17-118307-AS

IN THE SUPREME COURT OF THE STATE OF KANSAS

IN THE MATTER OF THE ESTATE OF LANNY LENTZ:

DIANN WYATT, Respondent / Appellant,

vs.

LANA KENNEDY (Respondent) and MARILYN LENTZ (Petitioner), Appellees.

On Appeal from the District Court of Shawnee County
Honorable Frank Yeoman, District Judge
District Court Case No. 2013-PR-000148

SUPPLEMENTAL BRIEF OF THE APPELLANT

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Table of Contents

Summary

Respondent/Appellant Diann Wyatt, Respondent/Appellee Lana Kennedy, and Petitioner/Appellee Marilyn Lentz are Decedent Lanny Lentz's three adult daughters and only heirs. Ms. Lentz also serves as his executrix.

Mr. Lentz's estate included a considerable amount of real property in Topeka, which the executrix sought distributed among the heirs in giving them equal shares. Ms. Wyatt contested the executrix's proposed settlement on various grounds, including that her property valuations were inaccurate.

Ms. Wyatt's appeal concerns the district court's valuation of four of the properties. After an evidentiary hearing, the district court distributed 517 Polk (which it valued at $17,833) and 2723 Monroe (which it valued at $18,762) to Ms. Wyatt and distributed 605 Lindenwood (Mr. Lentz's residence, which it valued at $38,787) and 613 Lindenwood (which it valued at $41,098) to the other two heirs as joint tenants in common.

These values lack substantial competent evidence in their support. They grossly overvalue the two properties distributed to Ms. Wyatt and undervalue the other two. No appraisal ever was introduced into the record below. And the ultimate values the district court found are outside the range of even the executrix's testimony below. This made for insufficient evidence that the ultimate distributed shares of the estate were equal.

In the Court of Appeals, the appellees all but conceded this. They did not brief the merits of Ms. Wyatt's appeal at all. And at oral argument, their counsel openly admitted that the values the district court found were not

supported by the evidence introduced at the hearing but instead were given by the executrix in her proposed journal entry after the fact to fit her math.

Nonetheless, the Court of Appeals dismissed Ms. Wyatt's appeal but also held that even if it engaged in review, it would affirm. It held her "motion to reconsider" the district court's judgment filed within 28 days did not toll the appeal period under K.S.A. § 60-2103(a) because the motion also "in part" sought to set aside the judgment under K.S.A. § 60-260(b), making her notice of appeal untimely. Then, it held that even if it considered her arguments, it would affirm because: (1) the values she questioned were supported by a supposed appraisal *outside* the record that the executrix claimed to have circulated after trial; and (2) she had not objected to those findings in the journal entry, rendering her arguments not preserved.

This was error. The law of Kansas is that Ms. Wyatt's appeal is timely and proper, her arguments are preserved, and the findings at issue are not supported by substantial competent evidence. First, as this Court uniformly has held, any request for a district court to "reconsider" its judgment filed within the period for a motion to alter or amend under K.S.A. § 60-259(f) qualifies as such a motion and tolls the time for appeal. Second, following K.S.A. § 60-252(a)(4), and as this Court also uniformly has held, in a court-tried case no objection to the court's findings is necessary to appeal the sufficiency of the evidence supporting them. Finally, materials *outside* the record cannot be substantial competent evidence to support those findings.

This Court should reverse the Court of Appeals' and district court's judgments and should remand this case for a new hearing.

Argument and Authorities

I. The Court of Appeals erred in holding that Ms. Wyatt's post-judgment "motion to reconsider" the district court's journal entry filed within 28 days did not toll the running of the appeal period under K.S.A. § 60-2103(a) and in dismissing her appeal as a result. The law of Kansas is that her motion qualified as a motion to alter or amend under K.S.A. § 60-259(f), and so tolled the period in which to file a notice of appeal.

Standard of Appellate Review

"[J]urisdiction depends on application of statutes and presents a question of law over which this court exercises unlimited review." *In re Care & Treatment of Emerson*, 306 Kan. 30, 34, 392 P.3d 82 (2017).

* * *

The Court of Appeals dismissed Ms. Wyatt's appeal, holding her post-judgment motion filed within 28 days of the district court's judgment did not qualify as a motion to reconsider under K.S.A. § 60-259(f), but only as a motion to set aside a judgment under K.S.A. § 60-260(b), and so did not toll the time in which to file a notice of appeal, making her notice of appeal filed within 30 days of its denial untimely. *In re Estate of Lentz*, No. 118,307, 2019 WL 494098, at *5-7 (Kan. App. 2019) (unpublished).

This was error. It departs from the well-established, uniform law of Kansas. For more than 25 years, until this case this Court and the Court of Appeals consistently and without exception have held that *any* request for a trial court to "reconsider" its judgment, no matter how perfunctory or poorly stated, qualifies as a motion to alter or amend its judgment under § 60-259(f) as long as it is filed within the period after judgment for such a motion, and so tolls the time for appeal. While Ms. Wyatt's post-judgment motion may

not have been artfully written, its plain intent was to serve as a request to the trial court to revisit its decision and, in so doing, toll the time in which to file her notice of appeal.

The law of Kansas is and must be that Ms. Wyatt's motion to reconsider was sufficient to vest the Court of Appeals with jurisdiction. This Court should reverse the Court of Appeals' judgment and decide Ms. Wyatt's appeal on the merits.

First, the Court of Appeals ignored that any doubt it might have have about the sufficiency of Ms. Wyatt's post-judgment motion to toll the notice of appeal time must be resolved in favor of retaining jurisdiction. This is because "the right of appeal is favored by the law, and it will not be held to have been waived except upon clear and decisive grounds." *Brown v. Combined Ins. Co. of Am.*, 226 Kan. 223, 230, 597 P.2d 1080 (1979) (citation omitted).

So, "when 'there is a valid controversy whether the statutory requirements have been complied with, [this Court is] required to construe those statutes liberally to assure justice in every proceeding.'" *Mundy v. State*, 307 Kan. 280, 290-91, 408 P.3d 965 (2018) (citation omitted). "[T]he law prefers that cases be decided on their merits rather than on technical compliance with procedural rules." *Fisher v. DeCarvalho*, 298 Kan. 482, 500, 314 P.3d 214 (2013). Therefore, "jurisdictional rules should be read liberally 'to allow the litigants the opportunity to have their claims heard and determined.'" *Vorhees v. Baltazar*, 283 Kan. 389, 394, 153 P.3d 1227 (2007) (citation omitted).

For this reason, since this Court's decision in *Honeycutt v. City of Wichita*, 251 Kan. 451, 836 P.2d 1128 (1992), except for the Court of Appeals' decision in this case **every single** request that a trial court "reconsider" its judgment filed within § 60-259(f)'s time limit, no matter how perfunctory or poorly written, and even if citing another statute – has been held to be sufficient to qualify as a motion to alter or amend a judgment under § 60-259(f) and toll the time for appeal.

Under K.S.A. § 60-2103(a), a party has "30 days from entry of the judgment" in which to appeal, "terminated by timely motion … under K.S.A. 60-259 … to alter or amend the judgment …." If that timely motion is filed, the 30 days to appeal then are "be computed from the entry of any" order "granting or denying" that motion. § 60-2103(a).

In *Honeycutt*, this Court squarely determined that "[a] motion for reconsideration is considered a motion to alter or amend a judgment." 251 Kan. at 460, 836 P.2d 1128. The Court of Appeals' decision in this case mentions *Honeycutt* once, remarking Ms. Wyatt relied on it, *Lentz*, 2019 WL 494098 at *4, but never revisits it again. But this Court's point in *Honeycutt* was that "by filing a motion to reconsider, a party tolls the running of the appeal period until that motion is decided." *Hundley v. Pfuetze*, 18 Kan.App.2d 755, 757, 858 P.2d 1244 (1993) (citing *Honeycutt*, *supra*).

In the more than 25 years since *Honeycutt*, until the Court of Appeals' decision in this case neither this Court nor the Court of Appeals **ever** had held a motion asking the trial court to reconsider its judgment for any reason, which was filed within the time limitation of § 60-259(f), did not toll the time

for appeal. Nor had either stated any exceptions to *Honeycutt*'s clear and certain holding that "motion to reconsider = motion to alter or amend". Many of these have been just as perfunctory as Ms. Wyatt's asking the district court to "reconsider", and many have not even been titled "motion to reconsider". *See*:

- *Hundley*, 18 Kan.App.2d at 757 (citing *Honeycutt*, *supra*; party filed "motion asking the court to reconsider its order granting summary judgment");
- *Centera Bank v. Wedel*, No. 92,255, 2004 WL 2848892 at *1-2 (Kan. App. 2004) (unpublished) (citing *Honeycutt*, *supra*; document purporting to be appeal of a judgment that later was amended properly had to be "treated as a motion to reconsider");
- *In re Marriage of Webster*, No. 94,112, 2006 WL 2129130 at *2-*3 (Kan. App. 2006) (unpublished) (motion to reconsider filed inside period for § 60-259(f) motion would be considered motion to alter or amend, but one filed outside would be considered § 60-260(b) motion);
- *Abel v. Werholtz*, No. 94,447, 2006 WL 538624 at *3 (Kan. App. 2006) (unpublished) ("motion for reconsideration" that asked district court to reconsider previous ruling in underlying case, which it legally could not do, still qualified as timely post-judgment motion and Court of Appeals had jurisdiction);
- *State v. Little*, No. 105,221, 2011 WL 4035796 at *1-2 (Kan. App. 2011) (unpublished) (State's motion to reconsider filed within § 60-259(f) period tolled the time to file a notice of appeal);

- *Bank of America, N.A. v. Inda*, 48 Kan.App.2d 658, 662-63, 303 P.3d 696 (2013) (motion denominated "motion to reconsider" tolled the time in which to file a notice of appeal, even though it cited § 60-260 as its authority rather than § 60-259);
- *State v. Wilson*, No. 114,203, 2016 WL 1169487 at *2-*3 (Kan. App. 2016) (unpublished) ("motion to reconsider" order that generally would not qualify as a judgment, and instead ordinarily would require a § 60-260(b) motion, nonetheless qualified as a motion to alter or amend judgment under § 60-259(f) because it was filed within the § 60-259(f) period: "When the State files a motion for reconsideration in a criminal case within 28 days of the district court's suppression decision, we thus construe that motion as a [§] 60-259(f) motion, and the time for interlocutory appeal is tolled until the date the motion for reconsideration is denied, on which date the time for appeal commences to run, restarting anew");
- *Ponds v. State*, No. 119,057, 2019 WL 494015 at *7 (Kan. App. 2019) (unpublished) (citing *Hundley*, holding "motion for reconsideration qualified as a motion to alter or amend judgment");
- *Lee-Thornton v. Ogunmeno*, No. 119,290, 2019 WL 2147725 at *6 (Kan. App. 2019) (unpublished) ("motion to set aside jury damage verdict award" would be "view[ed] … as a motion to reconsider" and therefore a "motion to alter or amend judgment under" § 60-259(f)).

At the same time, none of these decisions scrutinized other parts of a motion asking a trial court to reconsider a judgment and held that

"reconsider" does not mean "reconsider." Indeed, the Courts only have done the opposite, and held asking a trial court to "reconsider" its ruling is enough as long as it is filed within the time period for a motion to alter or amend:

- In *Bank of America*, the motion cited § 60-260(b), but the Court of Appeals held it was timely as a motion to alter or amend and qualified as one. 48 Kan.App.2d at 662-63.
- In *Wilson*, the "motion to reconsider" that the State filed ordinarily could not qualify as a motion to alter or amend, because it was not taken from a "judgment" as K.S.A. § 60-258 defines it, but because it was filed within the time period for a motion to alter or amend that was enough. 2016 WL 1169487 at *2-*3.
- In *Webster*, a motion to reconsider was held to qualify as a motion to alter or amend purely on its timing: if filed during the § 60-259(f) period it was a motion to alter or amend, but if filed outside that would be considered a § 60-260(b) motion. 2006 WL 2129130 at *2-*3.

This makes sense. Given that any doubt must be resolved in favor of retaining jurisdiction and jurisdictional motions must be liberally construed, if a litigant asks the trial court to "reconsider" its judgment, whatever her reasons may be, then she is asking the trial court to alter or amend its judgment, tolling the time for appeal.

The point is that "reconsider" means "reconsider." *Honeycutt*, 251 Kan. at 460; *Bank of America*, 48 Kan.App.2d at 662-63. Holding otherwise and instead peering into the reasons for the party seeking reconsideration would open a new form of litigation of whether a post-judgment motion seeking to

toll the time for a notice of appeal *really* qualified as one. It also would vitiate the notion that doubts should be resolved in favor of jurisdiction, as appeals are favored in the law.

While Ms. Wyatt's post-judgment motion filed within the 28 days of § 60-259 also "in part" sought to set aside the judgment under § 60-260, it plainly did ask the trial court to "Reconsider [the] Order of Final Settlement" (R.1 at 282). It prayed that this "requested relief be granted" (R.1 at 284).

Plainly, by filing a motion within 28 days of the trial court's judgment asking the trial court to reconsider that judgment, as with the defendant in *Bank of America* or the State in *Wilson*, Ms. Wyatt was intending to seek reconsideration so as to toll the time to file a notice of appeal. She certainly was not waiving her right to appeal.

Until now, the law of Kansas has been that the "motion to reconsider" that Ms. Wyatt filed below was enough to secure her statutory right to appeal. The Court of Appeals' decision otherwise, dismissing this appeal, was error. This Court should reverse its judgment and decide Ms. Wyatt's appeal on the merits.

II. The Court of Appeals erred in holding that Ms. Wyatt had to object to the district court's findings in order to appeal the sufficiency of the evidence supporting them. Its holding is directly contrary to the express language of K.S.A. § 60-252 and to *In re Marriage of Bradley*, 258 Kan. 39, 899 P.2d 471 (1995), under which it is unnecessary to object to findings in a judge-tried case in order to appeal the sufficiency of evidence supporting them.

Standard of Appellate Review

Whether an issue is preserved for appeal is a question of law over which this Court exercises unlimited review. *State v. Plummer*, 295 Kan. 156, Syl. ¶1, 283 P.3d 202 (2012).

* * *

The Court of Appeals also stated that "[e]ven if we were to find that proper jurisdiction existed to hear this appeal, we have determined that the issues raised by [Ms. Wyatt] lack merit and should not be addressed by us in this appeal." *Lentz*, 2019 WL 494098 at *8.

The first reason it gave for this was that Ms. Wyatt did not preserve her challenge to the trial court's findings. *Id.* It held she "objected only to [Ms. Lentz]'s proposed valuations of the properties prior to the final hearing" and "failed to object to the journal entry …." *Id.* at *8-9. It held Ms. Wyatt "never gave the district court a chance to address [her] complaints on valuation, and has not explained why we should grant an exception" to the rules of preservation "and now hear those matters on appeal …." *Id.* at *9.

The Court of Appeals must not have read Ms. Wyatt's brief, where she explained that, "in a court-tried case, 'when the trial court has made findings, it is not necessary to object to such findings to question the sufficiency of the

evidence on appeal'" (Brief of the Appellant ["Aplt.Br.] 13) (quoting *In re Marriage of Bradley*, 258 Kan. 39, 50, 899 P.2d 471 (1995)). And as the Court of Appeals acknowledges, all Ms. Wyatt challenges on appeal is that there was not "substantial competent evidence to support the property valuations" in the trial court's findings. *Lentz*, 2019 WL 494098 at *8.

The Court of Appeals' holding that Ms. Wyatt had to do anything more to challenge the sufficiency of evidence supporting the district court's findings cannot be squared with Kansas statutory law or case law. In *Bradley*, this Court quelled a prior conflict between decisions "by endorsing the following rule: In all actions under K.S.A. 60-252 and Rule 165, when the trial court has made findings, it is not necessary to object to such findings to question the sufficiency of the evidence on appeal." 258 Kan. at 50, 899 P.2d at 471. Section 60-252 and this Court's Rule 165 govern all judge-tried cases. And appeals in probate cases are governed by the ordinary rules of civil procedure applicable to judge-tried civil appeals, too. K.S.A. § 59-2401(c). And the Court in *Bradley* endorsed this rule because § 60-252 requires it: "A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them or moved for judgment on partial findings." § 60-252(a)(4).

The Legislature expressly has determined that Ms. Wyatt was not required to object to the district court's findings of value in order to question the sufficiency of the evidence to support them on appeal. The Court of Appeals' decision that she *did* have to do so was error. This Court should reverse its judgment and decide Ms. Wyatt's appeal on the merits.

III. The Court of Appeals erred in holding that materials the executrix purported to circulate *after* the evidentiary hearing but which were not admitted at the hearing and which neither Ms. Wyatt nor her appellate counsel ever have seen qualify as substantial competent evidence to support the district court's findings. Materials not introduced at the hearing or stipulated to by the parties are not part of the record on appeal and cannot support a judgment. No substantial competent evidence supported the district court's findings of the Properties' respective values.

Standard of Review

"Whether substantial competent evidence exists is a question of law." *Redd v. Kan. Truck Cent.*, 291 Kan. 176, 182, 239 P.3d 66 (2010).

* * *

Finally, on the merits of Ms. Wyatt's appeal challenging the sufficiency of the evidence supporting the district court's findings of value, the Court of Appeals held it would affirm. It held that "the district court did not err in" valuing the Properties as it did, because its findings were supported by the purported appraisal ["the CMA"] that Ms. Lentz stated she "submitted … to the parties on December 23, 2016", the day after the evidentiary hearing. *Lentz*, 2019 WL 494098 at *9. It held Ms. Wyatt "does not contest that she received a copy of the CMA on December 23, 2016", "does not contend that the final values differed from those in the CMA", and "challenges only the district court's approval of the values because the CMA was not submitted to the court, and the CMA values fell outside the range of values previously provided to the court." *Id.*

This was error. The purported December 23, 2016 appraisal is not in the record. It was never introduced into evidence below. No foundation was

laid for it. Ms. Wyatt did not stipulate to it or that she ever received a copy of it, let alone that she was able to scrutinize it. In fact, neither she nor her appellate counsel ever have seen it.

