NOT DESIGNATED FOR PUBLICATION

No. 112,851

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

GIANG T. NGUYEN,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Finney District Court; PHILIP C. VIEUX, judge. Opinion filed January 15, 2016. Affirmed.

Christopher J. Velez, of Law Office of Christopher J. Velez, of Garden City, for appellant.

Tamara S. Hicks, assistant county attorney, *Susan Lynn Hillier Richmeier*, county attorney, and *Derek Schmidt*, attorney general, for appellee.

Before MCANANY, P.J., POWELL, J., and DAVID J. KING, District Judge, assigned.

Per Curiam: Giang T. Nguyen appeals the denial of his third K.S.A. 60-1507 motion, arguing the district court should have conducted an evidentiary hearing for four reasons: (1) The motion was not time barred; (2) the motion was not successive; (3) the district court erred when it held the motion did not conform to Supreme Court Rule 183(e) (2015 Kan. Ct. R. Annot. 271); and (4) the district court did not make the necessary findings of fact and conclusions of law when summarily denying the motion. While we agree with Nguyen that his conviction for conspiracy to commit kidnapping is

likely multiplicitous and, therefore, his motion was not untimely, we disagree with the rest of his contentions and affirm the district court.

FACTUAL AND PROCEDURAL BACKGROUND

In 2003, a jury convicted Nguyen of felony murder, aggravated kidnapping, five counts of kidnapping, aggravated burglary, conspiracy to commit kidnapping, and conspiracy to commit aggravated burglary. Because he received a life sentence, Nguyen directly appealed his convictions and sentences to the Kansas Supreme Court, which affirmed. *State v. Nguyen*, 281 Kan. 702, 133 P.3d 1259 (2006).

In 2007, Nguyen filed a timely pro se K.S.A. 60-1507 motion in the Finney County District Court. The contents of the motion are not in the record. This motion was denied as was a subsequent motion to reconsider. This court then denied Nguyen's motion to docket his appeal out of time. See Appellate Case No. 09-102212-A.

Nguyen filed a second 60-1507 motion pro se in 2009, which was also denied by the district court. This motion was not in the record either. Nguyen again appealed to this court, which upheld the denial of the motion because it was untimely and Nguyen had demonstrated no manifest injustice. *Nguyen v. State*, No. 104,057, 2011 WL 781525, at *2 (Kan. App.), *rev. denied* 292 Kan. 965 (2011).

Nguyen attempted to file a third pro se 60-1507 motion in 2012. However, this purported filing was apparently returned to Nguyen by the district judge who, by letter, informed Nguyen that he was returning the motion unfiled as it was effectively identical to the prior motion and was successive. It appears no case file was ever opened.

On August 28, 2012, Nguyen filed his third pro se 60-1507 motion. The parties refer to this motion as Nguyen's fourth 60-1507 motion, but we shall refer to it as

Nguyen's third as his prior motion was never actually filed. The motion, accompanied by a 42-page memorandum of law and a 10-page affidavit, asserted 14 grounds for relief:

1. Nguyen's codefendants had obtained relief from their convictions of conspiracy to commit kidnapping due to the charge being multiplicitous and Nguyen was entitled to the same relief.
2. Because Nguyen's appeal of his first motion's dismissal was denied through no fault of his own but due to ineffective assistance of counsel, his first appeal should be "re-activated."
3. The district court erred in failing to provide unanimity instructions to the jury on the kidnapping and aggravated kidnapping counts.
4. The district court erred in failing to provide unanimity instructions to the jury on the aggravated burglary count.
5. The district court erred in constructively amending the criminal complaint through the jury instructions.
6. The district court erred in instructing the jury on the felony-murder count by omitting mention of an intervening felony.
7. The district court erred when it gave a "presumption of intent" instruction.
8. Nguyen was denied due process because, as a citizen of the Socialist Republic of Vietnam, he was never given the opportunity to contact the Vietnamese consul after his arrest.
9. Nguyen had the rights of a citizen by virtue of his "situation" and the sentencing court's ignoring of such resulted in cruel and unusual punishment.
10. Because of this cruel and unusual punishment, Nguyen was not able to understand the manifest injustice imposed upon him until the filing of this motion.

