NOT DESIGNATED FOR PUBLICATION

No. 115,401

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

TERRAL BREEDLOVE,
Appellant,

v.

STATE OF KANSAS,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JAMES R. FLEETWOOD, judge. Opinion filed July 14, 2017. Affirmed.

Kristen B. Patty, of Wichita, for appellant.

Lance J. Gillett, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before BUSER, P.J., PIERRON and STANDRIDGE, JJ.

Per Curiam: Terral Breedlove was convicted of first-degree murder on June 25, 2009. This was the second trial on the matter.

Breedlove filed a K.S.A. 60-1507 motion on September 4, 2013, after his second appeal and argued (1) the district court's adoption of the State's findings of fact and conclusions of law ceded judicial power to the State and violated Supreme Court Rule 183(j) (2017 Kan. S. Ct. R. 222); (2) he received ineffective assistance of counsel; (3) the

district court erred when it imposed a filing fee for his motion for summary judgment; and (4) he was entitled to an evidentiary hearing and appointment of counsel.

The State responded about 2 years later on September 17, 2015. The district court adopted the State's proposed findings of fact and conclusions of law on September 21, 2015.

We find the district court properly followed Supreme Court Rule 183(j); none of Breedlove's attorneys provided ineffective assistance of counsel; the district court did not err when it imposed a filing fee for the dispositive motion Breedlove filed; and the district court was correct to summarily deny Breedlove's K.S.A. 60-1507 motion and he was therefore not entitled to the appointment of counsel. The district court is affirmed.

The events of Breedlove's first conviction for the murder of Rigoberto Garcia are summarized in *State v. Breedlove*, 285 Kan. 1006, 1007-1009, 179 P.3d 1115 (2008). On August 12, 1995, Breedlove committed first-degree murder, aggravated robbery, and four counts of aggravated assault. At the time of the crimes, Breedlove was 17 years and 9 months old. In September 1995, Breedlove committed aggravated robbery, aggravated assault, aggravated assault on a law enforcement officer, and criminal use of a weapon. He was charged at the end of September in the juvenile court for the September crimes.

Breedlove stipulated to the State's motion for adult prosecution, and he was authorized to be prosecuted as an adult. His September charges were dismissed in juvenile court and he was then charged as an adult. Breedlove turned 18 years old on November 15, 1995. He pled guilty to the September crimes on January 9, 1996. He was sentenced to prison as an adult.

On June 26, 1997, Breedlove was charged with the August crimes of felony murder, aggravated robbery, and four counts of aggravated assault. While he committed

these crimes when he was 17, the case was filed in the district court rather than the juvenile court. His status as a juvenile or an adult was never addressed in this case.

Breedlove was tried as an adult for the August crimes and convicted by a jury on November 20, 1997. He received a life sentence plus 52 months' imprisonment, to be served consecutive to the previous sentence for the September crimes. On February 15, 2006, Breedlove filed a motion to correct an illegal sentence for the August crimes. He alleged that the district court lacked jurisdiction to prosecute him as an adult because he had not been initially charged in juvenile court and had never been authorized for adult prosecution. The district court denied the motion, and Breedlove appealed. The Kansas Supreme Court reversed and vacated the convictions. 285 Kan. at 1017.

On April 30, 2008, the State filed a new case in juvenile court and charged Breedlove with the August 1995 crimes. On May 5, 2008, the State requested authorization to charge Breedlove as an adult. On February 19, 2009, a journal entry was filed which authorized Breedlove to be prosecuted as an adult. That same day, Breedlove was arraigned on one count of first-degree murder. On June 25, 2009, a jury found Breedlove guilty of first-degree murder. He was sentenced to life in prison without possibility of parole for 15 years.

Breedlove appealed and argued the district court had violated the speedy trial statute; improperly allowed evidence regarding other criminal activity he had engaged in; and improperly allowed testimony to be read into the record. He also alleged there was prosecutorial misconduct during closing argument and the State violated a motion in limine and objected to jury instructions. The Kansas Supreme Court found no error of substance and concluded that Breedlove did not suffer substantial prejudice. *State v. Breedlove*, 295 Kan. 481, 482, 497-498, 286 P.3d 1123 (2012).

