NOT DESIGNATED FOR PUBLICATION

No. 115,073

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

MICHAEL JAMES PERRY,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Johnson District Court; KEVIN P. MORIARTY, judge. Opinion filed February 3, 2017. Affirmed.

Michael P. Whalen, of Law Office of Michael P. Whalen, of Wichita, for appellant.

Shawn E. Minihan, assistant district attorney, *Stephen M. Howe*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

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

Per Curiam: Michael James Perry appeals the denial of his second K.S.A. 60-1507 motion as untimely and successive. We find no error by the district court when it denied Perry's 1507 motion after conducting a preliminary hearing. We also find the recent amendment to K.S.A. 60-1507, adding paragraph (2)(A) to subsection (f), effective July 1, 2016, applies retroactively to Perry's pending motion. Affirmed.

FACTS

In 2002, Perry pleaded no contest to two counts of rape. Initially, Perry was charged with eight crimes including sexual exploitation of a child, alleging he had child pornography (photographs) in his possession. Prior to sentencing, Perry moved to withdraw his plea. At sentencing, the district court denied Perry's motion to withdraw his plea and sentenced him to 294 months' imprisonment. Although he was represented by the Kansas Appellate Defender Office, Perry filed a pro se direct appeal. The Kansas Appellate Defender Office sent Perry a letter advising him "a durable power of attorney cannot make decisions for a person charged, or on appeal, in a criminal case" and advising the Kansas Appellate Defender Office would withdraw if Perry wanted to proceed pro se. Perry proceeded pro se, and a panel of this court affirmed the district court in *State v. Perry*, No. 90,026, 2003 WL 22227452 (Kan. App. 2003) (unpublished opinion) (*Perry I*).

In 2006, Perry filed his first pro se motion pursuant to K.S.A. 60-1507; it was summarily denied by the district court. A panel of this court affirmed the district court in *Perry v. State*, No. 96,652, 2007 WL 1309810 (Kan. App. 2007) (unpublished opinion) (*Perry II*). In 2009, he filed his first pro se motion to correct an illegal sentence which the district court denied and a panel of this court affirmed in *State v. Perry*, No. 103,269, 2010 WL 3732082 (Kan. App. 2010) (unpublished opinion) (*Perry III*).

In 2012, Perry filed his second motion to correct an illegal sentence and requested the appointment of counsel. Perry's request for court-appointed counsel was granted. The district court denied Perry's motion to correct an illegal sentence. Perry appealed and moved for appointed appellate counsel. In 2013, this court affirmed the district court's denial of Perry's second motion to correct an illegal sentence as moot in an order in case No. 108,727 (*Perry IV*).

In 2015, now represented by counsel, Perry filed his second 1507 motion alleging ineffective assistance of counsel because his trial counsel incorrectly informed him of his potential sentence if he went to trial. He also filed a motion for evidentiary hearing arguing exceptional circumstances and manifest injustice required consideration of the merits of his 1507 motion. Perry now claims his mother, acting as power of attorney, drafted pleadings and briefs on his behalf. He alleges his mother's actions prevented him from obtaining qualified counsel to pursue postconviction relief.

The State moved to dismiss, contending Perry's 1507 motion was untimely and successive. The district court heard argument on the State's motion to dismiss on August 25, 2015. Perry's counsel argued his mother got sidetracked on nonwinning claims in "gibberish" petitions. The district court pointed out Perry could have filed each of his prior motions pro se and chose to sign them despite his mother drafting them. Perry's counsel indicated Perry would testify he signed what his mother told him to sign due to his mental health issues. Perry's counsel argued trial counsel incorrectly informed Perry of the consequences of his plea and the length of his sentence if convicted at trial. Finally, counsel indicated Perry would testify he was innocent.

The district court sustained the State's motion to dismiss because there was no manifest injustice, Perry's 1507 motion was filed outside the 1-year limit—now 12 years late—under K.S.A. 60-1507(f), and it was successive. Perry timely appeals, claiming the matter should be remanded for an evidentiary hearing on his motion.

