

No. 04-93181-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

vs.

JAMES ALLEN GREENWOOD
Defendant-Appellant

Brief of Appellee

Appeal from the District Court of Anderson County,
Honorable James J. Smith, Judge,
District Court Case No. 04-CV-6

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Statement of the Issues

- Issue I:** The defendant's Motion for Writ of Habeas Corpus filed under K.S.A. 60-1507 was properly dismissed.
- Issue II:** The issues raised by the defendant in his Brief are not properly before this Court as the appeal was made under K.S.A. 60-1507 and no direct appeal of the defendant's conviction in his criminal case has ever been filed.
- Issue III:** The defendant's appeal of his conviction in Anderson County District Court Case No. 01-CR-119 is barred because it was not timely filed.
- Issue IV:** The defendant is not entitled to a retroactive application of the *McAdam* decision.

Statement of the Facts

The following facts come from Anderson County District Court Criminal case no. 01-CR-119.

On August 15, 2001, the defendant was charged with (1) Possession of Anhydrous Ammonia as a drug severity level 4 felony, (2) Conspiracy to commit the unlawful manufacture of Methamphetamine as a drug severity level 2 felony, (3) Conspiracy to commit theft as a class A nonperson misdemeanor. (R. 2 at 1-2.) Count 2 of the Complaint should have been filed as a level 1 drug felony. (R. 1 at 18.)

On August 21, 2001, the defendant appeared in custody at which time he selected Craig Cole as his court appointed attorney. The defendant's bond was reduced to \$2,500 cash or corporate surety and his preliminary hearing was set for November 13, 2001 at 1:00 pm.

On September 8, 2001, the complaint was amended to add one count of unlawful possession of ephedrine as a drug severity level 1 felony and one count of no proof of

liability insurance a class B misdemeanor. (R. 2 at 3-4.)

On December 18, 2001, at preliminary hearing, the defendant was bound over on the felony counts contained in the 1st Amended complaint. (R. 2 at 11-12.)

On January 7, 2002, the defendant appeared in person with Mr. Cole for arraignment. The defendant waived formal arraignment and entered pleas of not guilty to all counts. Trial was set to begin at 9:00 am on March 6, 2002. Motions were ordered to be filed no later than 10 days prior to trial. (R. 2 at 13-14.)

Due to a malfunction with the court's recording system, no preliminary hearing transcript was produced. (R. 2 at A-1, Order Regarding Request for Transcript filed January 7, 2002.)

On February 21, 2002, the defendant filed a motion to suppress evidence in the case. (R. 2 at 15-17.)

On March 4, 2002, a hearing was held on the defendant's motion to suppress following which the motion was denied. (R. 2 at A-1.) On the same date, the defendant notified the court that he would enter a plea and a plea hearing was set for March 5, 2002 at 8:00 am.

On March 6, 2002, a hearing was held to allow the defendant to enter a plea. The defendant entered a guilty plea to count 2 of the 1st amended complaint. The state agreed not to prosecute the defendant's wife for perjury (R. 5 at 6), to dismiss the balance of the counts contained in the complaint (R. 5 at 5), and to not object to downward dispositional and durational departure at sentencing (R. 5 at 6.). The court accused the prosecutor of an "abrogation of [his] responsibilities to the public" in agreeing not to object to the defendant's

motion for departure. (R. 5 at 8.) The court accepted the defendant's plea. (R. 5 at 13.) The matter was set for sentencing at 9:30 am on April 1, 2002. (R. 5 at 14.)

During the plea hearing, at pages 12-13 of the transcript (R. 5 at 12-13), the following exchange took place:

THE COURT: Mr. Greenwood, I'm going to ask you to tell me why you believe you're guilty of this crime on August 13th, 2001?

THE DEFENDANT: I myself have used methamphetamine for some time and uh, I was guilty of attempting to obtain things to make it.

THE COURT: Who were you acting in conspiracy with to commit it?

THE DEFENDANT: Mr. Hutchcraft.