On September 4, 2013, Breedlove filed a K.S.A. 60-1507 motion. He alleged he was denied his right to effective assistance of counsel from his appointed juvenile counsel, his juvenile detention hearing counsel, and his trial counsel; his right to have adequate notice of the charges against him; his right to have his parents provided with adequate notice of the hearings; and his right to due process under the Fourteenth Amendment to the United States Constitution. On November 12, 2013, Breedlove filed a pro se amendment to his motion, which laid out the same allegations, and included facts as well as a list of witnesses and evidence. The clerk of the district court wrote a letter to Breedlove, filed December 26, 2013, which informed him a hearing was set on September 27, 2013. It was then continued out to May 27, 2015.

On July 23, 2014, Breedlove filed a pro se motion to request leave of the district court to add "supplemental and amendment pursuant to K.S.A. 60-215 to his pro se petition for writ of habeas corpus pursuant to K.S.A. 60-1507." In that motion, he added information regarding his ineffective assistance of counsel claims. In March 2015, the court requested a response to Breedlove's motion from the State.

On August 10, 2015, Breedlove filed a motion to obtain summary judgment on his K.S.A. 60-1507 motion. A $195 fee was assessed for the motion.

The State filed its response to Breedlove's pro se K.S.A. 60-1507 motion on September 17, 2015, 2 years after he filed his original K.S.A. 60-1507 motion. Breedlove's motion was approximately 10 pages long. The State's response was approximately 39 pages long. The district court denied Breedlove's motion on September 21, 2015, and adopted the State's findings of fact and conclusions of law.

On appeal, Breedlove argues: (1) the district court's adoption of the State's findings of fact and conclusions of law ceded judicial power to the State and violated Supreme Court Rule 183(j); (2) he received ineffective assistance of counsel; (3) the

district court erred when it imposed a filing fee for his motion for summary disposition; and (4) he was entitled to an evidentiary hearing and appointment of counsel.

Breedlove first argues the district court's adoption of the State's response to his K.S.A. 60-1507 motion deprived him of due process.

Whether the district court's findings of fact and conclusions of law comply with Supreme Court Rule 183(j) is a question of law that is reviewed de novo. *Robertson v. State*, 288 Kan. 217, 232, 201 P.3d 691 (2009). Supreme Court Rule 183(j) (2017 Kan. S. Ct. R. 224) states: "The court must make findings of fact and conclusions of law on all issues presented."

Generally, a movant must object to inadequate findings of fact and conclusions of law in order to give the trial court an opportunity to address the objection. *Gilkey v. State*, 31 Kan. App. 2d 77, 77, 60 P.3d 351 (2003). When there is no such objection, omissions in findings will not be considered on appeal because the trial court is presumed to have found all facts necessary to support its judgment. 31 Kan. App. 2d at 77-78. Here, Breedlove did not file an objection in the district court. We "may still consider a remand if the lack of specific findings precludes meaningful appellate review." 31 Kan. App. 2d at 78.

Breedlove's argument that the district court cannot adopt the State's suggested findings of fact and conclusions of law as its own is not persuasive. Just because the district court adopted the State's findings and conclusions in response to Breedlove's K.S.A. 60-1507 motion does not mean that it did not conduct its own independent review. *Reyes v. State*, No. 109,885, 2014 WL 2402931, at *4 (Kan. App. 2014) (unpublished opinion). It only suggests the district court agreed with the reasoning set forth by the State. 2014 WL 2402931, at *4. What matters in a K.S.A. 60-1507 determination is that

the court states its findings and conclusions orally or in writing so the appellate court can conduct a meaningful review. 2014 WL 2402931, at *4.