Simply put, the purported December 23 appraisal was not subject to any process or scrutiny, and its sufficiency was not shown. An appraisal must be based on sales of comparable property and must be subject to evidentiary scrutiny of this, for if the properties on which is based are non-comparable, the appraisal is not substantial competent evidence of value. *In re Prieb Props., L.L.C.*, 47 Kan.App.2d 122, 136-39, 275 P.3d 56 (2012) (reversing finding of fair-market value when appraisal supporting it was based on sales of non-comparable properties).

Accordingly, as a matter of law the purported December 23 appraisal was not substantial competent evidence. "It is hornbook law that [an appellate court] cannot consider evidence which was not before the court below." *Drexel v. Union Prescrip. Cents.*, 582 F.2d 781, 784 n.4 (3d Cir. 1978). This is because the "only proper function of a court of appeals is to review the decision below on the basis of the record that was before the [trial] court." *Fassett v. Delta Kappa Epsilon*, 807 F.2d 1150, 1165 (3d Cir. 1986). This is not any different in Kansas than it is anywhere else in the Anglo-American system. In Kansas, the "entire record" from which the record on appeal may be drawn consists only of "original papers and exhibits filed in the district court", "court reporter's notes and transcripts" of proceedings, a "court authorized record of the proceedings", and the entries on the docket. Supreme Court Rule 3.01(a).

Therefore, the law of Kansas, just like everywhere else that uses common law, is that appellate review is "confined to the record and the proceedings in the trial court, and statements of facts outside the record cannot of course be considered." *Medill v. McIntire*, 136 Kan. 594, 16 P.2d 952, 954 (1932) (purported statement of facts transpiring after trial "cannot be considered as a part of the record and therefore is not open to our consideration in this review"). This "Court has no power to consider evidence which was not submitted to the trial court, nor additional evidence whose truth might be the subject of controversy or dispute before a tribunal authorized to determine issues of fact." *Solomon v. Lampl*, 135 Kan. 469, Syl. ¶6, 11 P.2d 1028, 1033 (1932) (refusing to consider testimony of witness not in the record). "[W]hen [this Court] sit[s] to review the work of a trial court, [it is] limited to the record made in that court; and there would never be an end of litigation if first one party and then the other were permitted to pile up further evidence in the appellate court which was never submitted to the trial court or jury." *Gibson v. Enright*, 135 Kan. 181, 9 P.2d 971, 972 (1932) (refusing to consider evidence not submitted to district court at trial).

So, "matters which appear in certain correspondence between counsel for the litigants" after trial, and which were not introduced at trial, "form no part of the record." *Wenzel v. Lysle Milling Co.*, 113 Kan. 338, 214 P. 406, 407 (1923) (refusing to consider letter from trial judge to counsel for plaintiff written after trial); *see also Rural Water Dist. No. 3 of Miami Cty. v. Miller Paving & Constr., L.L.C.*, 40 Kan.App.2d 140, 152-53, 190 P.3d 973 (2008) (materials "never presented to the trial court … will not be considered" on

appeal, refusing to consider those materials); *Salt City Bus. Coll., Inc. v. Ohio Cas. Ins. Co.*, 4 Kan.App.2d 77, 80, 602 P.2d 953 (1979) ("material and facts … that were not offered into evidence in the district court … are not properly a part of the record"; appellate court does "not consider evidence that was not submitted to the trial court"; refusing to consider those materials).

These safeguards are necessary because as "[a]n appellate court," this Court "has no fact-finding function. It cannot receive new evidence from the parties, determine where the truth actually lies, and base its decision on that determination. Factfinding and the creation of a record are the functions of the [trial] court …." *Goland v. Cent. Intelligence Agency*, 607 F.2d 339, 371 (D.C. Cir. 1978).

> This limitation is fundamental. As a court of appeals, [this Court] lack[s] the means to authenticate documents submitted to [it], so [it] must be able to assume that documents designated part of the record actually are part of the record. To be sure, the fact that a document is filed in the [trial] court doesn't resolve all questions of authenticity, but it does ensure that both opposing counsel and the [trial] court are aware of it at a time when disputes over authenticity can be properly resolved. Litigants who disregard this process impair [this Court's] ability to perform our appellate function. … The appellate process is for addressing the legal issues a case presents, not for generating new evidence to parry an opponent's arguments.

Lowry v. Barnhart, 329 F.3d 1019, 1024-25 (9th Cir. 2003).

The law of Kansas is that the purported December 23, 2016 appraisal, which was not introduced into evidence at the hearing, does not appear anywhere in the district court's entire record, and which neither Ms. Wyatt

nor her appellate counsel ever have seen, was not evidence that legally can support the district court's findings of value.

Moreover, that the Court of Appeals had to turn to supposed evidence *outside* the record to affirm the judgment below just goes to show that no actual substantial competent evidence in the record supported it. And that the appellees did not file a brief arguing otherwise just goes to amplify this, too.

As Ms. Wyatt explained in her brief in the Court of Appeals, the executrix's mere testimony about her alleged unproduced appraisals of the Properties and her unsupported testimony of conversations with unnamed potential buyers, which was all the executrix produced at the evidentiary hearing, was not substantial competent evidence, either (Aplt.Br. 18-22). And even if that testimony somehow did qualify as substantial competent evidence, the district court's findings of the Properties' respective values were outside the range of even that evidence, making them unsupported in any case (Aplt.Br. 22-26).

Indeed, in his oral argument before the Court of Appeals, counsel for the appellees *openly conceded* that no evidence introduced at the hearing supported the values for the Properties that the district court found. Instead, he admitted that the executrix included them in her proposed journal entry after the fact to make her mathematical equalization of the estate work. That kind of results-oriented, "findings first, evidence later" decision-making is grossly improper and smacks of fundamental unfairness. As the evidence of the properties' value does not support equalizing the heirs' distributions by

giving Ms. Wyatt two properties and the other heirs two properties, the remedy is not to fudge the properties' values, but to reach a different distributive result.

The Court of Appeals erred in holding otherwise. As the appellees have all but conceded, no substantial competent evidence supported the district court's findings of the Properties' respective values. The remedy is to reverse the district court's judgment and remand this case for a new hearing and a new, truly supported equal settlement of Mr. Lentz's estate (Aplt.Br. 17, 26).

This Court should reverse the Court of Appeals' and district court's judgments and should remand this case for a new hearing.

Conclusion

This Court should reverse the Court of Appeals' and district court's judgments and should remand this case for a new hearing.

Respectfully submitted,

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by /s/Jonathan Sternberg

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Certificate of Service

I certify that on October 7, 2019, I electronically filed a true and accurate Adobe PDF copy of the foregoing with the Clerk of the Court by using the electronic filing system, which will send notice of electronic filing to the following:

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Appendix

129 P.3d 663 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Douglas L.R. ABEL, Appellant,
v.
Roger WERHOLTZ, et al., Appellees.

No. 94,447.
|
March 3, 2006.

Appeal from Reno District Court; Timothy J. Chambers, judge. Opinion filed March 3, 2006. Affirmed.

Attorneys and Law Firms

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Jon D. Graves, special assistant attorney general, for appellee.

Before BUSER, P.J., LARSON, S.J., and WAHL, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Douglas L.R. Abel appeals the trial court's dismissal of his habeas corpus petition which alleged his constitutional rights were violated in a proceeding of his prison disciplinary conviction of drug use. Abel was a prisoner at the Hutchinson Correctional Facility (HCF). On September 2, 2004, Abel provided a urine sample which tested positive for THC. On September 14, 2004, a disciplinary report was served on Abel notifying him that National Toxicology Laboratories (NTL) confirmed the results and he was alleged to have violated K.A.R. 44–12–312a, use of stimulants.

On September 21, 2004, the disciplinary hearing was held, and Officer Potter presented evidence showing the evidence card, result of the test, and the confirmation report from NTL. Abel entered a plea of not guilty and testified the initials on the card were not his and he had had 18 other urine tests which all came back clean. The hearing officer found Abel guilty based on the scientific evidence.

Abel appealed the hearing officer's decision to the Secretary of Corrections. Abel's disciplinary conviction was affirmed on November 15, 2004. The Department of Corrections (DOC) states Abel received this ruling on December 3, 2004.

On January 7, 2005, Abel filed a K.S.A. 60–1501 petition in the Reno County District Court. Abel alleged (1) his due process right was violated when the DOC failed to comply with its own policy and procedure in handling his urine sample for drug testing; (2) his right of confrontation was violated when his request to call Officer Harper as a witness at the disciplinary hearing was denied; and (3) his due process right was violated when the DOC failed to comply with the rule requiring the positive sample to be frozen until the resolution of the disciplinary action and requiring the inmate's signature of waiver. Additionally, Abel alleged the DOC targeted the Native American population for drug testing in violation of fundamental fairness.

On January 11, 2005, the district court denied Abel's petition as to all issues raised except for a claim on a chain of custody of the urine sample. The court remanded the case to the original hearing officer to determine the chain of custody.

On January 28, 2005, a rehearing was held before the same hearing officer where Officers Potter and Harper testified. Potter testified that when he took the urine samples, including Abel's, he put the cups in a box which fit into the refrigerator and put the evidence cards in a pile next to the samples. Potter matched the seal on the sample cups with the card by checking the inmate name, number, date, and time. Potter noticed the date error and called Harper to change the date on the card. HCF sent all positive test samples to NTL for confirmation before writing a disciplinary report.

Harper testified he collected the samples while checking the ID of the inmates. After Abel went back to his cell, Harper noticed the wrong date and corrected it. Abel testified he initialed and sealed the cup of the sample. Abel argued the officer changed the date without notice to Abel.

***2** The hearing officer found Abel guilty again, holding:

> "The preponderance of the evidence showed that inmate Abel provided a U/A sample that was collected by Lt. Harper. Lt. Harper verified the identification of inmate Abel using his ID badge, the sample was collected, and inmate Abel sealed and initialed his sample cup. The cup and the evidence card were placed together and then were placed into the evidence locker (refrigerator). The reporting officer collected the samples, matched the samples with the evidence cards utilizing inmate name, number, dates and times that were on the seal and the evidence card. Lt. Harper noticed a harmless error on the sticker and fixed it at that time, initialing the changes he had made. That showed he retained possession of the sample after inmate Abel had departed and had looked at it to insure an accurate seal. The evidence card reflected the same harmless error that was also fixed by Lt. Harper in the presence of the reporting officer. The reporting officer maintained possession of the sample upon retrieving it from the evidence locker for testing and storage pending confirmation. The hearing officer found that the chain of custody for the evidence was intact."

On February 16, 2005, Abel filed a motion for reconsideration in the district court, alleging the chain of custody was compromised because the officer changed the date and added initials. The court denied the motion. Abel filed a timely notice of appeal.

The DOC argues that this court has no jurisdiction to consider the habeas petition filed by Abel because he failed to exhaust administrative remedies and/or his notice of appeal was untimely. Whether jurisdiction exists is a question of law over which an appellate court's scope of review is unlimited. *Mid–Continent Specialists, Inc. v. Capital Homes,* 279 Kan. 178, 185, 106 P.3d 483 (2005). Whether a party is required to or has failed to exhaust its administrative remedies is also a question of law over which the appellate court's review is unlimited. *Miller v. Kansas Dept. of S.R.S.,* 275 Kan. 349, 353, 64 P.3d 395 (2003).

The DOC argues Abel failed to comply with the statutory requirement in filing his 1501 petition in the district court and his failure deprived the court of jurisdiction. K.S.A. 60–1501(b) provides:

> "Except as provided in K.S.A. 60–1507, and amendments thereto, an inmate in the custody of the secretary of corrections shall file a petition for writ pursuant to subsection (a) within 30 days from the date the action was final, but such time is extended during the pendency of the inmate's timely attempts to exhaust such inmate's administrative remedies."

The Secretary of Corrections affirmed Abel's disciplinary conviction on November 15, 2004. The DOC states Abel received this ruling on December 3, 2004. On January 7, 2005, Abel filed a 60–1501 petition in the Reno County District Court, more than 30 days after the DOC decision.

The record does not indicate this issue was raised as an affirmative defense in the district court. Failure to file a petition in a district court within 30 days of final administrative action constitutes an affirmative defense rather than a jurisdictional issue. *Battrick v. State,* 267 Kan. 389, 393, 985 P.2d 707 (1999).

***3** Furthermore, Abel's 60–1501 petition was notarized on December 31, 2004, indicating he gave his petition to prison authorities within 30 days. See *Holt v. Saiya,* 28 Kan.App.2d 356, 361, 17 P.3d 368 (2000) (the critical date for inmate's 60–1501 appeal is when the inmate delivered

A2

the habeas petition to prison authorities for mailing to the clerk of the district court). Thus, the DOC's jurisdictional argument on requirement on this statutory requirement fails.

The DOC then argues Abel failed to file a notice of appeal from the district court decision to the Court of Appeals within 30 days. According to the DOC, Abel filed a notice of appeal on March 2, 2005, 49 days after the district court order was filed on January 11, 2005.

Although we find no case dealing with the same procedural question in a habeas situation, there is a case of an administrative agency proceeding which is instructive. *Holton Transport, Inc. v. Kansas Corporation Comm'n,* 10 Kan.App.2d 12, 13, 690 P.2d 399 (1984), *rev. denied* 236 Kan. 875 (1985), held a district court order remanding an administrative proceeding to the administrative agency for additional findings of fact is not a final appealable order. The DOC argues Abel should have filed a notice of appeal to the Court of Appeals within 30 days from the district court order on January 11, 2005. This ruling by the district court remanded the case for further findings by the hearing officer and was not a final order. Abel could not have appealed.

The district court order filed on January 11, 2005, remanded the case to the original hearing officer to determine a chain of custody issue. Although it was a final order as to other issues, Abel could not have filed a notice of appeal in the case to this court where one issue was remanded to the hearing officer.

After the rehearing, Abel filed a motion for reconsideration in the district court and the court denied it on February 16, 2005. His notice of appeal filed on March 2, 2005, was timely from this ruling. The question then becomes whether his motion for reconsideration was effective for the district court to assume jurisdiction of his case.

The DOC argues Abel's motion for reconsideration filed on February 16, 2005, was out of time from the district court decision, did not toll the running of the appeal time, and was improperly captioned.

On January 28, 2005, as ordered by the district court, a rehearing was held regarding the issue of chain of custody. The hearing officer held the chain of custody of Abel's urine sample was proper and affirmed his conviction. Abel's motion for reconsideration was notarized on February 9, 2005. This is 8 days after the rehearing. See *Holt,* 28 Kan.App.2d at 361.

In his motion to reconsider, Abel did not request the hearing officer to reconsider its ruling; instead, he moved the district court to reconsider its previous ruling. The caption of the motion does not control the nature of the motion. Historically, the courts have construed pro se pleadings liberally. *Bruner v. State,* 277 Kan. 603, 605, 88 P.3d 214 (2004); see also *State v. Jackson,* 255 Kan. 455, 458, 874 P.2d 1138 (1994) (motion to withdraw a nolo contendere plea treated like a 60–1507 motion); *Jackson v. State,* 1 Kan.App.2d 744, 745, 573 P.2d 637 (1977) (a 60–1507 motion construed as a motion for a new trial).

***4** If the district court had jurisdiction of Abel's case in ruling on his motion for reconsideration, this court also has jurisdiction. The remaining question is whether Abel properly exhausted the administrative remedies before he filed his motion for reconsideration.

The DOC argues Abel failed to exhaust the administrative remedies because he failed to appeal the hearing officer's ruling for the second time to the Secretary of Corrections within 15 days. The DOC insists the Secretary should be given an opportunity to consider the issue on chain of custody which was not the focus of the previous hearing.

Under K.S.A. 75–52, 138, an inmate is required to exhaust his or her administrative remedies prior to filing any petition in a civil action. K.A.R. 44–13–703 provides the inmate's right to appeal to the Secretary of Corrections from a final decision made by the disciplinary hearing officer, after review by the warden. The Secretary may review the case and take actions according to K.A.R. 44–13–704. Once the exhaustion requirement is satisfied, the filing of a habeas corpus petition under K.S.A. 60–1501 must be accomplished within 30 days of the exhaustion.

In this case, Abel's 60–1501 petition was filed in the district court after his disciplinary conviction was affirmed by the Secretary of Corrections. Abel attached exhibits of all the previous rulings showing the administrative remedies had been exhausted upon filing his 60–1501 petition with the district court according to K.S .A. 75–52, 138.

A3

According to the DOC's argument, Abel should have filed another 60–1501 petition after receiving the ruling by the Secretary. The district court's order of remand was to have the issue of chain of custody resolved by the same hearing officer who heard the testimony of the officers and Abel. The DOC claims this was the new issue which the Secretary had not reviewed. However, the disposition of the disciplinary case of the original hearing shows Abel complained the initials on the card were not his, raising the issue of reliability of the test results. Further, the legal counsel for the DOC argued before the Secretary that foundation for the admission of the specimen should go to the weight of the evidence.

According to K.A.R. 44–13–704, the Secretary's review shall determine (1) whether there was substantial compliance with the procedures, (2) whether the hearing officer's decision was based on some evidence, and (3) whether the penalty was appropriate. The Secretary is not a finder of fact and the hearing officer found the chain of custody of the urine sample was proper in this case. Technically, the hearing officer's decision was to be reviewed by the Secretary, and the 60–1501 petition was to be filed in the district court even though it would be a futile effort in this case.

Obviously, Abel failed to request a review by the Secretary of the rehearing ruling from the remand. Consequently, Abel failed to file a renewed 60–1501 petition in the district court. Nor does the filing of a motion for reconsideration satisfy the requirement for exhausting administrative remedies. However, the district court retained jurisdiction over Abel's case when it denied his petition as to all issues except one and remanded the case to the hearing officer for further findings of fact, in effect implying that when the chain of custody was established, the court would consider that issue from the petition.