ANALYSIS

K.S.A. 60-1507 was amended, and it applies retroactively.

The long-standing rule in Kansas is a district court has three options when handling a K.S.A. 60-1507 motion:

"'(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.' [Citation omitted.]" *Sola-Morales v. State*, 300 Kan. 875, 881, 335 P.3d 1162 (2014).

Our standard of review depends upon which of these options a district court utilizes. 300 Kan. at 881. When, as here, the district court denies a 1507 motion based only on the motions, files, and records after a preliminary hearing, the appellate court is in just as good a position as the district court to consider the merits. Therefore, our standard of review is de novo. *Grossman v. State*, 300 Kan. 1058, 1061, 337 P.3d 687 (2014).

K.S.A. 2016 Supp. 60-1507(f)(1) states:

"Any action under this section must be brought within one year of:

"(A) The final order of the last appellate court in this state to exercise jurisdiction on a direct appeal or the termination of such appellate jurisdiction; or

"(B) the denial of a petition for writ of certiorari to the United States supreme court or issuance of such court's final order following granting such petition."

Our statute instructs the time limit may only be extended to prevent a manifest injustice. K.S.A. 2016 Supp. 60-1507(f)(2). In *Vontress v. State*, 299 Kan. 607, 616, 325 P.3d 1114 (2014), the Kansas Supreme Court held manifest injustice must be determined from the totality of the circumstances and a court should consider

"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."

Effective July 1, 2016, the Kansas Legislature amended K.S.A. 60-1507, adding subsection (f)(2)(A), which states:

> "For purposes of finding manifest injustice under this section, the court's inquiry shall be limited to determining why the prisoner failed to file the motion within the one-year time limitation or whether the prisoner makes a colorable claim of actual innocence. As used herein, the term actual innocence requires the prisoner to show it is more likely than not that no reasonable juror would have convicted the prisoner in light of new evidence." K.S.A. 2016 Supp. 60-1507(f)(2)(A).

The State argues the amendment should apply retroactively. Perry did not address in his brief the application of K.S.A. 2016 Supp. 60-1507(f)(2)(A) to his pending appeal. We will proceed to determine whether the amendment should apply retroactively.

Retroactive application of a statute is an issue of statutory interpretation over which appellate courts have unlimited review. See *State v. Brownlee*, 302 Kan. 491, 508, 354 P.3d 525 (2015). As a general rule, a statute operates prospectively unless (1) the statutory language clearly indicates the legislature intended the statute to operate retrospectively, or (2) the change is procedural or remedial in nature. *Norris v. Kansas Employment Security Bd. of Review*, 303 Kan. 834, 841, 367 P.3d 1252 (2016).

"Procedural laws relate to the "'machinery for carrying on the suit, including pleading, process, evidence, and practice" and "the mode or proceedings by which a legal right is enforced, that which regulates the formal steps in an action."'" *Brennan v. Kansas Insurance Guaranty Ass'n*, 293 Kan. 446, 461, 264 P.3d 102 (2011). In contrast,

"[s]ubstantive laws give or define the right, give the right or denounce the wrong, or create liability against a defendant for a tort committed." 293 Kan. at 461.

Here, the statute's language does not clearly indicate the legislature intended it to apply retroactively. However, the amendment is procedural, not substantive. The amendment does not bar 1507 motions based on manifest injustice, it simply limits the district court's inquiry when determining whether manifest injustice exists.