Breedlove cites to *State v. Woodward*, No. 103,555, 2011 WL 1002957, at *2 (Kan. 2011) (unpublished opinion), to argue the district court cannot adopt the State's findings of fact and conclusions of law. In *Woodward*, the Kansas Supreme Court stated the district court's blanket adoption of the State's responsive pleadings was "highly suspect." 2011 WL 1002957, at *2. The *Woodward* court found that appellate review can be more difficult if the State has failed to respond to all of the movant's arguments or if any of the facts or conclusions of law were imprecise or inaccurate. 2011 WL 1002957, at *2. However, the *Woodward* court agreed with the State that the record allowed it to dispose of the appeal without remanding to the district court to make its own findings of fact and conclusions of law. 2011 WL 1002957, at *2.

After reviewing the record, Breedlove's K.S.A. 60-1507 motion, and the State's response, it is clear the State responded to all of Breedlove's arguments and set forth accurate findings of fact and conclusions of law. Because the district court did set forth findings of fact and conclusions of law that complied with Supreme Court Rule 183(j) and did not deprive Breedlove of due process, the district court did not err. See *Bailey v. State*, 114,844 2017 WL 1197240 (Kan. App. 2017) (unpublished opinion) *petition for rev. filed* May 1, 2017.

Breedlove next argues his attorneys provided ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish (1) that the performance of defense counsel was deficient under the totality of the circumstances and (2) prejudice, *i.e.*, that there is a reasonable probability the jury would have reached a different result absent the deficient performance. *Sola-Morales v.*

State, 300 Kan. 875, 882, 335 P.3d 1162 (2014) (relying on *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674, *reh. denied* 467 U.S. 1267 [1984]).

Judicial scrutiny of counsel's performance in a claim of ineffective assistance of counsel is highly deferential and requires consideration of all the evidence before the judge or jury. The reviewing court must strongly presume 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, with a reasonable probability meaning a probability sufficient to undermine confidence in the outcome. *State v. Sprague*, 303 Kan. 418, 426, 362 P.3d 828 (2015).

If counsel has made a strategic decision after making a thorough investigation of the law and the facts relevant to the realistically available options, then counsel's decision is virtually unchallengeable. Strategic decisions made after a less than comprehensive investigation are reasonable exactly to the extent a reasonable professional judgment supports the limitations on the investigation. *State v. Cheatham*, 296 Kan. 417, 437, 292 P.3d 318 (2013) (citing *Strickland*, 466 U.S. at 690-91).

Defense Attorney Karen Palmer

Breedlove argues Palmer was unprepared at the initial juvenile hearing and she did not consult with him or his parents which resulted in prejudice. Had Palmer been effective, he argues, several arguments would have been made on his behalf including: (1) posting bond; (2) his parole officer's willingness to testify about allowing Breedlove to bond out; (3) his home environment; (4) the support of his family and friends; (5) he was not a flight risk; and (6) he had a job interview.

Under K.S.A. 60-1507, a prisoner in custody can collaterally attack his or her sentence "if he or she is subject to detention, confinement, or restraint on the sentence subject to challenge when the motion is filed." *Rawlins v. State*, 39 Kan. App. 2d 666, Syl. ¶2, 182 P.3d 1271 (2008). This does not include a detention hearing that had no bearing on whether Breedlove was guilty or the sentence imposed for the crimes. By definition, a detention hearing is "[a] hearing to determine whether an accused should be released pending trial." Black's Law Dictionary 836 (10th ed. 2014).

At the detention hearing, Palmer entered a not guilty plea for Breedlove. The State then outlined the reasons Breedlove should be detained, and the district court agreed.

While it is not likely Palmer's actions were deficient, in any event Breedlove cannot establish the second prong of *Strickland* because he cannot show a jury would have reached a different result absent the deficient performance because it was a detention hearing and did not bear on his guilt or sentence. Palmer did not provide ineffective assistance of counsel, and the district court did not err on that issue.

Defense Attorney Julia Craft

Breedlove argues Craft failed to raise before the juvenile court that he and his parents were not provided with written notice of the charges or the factual allegations against him. In addition, he argues he was not aware of his right to be represented by counsel retained by him sufficiently in advance of the initial hearing which violated his due process rights under the Fourteenth Amendment. Further, he argues Craft was ineffective in her attempt to get him to waive his transfer hearing to adult court.