***5** We shall consider whether the trial court erred in summarily denying Abel's habeas corpus. Proceedings on a petition for writ of habeas corpus filed pursuant to K.S.A. 60–1501 are not subject to ordinary rules of civil procedure. To avoid summary dismissal of a 60–1501 petition, allegations must be made of shocking and intolerable conduct or continuing mistreatment of a constitutional stature. *Bankes v. Simmons,* 265 Kan. 341, 349, 963 P.2d 412 (1998). An inmate claiming violation of his or her constitutional rights in a habeas proceeding carries the burden of proof. *Anderson v. McKune,* 23 Kan.App.2d 803, 807, 937 P.2d 16, *rev. denied* 262 Kan. 959, *cert. denied* 522 U.S. 958 (1997). The question of whether an individual's constitutional rights have been violated is a question of law. *Hearst v. State,* 30 Kan.App.2d 1052, 1055–56, 54 P.3d 518 (2002). The appellate court's review is unlimited. *Bankes,* 265 Kan. at 349.

Abel argues the DOC failed to follow policies and rules in K.A.R. 44–13–201 and Internal Management Policy and Procedure (IMPP) 12–124 in that (1) the disciplinary report was not written within specified time limits; (2) the evidence card and sample were not kept together; (3) the sample was not kept frozen until resolution of his case; and (4) the sample was sent for testing without his waiver and agreement. Abel also argues the DOC's drug testing screening process violates his constitutional rights.

(1) The disciplinary report was not written within the specified time limit. Abel argues the disciplinary report was written on September 13, 2004, 5 days after the testing of his sample on September 7, 2004, in violation of K.A.R. 44–13–201(c) which provides: "The disciplinary report shall be written within 48 hours of the offense, the discovery of the offense, or the determination following an investigation that the inmate is the suspect in the case and is to be named as defendant."

Abel submitted his urine sample on September 2, 2004, and onsite testing was done on September 7, 2004. The investigation was not completed until the sample was sent to NTL and its report received. NTL confirmed the positive results of the urinalysis on September 13, 2004. The disciplinary report was written the same day, and Abel was served a copy on September 14, 2004. Contrary to Abel's argument, the disciplinary report was filed within the time limits.

(2) The evidence card and sample were not kept together resulting in unreliable test results. Abel argues the initials on the sticker were not his, the dates on the evidence card and sticker were altered, and the officer forged Abel's signature on a form sent to NTL. It is not clear what the initials were on the sample sticker. The second initial is clearly "A" but the first letter could be "G" or "D." Nevertheless, Abel testified at the second hearing that he had put his initials and sealed the cup himself.

Officers Harper and Potter gave inconsistent testimony regarding the changed date on the evidence card and sticker. Harper collected the samples while checking ID of the inmates. After Abel went back to his cell, Harper noticed the wrong date and corrected it. Potter matched the seal on the sample cup with the card by checking the inmate name, number, date, and time. Potter noticed the date error and called Harper to change the date on the card. The change was made from 09/03/04 to 09/02/04 with the small initials above the change on both evidence card and sticker. The initials are not clear to read.

***6** Potter testified the samples were placed in the refrigerator and the cards placed in a pile next to the samples. He stated he matched the sample with the card by checking, name, number, date, and time, but not initials or signature.

The hearing officer found Harper collected the sample from Abel, verifying the identification and Abel sealed and initialed his sample cup. The sample and the card were placed together. Potter collected the samples and matched them with the evidence cards using inmate name, number, date, and time. Harper noticed the error on the dates and corrected them. Contrary to Abel's argument, there was no violation of the rules or policies in dealing with Abel's urinalysis, and no evidence showed tampering of the sample or break in chain of custody.

(3) The sample was not kept frozen until resolution of his case. Abel argues IMPP 12–124, Section IV(C) requires: "Samples which have tested positive under the KDOC drug detection system shall be frozen and retained at the facility until final resolution of any disciplinary action." True, but the same provision continues: "Samples which have tested positive under tests conducted by certified laboratories under contract with the KDOC shall be preserved in a manner consistent with the terms of the service contract." There is no evidence showing what the terms of the service contract regarding the preservation of samples are and whether there was noncompliance. Abel claims he could have shown that the number on the sample did not match the number on the evidence card had the sample been preserved. However, the copy of the evidence card and sticker show the same inmate name, number, date, and time.

(4) The sample was sent for testing without his waiver and agreement. Abel complains he did not agree to the testing by NTL and someone forged his initials on the form. The DOC points out Abel failed to raise this issue before the hearing officer and cannot raise it now.

There are two agreement forms; one is an attached form to IMPP 12–124 titled, "Drug Test Waiver and Agreement," which was to be signed after the disciplinary report was filed in order to take additional testing. This cannot be found in the record on appeal. The other agreement form is a document titled, "Chain of Custody for Drug Analysis" showing the sample was sent to NTL for confirmation bearing a collector's signature and an offender's signature. Abel complains this offender's signature is forged. HCF sent all positive test samples to NTL for confirmation before writing a disciplinary report.

K.A.R. 44–5–115(d) provides:

> "An offender shall be assessed a fee for each urinalysis test administered to them for the purpose of determining use of illegal substances which has a positive result. The amount of the fee shall be adjusted from time to time to reflect the actual cost of administering such tests, including staff participation."

Abel claims he was assessed $5.35 for onsite testing and $20 for GCMS confirmation testing as well as other sanctions imposed in the disciplinary conviction.

***7** There are no documents in the record supporting his disciplinary conviction penalties or an accounting for Abel's prison account. Even assuming his claims are supported by any evidence, it does not lead to the violation of the rules and regulations.

Abel argues HCF targeted the drug screening to Native American members. Abel complains he was tested 28 times since April 1, 2003, and sometimes 3 or 4 times in a 30–day period. Abel states his last dirty UA was in September 1999 and ever since then he had not done any drugs whatsoever. According to the DOC records, Abel had three disciplinary convictions for use of stimulants in 1999 and another one in September 2004. In November 2005, he was cited for trafficking in contraband.

A urinalysis constitutes a search for purposes of the Fourth Amendment to the United States Constitution and, therefore, must be reasonable. In determining whether a search of a prisoner is reasonable, the privacy interests of the prisoner are limited by the security interests of the penal institution. The maintenance and administration of penal institutions are executive functions and before courts will interfere, the institutional treatment must be of such a nature as to clearly infringe upon constitutional rights, be of such a character or consequence as to shock the general conscience, or be intolerable to fundamental fairness. It has been held that random urine testing of prisoners for drugs is reasonable and does not violate the Fourth Amendment. *Crutchfield v. Hannigan,* 21 Kan.App.2d 693, 694–95, 906 P.2d 184 (1995).

According to IMPP 12–124, Section I(A), the drug screening program shall target the inmates suspected of contraband drug usage or high risk group including inmates with a history of drug or alcohol abuse. Based on Abel's prior history of drug use, HCF may consider Abel as a high risk inmate. Abel claims HCF was harassing him by making him submit to drug testing because he was a member of Native American "call-out." Abel insists HCF's action was shocking to the conscience and fundamentally unfair. However, there is no evidence to show Abel's right to religion was violated or his constitutional rights were infringed by HCF's actions.

The trial court did not err in denying Abel's 60–1501 petition where Abel failed to allege shocking and intolerable conduct or continuing mistreatment of a constitutional stature. See *Bankes,* 265 Kan. at 349.

Affirmed.

All Citations

129 P.3d 663 (Table), 2006 WL 538624

End of Document

101 P.3d 741 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

CENTERA BANK, Appellee,
v.
Gerald WEDEL; Letha Wedel, Appellants.

No. 92255.
|
Dec. 10, 2004.

Appeal from Haskell District Court; Kim R. Schroeder, judge. Opinion filed December 10, 2004. Appeal dismissed.

Attorneys and Law Firms

Gerald Wedel and Letha Wedel, appellants pro se.

Charles E. Owen, II, of Charles E. Owen, II, P.A., of Garden City, for appellee.

Before RULON, C.J., KNUDSON, S.J., and WAHL, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Defendants Gerald Wedel and Letha Wedel appeal the district court's order directing the Sheriff of Haskell County to seize certain farm equipment listed within a security agreement for a promissory note issued by the Haskell County State Bank, of whose interests Centera Bank is the successor. Appeal dismissed.

The underlying facts of this case are well known by the parties. Consequently, we need not revisit those facts

According to the record on appeal, the earliest notice of appeal to this court from any decision of the district court occurred on November 17, 2003. Because the notice purports to appeal the district court's order dated July 7, 2003, the appeal is untimely. Any untimely notice of appeal deprives this court of jurisdiction. See *City of Lawrence v. McCormick,* 275 Kan. 509, 510, 66 P.3d 854 (2003).

A question of jurisdiction may be raised at any time, even upon an appellate court's own motion. *Rivera v. Cimarron Dairy,* 267 Kan. 865, 868, 988 P.2d 235 (1999). The right to appeal is not a constitutional right but a right only to the extent provided by the legislature. Kansas courts have jurisdiction only over those appeals taken in the manner prescribed by the appropriate statutes. See *Butler County R.W.D. No. 8 v. Yates,* 275 Kan. 291, 299, 64 P.3d 357 (2003). Whether an appellate court possesses jurisdiction is a question of law, over which this court has unlimited review. See *Summitt v. Summitt,* 31 Kan.App.2d 812, 814, 74 P.3d 584, *rev. denied* 277 Kan. 928 (2003).

K.S.A.2003 Supp. 60-2103(a) provides, in pertinent part:

> "When an appeal is permitted by law from a district court to an appellate court, the time within which an appeal may be taken shall be 30 days from the entry of judgment, as provided by K.S.A. 60-258, and amendments thereto, except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed."

Here, there are two possible orders from which the defendants might seek to take an appeal: the order permitting the sheriff to confiscate the defendants' property subject to the security agreement, as amended by the *nunc pro tunc* order, and the order granting summary judgment to the plaintiff. The confiscation order was originally filed on July 7, 2003, but a subsequent order, amending the original order was filed on August 5, 2003. After the original order but before the *nunc pro tunc* order, the defendants timely filed a document purporting to be an

appeal of the July 7, 2003, order, which the district court properly treated as a motion to reconsider.

A timely motion to reconsider will toll the time for filing a notice of appeal until a decision on the motion has been entered, at which point the 30-day filing period commences afresh. See *Honeycutt v. City of Wichita,* 251 Kan. 451, 460-61, 836 P.2d 1128 (1992). However, successive motions for reconsideration will not toll the time beyond that permitted for the initial motion for reconsideration. See *State ex rel. Secretary of SRS v. Mayfield,* 25 Kan.App.2d 452, 456-57, 966 P.2d 85 (1998).

***2** The district court ruled on the defendants' motion on August 29, 2003. As such, the defendants should have filed a notice of appeal on or before September 29, 2003. With the additional 3 days for mailing provided in K.S.A. 60-206(e), the filing deadline is extended until October 2, 2003. The notice of appeal, dated November 17, 2003, is clearly untimely.

The district court ruled on the plaintiff's motion for summary judgment on August 11, 2003. A timely notice of appeal, including mailing time, should have been filed by September 15, 2003. As the defendants filed no timely motions which tolled the statutory time for filing a notice of appeal, the November 17, 2003, notice of appeal does not provide this court with jurisdiction to review the district court's summary judgment order.

Because this court is without jurisdiction, the defendants' appeal must be dismissed. See *Cole v. Mayans,* 276 Kan. 866, 870, 80 P.3d 384 (2003) ("An appellate court has a duty to question jurisdiction on its own initiative. If the record show a lack of jurisdiction for the appeal, the appeal must be dismissed.").

Appeal dismissed.

All Citations

101 P.3d 741 (Table), 2004 WL 2848892

434 P.3d 240 (Table)
Unpublished Disposition
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

In the MATTER OF the ESTATE OF Lanny LENTZ

No. 118,307
|
Opinion filed February 8, 2019

Appeal from Shawnee District Court; FRANK J. YEOMAN, JR., judge.

Attorneys and Law Firms

Jonathan Sternberg, of Jonathan Sternberg, Attorney, P.C., of Kansas City, Missouri, for appellant.

Alan V. Johnson, of Sloan, Eisenbarth, Glassman, McEntire & Jarboe, L.L.C., of Topeka, for appellees.

Before Schroeder, P.J., Standridge, J., and Walker, S.J.

MEMORANDUM OPINION

Per Curiam:

***1** Decedent Lanny Lentz' three adult daughters were the heirs to his estate. His estate included several real properties, four of which are at issue. The district court distributed two of the properties to Diann Wyatt and the other two properties to Lana Kennedy and Marilyn Lentz as joint tenants in common. Diann appeals the district court's valuations of the four properties. But because we have concluded that Diann's appeal was not filed in a timely fashion, we are required to dismiss the appeal for lack of jurisdiction. But even if we were to reach the merits of Diann's issues on appeal, we find she did not properly raise them before the district court.

FACTS

When Lanny died on December 4, 2012, he left behind three heirs, his adult daughters: Lana, Marilyn, and Diann. In his will, the decedent named Lana as the executrix of his estate. On September 11, 2013, Lana filed an inventory and valuation of the decedent's probate assets, which included 12 real properties. The inventory values for four of those properties, all located in Topeka and which are in question in this appeal, were: 605 SW Lindenwood Ave., valued at $83,680; 613 SW Lindenwood Ave., valued at $61,150; 517 SW Polk, valued at $17,640; and 2723 SE Monroe St., valued at $17,000.

On December 5, 2014, the three heirs signed a family settlement agreement (FSA) in which they followed a document the decedent executed in September 2007, directing certain real estate distributions. In the 2007 document, the decedent bequeathed 2723 Monroe to Marilyn, 517 Polk to Diann, and 605 Lindenwood to Lana. For 613 Lindenwood, he provided Lana the right of first refusal to purchase at fair market value, with the proceeds divided equally among the three heirs.

Lana filed the FSA with the petition for final settlement on September 16, 2015, after she had fully administered the estate. Lana decided to sell 613 Lindenwood for $56,000 and pay the other two beneficiaries $18,666.66 each, once the sale was complete.

Diann objected to Lana's petition, claiming the FSA did not contain all of the decedent's assets. Diann contended that Lana had not provided proof of several transactions and lacked authority for distributions to heirs. The district court conducted a hearing on the FSA and Diann's objections. Lana admitted she (1) failed to complete and accurately inventory the estate's property; (2) distributed estate assets without authority, including payments to herself; (3) breached her duty to care for the assets by failing to make timely deposits and failing to file tax returns; (4) engaged in self-dealing by making loans to herself and distributing assets to herself without approval; and (5) delayed estate obligations to distribute assets. The court denied the petition.

On December 4, 2015, Diann moved for removal of Lana as executrix and requested that Lana reimburse the estate for damages by her negligence or mismanagement. In response, Lana contended that the heirs agreed on the FSA, as they believed it represented the decedent's wishes, and the division of the real properties had resolved issues regarding mismanagement of the estate. Lana petitioned the district court to accept her resignation and appoint Marilyn as the successor executrix. She also requested that the court approve the sale of real property to pay her expenses and attorney fees.

***2** In March 2016, the district court accepted Lana's resignation and appointed Marilyn as her successor. Lana withdrew her petition to sell real estate, and Diann withdrew her objections to the revised accounting. The court approved the revised accounting and the inventory and valuation Lana filed in December 2015. The approved inventory and valuation contained the same values of the four real properties in question as above. Diann withdrew her petition for damages against Lana on May 9, 2016.

In September 2016, Marilyn filed for the district court to approve private sale of real estate properties. The court authorized sale of two properties, both of which Marilyn sold for $30,000 total. The court then assessed payment of $28,500 to Lana for attorney fees and expenses of $1,042.43, both to be paid from the assets of the estate.

On December 9, 2016, Marilyn filed a revised petition for final settlement. She claimed the two Lindenwood properties were subject to disagreement among the heirs. Marilyn appraised 613 Lindenwood and Lana appraised 605 Lindenwood. Copies of the appraisals were provided to each of the heirs but were not admitted into evidence and are not in the record. All nonappraised properties were valued at the lower of the original inventory valuation or the certified market appraisal (CMA) by the executrix if the CMA value corresponded to a bona fide third-party discussion of purchase of the property in "as is" condition. Each nonappraised property was offered to each heir for purchase at those valuations.

To accomplish equal distribution of the real property, Marilyn and Lana agreed to take title of the real properties as joint tenants in common and include the obligations owed to each as executrixes as an offset against the valuations of the real properties distributed. Marilyn noted the court had approved Lana's executrix expenses and requested a $12,000 executrix fee. She proposed division of the real property as the decedent outlined in his will and the 2007 document. Marilyn valued 605 Lindenwood at $55,000; 613 Lindenwood at $30,000; and both 517 Polk and 2723 Monroe at $17,000 each. She proposed the court allocate the Lindenwood properties to her and Lana as joint tenants in common and that the Polk and Monroe properties be allocated to Diann.

Diann objected to the petition. She challenged several issues with the final settlement. Of significance, Diann contested the valuations for the Lindenwood properties, noting that the properties were appraised but the assigned values did not match the appraised values. Marilyn responded that the proposed values were equal to the appraised values minus costs of repairs deemed mandatory for sale of the properties.

Marilyn testified that the appraised value of 613 Lindenwood, less the approximate costs of mandatory repairs, was $34,000. Lana paid to have 605 Lindenwood appraised. That property was appraised at $60,000 but required $4,000 to $5,000 in repairs. Marilyn asked the district court to value the property at $55,000. She asked the court to value the 517 Polk property at $17,000 based on offers to purchase the property ranging from $15,000 to $18,000. She requested the court also value the 2723 Monroe property at $17,000 as the tenant offered to purchase the property for that amount. She stated that with those values less the fees and expenses to the executrixes, each heir would receive a distribution valued at approximately $34,000. However, Diann pointed out that the offers to purchase the Monroe and Polk properties had not been written offers and it was unclear whether the offers remained. The CMA value of the Monroe property was $5,000.