THE COURT: You did act in furtherance of your agreement to manufacture methamphetamine by obtaining some anhydrous ammonia. Is this correct?

THE DEFENDANT: Yes, your Honor.

THE COURT: You did so on August 13, 2001. Is that correct?

THE DEFENDANT: Yes, sir.

On March 12, 2002, the defendant was seen for an alcohol and drug assessment through the Heartland Regional Alcohol and Drug Assessment Center. The defendant refused a referral to level III treatment and was therefore referred to Level II, Intensive Outpatient treatment with admission to Cypress Recovery scheduled for March 14, 2002 at 12:00 pm. (R. 6 at 11-12.)

On March 26, 2002, a Presentence Investigative Report was filed with the court. The PSI indicated that the defendant's conviction was a severity level 2d with a criminal history score of I. The sentence was presumptive prison of 46-51 months with 36 months post

release supervision and 36 months probation. (R. 2 at 24-27.)

On March 27, 2002, the defendant filed a motion for both a dispositional and durational departure. The state agreed to the departures as part of the defendant's plea. (R. 2 at 28-29.)

On March 29, 2002, an amended conditions page for the PSI was submitted because the court services officer discovered that the defendant was out on a felony bond in Miami County case no. 01-CR-126 at the time this offense was committed. (R. 2 at 30-31.)

On April 1, 2002, the defendant appeared in person with Mr. Cole for sentencing. In spite of both the classification of presumptive imprisonment and the crime having been committed while out on bond, the court granted the defendant's motion for downward dispositional departure but not downward durational departure.(R. 6 at 13-14.) The defendant informed the court that he was a registered nurse and that he wanted to better himself through treatment. (R. 6 at 11.) The court sentenced the defendant to 49 months incarceration with the secretary of corrections. (R. 6 at 14.) The defendant was given the "extraordinary chance" of being placed in the community corrections program rather than being incarcerated. (R. 6 at 15.) The defendant was advised of his right to appeal. (R. 6 at 16.)

On March 21, 2002, the state filed an arrest warrant and a motion to revoke the defendant's probation based on a complaint filed in Linn County, Kansas alleging attempted possession of drug paraphernalia within the month of April. (R. 2 at 39-41.)

On November 15, 2002, the defendant entered a plea of no contest to the Linn County Charges. (R. 2 at 43-46.)

On December 20, 2002 the state amended its motion to revoke the defendant's probation to reflect the defendant's plea and conviction in Linn County. (R. 2 at 44-46.)

On January 17, 2003, the warrant was served on the defendant. (R. 2 at 47.)

On January 23, 2003, the defendant's probation was revoked and the defendant was ordered into custody to serve the sentence imposed. (R. 2 at 51, R. 7.)

On June 6, 2003, the defendant filed a Motion to Correct Illegal Sentence with the court. (R. 2 at 51-54.) Therein, the defendant asserts that his sentence was "illegal." (R. 2 at 51.) The defendant claims that the court lacked jurisdiction to sentence him because of "a defective affidavit and complaint." (*Id.*) The defendant then states that "all evidence clearly supports the lesser charge of possession of drug paraphernalia." (R. 2 at 52.) The defendant asserts that he was "greatly manipulated through the 'great' legal tactics and maneuvers of [the] prosecutor." (R. 2 at 52.)

On August 4, 2003, the defendant's Motion was denied. (R. 8 at 3.)

At this point, the references to Criminal Case No. 01-CR-119 end and the current case on appeal begin, 04-CV-6.

On February 23, 2004, the defendant filed a Motion for Writ of Habeas Corpus in the district court of Anderson County, Kansas, Case No. 04-CV-6. (R. 1 at 1.)

On May 13, 2004, a hearing was held on the defendant's Motion. (R. 1 at 14.)

On July 8, 2004, the defendant's Motion for Writ of Habeas Corpus was denied. (R. 1 at 18-22.)

On July 13 and July 29, 2004, the defendant filed notices of appeal in case no. 04-CV-6. (R. 1 at 23 and 27.)