In Breedlove's November 2013 amendment to his K.S.A. 60-1507 motion, he argued the district court violated several statutory procedures including failure to give notice of the hearings to Breedlove, his parents, and the attorney representing him.

Nowhere in this amendment did Breedlove place this blame with Craft. It is solely directed at the district court. However, in his brief, Breedlove places this blame on Craft.

An amendment to a K.S.A. 60-1507 motion is permitted, subject to the requirements set out in K.S.A. 2016 Supp. 60-215(c). *Thompson v. State*, 293 Kan. 704, 714, 270 P.3d 1089 (2011). This means relation back is permitted "only if the new claims arose 'out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.'" 293 Kan. at 714.

The new claim that Craft was at fault for not notifying Breedlove and his parents does not relate back to the claim that the district court was at fault for not notifying Breedlove and his parents. These are claims against two distinct entities, the district court and Craft and, therefore, could not arise out of the same conduct, transaction, or occurrence, as the actions taken by each entity would be entirely different. See K.S.A. 2016 Supp. 60-215(c)(2).

Further, even if the claims did arise out of the same conduct, transaction, or occurrence, the purpose of a K.S.A. 60-1507 motion is to allow a prisoner in custody to attack the sentence imposed. K.S.A. 60-1507(a). If they occurred, they are simply trial errors and do not bear on Breedlove's guilt or sentence.

Breedlove's next claim against Craft—that he was not notified of his right to be represented by counsel retained by him sufficiently in advance of his initial hearing to permit preparation—was stated but never expanded upon. Breedlove never states what exactly happened or how he was prejudiced by this alleged deficiency.

"[A] failure to adequately brief an issue results in abandonment or waiver. *State v. Logsdon*, 304 Kan. 3, 29, 371 P.3d 836 (2016). The Kansas Supreme Court has also held that "a point raised only incidentally in a brief but not argued there is deemed abandoned.

[Citations omitted.]" *Cooke v. Gillespie*, 285 Kan. 748, 758, 176 P.3d 144 (2008). Here, Breedlove states the claim against Craft that he was not notified of his right to be represented by counsel retained by him, but he never argues the issue. Because this issue was not adequately briefed, it is waived and abandoned.

Lastly, Breedlove argues Craft was ineffective for her attempt to get him to waive his transfer hearing to adult court. Craft made a strategic decision to ask Breedlove to waive his transfer hearing to adult court. Strategic decisions are virtually unchallengeable. *Cheatham*, 296 Kan. at 437. Her attempt to get Breedlove to waive his transfer hearing was not deficient under the totality of the circumstances, as it is reasonable as a strategic choice. See *Strickland*, 466 U.S. at 687. Craft was not ineffective.

Defense Attorney John Sullivan

Breedlove asserts several claims against Sullivan, his trial counsel, for ineffective assistance of counsel. He generally asserts Sullivan was ineffective because Sullivan had been charged with a drug related crime and his law license was temporarily suspended in 2014. There is no evidence in the record that indicates Sullivan was using drugs or at all impaired during the trial proceedings. Therefore, the first prong of *Strickland* cannot be established based on a drug charge in 2014 because there is no evidence Sullivan's performance was deficient under the totality of the circumstances. See *Strickland*, 466 U.S. at 687. This argument against Sullivan fails.

Breedlove also contends that Sullivan failed to investigate, pursue, and present an alibi defense. Breedlove claims that a friend had picked him up and dropped him off at home on the night of the murder. However, he does not indicate who this person was or how Sullivan could have contacted this individual. Even if Sullivan had provided Breedlove with a deficient performance under the totality of the circumstances,

Breedlove was not prejudiced by his actions. See *Strickland*, 466 U.S. at 687. There is no reasonable probability the jury would have reached a different result due to the various witnesses who identified Breedlove as the individual at the Checkers grocery store and as the one who shot the victim.