***3** The district court found that though Marilyn and Lana received distributions of $12,000, Diann received only $10,000 in distributions. Marilyn offered to redistribute the cash portion of the estate to accommodate for that difference. The court further determined that the same method of valuation needed to be used for all properties and considered a contract for purchase or a written offer as a reliable showing of value of the property. Marilyn offered to correct the two issues with the petition and submit the corrections for review by counsel then propose the journal entry based on the findings.

The district court issued the journal entry approving the final settlement and amended final accounting and inventory on December 30, 2016. Marilyn and Lana both approved the journal entry. Diann did not approve the journal entry but did not register any objections. The journal entry included an executrix fee of $12,000 and attorney fees in the amount of $36,000. The order granted attorney fees in the amount of $28,500 and $1,042.43 in fees for expenses while Lana had been executrix. The court approved a payment of not more than $700 for preparation of the final estate income tax return. The $21,799.13 Lana was to repay the estate was to be an offset against the property distribution. The $36,103.60 held by the Clerk of the District Court was to be deposited in the estate account for distribution. And Diann was to be paid $2,000 to equalize the distributions made to the other two heirs.

The district court directed use of CMA valuations for all properties other than the property with a contract for deed, which the court ordered the estate to sell to Marilyn for $12,000. The court distributed seven properties, including the Lindenwood properties, to Lana and Marilyn as joint tenants in common. The court distributed the Polk and Monroe properties to Diann.

The district court granted the petition for final settlement and approved the amended final accounting and inventory. The court attached the real estate valuations per CMA to the journal entry. The CMA value of the properties at issue in this appeal are:

Property:	CMA Value:
517 Polk	$18,762
2723 Monroe	$17,833
605 Lindenwood	$38,787
613 Lindenwood	$41,098

Using the CMA valuation, the value of Diann's property distribution was $36,595 and the value of the properties distributed to Marilyn and Lana was $72,251.87, which provided a value of $36,251.94 each.

On January 27, 2017, Diann moved for the district court to set aside and/or reconsider the final settlement and reinstitute the claim for damages against Lana. The motion states it was filed "in part pursuant to K.S.A. 60-260(b)(1) and (2)" but did not cite to any other statutory section.

As noted above, Diann had previously filed her claim for damages against Lana in December 2015. At the hearing on the motion to set aside or reconsider, Diann testified that prior to the hearing on her claim in April 2016, she had obtained new counsel who advised Diann to dismiss the claim because " 'she wouldn't get anything' " and the claim caused further disharmony in the family. Diann claimed that she "mistakenly believed that she did not have a valid claim based upon the representations of her counsel, felt unduly pressured to withdraw her claim, and now requests that it be reinstituted."

Diann also objected to the discharge of Marilyn as executrix and petitioned to disgorge Marilyn's administrative fee back to the estate. The district court concluded that Diann had been represented by counsel through every stage of the proceedings and had a fair opportunity to be heard. Evidence showed that she voluntarily withdrew her petition for damages. Therefore, the court found the petition and objections were meritless and denied them.

***4** Diann appeals the district court's final valuations of the Monroe, Polk, and both Lindenwood properties.

ANALYSIS

Jurisdiction to hear the appeal

Diann's appeal was filed within 30 days after the entry of the district court's order denying her motion to set aside or reconsider the order of final settlement and reinstitute her claim for damages. Marilyn and Lana contend that this court does not have jurisdiction to review the valuations adopted by the district court in its order of final settlement. They claim that because Diann's motion to set aside or for reconsideration was filed under K.S.A. 2017 Supp. 60-260(b), the posttrial motion did not toll the time for appeal from the district court's orders of final settlement in the estate. Since the orders of final settlement, which included the valuations of the four properties, were filed on December 30, 2016, any appeal should have been filed by January 29, 2017. Therefore, they argue that Diann's appeal was untimely and thus this court does not have jurisdiction to hear this appeal and review the valuations.

Diann does not deny that a K.S.A. 60-260(b) motion does not toll the time for appeal but claims because her motions were captioned both as a request to set aside and to reconsider and were described as *in part* pursuant to K.S.A. 2017 Supp. 60-260(b)(1) and (2), this court should consider her motion as a K.S.A. 60-259(f) motion to alter or amend judgment, which tolls the time for appeal. As authority, Diann relies on *Honeycutt v. City of Wichita*, 251 Kan. 451, 460, 836 P.2d 1128 (1992), which held that Kansas courts consider a motion to reconsider to be equivalent to a motion to alter or amend judgment, which tolls the running of the time for appeal until the motion is heard and decided.

Whether jurisdiction exists is a question of law over which our scope of review is unlimited. *In re Care & Treatment of Emerson*, 306 Kan. 30, 34, 392 P.3d 82 (2017). The right to appeal is entirely statutory, not constitutional. Subject to certain exceptions, our courts have jurisdiction to entertain an appeal only if the appeal is taken in the statutorily prescribed manner. *Wiechman v. Huddleston*, 304 Kan. 80, 86-87, 370 P.3d 1194 (2016).

Under K.S.A. 2017 Supp. 60-206(b)(2), "[a] court must not extend the time to act under ... K.S.A. 60-260(b)." However, a timely filed motion to alter or amend judgment under K.S.A. 2017 Supp. 60-259 tolls the time for appeal. *Bank of America v. Inda*, 48 Kan. App. 2d 658, 662, 303 P.3d 696 (2013). Thus, for this court to have jurisdiction to review Diann's complaints about valuations of the four properties, her motion must be appropriate for consideration as a motion to alter or amend judgment pursuant to K.S.A. 2017 Supp. 60-259(f).

Though Diann presents caselaw in support of her claim, the cited cases are distinguishable from hers. Diann first cites to *Bank of America*. In that case, a panel of this court determined that a district court may review a motion to reconsider as a motion to alter or amend based upon the content of the motion, not the heading. If the language of the motion is proper, it may allow for consideration as a motion under K.S.A. 2017 Supp. 60-259(f), even if that statute is not specifically invoked. See 48 Kan. App. 2d at 662. Though Inda, the pro se judgment-debtor appellant in *Bank of America*, provided K.S.A. 60-260(b) as the authority for the motion for reconsideration, courts liberally construe pro se motions for substance rather than form. The panel hearing the appeal noted that Inda was not raising any new arguments but simply contending that the district court erred in its prior ruling granting summary judgment. Thus, because the substance of the motion amounted to a request that the district court's decision be altered, it fell under the exceptions that extend the time for appeal.

***5** Unlike *Bank of America*, Diann was represented by counsel throughout the proceedings as well as on appeal. In light of this, the liberal construction granted to pro se litigants is not warranted on her motion. Nowhere in the motion to set aside and/or reconsider the order of final settlement is there any reference to K.S.A. 2017 Supp. 60-259(f). On appeal Diann contends that the inclusion of the qualifier "in part" prefacing her invocation of K.S.A. 2017 Supp. 60-260(b)(1) and (2) was adequate to bring the motion within the ambit of K.S.A. 2017 Supp. 60-259(f). But we believe this oblique reference is too slender a reed to support her argument and did not place either the district court or counsel for Lana and Marilyn on adequate notice that Diann was asking for the judgment to be altered or amended under K.S.A. 2017 Supp. 60-259(f).

But there is a more compelling reason why we believe Diann's case is much different than the fact pattern in *Bank of America*. The plain language of Diann's motion belies her contention that she was merely seeking to alter or amend the existing order of final settlement. Diann's entire motion to set aside and/or reconsider the final order of settlement essentially consists of complaints about bad legal advice from her prior counsel resulting in withdrawal of her request for damages against Lana. In fact, the closing sentence of Diann's motion prays that "the Order of Final Settlement be set aside *to the extent* to allow her to proceed with her damage claims against Lana Kennedy and her opposition to the discharge of Marilyn Lentz." (Emphasis added.) A review of the transcript from the hearing on the motion reveals that Diann's testimony and argument focused entirely on her belief she erroneously relied on prior counsel's advice and now wished to reinstate her damage claims against Lana. To us, this reads in substance much more like a motion for relief from final judgment based upon a mistake or excusable neglect under K.S.A. 2017 Supp. 60-260(b)(1), which is precisely one of the statutory subsections mentioned in the opening sentence of Diann's motion. We take special note of the fact that nowhere was the issue of Diann's concern about values of the four properties raised or discussed at the hearing on the motion.

A motion to alter or amend judgment under K.S.A. 2017 Supp. 60-259 is essentially an attack on errors allegedly made by the district court. It makes sense that a party should not be punished, and possibly lose the ability to appeal, because they are waiting on the district court to correct its own errors. That is clearly the reason why such a motion tolls the statute of limitations. But where a motion does not serve this purpose of allowing a court to potentially correct its own error, it does not make sense to simply consider it as a motion to alter or amend judgment just to permit a timely appeal.

By contrast, a motion for reconsideration under K.S.A. 2017 Supp. 60-260(b) essentially asks for a whole new consideration of the issues based upon a party's own errors or the discovery of new evidence. Here it is undisputed that Diann *voluntarily* withdrew her request for damages against Lana. Whether she did this based on good or bad advice of counsel is beside the point. Diann says she made a mistake, but if this is true then it is clearly her own, or her counsel's, mistake, and no part of any decision arising from her choice to abandon her claims against Lana can be properly laid at the feet of the district court. A motion to reconsider under K.S.A. 2017 Supp. 60-260(b) asks for a whole new consideration of the issues based upon the parties' own errors, and the record

clearly indicates that to be the situation here. We conclude that the deadline for appeal was not tolled by the motion to set aside and/or reconsider the order of final settlement of the estate, and thus the appeal was not timely filed.

***6** Diann later asserts that *Vorhees v. Baltazar*, 283 Kan. 389, 394, 153 P.3d 1227 (2007), also requires courts to liberally construe jurisdictional rules to permit litigants the opportunity to have their claims heard. However, in *Vorhees* the appellate court had discretion to dismiss the appeal. As we will discuss below, because of 2010 changes in the law after *Vorhees* was decided, if we cannot consider Diann's motion to be brought under K.S.A. 2017 Supp. 60-259(f), then we do not have discretion and must dismiss Diann's appeal.

In the next case cited by Diann, *Dieter v. Lawrence Paper Co.*, 237 Kan. 139, 143-44, 697 P.2d 1300 (1985), the Kansas Supreme Court analyzed the impact the 1979 amendment to K.S.A. 44-556(c) had on workers compensation appeals. The Supreme Court compared the motion for reconsideration to a K.S.A. 60-259 motion for a new trial. *Dieter* is inapplicable. Not only did the Supreme Court compare the motion to a motion for a new trial, but the case deals solely with interpretation of new legislative amendments to the workers compensation appellate procedures.

Finally, Diann relies on the decision in *Caplinger v. Carter*, 9 Kan. App. 2d 287, Syl. ¶ 1, 676 P.2d 1300 (1984), which stated "[a] motion to reconsider is in substance, if not form, a motion to alter or amend under K.S.A. 60-259(f) and stays the time for appeal until ruled on by the court." However, the court does not review K.S.A. 60-260(b) motions under K.S.A. 60-259(f) without having first analyzed the substance of the motion. 9 Kan. App. 2d at 290.

Of critical importance to our case is the fact the Kansas Legislature amended K.S.A. 60-206(b)(2) in 2010. Prior to 2010 amendments, K.S.A. 2009 Supp. 60-206(b) read as follows:

> "(b) *Enlargement.* When by this chapter or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the judge for cause shown may at any time in the judge's discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under subsection (b) of K.S.A. 60-250, subsection (b) of K.S.A. 60-252, subsections (b), (e) and (f) of K.S. A. 60-259 and subsection (b) of K.S.A. 60-260, and amendments thereto, except to the extent and under the conditions stated in them."

A careful reading of this statute supports an interpretation that we had discretion, with the proper showing, to enlarge the time to act if the K.S.A. 60-260(b) motion was timely filed, essentially tolling the time for an appeal.

However, after the enactment of 2010 amendments to numerous civil procedure statutes, K.S.A. 2010 Supp. 60-206(b), which has remained substantively unchanged to date following its amendment, provides as follows:

> "(b) *Extending time.* (1) *In general.* When an act may or must be done within a specified time, the court may, for good cause, extend the time:
>
> (A) With or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or
>
> (B) on motion made after the time has expired if the party failed to act because of excusable neglect.
>
> (2) *Exceptions*. A court must not extend the time to act under subsection (b) of K.S.A. 60-250, subsection (b) of K.S.A. 60-252, subsections (b), (e) and (f) of K.S.A. 60-259 and subsection (b) of K.S.A. 60-260, and amendments thereto."

***7** Thus, the 2010 amendment appears to have removed all discretion from this court and disallows an extension of time based on a K.S.A. 60-260(b) motion. A K.S.A. 60-259(f) motion tolls the clock for appeal, not by a determination by this court, but statutorily under K.S.A. 2017 Supp. 60-2103(a).

When the Legislature revises an existing law, we presume that the Legislature intended to change the law as it existed prior to the amendment. *Stueckemann v. City of Basehor*, 301 Kan. 718, 745, 348 P.3d 526 (2015). Thus we must presume the Legislature intended to remove discretion from tolling the time for appeal under a K.S.A. 60-260(b) motion. Such an amendment makes sense when one considers the purpose of the motions.

A party who files a motion under K.S.A. 2017 Supp. 60-260(b)(1) and (2) is requesting the district court grant relief from the judgment entered because the party erred, through "(1) [m]istake, inadvertence, surprise or excusable neglect"; or "(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under subsection (b) of K.S.A. 60-259, and amendments thereto." Subsection (c)(2) clarifies that such a motion has no bearing on the finality of the judgment nor does it suspend its operation. Essentially the party is attempting to make amends for their own errors. In the event of such an error by a party, it is reasonable that the district court be given the opportunity to make a determination based on all of the facts because the Court of Appeals generally does not consider an issue for the first time on appeal. *Cude v. Tubular & Equipment Services*, 53 Kan. App. 2d 287, 290, 388 P.3d 170 (2016) (citing *Wolfe Electric, Inc. v. Duckworth*, 293 Kan. 375, 403, 266 P.3d 516 [2011]).

> "This rule exists so that appellate courts do not interfere with trial court litigation. Also, it is better for the parties to fully brief and argue the issue at the trial court level instead of an appellate court deciding the issue without having the benefit of reviewing the briefs and the trial court's analysis. [Citations omitted.]" *Cude*, 53 Kan. App. 2d at 290.

The purpose of a K.S.A. 60-259(f) motion "is to allow a district court the opportunity to correct a prior error. It is not an opportunity for a party to present additional arguments or to offer additional evidence that the moving party could have —with reasonable diligence—presented prior to the entry of the final order." *Ross-Williams v. Bennett*, 55 Kan. App. 2d 524, Syl. ¶ 20, 419 P.3d 608 (2018). Permitting a K.S.A. 60-259(f) motion to toll the appellate clock is reasonable because a party should not potentially lose the ability to appeal due to possible error by the district court.

As we have noted, Diann's motion was not an attempt to provide the district court an opportunity to correct a prior mistake but to revive a claim she voluntarily dismissed. The purpose of her motion was to further litigate issues that could have been fully litigated in the district court. Her motion was properly filed under K.S.A. 2017 Supp. 60-260(b) because she sought relief from the judgment based on her own mistake. The substance of her motion does not comport with the purpose of a K.S.A. 60-259(f) motion. Because of this, we do not consider Diann's motion as a motion to alter or amend judgment. Based on the content of her motion, the time for her appeal did not toll. This court does not have jurisdiction to review Diann's claim. Her appeal must be dismissed.

District court's valuations of real estate in the order of final settlement

***8** Even if we were to find that proper jurisdiction existed to hear this appeal, we have determined that the issues raised by Diann lack merit and should not be addressed by us in this appeal.

Apart from her arguments on jurisdictional issues, the substance of Diann's appeal is her contention that Marilyn overvalued the Polk and Monroe properties and undervalued the Lindenwood properties. She claims Marilyn bore the burden of proving the accuracy of the final accounting, a burden that can be met only by providing substantial competent evidence to support the property valuations. See *In re Estate of Engels*, 10 Kan. App. 2d 103, 110, 692 P.2d 400 (1984); see also *In re Estate of Hjersted*, 285 Kan. 559, 569-70, 175 P.3d 810 (2008). While Marilyn provided copies of the appraisals for both Lindenwood properties to the parties, she did not admit the appraisals into evidence, and they are not part of the record on appeal.

Of critical importance to our consideration of these issues is the fact that Diann's complaints about the district court's valuation of the four disputed tracts were never raised or argued before the district court. The valuations to which Diann objects were set out in the district court's order of final settlement filed December 30, 2016. These valuations followed the district court's hearing on final settlement, at which the court ordered certain revisions to be made to the valuations presented at the hearing. Marilyn was directed to prepare and circulate a journal entry with the revised values reflecting its orders.

Marilyn provided the proposed journal entry with the corrected valuations as ordered, in accordance with Supreme Court Rule 170(a) (2019 Kan. S. Ct. R. 222). The final settlement valued all real estate per the CMA, as ordered by the district court. Marilyn submitted the CMA valuations to the parties on December 23, 2016. The final value of 605 Lindenwood was $38,787; 613 Lindenwood was $41,098; 517 Polk was $18,762; and 2723 Monroe was $17,833. The district court approved the final settlement and amended final accounting and inventory on December 30, 2016.

Diann objected only to Marilyn's proposed valuations of the properties prior to the final hearing, not to the district court's

final valuations. Though she did not approve the journal entry prior to submission to the district court, she failed to object to the proposed journal entry within 14 days after service of the proposal. See Supreme Court Rule 170(c) (objection to proposed order must be served no later than 14 days after service on party that drafted it).