Arguments and Authorities

Issue I: The defendant’s Motion for Writ of Habeas Corpus filed under K.S.A. 60-1507 was properly dismissed.

Standard of Appellate Review

For a habeas appeal under K.S.A. 60-1507, “the proper standard of review when the district court summarily dismisses a movant’s motion is abuse of discretion.” *State v. Robinson*, ___ Kan.App. ___, 90 P.3d 379 (2004). “Judicial discretion is abused when no reasonable person would take the view adopted by the trial court.” *Woodberry v. State*, 33 Kan.App.2d 171, 101 P.3d 727 (2004).

Discussion

“A district court is required to hold an evidentiary hearing on a K.S.A. 60-1507 motion and make findings of fact and conclusions of law with respect thereto unless the motion and the files and records of the case conclusively show the movant is not entitled to relief.” *Phillips v. State*, ___ Kan.App. ___, 102 P.3d 1 (2004). The defendant, in his Motion, did not allege facts sufficient to warrant an evidentiary hearing on the motion. (R. 1 at 1-8.) When the district court concludes that a 60-1507 motion is without merit, “the district court must tell us what its findings are and why it concluded the motion to be without merit if we are to conduct any sort of meaningful appellate review.” *State v. Moncla*, 269 Kan. 61, 4 P.3d 618 (2000). The court provided a lucid and compelling review of the merits of the defendant’s motion for a writ of habeas corpus. (R. 1 at 18-22.) Although reasonable persons may differ as to whether the court’s evaluation is correct, it would be impossible for anyone to say that no reasonable person would take the view adopted by the trial court.

Burden of Proof

“In a K.S.A. 60-1507 proceeding the movant has the burden of proof.” *Gilkey v. State*, 31 Kan.App.2d 84, 60 P.3d 347 (2003). Conclusory contentions without evidentiary basis are not sufficient for relief. *Burns v. State*, 215 Kan. 497, 500, 524 P.2d 737 (1974).

When Remedy May be Invoked

The defendant is not entitled to a remedy under K.S.A. 60-1507. *Maggard v. State*, 27 Kan.App.2d 1060, 11 P.3d 89 (2000). A proceeding under K.S.A. 60-1507 cannot be used as a substitute for a direct appeal absent a showing the trial error affected constitutional rights, and then only “provided there were ***exceptional circumstances excusing the failure to appeal.***” Supreme Court Rule 183(c)(3) (emphasis added). *Crease v. State*, 252 Kan. 326, Syl. ¶ 3, 845 P.2d 27 (1993).

First of all, the failure of the court to reduce the defendant’s sentence based on the *McAdam* ruling does not affect the defendant’s constitutional rights. *State v. Barnes*, 278 Kan. 121, 92 P.3d 578 (2004); *State v. McAdam*, 277 Kan. 136, 83 P.3d 161 (2004). Because the defendant’s constitutional rights have not been affected, the defendant is not entitled to relief under K.S.A. 60-1507. K.S.A. 60-1507(c).

Additionally, other than the issue of the application of the *McAdam* ruling, there are no exceptional circumstance in this case which could have excused the defendant’s failure to file a timely appeal. And, since the *McAdam* ruling is not applied retroactively, it cannot serve as a basis for the defendant’s motion. “The holding of *State v. McAdam*, 277 Kan. 136, 83 P.3d 161 (2004), will not be given retroactive effect to cases whose direct criminal proceedings were final prior to January 30, 2004.” *Snyder v. State*, ____ Kan.App. ____,

Syl. ¶ 2, 2005 WL 496003 (2005).

In fact, the defendant was released on probation following his sentencing and appears to have been free to commit other crimes in the ten days during which an appeal could have been filed. Rather than file an appeal, the defendant chose to commit new drug offenses within the 22 days immediately following his sentencing hearing.

Issue II: The issues raised by the defendant in his Brief are not properly before this Court as the appeal was made under K.S.A. 60-1507 and no direct appeal of the defendant’s conviction in his criminal case has ever been filed.

