K.S.A. 60-1507 motion because it had already appointed counsel, Mundy does not cite any authority to support this assertion. Mundy's failure to support her argument with pertinent authority or show why it is sound despite a lack of supporting authority is akin to failing to brief the issue. See *State v. Tague*, 296 Kan. 993, 1001, 298 P.3d 273 (2013). When an argument is not supported with pertinent authority it is deemed waived and abandoned. 296 Kan. at 1001. Therefore, Mundy has abandoned this issue on appeal.

Next, even if Mundy had not abandoned this argument, Mundy's argument literally begs the question. This occurs when the proposition being debated is being used to prove that same proposition. The unstated major premise of Mundy's argument is as follows: When a trial court appoints counsel for a K.S.A. 60-1507 movant, this is evidence that the trial court has determined that the K.S.A. 60-1507 motion raised issues requiring a

hearing. Mundy's argument assumes what she ought to prove: whether the trial court determined that the K.S.A. 60-1507 motion raised issues requiring a hearing. But no independent evidence for the premise is offered. We expect independent evidence for the claim. This evidence, however, is just what is lacking in Mundy's question—begging argument.

Moreover, Mundy's argument is conclusory. Mundy states that the trial court must have appointed counsel because she raised substantial questions of law and triable issues of fact in her motion. Nevertheless, Mundy provides no further evidence to support this contention. Conclusory contentions without an evidentiary basis are not sufficient for relief. *Gilkey v. State*, 31 Kan. App. 2d 84, 87, 60 P.3d 347 (2003) (citing *Burns v. State*, 215 Kan. 497, 500, 524 P.2d 737 [1974]). Consequently, Mundy's argument fails.

Last, it is worth noting that the record shows that the trial court appointed Meier automatically, without considering the merits of Mundy's arguments. K.S.A. 22-4506(b) states:

> "If the court finds that the petition or motion presents substantial questions of law or triable issues of fact and if the petitioner or movant has been or is thereafter determined to be an indigent person as provided in K.S.A. 22-4504, and amendments thereto, the court *shall* appoint counsel." (Emphasis added.)

Thus, when a person's K.S.A. 60-1507 motion presents substantial issues and that person is indigent under K.S.A. 22-4504, then the trial court must appoint an attorney. Yet, as the State points out in its brief, "just because the trial court appoints counsel to an indigent movant does not mean that the movant has presented substantial questions of law or triable fact."

Here, it is readily apparent that the trial court appointed counsel automatically when Mundy moved for relief under K.S.A. 60-1507 and moved to proceed in forma pauperis at the same time. This is supported by the fact the trial court appointed Meier to represent Mundy only 1 minute after she filed her K.S.A. 60-1507 and in forma pauperis motion together. Additionally, the trial court's order appointing Meier does not state that it appointed Meier because Mundy's motion presented substantial questions of law or triable issues of fact. Based on this evidence, it seems that the trial court appointed counsel without considering the merits of Mundy's arguments. Consequently, the fact that the trial court appointed counsel does not mean that Mundy's K.S.A. 60-1507 motion presented substantial or potentially substantial questions of law or triable issues of fact.

Mundy Has Abandoned Her Argument That the Trial Court Was Required to Hold a Hearing on Her K.S.A. 60-1507 Motion Because It Had Originally Scheduled a Hearing on Her Motion.

Next, Mundy asserts that she was entitled to a hearing because the trial court had originally scheduled a hearing on her motion. Mundy asserts that the trial court would not have scheduled the hearing unless the trial court found that her motion had some merit. Nevertheless, as with her previous argument, Mundy fails to cite any pertinent authority. The only statute Mundy cites to support her argument is K.S.A. 60-1507(b). Again, K.S.A. 60-1507(b) states that the trial court may summarily deny a K.S.A. 60-1507 motion without a hearing when "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." Nothing in K.S.A. 60-1507(b), however, prohibits a trial court from scheduling a hearing on the motion, then cancelling that hearing on the motion, and later summarily denying the motion without a hearing. Thus, Mundy abandons this argument by failing to support it with pertinent authority or show why it is sound despite a lack of supporting authority. See *Tague*, 296 Kan. at 1001.