Generally, issues not raised before the district court cannot be raised on appeal. *Wolfe Electric, Inc.*, 293 Kan. at 403. Exceptions to the general rule include the following: (1) The newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; or (3) the district court is right for the wrong reason. *State v. Spotts*, 288 Kan. 650, 652, 206 P.3d 510 (2009). If an issue raised on appeal was not raised below, the party must also explain why the issue is properly before the court. See Supreme Court Rule 6.02(a)(5) (2019 Kan. S. Ct. R. 34). That rule is to be strictly enforced. *State v. Godfrey*, 301 Kan. 1041, 1044, 350 P.3d 1068 (2015).

***9** Diann does not contest that she received a copy of the CMA on December 23, 2016, as stated on the real estate valuation included in the journal entry. She also does not contend that the final values differed from those in the CMA. Diann challenges only the district court's approval of the values because the CMA was not submitted to the court, and the CMA values fell outside the range of values previously provided to the court. She does not appear to challenge the values as being inconsistent with the CMA, only that the district court had no basis for confirming the proposed values. However, both Marilyn and Lana agreed that the approved values reflected the CMA, and Diann failed to object. Diann only contested the values as arbitrary in that the specific values were not in the record.

Diann does not contend the values approved differed from the CMA values, and she never contested having been provided the CMA. Her only issue is that Marilyn did not present the CMA to the district court. However, Marilyn provided the proposed journal entry as directed by the court, having all properties valued under the same method. The valuations were sent to each party, and no parties objected to the values. The district court did not err in approving the CMA property values.

We also take note of the fact that Diann's "Petition to Set Aside and/or Reconsider the Order of Final Settlement and Reinstitute Claim for Damages Against Former Executrix Lana Kennedy," which was filed 28 days after the journal entry of final settlement was entered, made no mention whatsoever of the district court's valuation of the four properties she now complains of in this appeal. Diann likewise never argued those issues or testified concerning them at the hearing on her motion, focusing exclusively on her desire to reopen the case and pursue her damage claims against Lana, former executrix. Since Diann never gave the district court a chance to address those complaints on valuation, and has not explained why we should grant an exception and now hear those matters on appeal, we decline to consider them for the first time in this appeal.

Appeal dismissed.

All Citations

434 P.3d 240 (Table), 2019 WL 494098

138 P.3d 798 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

In the Matter of the MARRIAGE OF
Marilyn Gay WEBSTER, Appellant,
and
Billie Joe WEBSTER, Appellee.

No. 94,112.
|
July 28, 2006.

Appeal from Sedgwick District Court; David J. Kaufman, judge. Opinion filed July 28, 2006. Affirmed.

Attorneys and Law Firms

Cheryl J. Roberts, of Cheryl J. Roberts, Attorney Chartered, of Wichita, for the appellant.

Shannon A. Kelly, of Kelly Law Offices, of Wichita, for appellee.

Before MCANANY, P.J., GREENE and HILL, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Marilyn G. Webster appeals the district court's division of property in her divorce from Billie Joe Webster and the district court's denial of her third motion to reconsider. We have no jurisdiction to consider the former and find no abuse of discretion in the district court's ruling on the latter. Accordingly, we affirm.

After 5 years of marriage, Marilyn G. Webster sought a divorce from her husband, Billie Joe Webster. For convenience we will refer to the parties as Husband and Wife. The matter was tried on August 19, 2004. Since no children had been born of the marriage, the only disputed matters were the division of the marital estate and maintenance. The court awarded the 2001 Ford F–150 pickup truck to Wife and ordered Husband to pay the truck payment to Boeing Wichita Credit Union (credit union) as spousal maintenance through the month of December 2005, at which time maintenance would terminate.

During the divorce trial, Husband advised the court that a Dodge Dakota pickup truck that was part of the marital estate had recently been repossessed by the credit union. In dividing the marital estate, the district court ordered that Husband be solely responsible for any debt secured by the Dodge Dakota truck.

On August 23, 2004, Wife filed a motion asking the district court to reconsider its August 19, 2004, ruling. The district court denied the motion as premature since the decree had not yet been filed.

On September 21, 2004, Wife filed a second motion to reconsider. On October 4, 2004, the district court held a hearing at which it filed the journal entry of judgment and decree of divorce. The court then heard arguments on Wife's second motion to reconsider. The district court denied the motion on October 12, 2004.

On October 22, 2004, Wife filed a third motion to reconsider and requested a new trial because she believed the Ford truck was in danger of being repossessed. On November 3, 2004, before any hearing on her third motion, Wife filed a notice of appeal. She completed the docketing of her appeal in this court.

In December 2004, the district court advised Wife that it no longer had jurisdiction to hear her third motion to reconsider because of the docketing of the pending appeal. In response, Wife moved this court to remand the action to the district court. On January 10, 2005, this court denied that motion but dismissed the appeal.

On February 3, 2005, the appeal having been dismissed, the district court held a hearing on Wife's third motion to reconsider. The district court ruled that Wife's motion was untimely as a K.S.A. 60–259(f) motion because it was filed on October 22, 2004, more than 10 days after the judgment was entered on October 4, 2004. Consequently, the district court treated the motion as having been brought pursuant to K.S.A. 60–260(b)(6). After hearing arguments on the motion, the district court denied it on February 4, 2005.

Wife then filed the instant appeal on February 14, 2005.

***2** An appeal from a district court to an appellate court shall be taken 30 days from the entry of the judgment. K.S.A. 60–2103(a). The pendency of a motion to alter or amend the judgment or for new trial pursuant to K.S.A. 60–259 tolls the running of the time for an appeal. K.S.A. 60–2103(a). Such a motion must be brought within 10 days after entry of the judgment. K.S.A. 60–259(f). On the other hand, a motion for relief from judgment pursuant to K.S.A. 60–260(b)(6) shall be brought within a reasonable time from the judgment. However, a motion under K.S.A. 60–260 does not toll the running of the time limit for an appeal.

The judgment at issue here was filed by the court in open court at the hearing on October 4, 2004, while both parties were in attendance. The running of the 10–day period described in K.S.A. 60–259 began that day. The added 3 days for mailing under K.S.A. 60–206(e) does not apply since there was not service of the judgment and decree by mail. See *Blue v. Tos,* 33 Kan.App.2d 404, Syl. ¶ 3, 102 P.3d 1190 (2004). Excluding weekends and holidays pursuant to K.S.A. 60–206(a), Wife had until October 19 to file another motion to reconsider. She filed her third motion to reconsider on October 22, 2004. The district court properly found that she was out of time for a K.S.A. 60–259 motion.

Since Wife's third motion to reconsider was properly treated as a K.S.A. 60–260(b)(6) motion, the time for appeal was not tolled during its pendency. Thus, she had 30 days from October 4, 2004, to appeal the district court's decision. Since she did not file her notice of appeal until February 14, 2005, her appeal of the October 4, 2004, judgment is not timely, and we have no jurisdiction to consider it.

What remains is whether the district court erred in denying Wife's third motion to reconsider, since her appeal was filed within 30 days of the court's ruling on that motion. We will confine our consideration to that issue

K.S.A. 60–260(b)(6) allows the district court to relieve a party from a final judgment for any other reason justifying relief from the operation of the judgment. We review the denial of relief under K.S.A. 60–260(b) using the abuse of discretion standard. *In re Marriage of Leedy,* 279 Kan. 311, 314, 109 P.3d 1130 (2005).

As of October 2004, Husband owed the credit union over $24,000 on loans for the purchase of the Ford and Dodge trucks, on a overdrawn checking account, and on a credit card account. On October 8, 2004, the credit union wrote to Husband and advised him that the Dodge truck had been sold at action for $10,300. Husband was asked to make arrangements within 10 days to clear the deficiency balance to avoid further collection efforts. Wife attached a copy of this letter to her K.S.A. 60–260(b)(6) motion. She was concerned that the Ford truck awarded to her was in jeopardy.

At the February 3, 2005, hearing on Wife's motion, Husband stated that the Ford truck would not be repossessed so long as the payments were made, and that the payments on the Ford truck were current. Wife also advised the court that the credit union had approached her about refinancing the Ford truck in her name.

***3** Wife's motion was based on speculation that in the future Husband might not continue to make payments on the Ford truck loan as he was obligated to do. At the time of the hearing 4 months had passed since the October 8, 2004, letter, and Husband had kept the loan current. The Ford truck had not been repossessed. Therefore, there was no basis for the district court to grant Wife's motion at that time. As the trial judge observed, if the Ford truck were to be repossessed at some later date, Wife then would have the option of filing another motion pursuant to K.S.A. 60–260(b)(6). The district court did not abuse its discretion in denying Wife's motion.

Affirmed.

All Citations

138 P.3d 798 (Table), 2006 WL 2129130

End of Document

440 P.3d 632 (Table)
Unpublished Disposition
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

Kimberley LEE-THORNTON, Appellee,
v.
Adebayo OGUNMENO, Appellant.

No. 119,290
|
Opinion filed May 17, 2019.

Appeal from Sedgwick District Court; WILLIAM S. WOOLLEY, judge.

Attorneys and Law Firms

Adebayo Ogunmeno, of Ogunmeno Law Firm, LLC, of Kansas City, appellant pro se.

Larry G. Michel and Klint A. Spiller, of Kennedy Berkley Yarnevich & Williamson, Chartered, of Salina, for appellee.

Before Hill, P.J., Bruns, J., and Burgess, S.J.

MEMORANDUM OPINION

Per Curiam:

***1** This is an appeal by an attorney from a damage award levied against him for professional negligence. Adebayo Ogunmeno raises several issues of trial court error. They concern improper venue, the denial of his summary judgment motion, the trial court's modification of the jury's damage award, and the court's refusal to set aside the jury verdict. His former client, Kimberley Lee-Thornton, who was awarded $ 40,000 in damages by the jury, maintains the trial court did not err in any fashion. As we have found no errors, our review of the record compels us to affirm the actions of the district court and approve the judgment.

Ogunmeno has represented himself throughout these proceedings and he failed to appear at oral argument. Therefore, we consider his case submitted on his brief and the record on appeal.

We begin with a brief recitation of the facts and then address the issues in the order we have written above.

A Wichita traffic clerk mislabels a ticket and it results in harm to Lee-Thornton.

Lee-Thornton, a resident of Wichita, received a traffic citation in Wichita for operating her vehicle without proof of insurance and was found guilty. Unfortunately, while logging her conviction, a court clerk mistakenly categorized her conviction as a sex offense instead of a traffic offense. This error had profound consequences for Lee-Thornton.

Lee-Thornton is a certified medical assistant, a certified nurse assistant, and a certified home health assistant. When her employer received the results of a background check from the Kansas Bureau of Investigation, the company fired her. She was told by her employer that she was terminated for failing to disclose her criminal history of a sex offense. This was when she learned that her criminal history now contained a sex offense. Her employment with a second employer ended for the same reason, before she even began working for them. This classification error also led to social problems for Lee-Thornton.

Upon learning that her background check included a sex offense, Lee-Thornton disclosed the information to her church pastor because "[i]t is under the law." For the previous five years, she worked with the 3- to 11-year-old children at her church. But after her disclosure, she was asked to step down from the position. She was also then unable to lead the children in their Christmas speeches that year and it "was announced in church that someone else would have that position." Lee-Thornton felt embarrassed and humiliated.

At Lee-Thornton's request, a City employee wrote a letter, which admitted the error in classifying her conviction as a sex offense. The letter showed Lee-Thornton was never arrested, charged with, or convicted of any sex-related charges. The letter acknowledged the error negatively affected her employment and her position at her church. When Lee-Thornton gave the letter to her pastor, he accepted that she had not been convicted of a sex offense. But by that time the position as a children's teacher at her church was filled by someone else.

***2** A couple of weeks after learning of the erroneous categorization of her conviction, she did find new employment. But since she was not sure if the mistake

had been cleared from her record with the K.B.I., Lee-Thornton disclosed the incident to that prospective employer during her interview. "[I]t was going to show up on the KBI anyway." She did show the prospective employer documentation relating to her actual conviction.

Lee-Thornton retained Ogunmeno, an attorney licensed in Kansas, in July 2014 to pursue a claim against the City of Wichita for damages caused by the misclassification. Ogunmeno filed a notice of claim with the City, which was denied on September 29, 2014. He filed a petition against the City in Sedgwick County District Court on December 3, 2014, alleging negligence, defamation, and invasion of privacy.

Unfortunately, Ogunmeno failed to effect service on the City until March 9, 2015. The district court then dismissed Lee-Thornton's case as barred by the statute of limitations. Lee-Thornton understood that her case was dismissed because "Ogunmeno didn't request to get a 30-day extension in the 90 days, and that is all I understood." Ogunmeno did not explain to Lee-Thornton why her case was dismissed but informed her that she could appeal and he would contact her.

When Ogunmeno later got in touch with Lee-Thornton, he "terminated" her as a client.

Lee-Thornton then sues Ogunmeno.

Claiming negligence and legal malpractice for failing to timely serve the City, Lee-Thornton sued Ogunmeno. She alleged venue was proper in Sedgwick County because her original cause of action arose there.

In response, Ogunmeno challenged jurisdiction and venue. He argued Sedgwick County was an improper venue but did not move for a change of venue. He claimed "the alleged negligent action occurred in Wyandotte County where the alleged actions and/or inactions not 'to timely serve the City of Wichita' took place." Ogunmeno requested that the district court determine that it lacked "proper jurisdiction over [him] because of improper venue."

Lee-Thornton disputed Ogunmeno's improper venue claim. She argued that because Ogunmeno filed her petition in Sedgwick County, failed to effect timely service on the City, and then, as a result, the Sedgwick County District Court barred her claims against the City because of the statute of limitations, her cause of action against Ogunmeno arose in Sedgwick County. Thus, she argued, Sedgwick County was the proper venue for her suit against Ogunmeno.

The district court agreed with Lee-Thornton and denied Ogunmeno's motion and found venue in Sedgwick County was proper. At the case management conference, the district court set the deadline for dispositive motions for March 22, 2017, and scheduled the trial for June 12, 2017.

Ogunmeno filed his answer on October 12, 2016, again claiming the Sedgwick County District Court did "not have jurisdiction of [*sic*] the defendant because venue is not proper in Sedgwick County, Kansas." He also filed counterclaims against Lee-Thornton for fraud and breach of contract.

The case proceeded normally. In the pretrial conference order, Ogunmeno itemized his claimed damages to include $ 1,384.02 in litigation expenses, $ 53,050 in case work, and general damages of $ 300,000. Ogunmeno continued to assert his objection to venue in Sedgwick County. The order set a deadline for the parties to file motions for summary judgment "within 20 days of the date of this order."

***3** The jury trial started as scheduled. But partway through the first day, the trial judge was informed of a death in his immediate family. Following this news, both parties requested that the case not be transferred to another judge. The district court granted their request and declared a mistrial.

After the mistrial, Ogunmeno moved for summary judgment on June 28, 2017. In response Lee-Thornton argued his summary judgment motion was untimely and moved to strike his motion. Ogunmeno then responded in opposition to the motion to strike, claiming that the district court's declaration of a mistrial on June 12 "essentially resets a new trial schedule, which thus, permits parties to engage in a dispositive motion practice." Ogunmeno conceded that he moved for summary judgment "more than 30 days after the close of all discovery in this matter." Ogunmeno then moved for default judgment for Lee-Thornton's failure to timely respond to his motion for summary judgment.

When the district court addressed the parties' motions, it cited K.S.A. 60-256(c) and the pretrial order. It found that Ogunmeno's motion for summary judgment was untimely and denied it. The district court granted Lee-Thornton's motion to strike and summarily denied Ogunmeno's motion for default judgment. The case went on to trial.

The jury found Ogunmeno was negligent in his representation of Lee-Thornton, and that but for his negligence, her suit

against the City would have resulted in a judgment in her favor. The jury found that the City would have been found 100 percent at fault in Lee-Thornton's underlying case. The jury determined that Lee-Thornton's economic loss was $ 15,000, and her noneconomic loss was $ 25,000. As for Ogunmeno's counterclaims, the jury found Lee-Thornton did not breach the Attorney Engagement Agreement. But the jury did find Lee-Thornton committed fraud in dealing with Ogunmeno and awarded him $ 1,200.

Offsetting the judgments, the district court entered judgment against Ogunmeno and in favor of Lee-Thornton in the amount of $ 38,800, plus costs and postjudgment interest.

Venue is not the same as jurisdiction.

Ogunmeno contends that the district court lacked personal jurisdiction over him because venue in Sedgwick County was improper. But the law is clear—venue is a procedural matter that relates to the convenience of the parties, not a jurisdictional matter. See *AkesoGenX Corp. v. Zavala*, 55 Kan. App. 2d 22, 37, 407 P.3d 246 (2017), *rev. denied* 308 Kan. 1593 (2018). If venue is improper, the remedy is to transfer the action to a court of proper venue, not to dismiss the case. See K.S.A. 60-609; K.S.A. 60-611. Ogunmeno did not move for a change of venue. He requested only that the district court find that Sedgwick County was an improper venue and it lacked jurisdiction over him. Improper venue is not a jurisdictional matter but is a question of the convenience of the parties and the interests of justice. It is not a basis for dismissal.

The venue statute, K.S.A. 60-603, is the general rule establishing where lawsuits may be filed:

> "An action against a resident of this state, other than an action for which venue is otherwise specifically prescribed by law may be brought in the county,
>
> "(1) in which the defendant resides, or
>
> "(2) in which the plaintiff resides if the defendant is served therein, or
>
> ***4** "(3) in which the cause of action arose, or
>
> "(4) in which the defendant has a place of business or of employment if said defendant is served therein, or
>
> "(5) in which the estate of a deceased person is being probated if such deceased person was jointly liable with the defendant and a demand to enforce such liability has been duly exhibited in the probate proceedings, or
>
> "(6) in which there is located tangible personal property which is the subject of an action for the possession thereof if immediate possession is sought in accordance with K.S.A. 60-1005 at the time of the filing of the action."