11. Nguyen was innocent of the crimes of which he was convicted, and the above-alleged cruel and unusual sentence imposed on him prevented him from communicating his innocence.
12. Nguyen was incompetent to stand trial because he did not comprehend English and the court-provided interpreter did not comprehend Nguyen's dialect of Vietnamese.
13. Trial counsel was statutorily and constitutionally ineffective.
14. Appellate counsel was statutorily ineffective.

After reviewing Nguyen's third 60-1507 motion, the district court summarily dismissed it. The court held that the motion was untimely and successive, that Nguyen had failed to establish manifest injustice and exceptional circumstances to warrant consideration of the merits of the motion, and that the motion did not comply with the form required by Kansas Supreme Court Rule 183(e) (2015 Kan. Ct. R. Annot. 271).

Nguyen timely appeals.

DID THE DISTRICT COURT ERR IN SUMMARILY DENYING NGUYEN'S K.S.A. 60-1507 MOTION WITHOUT CONDUCTING AN EVIDENTIARY HEARING?

A district court has three options when reviewing a motion filed pursuant to K.S.A. 60-1507:

> "(1) The court may determine that the motion, files, and case records conclusively show the prisoner is entitled to no relief and deny the motion summarily; (2) the court may determine from the motion, files, and records that a potentially substantial issue exists, in which case a preliminary hearing may be held. If the court then determines there is no substantial issue, the court may deny the motion; or (3) the court may determine from the motion, files, records, or preliminary hearing that a substantial issue is presented requiring a full hearing." *Fischer v. State*, 296 Kan. 808, 822-23, 295 P.3d 560 (2013).

When a district court summarily denies a K.S.A. 60-1507 motion, we conduct a de novo review to determine whether the motion, files, and records of the case conclusively establish that a movant is not entitled to relief. *Edgar v. State*, 294 Kan. 828, 836-37, 283 P.3d 152 (2012).

Nguyen argues the district court should have conducted an evidentiary hearing on his 60-1507 motion for four reasons: (1) The motion was not time barred; (2) the motion was not successive; (3) the district court erred when it held the motion did not conform to Supreme Court Rule 183(e); and (4) the district court did not make the necessary findings of fact and conclusions of law when summarily denying the motion. We will analyze each argument in turn.

A. *Nguyen's 60-1507 motion is not time barred.*

First, Nguyen argues that although his motion was filed 6 years after his direct appeal was decided, he can show manifest injustice and, therefore, his motion is timely.

Motions filed under K.S.A. 60-1507 must be brought within 1 year after the final order of the last appellate court to exercise jurisdiction over a defendant's direct appeal. K.S.A. 60-1507(f)(1)(i). This time limitation may be extended by the district court only to prevent a manifest injustice. K.S.A. 60-1507(f)(2).

> "[A] manifest injustice inquiry . . . should consider a number of factors as a part of the totality of the circumstances analysis . . . includ[ing] whether (1) the movant provides persuasive reasons or circumstances that prevented him or her from filing the 60-1507 motion within the 1-year time limitation; (2) the merits of the movant's claim raise substantial issues of law or fact deserving of the district court's consideration; and (3) the movant sets forth a colorable claim of actual innocence, *i.e.*, factual, not legal, innocence." *Vontress v. State*, 299 Kan. 607, 616, 325 P.3d 1114 (2014).