Standard of Appellate Review

It appears that the proper standard of review on this question is “abuse of discretion.” *State v. Robinson*, ___ Kan.App. ___, 90 P.3d 379 (2004). However, “to the extent that an appellate court reviews the district court’s conclusions of law, the review is de novo.” *Gibson v. State*, ___ Kan.App. ___, 105 P.3d 279 (2005). “Judicial discretion is abused when no reasonable person would take the view adopted by the trial court.” *Woodberry v. State*, 33 Kan.App.2d 171, 101 P.3d 727 (2004).

Discussion

“A mere suggestion of the applicability of an *Ortiz* exception to the filing requirements of an appeal is insufficient to raise the issue before this court.” *Snyder v. State*, ___ Kan.App. ___, 2005 WL 496003 (2005); *State v. Ortiz*, 230 Kan. 733, 640 P.2d 1255 (1982).

The defendant filed no appeal in his criminal case. The defendant did file a motion

to “correct” his sentence which was denied. The defendant subsequently opened a case under K.S.A. 60-1507 in which his motion for relief was denied. (R. 1 at 18-22.)

In Case No. 04-CV-6, a K.S.A. 60-1507 proceeding, the defendant filed his first Notice of Appeal on July 13, 2004. (R. 1 at 23.) The defendant filed his second Notice of Appeal on July 29, 2004. (R. 1 at 27.)

“A petition for a writ of habeas corpus is not a substitute for a direct appeal and does not preserve the issues that could have been raised in a direct appeal” *Treiber v. Stong*, 5 Kan.App.2d 392, 617 P.2d 114 (1980). A proceeding under K.S.A. 60-1507 cannot be used as a substitute for a direct appeal absent a showing the trial error affected constitutional rights, and then only “provided there were *exceptional circumstances excusing the failure to appeal.*” Supreme Court Rule 183(c)(3) (emphasis added). *Crease v. State*, 252 Kan. 326, Syl. ¶ 3, 845 P.2d 27 (1993).

In his brief, the defendant asserts that he is entitled to be resentenced in conformity with the decision in *McAdam* without regard to the fact that the defendant is proceeding under a motion filed pursuant to K.S.A. 60-1507 which requires the implication of the defendant’s constitutional rights in conjunction with exceptional circumstances which prevented the defendant from filing a timely appeal. Rule 183(c)(3). As discussed *supra*, the defendant has no grounds for a motion under K.S.A. 60-1507 and has not filed a direct appeal in his criminal case for consideration of the issues he has raised.

Because the defendant has not filed a direct appeal in his criminal case, his constitutional rights have not been infringed and the right to appeal is statutorily conferred, this court has no jurisdiction to consider the defendant’s arguments under the guise of a

Motion for Writ of Habeas Corpus.

Issue III: The defendant's appeal of his conviction in Anderson County District Court Case No. 01-CR-119 is barred because it was not timely filed.

Standard of Appellate Review

“The interpretation of statutes is a question of law, and, thus, this court’s scope of review is unlimited.” *State v. Bost*, 21 Kan.App.2d 560, 562, 903 P.2d 160 (1995).

Discussion

“The right to appeal is strictly statutory.” *State v. Singleton*, ____ Kan.App. ____, 104 P.3d 424 (2005). “The filing of a timely notice of appeal is jurisdictional.” *State v. McDaniel*, 249 Kan. 341, 819 P.2d 1165 (1991). “This court has only such appellate jurisdiction as is provided by law. Jurisdiction to entertain an appeal is conferred by statute pursuant to article 3, § 3 of the Constitution of Kansas, and when the record discloses a lack of jurisdiction it is the duty of this court to dismiss the appeal.” *State v. Ortiz*, 230 Kan. 733, Syl. ¶ 1, 640 P.2d 1255 (1982).