A cause of action may arise either where the act or failure to act that caused the injury occurred, or where the injury occurred. See *Schmidt v. Shearer*, 26 Kan. App. 2d 760, 770, 995 P.2d 381 (1999). In malpractice matters, venue is proper where the facts show the malpractice occurred. See 26 Kan. App. 2d at 766. The trial courts are in the best position to conclude where a suit of this nature should be tried. 26 Kan. App. 2d at 770-71.

Lee-Thornton's cause of action against the City arose in Sedgwick County when the clerk misclassified her traffic infraction as a sexual offense. This negligence triggered venue under K.S.A. 60-603(3). Ogunmeno failed to timely serve the City in Sedgwick County. Lee-Thornton's suit against the City was then dismissed, and her claims were barred by the statute of limitations. Her damages arose in Sedgwick County. The district court correctly ruled it had jurisdiction.

Ogunmeno does not argue on appeal that the district court either abused its discretion or erred in its interpretation of the venue statute. He simply contends venue was improper in Sedgwick County and thus the district court lacked jurisdiction over him. He cites no authority in support of this position. Failure to support a point with pertinent authority or show why it is sound despite a lack of supporting authority or in the face of contrary authority is like failing to brief the issue. *University of Kan. Hosp. Auth. v. Board of Comm'rs of Unified Gov't*, 301 Kan. 993, 1001, 348 P.3d 602 (2015). We are not persuaded that Ogunmeno is correct.

Ogunmeno's motion for summary judgment was untimely.

Parties procrastinate at their peril when defending a lawsuit. Generally, a party may move for summary judgment at any time until 30 days after the close of all discovery. K.S.A. 2018 Supp. 60-256(c)(1)(A). Here, the district court designated February 24, 2017, as the discovery cutoff date, which meant the parties' motions for summary judgment were due by March 26, 2017. But in the final pretrial order, the court extended that deadline to March 28, 2017. Ogunmeno moved for summary judgment on June 28, 2017, which was

three months after the deadline. The court's finding that Ogunmeno's motion violated the deadlines in both the statute and the pretrial order is reasonable.

In an argument made without citing any authority, Ogunmeno argues that the district court "failed to follow the provisions of the Kansas Supreme Court Rule 141," and contends that because his motion for summary judgment met all the requirements of this rule, it was the district court's duty to consider his motion on its merits. He is contending that the Supreme Court Rule somehow trumps the statute dealing with summary judgment motions.

***5** The statute dealing with summary judgments, K.S.A. 2018 Supp. 60-256(c)(1)(A), says that a party may move for summary judgment up until 30 days after the close of all discovery. This time frame applies "unless a different time is set by local rule *or the court orders otherwise*." (Emphasis added.) K.S.A. 2018 Supp. 60-256(c)(1). In contrast, Supreme Court Rule 141 (2019 Kan. S. Ct. R. 211), which addresses the required substance of a motion for summary judgment, states no time frame for filing such a motion.

Both the statute and the rule are plain and unambiguous. While the statute provides a specific time frame for filing a motion for summary judgment, subject to court-ordered modification, Rule 141 does not. Rule 141 includes language acknowledging that district courts may set different deadlines for the timing of response and reply motions. This is indicative of Rule 141's deference to the district court's decisions on docket management and its supervision of the pretrial phase of litigation.

We hold that Rule 141 imposed no duty on the district court to consider Ogunmeno's untimely motion for summary judgment simply because it may have met the rule's substantive requirements. The district court's pretrial order controlled the pretrial proceedings, including the deadline for the parties filing motions for summary judgment. The district court did not abuse its discretion based on an error of law when it summarily denied Ogunmeno's motion as untimely.

Ogunmeno failed to provide an adequate record for his argument on the court's reduction of his counterclaim.

Ogunmeno contends that the district court abused its discretion when it reduced his maximum damages on his fraud counterclaim from $ 300,000 to $ 1,221.77. He argues there was "not justification for the trial court's prohibitive order." He frames the issue as an appeal of the district court's impermissible amendment to the pretrial order. He argues that "the trial court's order that compelled defendant to present to the jury an amount less than the amount he claimed in the pretrial order after the parties had rested their case[s], essentially amounted to the modification of the pretrial order." Since the record on appeal contains no amended pretrial order, the reduction to Ogunmeno's maximum damages for fraud was made in a jury instruction.

This means that to answer this question we must:

- determine whether we can or should review the issue, i.e., whether there is a lack of appellate jurisdiction or a failure to preserve the issue for appeal;
- consider the merits of the claim to determine whether error occurred below; and
- assess whether the error requires reversal, i.e., whether the error can be considered harmless. *State v. McLinn*, 307 Kan. 307, 317, 409 P.3d 1 (2018).

Whether a party has preserved a jury instruction issue affects the appellate court's reversibility inquiry at the third step. *McLinn*, 307 Kan. at 317. The statute, K.S.A. 2018 Supp. 22-3414(3), mandates that no party may assign as error the giving or failure to give an instruction unless the party objects before the jury retires to consider its verdict unless the instruction or the failure to give an instruction is clearly erroneous.

The burden is on Ogunmeno to designate facts in this record to support that claim; without such a record, the claim of error fails. *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan. 636, 644-45, 294 P.3d 287 (2013). On appeal, Ogunmeno cites no portion of the record to support his claim that the district court impermissibly amended the pretrial order or improperly reduced his claimed damages in the jury instructions. A review of the record reveals that the only portion of the trial available on appeal is Lee-Thornton's testimony. Without a transcript of the jury instruction conference to support Ogunmeno's claims, he cannot pass the first threshold of the analysis—that is, he cannot show that he preserved the issue for appeal. We must presume the actions of the district court were proper.

Ogunmeno fails to provide a record on appeal to support his claim that the court erred when it failed to set aside the jury's verdict.

***6** Ogunmeno claims the district court had a duty to set aside the jury damage verdict award in Lee-Thornton's favor. We view this claim as a motion to reconsider or motion to alter or amend judgment under K.S.A. 2018 Supp. 60-259(f). When reviewing the denial of a motion to alter or amend the judgment, we apply the abuse of discretion standard of review. *Exploration Place, Inc. v. Midwest Drywall Co.*, 277 Kan. 898, 900, 89 P.3d 536 (2004).

Once again, we are hindered by a silent record on appeal. We find no written motion by Ogunmeno and find no transcript of any oral motion made to the district court, let alone any ruling by the district court on this point. Again, the burden is on the party making a claim to designate facts in the record to support that claim; without such a record, the claim of error fails. *Friedman*, 296 Kan. at 644-45. Ogunmeno has not met this burden. His claim fails.

Affirmed.

All Citations

440 P.3d 632 (Table), 2019 WL 2147725

End of Document

56 Kan.App.2d 743
Court of Appeals of Kansas.

Steven W. PONDS, Appellant,
v.
STATE of Kansas, Appellee.

No. 119,057
|
Opinion filed February 8, 2019.

Synopsis

Background: After Court of Appeals, 2015 WL 249836, affirmed defendant's conviction in a bench trial in the District Court, Sedgwick County, James R. Fleetwood, J., of aggravated burglary, attempted burglary, and theft, and subsequently affirmed trial court's denial of motion to correct illegal sentence, 2016 WL 6822176, defendant filed motion attacking sentence. The District Court, Sedgwick County, Fleetwood, J., denied motion. Defendant appealed.

Holdings: The Court of Appeals, Malone, J., held that:

[1] defendant's filing of timely motion for reconsideration terminated running of period for filing appeal after entry of order denying motion attacking sentence;

[2] defendant's notice of appeal from denial of such motion was premature;

[3] rule allowing for notices of appeal to be filed within 30 days after entry of judgment on motions to alter or amend judgment did not apply to save premature notice;

[4] rule allowing for premature notices of appeal to remain effective if they were filed after judge announced judgment, but before entry of judgment, applied to validate notice; and

[5] res judicata barred defendant's claims that footwear should have been suppressed, that there was insufficient evidence to support guilty verdict, and that there was lack of probable cause to place GPS device.

Affirmed.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (19)

[1] **Criminal Law**
Jurisdiction and venue

Whether jurisdiction exists is a question of law over which an appellate court's scope of review is unlimited.

Cases that cite this headnote

[2] **Criminal Law**
Nature and scope of remedy in general

The right to appeal is entirely statutory and is not contained in the United States or Kansas Constitutions.

Cases that cite this headnote

[3] **Criminal Law**
Nature and scope of remedy in general

Subject to certain exceptions, Kansas appellate courts only have jurisdiction to consider appeals taken in the manner prescribed by statute.

Cases that cite this headnote

[4] **Criminal Law**
Civil or criminal nature

A proceeding brought pursuant to motion attacking sentence is a civil action. Kan. Stat. Ann. § 60-1507.

Cases that cite this headnote

[5] **Criminal Law**
Finality of determination in general

A final decision, as required for such decision to be appealed, generally disposes of the entire merits of the case and leaves no further questions or the possibility of future directions or actions by the court. Kan. Stat. Ann. § 60-2102(a)(4).

Cases that cite this headnote

[6] **Criminal Law**
Excuse for delay; extension of time and relief from default

Burglary defendant's filing of timely motion for reconsideration, which qualified as motion to alter or amend judgment under statute permitting such motions to terminate running of appeals period, terminated running of 30-day period for filing appeal after entry of order denying defendant's motion attacking sentence, and thus notice of appeal did not need to be entered until 30 days after court entered decision regarding defendant's motion. Kan. Stat. Ann. §§ 60-259, 60-1507, 60-2103(a).

Cases that cite this headnote

[7] **Criminal Law**
Time of Giving

Burglary defendant's notice of appeal from denial of his motion attacking sentence was premature, where defendant filed notice before trial court ruled on his motion for reconsideration. Kan. Stat. Ann. § 60-1507.

Cases that cite this headnote

[8] **Criminal Law**
Effect of transfer or proceedings therefor

Trial court had jurisdiction to rule on burglary defendant's motion for reconsideration, even though defendant's appeal from court's denial of his motion attacking sentence was pending; court maintained jurisdiction until defendant docketed appeal, which did not occur until after court proceeding. Kan. Stat. Ann. § 60-1507.

Cases that cite this headnote

[9] **Criminal Law**
Time of Giving

Rule allowing for notices of appeal to be filed within 30 days after entry of judgment on motions to alter or amend judgment, rather than within 30 days of original judgment, did not apply to save burglary defendant's premature notice of appeal from denial of motion attacking sentence; although defendant filed timely motion for reconsideration, which qualified as motion to alter or amend judgment, he failed to file separate notice of appeal from denial of motion for reconsideration within 30 days. Kan. Sup. Ct. R. 2.03(b).

Cases that cite this headnote

[10] **Courts**
Highest appellate court

The Court of Appeals is duty bound to follow Kansas Supreme Court precedent, absent some indication the Supreme Court is departing from its previous position.

Cases that cite this headnote

[11] **Criminal Law**
Time of Giving

Rule allowing for premature notices of appeal to remain valid and effective if they were filed after judge announced judgment, but before actual entry of judgment, applied to validate burglary defendant's premature notice of appeal from trial court's denial of motion attacking sentence, even though defendant filed appeal after motion to alter or amend judgment was filed, but before motion was denied. Kan. Stat. Ann. § 60-1507; Kan. Sup. Ct. R. 2.03(a).

Cases that cite this headnote

[12] **Criminal Law**
Time of Giving

Burglary defendant's notice of appeal from trial court's denial of his motion attacking sentence was timely, even though it was filed four months after entry of initial judgment, where notice was filed while timely motion for reconsideration was pending. Kan. Stat. Ann. §§ 60-259(f), 60-1507.

Cases that cite this headnote

[13] **Criminal Law**
Notice of Appeal

Court of Appeals lacked jurisdiction to review trial court's denial of burglary defendant's motion for reconsideration of order denying postconviction relief where defendant did not file separate notice of appeal from denial of motion.

Cases that cite this headnote

[14] Criminal Law

Necessity for Hearing

A district court has three options when handling a motion attacking sentence: (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, and, 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. Kan. Stat. Ann. § 60-1507.

Cases that cite this headnote

[15] Criminal Law

Interlocutory, Collateral, and Supplementary Proceedings and Questions

When the district court summarily denies a motion attacking sentence, an appellate court has unlimited review to determine whether the motion, files, and records of the case conclusively establish that the movant is not entitled to relief. Kan. Stat. Ann. § 60-1507.

Cases that cite this headnote

[16] Judgment

Criminal prosecutions

Doctrine of res judicata barred burglary defendant's claims that footwear should have been suppressed as evidence, that there was insufficient evidence to support guilty verdict, and that there was lack of probable cause to obtain warrant to place GPS device on car, in defendant's appeal from denial of motion attacking sentence, where Court of Appeals had already considered those claims on direct appeal and ruled adversely to defendant. U.S. Const. Amend. 4; Kan. Stat. Ann. § 60-1507.

Cases that cite this headnote

[17] Criminal Law

Counsel for accused

Generally, claims of ineffective assistance of counsel will not be considered when raised for the first time on appeal. U.S. Const. Amend. 6; Kan. Sup. Ct. R. 6.02(a)(5).

Cases that cite this headnote

[18] Criminal Law

Presentation of questions in general

The general rule is that issues not raised before the district court cannot be raised on appeal. Kan. Sup. Ct. R. 6.02(a)(5).

Cases that cite this headnote

[19] Criminal Law

Post-conviction relief

Burglary defendant failed to establish that postconviction court made insufficient findings of fact and conclusions of law to support legal conclusions, where defendant did not object to adequacy of such findings below, and court's findings, though brief, were adequate to allow for meaningful appellate review. Kan. Sup. Ct. R. 183(j).

Cases that cite this headnote

Syllabus by the Court

*****1** 1. Whether jurisdiction exists is a question of law over which an appellate court's scope of review is unlimited.

2. Under the facts of this case, where the plaintiff filed a notice of appeal from the district court's summary denial of his K.S.A. 60-1507 motion while a timely motion for reconsideration was still pending in district court, this court

has jurisdiction to review the district court's original judgment denying the K.S.A. 60-1507 motion. But we lack jurisdiction to review the district court's later ruling on the motion for reconsideration because the plaintiff did not file a separate notice of appeal from that ruling.

3. When the district court summarily denies a K.S.A. 60-1507 motion, an appellate court has unlimited review to determine whether the motion, files, and records of the case conclusively establish that the movant is not entitled to relief.

4. A prisoner's attempt to relitigate the same claims in a K.S.A. 60-1507 motion that were decided in the prisoner's direct criminal appeal is barred by the doctrine of res judicata.

****87** Appeal from Sedgwick District Court; JAMES R. FLEETWOOD, judge.

Attorneys and Law Firms

Roger L. Falk, of Law Office of Roger L. Falk, P.A., of Wichita, for appellant.

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

Before Atcheson, P.J., Malone and Leben, JJ.

Opinion

Malone, J.:

***743** Steven W. Ponds appeals the district court's summary denial of his K.S.A. 60-1507 motion. Ponds argues that the district court erred when it summarily denied his motion and that he is entitled to a hearing. The State first argues that this court lacks jurisdiction to hear the appeal because Ponds' notice of appeal was untimely. The State also argues that the district court correctly ***744** denied Ponds' motion. We disagree with the State's jurisdictional claim, but on the merits we affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 2009, the State charged Ponds with 14 felony charges, including aggravated burglary, attempted burglary, as well as several counts of burglary and theft. Before trial, Ponds sought to suppress: (1) evidence of his footwear because he claimed the officers lacked probable cause to support his arrest; and (2) evidence from GPS tracking devices attached to his vehicles because the search warrant application failed to provide a substantial basis for the issuing magistrate to conclude there was a fair probability contraband or evidence would be found as a result of those devices. After an evidentiary hearing, the district court denied Ponds' motion to suppress the evidence.

After a bench trial in 2012, the district court found Ponds guilty of all charges. The ****88** district court sentenced Ponds to a controlling term of 244 months in prison. Ponds filed a direct appeal challenging the sufficiency of the evidence and the district court's rulings on the motion to suppress evidence. This court affirmed his convictions and sentence in *State v. Ponds*, No. 109,965, 2015 WL 249836 (Kan. App. 2015) (unpublished opinion), *cert. denied* —— U.S. ——, 136 S.Ct. 2024, 195 L.Ed.2d 228 (2016) (*Ponds I*).

While his direct appeal was pending, Ponds filed a motion to correct an illegal sentence, asserting that the district court erroneously classified his pre-1993 convictions as person felonies in calculating his criminal history score. The district court summarily denied relief, and this court affirmed that decision in *State v. Ponds*, No. 114,761, 2016 WL 6822176 (Kan. App. 2016) (unpublished opinion) (*Ponds II*).

*****2** On May 3, 2017, Ponds filed a K.S.A. 60-1507 motion. Ponds challenged: (1) the district court's refusal to suppress his footwear because of a lack of probable cause; (2) the sufficiency of the evidence to support his convictions; and (3) the district court's denial of his request to suppress the GPS evidence for lack of probable cause.

On June 26, 2017, the district court filed a journal entry ***745** summarily denying Ponds' K.S.A. 60-1507 motion, finding that the three issues raised were the same issues Ponds raised on direct appeal. The district court also found that Ponds' motion contained several conclusory statements, unsupported by any legal argument or evidentiary basis.

On July 17, 2017, Ponds filed a timely motion for reconsideration of the district court's K.S.A. 60-1507 judgment. Then on November 16, 2017, while the motion for reconsideration was still pending, Ponds filed a notice of appeal of the district court's "decision to deny his 60-1507 motion."

On January 29, 2018, the district court denied Ponds' motion for reconsideration, finding that it lacked jurisdiction because of the pending appeal. On March 14, 2018, this court granted Ponds' motion to docket his appeal out of time. Ponds did not file a separate notice of appeal from the district court's denial of his motion for reconsideration.