Callie Bishop testified two men—one of whom was African-American and holding a gun—approached her and her friends, Danielle Holt and Kevin Hammond. Bishop identified Breedlove as the man with the gun who had approached them. Holt and Hammond relayed similar descriptions of what had happened to them that night. Holt indicated the friends were at her home, which was in walking distance of Checkers.

Shelley Hernandez testified two men approached her when she was at her apartment complex. Hernandez identified Breedlove as the man who approached her with a gun. She stated her apartment complex was close to Checkers. When the two men left, they walked west towards Checkers.

Dawn Landsdowne was working at Checkers on the night of the murder. She saw the victim in the store as well as Breedlove and Israel Sosa, the man who was with him. She testified she saw the two men go in and out of the store and ask people for rides. The two men were in the store at the same time as the victim. Landsdowne identified Breedlove as one of the men who was in Checkers the night of the murder.

Andrea Carlyle was unavailable to testify at the second trial, but the transcript from her testimony at the first trial was read into the record. Carlyle was Breedlove's girlfriend at the time of the murder. She testified she had been with both Breedlove and Sosa on the day of the murder. She stated both Breedlove and Sosa were at her apartment, and the men left together. When Breedlove returned to her apartment around 2 a.m. or 3 a.m. in the morning, he told her that he and Sosa had been at Checkers and saw an old man behind the store get shot. He told her that he and Sosa saw the victim's keys on the

ground, picked them up, and took the car because they needed a ride home. Breedlove told Carlyle he had shot the man once or twice, and then said he was joking around.

Anthony Davis testified about a conversation he overheard between Breedlove and Sosa when they were in jail. He stated he heard Breedlove tell Sosa to keep his mouth shut and not to say anything. Davis testified he had a conversation with Sosa and Sosa told him Breedlove had a pistol, they got into a fight with a man at Checkers, and the man was shot and killed.

Sosa testified he was with Breedlove at the Checkers grocery store. He stated they both approached kids in a driveway and walked through an apartment complex. During that time Breedlove had a handgun. Sosa stated Breedlove shot the victim behind Checkers.

Based on this overwhelming evidence that Breedlove was at the scene of the crime and the one who shot the victim, it is clear there is no reasonable probability a jury would have reached a different conclusion if the alleged alibi had been presented.

Breedlove also claims Sullivan failed to interview and present a potential key witness. This alleged witness was at the crime scene and reported to the police that he saw two men coming in and out of the store on the night of the crime and spoke to them briefly before they followed someone around the back of the building where the murder took place. Like in the above claim, Breedlove does not identify who this witness was or how Sullivan could have gotten in contact with the individual. Further, if there had been a witness that Sullivan did not call, Breedlove cannot overcome the second prong of *Strickland* because of the overwhelming evidence outlined in the above claim. It is clear that even if Sullivan was deficient in his performance, there is no reasonable probability a jury would reach a different conclusion based on the evidence that identified Breedlove as the man at the scene of the crime who shot the victim. Sullivan was not ineffective.

Breedlove also argues Sullivan failed to exercise his rights under the Sixth Amendment to the United States Constitution for the compulsory process for obtaining witnesses. He claims Sullivan failed to subpoena C. Phillips who was a friend of Davis. Phillips allegedly would have testified that Davis admitted to lying about the conversation where Breedlove talked about the murder.

Sullivan attempted to impeach Davis on cross-examination by challenging his motivation for testifying at trial. In addition, Sullivan pointed out during his closing statement that Davis lacked credibility as a witness. Further, Davis never testified he and Breedlove had a conversation regarding the murder, only that he overheard Sosa and Breedlove discussing the events. Based on this information, Breedlove cannot overcome the first prong of *Strickland* and show that Sullivan was deficient. See *Strickland*, 466 U.S. at 687. If he was deficient, Breedlove was not prejudiced by his actions as there was overwhelming identification evidence at trial. Sullivan was not ineffective for not using the compulsory process to obtain a witness.

