NOT DESIGNATED FOR PUBLICATION

No. 114,284

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STEPHEN DOUGLAS WHITE,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Butler District Court; DAVID A. RICKE, judge. Opinion filed June 10, 2016. Affirmed.

Joshua S. Andrews, of Cami R. Baker & Associates, P.A., of Augusta, for appellant.

Joseph M. Penney, assistant county attorney, and *Derek Schmidt*, attorney general, for appellee.

Before HILL, P.J., STANDRIDGE and ATCHESON, JJ.

Per Curiam: The Butler County District Court dismissed as untimely Stephen Douglas White's motion for habeas corpus relief from his conviction for rape and found no manifest injustice excusing the late filing. Although our analysis departs from the district court's in some respects, we arrive at the same conclusion and, therefore, affirm the dismissal.

In 2011, the State charged White with three counts of rape of a child under 14 years of age. Those are Jessica's Law crimes carrying a penalty of life in prison without parole eligibility for 25 years. The victim regularly rode horses at a stable White owned

and operated. The State and White entered into an agreement calling for the dismissal of two of the counts and his plea of no contest to the remaining count with a joint recommendation to the district court for a departure sentence for a term of years based on the sentencing grid. At a hearing, the district court accepted White's plea and set the case for sentencing. At the sentencing, the district court declined to follow the recommendation for a departure and sentenced White to life in prison. White was then 68 years old.

White filed an appeal and was represented by the Appellate Defender's Office. The ADO requested the appeal be considered without full briefing, since only exceptionally limited challenges can be made to a statutorily authorized sentence following a plea. The ADO argued that a life sentence amounted to cruel or unusual punishment under § 9 of the Kansas Constitution Bill of Rights as applied to White. The Kansas Supreme Court has precluded defendants from raising that constitutional challenge for the first time on appeal, as the ADO acknowledged. See *State v. Roberts*, 293 Kan. 1093, 1096, 272 P.3d 24 (2012), *disapproved on other grounds State v. Jolly*, 301 Kan. 313, 322-23, 342 P.3d 945 (2015). This court granted the ADO's request and affirmed White's sentence without an opinion. The mandate came out on February 12, 2013.

What happened (or didn't happen) at the conclusion of the direct appeal figures in the reason White contends he didn't promptly file his habeas corpus motion under K.S.A. 60-1507. In January 2015, White wrote to the ADO's office to ask about the status of the direct appeal. The lawyer who had handled the appeal wrote back on January 21 and informed White that the ADO had sent him a letter on January 14, 2013, reporting the adverse decision in this court and advising him the ADO would not file a petition for review with the Kansas Supreme Court unless he specifically requested the office to do so. The January 21 letter went on to explain the ADO never heard from White and took no further action on his behalf.

White again wrote the ADO on February 2, 2015, prompting another responsive letter from the ADO 10 days later. In the response, the lawyer acknowledged both that he failed to inform White that the mandate had been issued in the direct appeal and that he should have done so. On March 19, the lawyer sent White another letter and an affidavit stating that due to an oversight on the lawyer's part, the ADO did not notify White that the mandate had been issued in his direct appeal. In the affidavit, the lawyer states he first informed White about the mandate on January 21, 2015.

White drafted his own motion for habeas corpus relief under K.S.A. 60-1507 and filed it in the district court on April 10, 2015. The district court appointed a lawyer to represent White on the motion and held a preliminary hearing to determine if the issues required a full evidentiary hearing. White testified at the preliminary hearing. He denied having received the January 14, 2013, letter from the ADO stating that this court had ruled against him on his direct appeal. Neither the original nor a file copy of the January 14, 2013, letter from the ADO's office has been presented in court or otherwise made part of the record. The record does include the letters from the ADO's office on January 21, February 12, and March 19, 2015, along with the affidavit from the lawyer.

The district court denied White's 60-1507 motion as untimely because it had not been filed within 1 year after the mandate issued in the direct appeal and White had failed to demonstrate "manifest injustice" excusing compliance with that deadline. See K.S.A. 60-1507(f) (establishing 1-year deadline and exception for manifest injustice). White has now appealed that ruling.

The success of White's appeal turns on whether he has demonstrated manifest injustice, thereby establishing a path to the substantive issues he has asserted in the 60-1507 motion.