However, a statute may not be applied retroactively if it would prejudicially affect a party's substantive or vested rights even if the legislature intended for it to apply retroactively. *Brennan*, 293 Kan. at 460. "Vested rights" is a conclusory term describing "rights that cannot be abolished by retroactive legislation." *Brennan*, 293 Kan. at 460. When considering retroactive application of a new statutory change, we look at three factors to determine if the law violates a party's vested rights:

> "'(1) the nature of the rights at stake (*e.g.*, procedural, substantive, remedial), (2) how the rights were affected (*e.g.,* were the rights partially or completely abolished by the legislation; was any substitute remedy provided), and (3) the nature and strength of the public interest furthered by the legislation.' [*Resolution Trust Corp. v. Fleischer*,] 257 Kan. [360,] 369[, 892 P.2d 497 (1995)]." *Brennan*, 293 Kan. at 460.

The first factor (nature of the right) is not determinative and must be balanced against the other factors. *Brennan*, 293 Kan. at 462.

Here, the amendment is clearly procedural. Second, the amendment only partially limits the inquiry for determining whether manifest injustice exists. Finally, considering whether the movant raised substantial issues of law or fact deserving of consideration would essentially negate the time limitation of K.S.A. 2016 Supp. 60-1507(f)(1). Therefore, we find the addition of subsection (2)(A) to K.S.A. 60-1507(f) should apply retroactively. Accordingly, we will limit our inquiry to determine whether Perry's failure

to file his 1507 motion within the 1-year time limitation of K.S.A. 2016 Supp. 60-1507(f)(1) should be extended to avoid manifest injustice or whether he has presented a colorable claim of actual innocence.

Perry has not shown manifest injustice.

It has long been the law in Kansas the 1-year time limit to bring a 1507 motion may only be extended to prevent manifest injustice. K.S.A. 60-1507(f)(2). Perry argues his ill-informed mother acting outside the scope of her power of attorney, his mental health problems, and his failure to understand he had a right to competent legal counsel prevented him from timely filing a legitimate 1507 claim.

In the context of K.S.A. 60-1507(f), "manifest injustice" means "obviously unfair" or "shocking to the conscience." *Vontress*, 299 Kan. at 614. Here, Perry has the burden to show manifest injustice exists. 299 Kan. at 617. In 2012, Perry filed a motion to correct an illegal sentence and moved for appointed counsel in *Perry IV*. Even if we accept Perry was unaware he could be appointed counsel prior to 2012, he was clearly aware counsel could be appointed in 2012. Yet, in this appeal, Perry does not explain why he waited nearly 2 years after our court's order in *Perry IV*—and nearly 17 months after the mandate issued—to file his current 1507 motion. An issue not briefed is deemed waived or abandoned. *Superior Boiler Works, Inc. v. Kimball*, 292 Kan. 885, 889, 259 P.3d 676 (2011). Perry has failed to show manifest injustice.

Similarly, Perry has not shown a colorable claim of actual innocence. Pursuant to K.S.A. 2016 Supp. 60-1507(f)(2)(A), Perry must "show it is more likely than not that no reasonable juror would have convicted the prisoner in light of new evidence." Perry proffered he would testify he was innocent and manufactured the child pornography photographs as part of research for a book. Perry failed to proffer new facts or evidence

regarding his claim of innocence. Perry has not shown that a reasonable juror would not have convicted him based on his new evidence. See K.S.A. 2016 Supp. 60-1507(f)(2)(A).

Even if we assume manifest injustice existed prior to 2012, when Perry filed a motion to correct an illegal sentence and requested appointed counsel, Perry has not explained why more than 1 year passed between that motion and this 1507 motion. Similarly, Perry has failed to show a colorable claim of actual innocence. Thus, his second 1507 motion is untimely and successive. The district court did not err when it denied his motion after the preliminary hearing.

Even though we have found K.S.A. 2016 Supp. 60-1507(f)(2)(A) applies, we recognize the statutory change became effective after the district court ruled on Perry's motion. Therefore, we take the time to acknowledge even if we apply K.S.A. 60-1507(f)(1) and (2) to the facts of this case, Perry still loses. As previously discussed, Perry's motion is untimely, and he has failed to show manifest injustice upon denial of his motion. The motion is Perry's second 1507 motion, and it is successive.

Affirmed.