Breedlove next argues Sullivan failed to impeach Davis, Holt, and Hammond with their testimony from the original 1997 preliminary hearing and trial. He claims Davis admitted at the preliminary hearing that Breedlove had not told him he killed the victim and Holt and Hammond could not identify him. As discussed above, Sullivan attempted to impeach Davis during cross-examination. Davis never testified about a conversation between him and Breedlove but about a conversation he overheard between Breedlove and Sosa. In regards to Holt and Hammond, neither one attempted to identify Breedlove. Sullivan's performance was not deficient based on this information. Even if it were deemed deficient, Breedlove was not prejudiced as Bishop, Hernandez, Landsdowne, and Sosa identified him before and at the crime scene and as the one who shot the victim. Sullivan was not ineffective,

Breedlove argues Sullivan failed to lodge a contemporaneous objection to the testimony of the victim's daughter. He claims the evidence about the victim's family and relationships constituted reversible error because it was irrelevant to his guilt or innocence and inflamed the passion of the jury.

At trial, the victim's daughter testified her father lived in a trailer court close to the Checkers store. He frequently went to Checkers. He went behind the store to the dumpsters to get scraps of food, like bread, to feed his doves. She testified her father drove a tan station wagon.

Under K.S.A. 60-401(b) relevant evidence "means evidence having any tendency in reason to prove any material fact." Here, the testimony of the victim's daughter served to identify the murder victim, indicate his proximity to the location of the crime scene, why he was behind the store, and the type of car he drove, all of which was relevant to proving the facts of the case.

In *State v. Donesay*, 265 Kan. 60, 959 P.2d 862 (1998), the witness testified about her relationship with the victim, when they first met, their first date, the victim's ambitions, his family, and identified a photo of them at their wedding. The testimony in *Donesay* "was intended to . . . inflame the jury against the defendant," and was found to affect the defendant's right to a fair and impartial trial. 265 Kan. at 89. Here, the purpose of the testimony was to identify the victim and explain why he was behind Checkers by the dumpsters—the location of the crime scene. The testimony here is in stark contrast to the testimony in *Donesay*. Sullivan was not deficient in his performance, as this testimony was relevant to the material facts of the case.

Breedlove also claims Sullivan failed to lodge contemporaneous objections timely and with specificity in order to preserve the issues for appeal. He states the Kansas Supreme Court declined to hear several claims on his direct appeal for this reason,

including that "the district court improperly allowed the State to introduce evidence showing that he engaged in criminal activity outside the time immediate to [the victim's] murder; violation of the order in limine during the State's examination of his codefendant; and the *Allen* type instructions."

Breedlove's assertions must be more than conclusory statements. *Sola-Morales*, 300 Kan. at 881. Further "a failure to adequately brief an issue results in abandonment or waiver. *Logsdon*, 304 Kan. at 29. The Kansas Supreme Court has also held that "a point raised only incidentally in a brief but not argued there is deemed abandoned. [Citations omitted.]" *Cooke*, 285 Kan. at 758.

Breedlove states his claim against Sullivan, but never argues the issues and does not include any citations to the record as to where these instances occurred. He makes conclusory statements but does not support them. This claim of ineffective assistance of counsel against Sullivan is therefore waived and abandoned.

Even if this issue were examined, Breedlove would not be able to prove the second prong of *Strickland*, that there was a reasonable probability the jury would have reached a different conclusion absent the deficient performance. 466 U.S. at 687. As analyzed above, there was overwhelming evidence presented at trial to convict Breedlove of first-degree murder.

After analyzing all of Breedlove's claims of ineffective assistance of counsel against Palmer, Craft, and Sullivan, it is clear none of them provided ineffective assistance of counsel. The district court is affirmed.

Breedlove next contends the district court erroneously imposed a filing fee for his motion for summary disposition.

The assessment of costs lies within the discretion of the district court. *Fought v. State*, 14 Kan. App. 2d 17, 20, 781 P.2d 742 (1989.)

Breedlove argues a motion filed to collaterally attack a criminal conviction, under K.S.A. 60-1507, is a civil action and the assessment of costs is governed by K.S.A. 2016 Supp. 60-2002. Further, he argues no fees are required to commence a suit.