Upon receiving a 60-1507 motion, a district court has three options. The district court can dismiss the motion after reviewing it and the record in the criminal case. *Bellamy v. State*, 285 Kan. 346, 353, 172 P.3d 10 (2007). But when "a motion . . . presents a substantial question of law or triable issue of fact, the court must appoint" a lawyer to represent the petitioner. Supreme Court Rule 183(i) (2015 Kan. Ct. R. Annot. 273). After appointing a lawyer, the district court then has two choices. It may conduct a preliminary hearing during which lawyers for the State and for the movant may present legal argument, limited evidence, and otherwise address whether the circumstances call for a full hearing. *Bellamy*, 285 Kan. at 354. If the parties call witnesses at the preliminary hearing, the reviewing court must defer to any factual findings of the district court substantially supported with that evidence. 285 Kan. at 354. But the reviewing court can consider the record in the criminal case and other documentary evidence without any particular deference, since they can be assessed equally well on appeal. See *State v. Trotter*, 296 Kan. 898, 901-02, 295 P.3d 1039 (2013); *Heiman v. Parrish*, 262 Kan. 926, 927, 942 P.2d 631 (1997). The reviewing court makes an independent determination of the district court's legal conclusions. *Bellamy*, 285 Kan. at 353.

The Kansas Supreme Court recently outlined relevant factors for determining whether a movant has shown manifest injustice rescuing an untimely 60-1507 motion from dismissal to include: (1) persuasive reasons for failing to file a timely motion; (2) substantial legal or factual grounds indicative of a claim "deserving of the district court's consideration" on the merits; and (3) a "colorable claim" of actual innocence. *Vontress v. State*, 299 Kan. 607, 616, 325 P.3d 1114 (2014). The ultimate determination of manifest injustice depends upon the totality of the circumstances of a given 60-1507 proceeding, and no one consideration controls the outcome. 299 Kan. at 616-17. We consider and apply the *Vontress* test.

As to the first factor, White has shown at least a fair, if not persuasive, reason for the delay in filing his 60-1507 motion. He says he received no notification from the ADO

about the status of his direct appeal and, therefore, didn't understand the statutory time period for filing the 60-1507 motion had begun running. White said he didn't get the letter the ADO sent him about this court's ruling affirming his sentence and asking whether he wished to pursue a petition for review. The ADO has never produced a file copy of that letter. It is, therefore, entirely possible one was never sent or it was sent to the wrong place. The ADO admitted never sending a letter to White about the mandate, even though the office should have done so. The district court characterized White's testimony about not receiving the letter as "self-serving." That's certainly an apt label. But it is not a credibility determination against White. The testimony, whether true or false, was by its very content self-serving in the sense of advancing White's legal point.

The district court weighed this *Vontress* factor against White on the notion he had an independent duty to regularly check the status of his direct appeal even though he was represented by the ADO's office. We are disinclined to march down that path with the same vigor as the district court. Criminal defendants may expect and rely on their lawyers to monitor legal milestones and deadlines and to keep them informed about the implications of material case events. We don't see criminal defendants having an independent duty to effectively act as their own cocounsel to routinely review those circumstances or to contact their lawyers periodically, say weekly or monthly, to ask if anything has happened. To be sure, as the district court noted, with the internet and the electronic posting of case filings, parties generally have far greater direct access to case information than they did a generation ago. But that doesn't, in our view, come with an obligation they actively review or attempt to analyze such information on their own unless they choose to represent themselves.

Here, for example, White would have had to review the electronic docket for his direct appeal. In turn, he would have to be aware that the ADO had 30 days from this court's ruling affirming in the direct appeal to file for review in the Kansas Supreme Court—a filing that would delay the mandate. And he would have to know that the 1-year

deadline for filing a 60-1507 motion was triggered by the issuance of the mandate. White presumably could have figured all that out had he regularly checked the docket and researched the law. But he also had a right to presume the ADO was protecting his legal interests.[*]

[*]Part of the problem here stemmed from how the ADO treated White's silence in response to its initial letter advising him of the adverse decision in this court on his direct appeal. The ADO presumed silence to mean White wanted nothing further done on his behalf. But silence was equally compatible with White having never received the letter at all, something that would have to be considered reasonably foreseeable especially within the corrections system. Conversely, the ADO could have presumed White wanted to pursue all available steps of appellate review absent an explicit direction from him otherwise. White shouldn't be penalized for the ADO's decision to treat a client's silence as a default indicating abandonment of further legal action.

White did promptly file his 60-1507 motion after the ADO's office informed him in 2015 that the direct criminal appeal had actually been concluded in 2013. Nothing in the record here proves White simply dawdled in asserting his habeas corpus claims. At the same time, however, we recognize there to be some outer limit as to how long a criminal defendant reasonably might wait to hear from his or her lawyer about the status of a direct appeal. We do not think that limit is defined with a fixed time period applicable to every case but must be shaped by the circumstances of a given case. Considering the record here, we cannot say White exceeded some reasonable outer limit. We, therefore, weigh the first *Vontress* factor in his favor.

The second factor requires us to scan White's claims for habeas corpus relief to see if they have some facial merit without actually deciding them. On appeal, White offers three assertions. He says the lawyer representing him on the criminal charges at the trial level failed to file a motion to suppress evidence and failed to undertake adequate discovery. He also says the district court misinformed him about the maximum sentence he faced when he entered the no-contest plea.