The defendant is barred from filing an appeal because the time for doing so has expired. The defendant was sentenced on April 1, 2002, in Anderson County District Court Case No. 01-CR-119, for crimes which occurred on August 13, 2001. (R. Vol. 6.) The defendant has never filed any appeal in that case and the defendant’s sentence has become final. “For crimes committed on or after July 1, 1993, the defendant shall have 10 days after the judgment of the district court to appeal.” K.S.A. 22-3608. And, there is no record of a lack of “fundamental fairness” upon which to allow an appeal out of time. *Singleton*.

At sentencing, the defendant was advised of his right to appeal although the court did

not specifically state that the defendant had ten days in which to do so. (R. 6 at 16.) K.S.A. 22-3424(f) states that “after imposing sentence in a case *which has gone to trial on a plea of not guilty*, the court shall advise the defendant of the defendant’s right to appeal. K.S.A. 22-3424(f) (emphasis added.) Because the defendant did not go to trial on a plea of not guilty, K.S.A. 22-3424 does not impose any requirement on the court to advise the defendant of his right to appeal. The language used by the court was sufficient to advise the defendant of his right to appeal. Although the *Singleton* Court incorrectly stated that K.S.A. 22-3424(f) requires the district court to notify a defendant who has not gone to trial on a plea of not guilty of his right to appeal, here, as in *Singleton*, “this movant entered a guilty plea, did not file a direct appeal from the sentence imposed, and his sentence became final 10 days after sentencing under K.S.A. 22-3608(c).” *State v. Singleton*, ___ Kan.App. ___, 104 P.3d 424 (2005).

Unlike *Singleton*, the record in this case shows that the defendant was advised of his right to appeal and chose to ignore that advice.

Issue IV: The defendant is not entitled to a retroactive application of the McAdam decision.

Standard of Appellate Review

As this question appears to be *stare decisis*, and as it involves questions of law and fact relating to the motion under 60-1507 and rights of appeal, it appears the appropriate standard of review would be *de novo*.

Discussion

The holding of *State v. McAdam*, 277 Kan. 136, 83 P.3d 161 (2004), will not be given

retroactive effect to cases whose direct criminal proceedings were final prior to January 30, 2004.” *Snyder v. State*, No. 92,393, WL496003 (Kan. App. 2005). “Where a defendant pleads no contest to take advantage of a favorable plea agreement and does not file a direct appeal, he or she cannot collaterally challenge the sentence imposed.” *Collins v. State*, ____ Kan.App. ____, 103 P.3d 988 (2005).

In the defendant’s criminal case, the defendant pleaded guilty to the charge of conviction and provided the foundation to support such a charge.

The defendant has received the benefit of a “generous” and “extraordinary” plea agreement in his criminal case. (R. 6 at 15.) He was granted a downward departure from presumptive prison to probation. The state agreed not to pursue a perjury prosecution of the defendant’s wife for statements made by her at the defendant’s hearing on his motion to suppress. The defendant also received the benefit of having the additional counts in the complaint dismissed. And, as noted by the court in its denial of the defendant’s motion for a writ of habeas corpus, the state chose to proceed on the count using a lesser severity level than that listed in the statute of conviction. (R. 1 at 18-22.)

By committing the felony drug crime, within 22 days following his sentencing in Anderson County, which led to the defendant’s conviction in Linn County and to the subsequent revocation of the defendant’s probation in his criminal case in Anderson County, the defendant made a conscious decision to renounce his probation. The lesser sentence imposed by the reduction in severity level and the freedom from prosecution for the defendant’s wife are benefits of the plea that the defendant continues to enjoy.

Conclusion

The defendant's Motion for Writ of Habeas Corpus is without merit and its dismissal by the district court should be upheld. The defendant has not made a direct appeal in his criminal case and, should he contemplate doing so, such an appeal would be jurisdictionally defective as being out of time. Additionally, the defendant is not entitled to retroactive application of the *McAdam* decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of _____, 200____, I mailed a five (5) copies of the above and foregoing Brief of Appellee, by placing the same in the U.S. Mail, postage prepaid to:

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