First, after reviewing the record, Breedlove did not raise this issue with the district court. Under Kansas Supreme Court Rule 6.02(a)(5) (2017 Kan. S. Ct. R. 35), "[i]f the issue was not raised below, there must be an explanation why the issue is properly before the court." Breedlove acknowledges the issue is raised for the first time on appeal, and does not offer an explanation except that he is "unaware of any published caselaw requiring him, *pro se* and indigent, to first raise this issue before the district court." Issues not raised before the district court generally cannot be raised on appeal. *State v. Shopteese*, 283 Kan. 331, 339, 153 P.3d 1208 (2007). Therefore, because the issue was not raised below and Breedlove does not offer an explanation as to why it should be heard on appeal, the issue is abandoned and will not be heard by us.

Second, the purpose of a K.S.A. 60-1507 motion is to allow a prisoner in custody to attack the sentence imposed. K.S.A. 60-1507(a). Breedlove is attacking a filing fee the court assessed against him when he filed the motion for summary judgment. This filing fee was not part of the sentence the district court imposed against Breedlove, nor was it assessed against his K.S.A. 60-1507 motion.

The fee was assessed against a motion for summary judgment, a dispositive motion, not his motion under K.S.A. 60-1507. Under K.S.A. 2016 Supp. 60-2008(a), "any party filing a dispositive motion shall pay a fee in the amount of $195 to the clerk of the district court." A dispositive motion includes a motion for summary judgment. K.S.A. 2016 Supp. 60-2008(b). Breedlove could have filed a poverty affidavit under K.S.A.

2016 Supp. 60-2001. The filing fee was not assessed against Breedlove as a condition of hearing his K.S.A. 60-1507 motion but against the motion he filed for summary judgment. The district court is affirmed.

Breedlove finally argues his K.S.A. 60-1507 motion established the need for an evidentiary hearing and he was entitled to the appointment of counsel.

In order to be granted relief under K.S.A. 60-1507, Breedlove must establish by a preponderance of the evidence one of the following: (1) "the judgment was rendered without jurisdiction"; (2) "the sentence imposed was not authorized by law or is otherwise open to collateral attack"; or (3) "there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack." K.S.A. 60-1507(b).

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.' [Citations omitted.]" *Sola-Morales*, 300 Kan. at 881.

The standard of review depends upon which of these options a district court uses. 300 Kan. at 881. When the district court summarily denies a K.S.A. 60-1507 motion, an appellate court conducts de novo review to determine whether the motion, files, and records of the case conclusively establish that the movant is not entitled to relief. 300 Kan. at 881.

To avoid a summary denial of a K.S.A. 60-1507 motion, Breedlove bears the burden of establishing that he is entitled to an evidentiary hearing. This burden requires that Breedlove's assertions be more than conclusory statements. He must either set forth an evidentiary basis to support each of the assertions, or the bases must be evident from the record. 300 Kan. at 881 (citing *Holmes v. State*, 292 Kan. 271, 274, 252 P.3d 573 [2011]).

Breedlove argues that because the district court requested a response from the State before it made its decision, he had presented a substantial question of law and triable issues of fact. In addition, because his motion "proceeded past the initial review contemplated in K.S.A. 60-1507(b)," Breedlove argues his statutory right to counsel attached.

The issues above outline the arguments Breedlove set forth in his K.S.A. 60-1507 motion. From analyzing the law and the facts of this case, it is clear that (1) Breedlove was not denied due process when the district court adopted the State's findings of fact and conclusions of law and it complied with Supreme Court Rule 183(j); (2) neither Palmer, Craft, nor Sullivan provided Breedlove with ineffective assistance of counsel; and (3) the fee for the motion for summary judgment was appropriate under K.S.A. 2016 Supp. 60-2008(a), as it was a dispositive motion and did not bear on whether the district court would hear Breedlove's K.S.A. 60-1507 motion. The district court did not err in finding that the motion, files, and records of this case conclusively established that Breedlove was not entitled to relief and did not require an evidentiary hearing. He was also then not required to be appointed counsel. The district court is affirmed.

Affirmed.