Here, under the standard time limit, Nguyen's motion is time barred. However, *Vontress*, which was decided after the trial court denied Nguyen's motion, provides Nguyen with an opportunity for an extension of the time limit under the second factor for one of his claims for relief. Nguyen raises the argument that the Supreme Court found his codefendants' convictions of conspiracy to commit kidnapping multiplicitous, reversed their convictions, and ordered that they be resentenced. See *State v. Pham*, 281 Kan. 1227, 1262, 136 P.3d 919 (2006); *State v. Nguyen*, No. 96,430, 2008 WL 360635, at *2 (Kan. 2008) (unpublished opinion). Similarly, Nguyen's conviction for conspiracy to commit kidnapping appears multiplicitous, meaning Nguyen's failure to receive the same relief raises "substantial issues of law or fact deserving of the district court's consideration." See *Vontress*, 299 Kan. at 616. Therefore, Nguyen's claim on this point is not time barred, although, as we explain below, the motion is barred as being successive.

B. *Nguyen's 60-1507 motion is successive.*

Second, Nguyen argues that the district court erred when it held his 60-1507 motion was successive because he was unable to show exceptional circumstances allowing him to bring this third motion.

In a K.S.A. 60-1507 proceeding, the district court is not required to entertain a second or successive motion for similar relief on behalf of the same prisoner. *State v. Trotter*, 296 Kan. 898, 904, 295 P.3d 1039 (2013). Supreme Court Rule 183(c)(3) (2015 Kan. Ct. R. Annot. 272) provides:

> "A proceeding under K.S.A. 60-1507 ordinarily may not be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal. . . . [T]rial errors affecting constitutional rights may be raised even though the error could have been raised on appeal, provided exceptional circumstances excuse the failure to appeal."

"A movant in a K.S.A. 60-1507 motion is presumed to have listed all grounds for relief, and a subsequent motion need not be considered in the absence of a showing of circumstances justifying the original failure to list a ground." *Trotter*, 296 Kan. 898, Syl. ¶ 2. These circumstances must be "exceptional," which has been defined as "'"unusual events or intervening changes in the law which prevent a movant from reasonably being able to raise all of the trial errors in the first post-conviction proceeding." [Citation omitted.]'" *State v. Kelly*, 291 Kan. 868, 872, 248 P.3d 1282 (2011) (quoting *Woodberry v. State*, 33 Kan. App. 2d 171, 175, 101 P.3d 727, *rev. denied* 278 Kan. 853 [2004]).

Unfortunately, Nguyen makes no arguments alleging that any exceptional circumstances prevented him from previously raising any of the 14 grounds for relief he now raises. It is not our role to hunt the record for such circumstances; it is Nguyen's duty to assert the existence of any exceptional circumstances that would justify the filing of a successive motion for relief. See *Vontress*, 299 Kan. at 617. This is troubling for us because Nguyen has at least one claim that likely has merit.

For example, as we have previously explained, one of Nguyen's claims for relief argues that because his two codefendants have been resentenced, he is entitled to resentencing as well. Nguyen's codefendants' convictions of conspiracy to commit kidnapping were held to be multiplicitous by the Kansas Supreme Court and were reversed. *Pham*, 281 Kan. at 1262; *Nguyen*, 2008 WL 360635, at *2. Unfortunately, Nguyen's memorandum in support of his 60-1507 motion makes no assertion as to why he did not raise this argument in his direct appeal or in his first 60-1507 motion. Although *Pham* was decided after Nguyen's direct appeal, Nguyen did not file his first 60-1507 motion until March 5, 2007, nearly 9 months after *Pham* was decided. Compare *Nguyen*, 281 Kan. 702 (decided May 5, 2006) with *Pham*, 281 Kan. 1227 (decided June 16, 2006). Nguyen presents no argument in his current motion as to what exceptional circumstances prevented him from raising this issue in his first K.S.A. 60-1507 motion.

Therefore, the district court did not err in summarily denying Nguyen's motion as successive.

C. *Nguyen's 60-1507 motion fails to comply with Supreme Court Rule 183(e).*

Third, Nguyen argues that he substantially complied with the requirements of Supreme Court Rule 183(e) and the district court erred in finding that the he did not comply with the rule.