Furthermore, even if Mundy had not abandoned this argument, Mundy's argument is conclusory and question begging. Mundy states that the trial court must have scheduled her motion for a hearing because it determined that her K.S.A. 60-1507 motion raised substantial issues. Nevertheless, Mundy provides no further evidence to support her argument. Since Mundy's argument is conclusory, this court cannot grant her relief. See *Gilkey*, 31 Kan. App. 2d at 87 (citing *Burns*, 215 Kan. at 500).

The Trial Court Did Not Err When It Summarily Denied Mundy's K.S.A. 60-1507 Motion Because the Arguments Mundy Raised Did Not Entitle Her to Relief

Mundy asserts that the trial court erred in summarily denying her K.S.A. 60-1507 motion because she established her right to an evidentiary hearing. Specifically, Mundy asserts that her arguments regarding Haney's failure to subpoena and interview witnesses raised substantial questions of law and triable issues of fact, which required a hearing. Nevertheless, Mundy's arguments fail.

First, Mundy's arguments fail because she did not provide enough information in her K.S.A. 60-1507 motion to establish that Haney's representation was deficient. In her motion, Mundy never provided the names of the witnesses Haney allegedly failed to subpoena or interview. Also, Mundy never explained how the witnesses would have changed the outcome of her case. Because she provided so little information, Mundy failed to show Haney's representation fell below a standard of reasonableness, which is the first step of the test for ineffective assistance of counsel. Moreover, even if Mundy had met the first step, Mundy certainly failed to establish that she was prejudiced under the second step of the test for ineffective assistance of counsel. As a result, Mundy clearly failed to provide any information showing that she was entitled to relief under K.S.A. 60-1507.

Second, Mundy's argument fails because the record of her case and caselaw clearly show that she was not entitled to relief under K.S.A. 60-1507. Regarding Mundy's argument that Haney did not subpoena witnesses, the appearance docket indicates that Haney subpoenaed several witnesses to testify at Mundy's trial. Additionally, regarding Mundy's allegation that Haney failed to interview certain people with traumatic brain injuries that she wanted to have as witnesses, Haney had the right to make that strategic decision. Although a defendant has the right to decide """(1) what plea to enter; (2) whether to waive jury trial; and (3) whether to testify in his own behalf,"" trial counsel has the right to make all strategic and tactical decisions. *State v. Rivera*, 277 Kan. 109, 117, 83 P.3d 169 (2004) (quoting *State v. Bafford*, 255 Kan. 888, 895, 879 P.2d 613 [1994]). Therefore, if Haney actually declined to interview certain people, he would have had the right to make this strategic decision. Furthermore, this strategic decision seems reasonable. According to Mundy's motion, Haney allegedly declined to interview those people because he believed they could not help her defense. An attorney's strategic trial decision, made after a thorough investigation, is virtually unchallengeable. *Cheatham*, 296 Kan. at 437 (citing *Strickland v. Washington*, 466 U.S. 668, 690-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674, *reh. denied* 467 U.S. 1267 [1984]). Consequently, the trial court did not err when it summarily denied Mundy's K.S.A. 60-1507 motion because Mundy's arguments did not entitle her to relief.

Finally, it is important to note that in her K.S.A. 60-1507 motion, Mundy raised five additional arguments why she believed she was entitled to relief under K.S.A. 60-1507. Yet, Mundy does not address those issues in her brief. Accordingly, Mundy has abandoned those arguments on appeal. See *State v. Boleyn*, 297 Kan. 610, 633, 303 P.3d 680 (2013) ("An issue not briefed by an appellant is deemed waived and abandoned.").

Affirmed.