As to his lawyer's performance, White has not explained what evidence could have or should have been suppressed. We infer the evidence included inculpatory statements he made to law enforcement officers. But White does not elaborate on any legal argument that might have warranted the exclusion of those statements or any other evidence. That is insufficient to demonstrate something even in the general vicinity of a meritorious habeas corpus claim, even for purposes of a preliminary assessment under *Vontress*. To demonstrate constitutionally ineffective assistance of counsel warranting relief on a 60-1507 motion, the movant must show how the representation fell below an objective standard of reasonableness resulting in legal prejudice, meaning there probably would have been a different outcome had the representation been adequate. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see *Chamberlain v. State*, 236 Kan. 650, Syl. ¶¶ 3, 4, 694 P.2d 468 (1985) (adopting and stating *Strickland* test for ineffective assistance); see also *Haddock v. State*, 282 Kan. 475, 512-13, 146 P.3d 187 (2006) (stating *Strickland* test and *Chamberlain* standard of review). The showing requires a focused explanation of specific decisions and a detailed explanation of how they adversely affected the defendant resulting in a constitutionally deficient outcome. White fares no better with his second assertion about his lawyer's performance. He identifies no particular discovery the lawyer overlooked or how that discovery would have unearthed materially exculpatory evidence.

The way the district court discussed the maximum sentence with White at the plea hearing may have been technically amiss. *State v. Shaw*, 259 Kan. 3, Syl. ¶ 7, 910 P.2d 809 (1996) (due process requires district court inform criminal defendant of maximum potential sentence); K.S.A. 22-3210(a)(2) (district court must inform defendant "of the maximum penalty provided by law which may be imposed upon acceptance of such plea"). But White was not actually prejudiced. *State v. White*, 289 Kan. 279, 286-87, 211 P.3d 805 (2009) (failure to inform defendant of maximum sentence subject to harmless error review; plea must be "fairly and understandingly made"). The district court went about informing White this way:

"The Court: All right. Mr. White, do you understand the possible penalties that could be imposed as a result of this guilty plea that you are attempting to make?

"The Defendant: Yes, Sir.

"The Court: What do you understand those possible penalties to be?

"The Defendant: Twenty-five to life, Your Honor."

The district court didn't really inform White of the maximum penalty but conducted a Socratic dialogue with him on the topic. We suppose that would be acceptable, especially if the district court then told the defendant he had responded correctly. Here, the district court simply moved on to discuss the ramifications of a motion for a downward departure to the grid box. White may have assumed he had given the A+ answer to the question about the penalty, since the district court neither corrected him nor in Socratic fashion posed any related questions to refine the exchange of information.

The problem here lies in White's answer. It wasn't correct or at least sufficiently precise to show White accurately understood the potential sentence. The maximum sentence was life in prison with eligibility to ask for parole after 25 years. That's it. And that's not the same as 25 years to life. What White recited could mean he thought the district court would impose a term of incarceration of some length between 25 years and life. In that scenario, White might have believed he could get a 25-year sentence, so he would be released even earlier with good-time credit. Maybe White actually understood the shortest time he could possibly serve would be 25 years. But it's not at all clear he grasped that his release then would depend on an administrative determination by the prisoner review board—that is, parole—rather than some later judicial determination.

Nonetheless, under the circumstances of this case, all of that makes no practical difference and, thus, resulted in no demonstrable legal prejudice to White. As we have already mentioned, White was 68 years old when he entered his plea. Under any construction of the exchange between White and the district court, he understood that if

he received the maximum sentence, he would spend something on the order of 25 years in prison. Actuarially and practically, given his age, White reasonably had to recognize he would spend the rest of his life in prison were his request for a departure sentence denied. Accordingly, he was not materially misled during the plea hearing or not in a manner rising to manifest injustice. White's alternative would have been to face a trial and likely conviction, rendering a departure sentence theoretically possible but utterly improbable.

In summary, the second *Vontress* factor offers little to nothing for White. He has not advanced arguments suggesting even marginal chances for success on the merits of his 60-1507 motion.

As to the final factor, White has not asserted a claim of actual innocence, let alone demonstrated some colorable support for it. This arguably may be the most significant *Vontress* consideration. There is something fundamentally repugnant to both our judicial system and elemental fairness that an innocent person should be incarcerated for a crime he or she did not commit. Here, however, White presents no argument to that effect, so the factor falls heavily against him.

In conclusion, we find White has failed to present circumstances demonstrating manifest injustice, as outlined in *Vontress*, warranting proceeding with his untimely 60-1507 motion challenging his conviction and sentence for rape. We, therefore, agree with the district court's ultimate determination in denying the motion as too late.

Affirmed.