Supreme Court Rule 183(e) (2015 Kan. Ct. R. Annot. 272) states: "**Sufficiency of Motion.** A motion to vacate, set aside, or correct a sentence is sufficient if it is in substantial compliance with the judicial council form. The form must be furnished by the clerk on request." Pro se pleadings are to be liberally construed. *State v. Andrews*, 228 Kan. 368, 370, 614 P.2d 447 (1980). However, "a pro se K.S.A. 60-1507 movant is in the same position as all other pro se civil litigants and is required to be aware of and follow the rules of procedure that apply to all civil litigants, pro se or represented by counsel." *Guillory v. State*, 285 Kan. 223, 229, 170 P.3d 403 (2007).

Here, although we are to construe Nguyen's pleadings liberally, we agree with the district court that Nguyen failed to substantially comply with the 60-1507 form in two ways. First, he failed to satisfy the requirements of paragraph 10, which directs a movant to "[s]tate concisely all the grounds on which you base your allegation that you are being held in custody unlawfully." Nguyen responded: "SEE ATTACHED 42 PAGES MEMORANDUM OF LAW, EXHIBIT, AND 10 PAGES OF AFFIDAVIT IN SUPPORT OF MOTION AND MEMORANDUM." Nguyen could have simply listed his 14 claims in this space and elaborated on them in his memorandum in support; however, he chose not to. This is not substantial compliance with the rule.

Second, Nguyen failed to comply with paragraph 11 of the K.S.A. 60-1507 form, which requires a movant to concisely state the facts that support a claim of unlawful detention and provide the names and addresses of the witnesses or other evidence on which the movant would rely. Instead of listing evidentiary support arranged by each alleged claim of unlawful custody, Nguyen listed 22 people, some by name and some by profession only, and various documents. These were not organized by any basis for his argument of unlawful detention; rather, they were mentioned sporadically throughout Nguyen's 52 pages of supporting documents. It is unclear what evidence would be provided by the sources listed or what sources and evidence supported each claim of unlawful custody.

Nguyen is required to follow the rules of procedure, regardless of whether he is proceeding pro se, and he failed to substantially comply with the form. See *Guillory*, 285 Kan. at 229. Thus, the district court did not err in finding that Nguyen did not comply with Supreme Court Rule 183(e) and did not err in using his failure to comply as one of the grounds to summarily dismiss Nguyen's motion.

D. *The district court made the necessary findings of fact and conclusions of law to summarily deny the motion.*

Finally, Nguyen argues that the district court failed to make the necessary findings of fact and conclusions of law as required by Supreme Court Rule 183(j) (2015 Kan. Ct. R. Annot. 273), which states: "**Judgment.** The court must make findings of fact and conclusions of law on all issues presented." In interpreting this rule, appellate courts have emphasized the importance of specific findings of fact and conclusions of law to allow for meaningful appellate review. See *State v. Moncla*, 269 Kan. 61, 64-65, 4 P.3d 618 (2000); *Harris v. State*, 31 Kan. App. 2d 237, 239, 62 P.3d 672 (2003); *Stewart v. State*, 30 Kan. App. 2d 380, 382, 42 P.3d 205 (2002). However, when no objection is made to the district court's inadequate findings of fact or conclusions of law, we can presume the

district court found all facts necessary to support its judgment. *Drach v. Bruce*, 281 Kan. 1058, 1080, 136 P.3d 390 (2006), *cert. denied* 549 U.S. 1278 (2007). Here, Nguyen never objected to the district court's alleged insufficient findings; therefore, we may presume they were sufficient.

Our independent review of the record shows the district court did not err by summarily dismissing Nguyen's 60-1507 motion. While the motion was timely filed as to one of the issues raised, we agree with the district court that the motion was successive and failed to comply with Supreme Court Rule 183(e).

Affirmed.