On appeal, Ponds argues that the district court erred when it summarily denied his K.S.A. 60-1507 motion. Ponds argues that his K.S.A. 60-1507 motion, when read broadly, asserts a claim of ineffective assistance of counsel that can only be resolved with an evidentiary hearing. He also argues that in summarily denying his K.S.A. 60-1507 motion, the district court failed to make sufficient findings of fact and conclusions of law to comply with Kansas Supreme Court Rule 183(j) (2019 Kan. S. Ct. R. 228).

The State first argues that this court lacks jurisdiction over the appeal because Ponds failed to file his notice of appeal in a timely manner. On the merits, the State argues that the district court correctly denied Ponds' K.S.A. 60-1507 motion.

DOES THIS COURT HAVE JURISDICTION OVER THIS APPEAL?

[1] To begin with the State questions this court's jurisdiction over this appeal. Ponds does not address the jurisdictional issue. Whether jurisdiction exists is a question of law over which an appellate court's scope of review is unlimited. *State v. Dull*, 302 Kan. 32, 61, 351 P.3d 641 (2015).

[2] **[3]** The right to appeal is entirely statutory and is not contained in the United States or Kansas Constitutions. Subject to certain ***746** exceptions not applicable here, Kansas appellate courts only have jurisdiction to consider appeals taken in the manner prescribed by statute. *State v. Smith*, 304 Kan. 916, 919, 377 P.3d 414 (2016); *Wiechman v. Huddleston*, 304 Kan. 80, 86-87, 370 P.3d 1194 (2016).

Here, the four relevant dates and filings that affect this court's jurisdiction are:

- June 26, 2017 (the district court filed an order denying the K.S.A. 60-1507 motion)
- July 17, 2017 (Ponds filed a motion for reconsideration)
- November 16, 2017 (Ponds filed a notice of appeal)
- ****89** January 29, 2018 (the district court denied the motion for reconsideration)

[4] **[5]** A K.S.A. 60-1507 proceeding is a civil action. Under K.S.A. 2017 Supp. 60-2102(a)(4), the appellate jurisdiction of the court of appeals may be invoked by appeal as a matter of right from a *final decision* in any action, except in an action where a direct appeal to our Supreme Court is required by law. "A 'final decision' generally disposes of the entire merits of the case and leaves no further questions or the possibility of future directions or actions by the court." *In re T.S.W.*, 294 Kan. 423, 433, 276 P.3d 133 (2012).

*****3** **[6]** Under K.S.A. 2017 Supp. 60-2103(a), a notice of appeal must be filed within 30 days from the entry of judgment. Here, the district court filed its order denying the K.S.A. 60-1507 motion on June 26, 2017. Ponds did not file a notice of appeal until November 16, 2017, well beyond 30 days from the district court's entry of judgment. But Ponds filed a timely motion for reconsideration on July 17, 2017. See K.S.A. 2017 Supp. 60-259(f) (motion to alter or amend judgment must be filed no later than 28 days after entry of judgment). Ponds' motion for reconsideration qualified as a motion to alter or amend judgment. See *Hundley v. Pfuetze*, 18 Kan. App. 2d 755, 756, 858 P.2d 1244 (1993).

K.S.A. 2017 Supp. 60-2103(a) goes on to provide:

> "The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subsection commences to run and is to be computed from the entry of any ***747** of the following orders made upon a timely motion under such rules: Granting or denying a motion for judgment under subsection (b) of K.S.A. 60-250, and amendments thereto; or granting or denying a motion under subsection (b) of K.S.A. 60-252, and amendments thereto, to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under K.S.A. 60-259, and amendments thereto, to alter or amend the judgment; or denying a motion for new trial under K.S.A. 60-259, and amendments thereto."

Under K.S.A. 2017 Supp. 60-2103(a), Ponds' timely filing of a motion to alter or amend judgment terminated the running of the time for appeal. Under that statute, the "full time for appeal" commenced to run from the entry of an

order "[g]ranting or denying a motion under K.S.A. 60-259." K.S.A. 2017 Supp. 60-2103(a).

[7] **[8]** The problem in this case arises because Ponds filed his notice of appeal from the district court's decision to deny his K.S.A. 60-1507 motion on November 16, 2017, before the district court ruled on his motion for reconsideration. As a result, Ponds' notice of appeal was premature because it was filed before the district court's judgment on the K.S.A. 60-1507 motion became final. The district court eventually denied Ponds' motion for reconsideration on January 9, 2018, finding that it lacked jurisdiction to rule on the motion for reconsideration because of the pending appeal. This finding was incorrect because the district court did not actually lose jurisdiction over the case until Ponds docketed his appeal, which did not occur until March 14, 2018. See *City of Kansas City v. Lopp*, 269 Kan. 159, 160, 4 P.3d 592 (2000) (finding that once the appeal is docketed in the appellate courts, the district court loses jurisdiction). Ponds did not file a separate notice of appeal after the district court denied his motion for reconsideration.

The State argues that Ponds' premature notice of appeal is not saved by Kansas Supreme Court Rule 2.03 (2019 Kan. S. Ct. R. 14). Supreme Court Rule 2.03 covers premature notices of appeal in civil cases and provides:

> "(a) **When a Premature Notice of Appeal is Effective.** A notice of appeal that complies with K.S.A. 60-2103(b)—filed after a judge of the district court announces a judgment to be entered, but before the actual entry of judgment—is effective as notice of appeal under K.S.A. 60-2103 if it identifies the judgment or part of the judgment from which the appeal is taken with ****90** sufficient certainty to inform all parties of the rulings to be reviewed on appeal.
>
> *****4** ***748** "(b) **Timing of a Notice of Appeal Challenging Certain Posttrial Motions.** A party intending to challenge an order disposing of any of the following motions, or a judgment's alteration or amendment upon such a motion, must file a notice of appeal—in compliance with these rules—not later than 30 days after the entry of the order disposing of the last such remaining motion:
>
> (1) for judgment under K.S.A. 60-250(b);
>
> (2) to amend or make additional factual findings under K.S.A. 60-252(b), whether or not granting the motion would alter the judgment;
>
> (3) to alter or amend the judgment under K.S.A. 60-259;
>
> (4) for a new trial under K.S.A. 60-259; or
>
> (5) for relief under K.S.A. 60-260 if the motion is filed not later than 28 days after the judgment is entered." (2019 Kan. S. Ct. R. 14-15.)

The State argues that Rule 2.03(a) is limited to those situations in which the notice of appeal is filed after the time the district court announces a judgment to be entered, but before the actual entry of judgment. The State's argument may be correct under the plain language of Rule 2.03(a). Had Ponds filed a notice of appeal after the district court announced its judgment on the K.S.A. 60-1507 motion but before the actual entry of judgment, then the language of Rule 2.03(a) would save Ponds' notice of appeal.

[9] But that is not what happened here. The district court did not announce a judgment from the bench on Ponds' K.S.A. 60-1507 motion; rather, the district court simply entered judgment on the motion by filing a written journal entry on June 26, 2017. Ponds did not file a notice of appeal after the district court announced the judgment but "before the actual entry of judgment" as contemplated by Rule 2.03(a). Instead, Ponds filed his notice of appeal from the district court's decision to deny his K.S.A. 60-1507 motion after the district court entered its judgment on June 26, 2017, but before the district court ruled on his motion for reconsideration of the judgment. Under these facts, the plain language of Rule 2.03(a) does not appear to save Ponds' premature notice of appeal. Likewise, Ponds' notice of appeal was not timely under Rule 2.03(b) because he failed to file a separate notice within 30 days after the denial of his motion for reconsideration.

We now turn to Kansas caselaw construing Supreme Court Rule 2.03. In *Miller v. Safeco Ins. Co. of America*, 11 Kan. App. 2d 91, 712 P.2d 1282 (1986), a personal injury action, Ronald Miller sued both the alleged tortfeasor, Mark Gober, and his own insurer, ***749** Safeco Insurance Company of America (Safeco), for underinsured motorist coverage. Safeco was granted summary judgment on September 7, 1984, but the district court did not certify the judgment as a final judgment under K.S.A. 60-254(b). On September

24, 1984, Miller filed his notice of appeal of the summary judgment granted to Safeco, while his claim against Gober was still pending. On September 27, 1984, the district court dismissed with prejudice Miller's suit against Gober. Miller did not file a separate notice of appeal after Gober was dismissed from the suit.

On appeal, Miller conceded that his notice of appeal filed on September 24, 1984, before a final judgment was rendered as to all parties, constituted a premature notice of appeal. But Miller invoked Supreme Court Rule 2.03 and argued that this court had jurisdiction to consider his appeal. This court rejected Miller's argument and dismissed his appeal with the following analysis:

> ***5** "After Miller filed his notice of appeal on September 24, 1984, Gober was dismissed with prejudice by a journal entry filed three days later on September 27, 1984. The journal entry granting Safeco summary judgment became a final judgment subject to appeal on that date. A final judgment from which no appeal was taken does not retroactively validate a premature notice of appeal from an interlocutory order granting summary judgment to one party. To extend Rule 2.03 to these facts would effectively nullify the purpose of K.S.A. 60-254(b). *Rule 2.03 is limited to those situations where the notice of appeal* **91 *is filed after the time the decision is announced, but before a final judgment is entered pursuant to K.S.A. 60-258.* The Rule does not save an appeal where the notice of appeal is filed from an interlocutory decision which later becomes part of the final judgment disposing of all issues in the litigation. See *United States v. Taylor*, 632 F.2d 530, 531 (5th Cir.1980)." (Emphasis added.) 11 Kan. App. 2d at 94, 712 P.2d 1282.

Miller supports the State's position herein because it applies the plain language of Rule 2.03 and holds the rule is limited to those situations in which the notice of appeal is filed after the district court announces a decision but before the actual entry of the judgment. If the law in *Miller* still stands, then the State is correct that Rule 2.03 does not save Ponds' appeal. But unfortunately for the State, the holding in *Miller* was short-lived.

Honeycutt v. City of Wichita, 251 Kan. 451, 836 P.2d 1128 (1992), is another case, like *Miller*, in which a party filed a premature notice of appeal after some defendants were dismissed in *750 district court but before the judgment became final as to all defendants. In *Honeycutt*, the plaintiff, a minor, lost both legs when he was run over by a train within the city limits of Wichita as he walked home from kindergarten. The plaintiff sued the City of Wichita, U.S.D. No. 259, and two different railroad companies. The district court granted summary judgment in favor of the City and U.S.D. No. 259, but the court did not certify the judgment as final under K.S.A. 60-254(b). The plaintiff filed a notice of appeal of the summary judgment ruling while the claims against the two railroad companies were still pending. The claims against the railroad companies were later settled and a journal entry was filed disposing of all claims. The plaintiff then filed another notice of appeal, but it was later found to be untimely and came too late to give the appellate court jurisdiction. 251 Kan. at 458-59, 836 P.2d 1128.

On appeal before the Kansas Supreme Court, U.S.D. No. 259 contended that Rule 2.03 should not save the plaintiff's first notice of appeal and argued that the court should follow the Court of Appeals' decision in *Miller v. Safeco* to dismiss the appeal. Our Supreme Court noted that if it followed *Miller v. Safeco*'s interpretation of Rule 2.03, the answer was clear that it should dismiss the appeal. 251 Kan. at 457, 836 P.2d 1128. But after engaging in an extensive discussion of Rule 2.03, Kansas statutes on civil and appellate procedure, and state and federal cases, our Supreme Court rejected *Miller v. Safeco*'s interpretation of Rule 2.03. 251 Kan. at 457-62, 836 P.2d 1128. Relying on the liberal construction policy of civil procedure statutes to ensure that cases are decided on the merits and to eliminate traps for attorneys and pro se litigants, our Supreme Court found that it had jurisdiction over the plaintiff's appeal. 251 Kan. at 459-62, 836 P.2d 1128.

> "We hold that if a judgment is entered disposing of all claims against one of multiple parties, and a premature notice of appeal is filed and has not been dismissed, then a final judgment disposing of all claims and all parties validates the premature notice of appeal concerning the matters from which the appellant appealed. The appellee will not be prejudiced because the appellee will know of the intent to appeal prior to final judgment and would be in the same position as if a notice of appeal had been filed after the final judgment.

***6 "Syllabus ¶¶ 2 and 3 and the corresponding portion of the opinion of *Miller v. Safeco Ins. Co. of America*, 11 Kan. App. 2d 91, 712 P.2d 1282, *rev. denied* 238 Kan. 878 (1986), are overruled." *Honeycutt*, 251 Kan. at 462, 836 P.2d 1128.

*751 So it appears that our Supreme Court has rejected the State's strict construction of Supreme Court Rule 2.03, and the court has adopted a more liberal interpretation of the rule in conjunction with Kansas statutes on civil and appellate procedure. The court in *Honeycutt* relied on Rule 2.03, in part, to validate a premature notice of appeal in a situation that did not strictly fit within the parameters of the rule.

This brings us back to the effect of Ponds' timely motion for reconsideration. In cases with facts almost identical to the facts herein, Kansas courts have relied on Rule 2.03, at **92 least in part, to validate a premature notice of appeal filed while a motion for reconsideration of the judgment was still pending in district court. For instance, in *Cornett v. Roth*, 233 Kan. 936, 666 P.2d 1182 (1983), the district court entered judgment in favor of the defendants on October 5, 1982. The plaintiffs filed a motion to reconsider on October 15, 1982. Then, before the motion to reconsider was ruled on, the plaintiffs filed a notice of appeal on November 2, 1982. The district court overruled the motion to reconsider on November 10, 1982. Under these facts, and without engaging in any lengthy analysis, our Supreme Court allowed the notice of appeal to become a valid premature notice of appeal, finding that

> "Defendants have shown no prejudice resulting from the alleged premature filing of the notice of appeal. Considering the liberal construction to be given our procedural statutes and rules and the intent of our code of civil procedure and our appellate rules, we find no fatal jurisdictional defects and will proceed to determine the appeal on the merits. See K.S.A. 60-102; Supreme Court Rule 203 (230 Kan. xcix)." 233 Kan. at 939-40, 666 P.2d 1182.

On the same day our Supreme Court decided *Honeycutt*, it also decided *Resolution Trust Corp. v. Bopp*, 251 Kan. 539, 836 P.2d 1142 (1992). In *Resolution Trust*, the district court entered judgment in a mortgage foreclosure case on June 24, 1991. A party who asserted an interest in the property filed a motion to alter or amend the judgment on June 28, 1991. Another party who had a judgment lien on the property filed a notice of appeal on July 16, 1991, while the motion to alter or amend was pending. The district court denied the motion to alter or amend on August 23, 1991.

The Court of Appeals issued an order to show cause why the *752 appeal should not be dismissed based on *Miller v. Safeco*, and it dismissed the appeal before the Supreme Court filed its decision in *Honeycutt*. On a petition for review, our Supreme Court reinstated the appeal. *Resolution Trust*, 251 Kan. at 545, 836 P.2d 1142. Relying on *Cornett* and *Honeycutt*, the court held that Rule 2.03 validates a premature notice of appeal filed after a motion to alter or amend the judgment is filed, but before the motion to alter or amend is denied. *Resolution Trust*, 251 Kan. 539, Syl. ¶ 3, 836 P.2d 1142. The court observed that the result was contrary to rulings in federal cases because Federal Rule of Appellate Procedure 4(a) is substantially different from K.S.A. 1991 Supp. 60-2103(a) and Supreme Court Rule 2.03. 251 Kan. at 544, 836 P.2d 1142. The court went on to rely in part on Rule 2.03 to uphold its ruling, without actually analyzing the language of the rule. 251 Kan. at 544-45, 836 P.2d 1142.

***7 The most recent decision from this court on this issue reaches the same result as our Supreme Court reached in *Cornett* and *Resolution Trust*. In *Hundley*, the district court granted summary judgment on October 9, 1992, and mailed a memorandum decision to the parties that same day. On October 28, 1992, Hundley filed her motion asking the court to reconsider its order granting summary judgment. On November 9, 1992, she filed a notice of appeal from the order granting summary judgment. The district court did not rule on the motion to reconsider until December 14, 1992.

Under those facts, this court ruled: "A notice of appeal filed after a final judgment on the merits but before the trial court's ruling on a motion to alter or amend judgment is premature. However, it can 'ripen' into a valid notice of appeal when all the claims against the parties are resolved." 18 Kan. App. 2d at 756-57, 858 P.2d 1244. This court quoted the language of Supreme Court Rule 2.03, and without actually analyzing the language of the rule, this court stated: "This rule promotes the determination of appeals upon their merits and eliminates the

formal rigidity that hampered litigants and their attorneys in the past." 18 Kan. App. 2d at 757, 858 P.2d 1244.

The State's brief notes *Cornett*, *Resolution Trust*, and *Hundley* but tries to distinguish those cases by correctly pointing out that the notice of appeal in those cases was otherwise timely filed within 30 days of the judgment. But the court's analysis in those cases did ***753** not turn on that fact, and we do not see how it makes a difference. If a timely motion for reconsideration terminates the running of the ****93** time for appeal, then Ponds' notice of appeal filed on November 16, 2017, *was timely*, but it was premature because the motion for reconsideration was still pending. This is the same situation as in *Cornett*, *Resolution Trust*, and *Hundley*, and in each of those cases the court allowed the notice of appeal to stand as a premature notice of appeal, either under a liberal construction of K.S.A. 60-2103(a) or under Supreme Court Rule 2.03.

The State makes much of the fact that under K.S.A. 2017 Supp. 60-2103(a), the filing of a motion for reconsideration *terminates* the time for appeal, rather than *tolls* the time for appeal. The State argues that Ponds' motion for reconsideration filed on July 17, 2017, terminated his right to appeal the K.S.A. 60-1507 judgment, so that his notice of appeal filed on November 16, 2017, had no effect. We disagree. K.S.A. 2017 Supp. 60-2103(a) states that "[t]he *running* of the time for appeal is terminated by a timely motion" for reconsideration. (Emphasis added.) Ponds' motion for reconsideration filed on July 17, 2017, did not terminate his right to appeal the district court's judgment. Instead, the motion for reconsideration terminated the *running* of the time for appeal. But this fact does not mean that Ponds' later notice of appeal had no effect, and such a finding would be contrary to the courts' rulings in *Cornett*, *Resolution Trust*, and *Hundley*.

[10] **[11]** So where does all this discussion leave us? The State may be correct that the plain language of Rule 2.03(a) is limited to those situations in which the notice of appeal is filed after the time the district court announces a judgment to be entered, but before the actual entry of the judgment. But this court interpreted and limited Rule 2.03 in this way in *Miller v. Safeco*, and that ruling was expressly overruled by our Supreme Court in *Honeycutt*. In *Resolution Trust*, our Supreme Court addressed facts almost identical to the facts in Ponds' case and held Rule 2.03 validates a premature notice of appeal filed after a motion to alter or amend the judgment is filed, but before the motion to alter or amend is denied. 251 Kan. 539, Syl. ¶ 3, 836 P.2d 1142. We have found no Kansas Supreme Court case since *Resolution Trust* that addresses this precise issue. This court is duty ***754** bound to follow Kansas Supreme Court precedent, absent some indication the Supreme Court is departing from its previous position. *Majors v. Hillebrand*, 51 Kan. App. 2d 625, 629-30, 349 P.3d 1283 (2015), *rev. denied* 303 Kan. 1078, —— P.3d —— (2016). We have no indication that our Supreme Court is departing from its holdings in *Cornett*, *Honeycutt*, and *Resolution Trust*.

*****8** **[12]** **[13]** Based on *Cornett*, *Resolution Trust*, and *Hundley*, we find that this court has jurisdiction over Ponds' appeal of the district court's judgment entered on June 26, 2017, summarily denying his K.S.A. 60-1507 motion. Ponds' notice of appeal filed on November 16, 2017, was not out of time because it was filed while a timely motion for reconsideration was pending. Although the notice of appeal was filed before the district court ruled on the motion for reconsideration, this act does not deprive this court of jurisdiction to review the district court's original judgment denying the K.S.A. 60-1507 motion. But because Ponds did not file a separate notice of appeal identifying the district court's ruling on the motion for reconsideration, we lack jurisdiction to review that ruling.

DID THE DISTRICT COURT ERR IN SUMMARILY DENYING PONDS' K.S.A. 60-1507 MOTION?

Turning to the merits of the appeal, Ponds argues that the district court erred in summarily denying his K.S.A. 60-1507 motion without holding an evidentiary hearing. Ponds now claims that his K.S.A. 60-1507 motion, when read broadly, asserted an ineffective assistance of counsel claim that could only be resolved with an evidentiary hearing. He also claims that the district court's findings violated Supreme Court Rule 183(j). The State argues that the district court correctly denied Ponds' motion.

[14] 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, ****94** 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 ***755** hearing.' [Citation omitted.]" *Sola-Morales v. State*, 300 Kan. 875, 881, 335 P.3d 1162 (2014).

[15] Here, the district court summarily denied Ponds' K.S.A. 60-1507 motion. When the district court summarily denies a K.S.A. 60-1507 motion, an appellate court has unlimited 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, 335 P.3d 1162.

The three claims Ponds raised in his K.S.A. 60-1507 were stated as follows:

- "Footwear should have been suppressed due to lack of probable cause to support the arrest."
- "Insufficient evidence to support a guilty verdict on the subject offenses."
- "Lack of probable cause to obtain a warrant to place a GPS device on defendant's car."

[16] In Ponds' direct appeal, this court considered these exact claims and ruled adversely to Ponds in affirming his convictions. *Ponds I*, 2015 WL 249836, at *4, 9. Ponds' attempt to relitigate the same claims in his K.S.A. 60-1507 motion is barred by the doctrine of res judicata. See *Woods v. State*, 52 Kan. App. 2d 958, Syl. ¶ 1, 379 P.3d 1134 (2016), *rev. denied* 306 Kan. 1332, —— P.3d —— (2017).

Ponds argues that his K.S.A. 60-1507 motion, when read broadly, asserted an ineffective assistance of counsel claim that could only be resolved with an evidentiary hearing. But nowhere in the K.S.A. 60-1507 motion is there a claim or argument relating to ineffective assistance of counsel or the standards by which a court would address such a claim. There is simply no way to liberally construe Ponds' K.S.A. 60-1507 motion as raising an ineffective assistance of counsel claim.

[17] **[18]** Generally, claims of ineffective assistance of counsel will not be considered when raised for the first time on appeal. *Trotter v. State*, 288 Kan. 112, 127, 200 P.3d 1236 (2009). This rule comports with the general rule that issues not raised before the district court cannot be raised on appeal. *State v. Kelly*, 298 Kan. 965, 971, 318 P.3d 987 (2014). Ponds offers no reason why this issue should be considered for the first time on appeal. See ***756** Supreme Court Rule 6.02(a)(5) (2019 Kan. S. Ct. R. 35) ("If the issue was not raised below, there must be an explanation why the issue is properly before the court.").

*****9** **[19]** Finally, Ponds argues that the district court violated Supreme Court Rule 183(j) by making insufficient findings of fact and conclusions of law. But Ponds failed to object in district court to the adequacy of the district court's findings. Without such an objection, this court must presume the district court found all the facts needed to support its legal conclusions. See *Gilkey v. State*, 31 Kan. App. 2d 77, 77-78, 60 P.3d 351 (2003). Here, although the district court's journal entry was brief, it explained the court's decision for denying relief, and the findings were adequate to allow for meaningful appellate review.

Affirmed.

All Citations

56 Kan.App.2d 743, 437 P.3d 85, 2019 WL 494015

259 P.3d 749 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellant,
v.
Kenneth LITTLE, Appellee.

No. 105,221.
|
Sept. 9, 2011.
|
Review Denied March 8, 2012.

Appeal from Sedgwick District Court; Gregory L. Waller, Judge.

Attorneys and Law Firms

Boyd K. Ishenvood, assistant district attorney, Nolo Tedesco Foulston, district attorney, and Derek Schmidt, attorney general, for appellant.

Carl F.A. Maughan and Catherine A. Zigtema, of Maughan & Maughan LC, of Wichita, and Richard Ney, of Ney & Adams, of Wichita, for appellee.

Before GREENE, C.J., MALONE, J., and KNUDSON, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** The State has filed this interlocutory appeal pursuant to K.S.A. 22–3603. The district court suppressed evidence taken from the trunk of Kenneth Little's vehicle that was located on the premises during execution of a residential search warrant. Little was not a target of the search, nor did he currently reside at the premises to be searched. However, he was present when the police officers arrived to execute the search warrant and was detained during the subsequent search. The district court held that because "after the residence was secure [*sic*], law enforcement had no legal justification to continue the detention of the defendant or his vehicle," the search of Little's vehicle was unlawful.

We conclude Little's lawful detention could only be coextensive with the period of the search authorized under the warrant. However we are unable to determine from the record on appeal what factual findings were made by the district court to support a legal conclusion that the period of Little's detention was constitutionally unreasonable. Moreover, based on the district court's expressed rationale, we will not entertain a presumption of unreasonableness. Accordingly, we must reverse and remand this case for additional findings and conclusions. See *State v. Vaughn,* 288 Kan. 140, 200 P.3d 446 (2009).

During a drug investigation, a search warrant was issued for the residence at 2011 N. Minneapolis in Wichita. When officers arrived at the residence, a person standing on the porch saw police and ran inside. Authorized to execute a "no-knock" warrant, officers entered the residence. Vincent Metcalf, identified as the male who ran inside, was located in one of the bedrooms. An unknown female was found in the bedroom with Metcalf. Another male, identified as Little, was located in a separate bedroom. The occupants were handcuffed for officer safety and detained separately in patrol cars. Little was also searched and property was removed from his person, including a wallet and set of keys. There were four vehicles located in the parking area of the residence. Little denied ownership of any of the vehicles.

During Little's detention in a patrol car, a police officer searched the bedroom where Little was initially located and discovered a small bag of ecstasy pills in close proximity to where Little was found. After completing a search of the house, officers turned their attention to the cars parked on the premises. A drug dog was brought in and alerted on the trunk of one car, identified through its VIN number as registered to Little. Officers retrieved Little's keys. In the trunk, officers found a black duffle bag containing marijuana, crack cocaine, two digital scales, and 410 ecstasy pills. A traffic citation issued to Little was also located in the car.

Little was charged with cultivation and distribution of a controlled substance and failure to affix a drug tax stamp. Before trial, the district court sustained Little's motion to suppress all evidence taken from him and his vehicle.

The State has not appealed from the ruling that Little was unlawfully searched. The only issue before us concerns the evidence seized from the trunk of Little's vehicle.

***2** The district court's memorandum opinion provides:

> "The Court raised the issues of the validity of the search of the defendant's vehicle and the application of the inevitable discovery rule. Based upon the evidence presented at hearing, the defendant's vehicle was one of four located on the property. It was in the rear of the driveway near the back of the residence. No evidence was presented as to whether or not the vehicle was blocked in by the other vehicles. All of the vehicles on the property were searched because they 'did not find much in the house.' Nothing was found in any vehicle except defendants [*sic*]. A drug dog was called to the scene and alerted upon the trunk of the defendant's vehicle. The trunk was opened with the keys taken from the defendant and a black bag was found in the trunk. The bag contained marijuana, crack cocaine, ecstasy, pills and scales. *The vehicle was not searched until approximately 1 to 1 1/2 hours after the search warrant was executed on the house.*"
>
> ....
>
> "The Court believes that *after the residence was secure,* law enforcement had no legal justification to continue the detention of the defendant or his vehicle. The inevitable discovery doctrine requires this Court to view the circumstances as they existed before the unlawful search. In this case *the defendant should have been released once it was determined there was no probable cause to hold him and safety of the search was not in jeopardy.* The Court believes that the inevitable discovery doctrine does not apply. Therefore, the Court is suppressing for use against the defendant the evidence found in the trunk of his vehicle." (Emphasis added).

We note in passing that the district court was not troubled by the use of Little's car key to open the trunk of the vehicle. The district court acknowledged the trunk could have been forcibly opened once the drug dog alerted. What the district court found impermissible was the detention of Little from the time the premises were secured until the drug dog alerted. Before turning to a discussion of the substantive issue, we need to consider Little's contention that the State's interlocutory appeal is not properly before us.

Little contends the State's appeal is not properly before this court for the following two reasons. First, Little argues the State did not timely file its notice of appeal because the plain language of K.S.A. 22–3603, providing for the State's appeal in this instance, does not extend the time for appeal by the filing of a motion to reconsider. The State maintains it timely filed the notice of appeal after entry of the court's order in this case.

Little's argument has no merit. Motions to reconsider, treated as motions to alter or amend the judgment under K.S.A. 60–259(f), apply in criminal cases in the absence of a specific statute to the contrary. *McPherson v. State,* 38 Kan.App.2d 276, 287, 163 P.3d 1257 (2007). We conclude the State's motion to reconsider was properly filed and extended the time for appeal. See K.S.A. 60–2103(a).

***3** Second, Little contends the State has not shown its prosecution would be substantially impaired by suppression of the evidence, because evidence recovered from his car was not the sole evidence in this case. Little maintains testimony at the suppression hearing and the proffer of facts show drugs, money, indicia of residence, and other contraband were recovered from the premises. Little's citations to the record are less sweeping, referring to an officer's testimony that "we didn't find that much in the house" and that the search of the bedroom where Little was located resulted in the discovery of a small bag of ecstasy pills and possibly some indication of Little's occupancy of the bedroom.

In response, the State indicates it charged Little with cultivation and distribution of a controlled substance under K.S.A.2009 Supp. 21–36a05. According to the State, an element of that crime requires the State to prove Little possessed illegal drugs with the intent to distribute. Thus, the focus of the suppression motion was the 410 ecstasy pills found in Little's car. The State asserts this element could not be met by merely showing Little was in constructive possession of some drugs found in the house.

A threshold requirement for the State's interlocutory appeal is a showing that the suppression order substantially impaired the State's ability to prosecute the case. See *State v. Griffin,* 246 Kan. 320, 324, 787 P.2d 701 (1990); *State v. Newman,* 235 Kan. 29, 34, 680

P.2d 257 (1984). In *Griffin,* the State claimed the court's suppression of cocaine evidence substantially impaired its case because, in part, the evidence would indicate the defendant's intent to sell. See *State v. Sales,* 290 Kan. 130, 138–39, 224 P .3d 546 (2010) (finding *Griffin* impliedly found the order of exclusion substantially impeded the State's ability to prosecute the case); see also *State v. Huninghake,* 238 Kan. 155, 157, 708 P.2d 529 (1985) ("Suppression rulings which seriously impede, although they do not technically foreclose, prosecution can be appealed under K.S.A. 22–3603."). We conclude the reasoning in *Griffin* is equally applicable in this appeal. We hold suppression of the 410 ecstasy pills found in Little's car would substantially impair the State's prosecution alleging distribution of controlled substances. We turn next to a discussion of the issue presented on appeal.

> ' "[T]his court reviews the factual underpinnings of a district court's decision for substantial competent evidence and the ultimate legal conclusion drawn from those facts de novo. The ultimate determination of the suppression of evidence is a legal question requiring independent appellate review. [Citation omitted.] The State bears the burden to demonstrate that a challenged search or seizure was lawful. [Citation omitted.]" ' *State v. Morlock,* 289 Kan. 980, 985, 218 P.3d 801 (2009) (quoting *State v. Moore,* 283 Kan. 344, 349, 154 P.3d 1[2007]).

***4** The district court suppressed the evidence taken from the trunk of the vehicle after concluding: (1) Little should have been released from custody as soon as the residence was secured and (2) Little's vehicle was not searched until approximately 1 to 1 1/2 hours after the search warrant was executed on the house. The district court's conclusion that Little should have been released as soon as the residence was secured is not an accurate statement of law. Implicit in the conclusion that Little's vehicle was not searched until approximately 1 to 1 1/2 hours after the search warrant was executed on the house is a determination that the delay was unreasonable. We cannot determine from the record on appeal whether the delay was unreasonable; thus, we remand for additional findings.

The State argues Little's detention was authorized under the authority of *Michigan v. Summers,* 452 U.S. 692, 702–03, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981) (limited detention during execution of a search warrant is justified by the need to prevent flight, to protect officers, and to complete the search in orderly manner), and *Muehler v. Mena,* 544 U.S. 93, 99, 125 S.Ct. 1465, 161 L.Ed.2d 299 (2005) (officer safety justified handcuffing and detaining the occupants of a residence in the garage during execution of a residential search warrant). "An officer's authority to detain incident to a search is categorical; it does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.' " *Mena,* 544 U.S. at 98 (quoting *Summers,* 452 U.S. at 705 n. 19).

Little contends *Summers* and *Mena* are distinguishable because, in those cases, the defendant was the resident and subject of the search warrant. Instead, Little cites to *State v. Wilson,* 30 Kan.App.2d 100, 106, 39 P.3d 668, *rev. denied* 273 Kan. 1040 (2002) (nonresident's detention and consent to search during execution of a search warrant was illegal), and *State v. Vandiver,* 257 Kan. 53, 64, 891 P.2d 350 (1995) (finding a warrantless search of defendant's pocket during execution of a search warrant was illegal where defendant was a mere visitor), as the decisions to consult when reviewing the rights of nonresidents present in a location at the time a search warrant is executed. Further, Little maintains he was not a threat and made no moves to conceal or otherwise destroy evidence described in the warrant; thus, law enforcement officers had no right to detain and search him under K.S.A. 22–2509.

The district court's determination that Little was illegally detained because he was not the target of the search warrant and there was no probable cause for his detention was in error. *Summers* ' balancing of rights under the Fourth Amendment to the United States Constitution led the Court to find the detention of occupants during execution of a search warrant was constitutional, particularly because the warrant signifies there was probable cause to find criminal activity occurring in the house and authorized a significant intrusion into the occupant's privacy.

> ***5** "Of prime importance in assessing the intrusion is the fact that the police had obtained a warrant to search respondent's house for contraband. A neutral and detached magistrate had found probable cause to believe that the law was being violated in that

> house and had authorized a substantial invasion of the privacy of the persons who resided there. The detention of one of the residents while the premises were searched, although admittedly a significant restraint on his liberty, was surely less intrusive than the search itself." *Summers,* 452 U.S. at 701.

Although *Summers* ' interchangeable use of "occupants" versus "residents" in the opinion and the district court's finding that Little was not a target of the search warrant may have led the district court to reject the holding in *Summers* and *Mena,* courts have consistently held that *Summers* applies to *any* occupants present at a search location, whether residents or visitors. See, *e.g., United States v. Martinez–Cortes,* 566 F.3d 767, 770 (8th Cir.2009) (Cases following *Summers* have confirmed law enforcement's authority to forcibly detain during the warrant search extends to all occupants of the premises, not just the owner or the subject of the warrant); *United States v. Sanchez,* 555 F.3d 910, 918 (10th Cir.2009) (concluding the authority to detain relates to all persons present on the premises).

The decisions in *Wilson* and *Vandiver* were decided before the Supreme Court in *Mena* stated the authority to detain occupants incident to a search warrant is absolute. See *Mena,* 544 U.S. at 98. Further, *Vandiver* was primarily concerned with the legality of the search of the defendant. *Vandiver* noted the application for the search warrant in that case did not request a search of persons present on the premises other than the resident. Additionally, the court found there was nothing to indicate the officer was concerned for his safety or that the defendant was connected to the marijuana discovered in plain view to suggest a need to prevent the defendant's disposal or concealment of the contraband; thus, the search was not justified under K.S.A. 22–2509 ("In the execution of a search warrant the person executing the same may reasonably detain and search any person in the place at the time: [a] To protect himself from attack, or [b] To prevent the disposal or concealment of any things particularly described in the warrant."). *Vandiver,* 257 Kan. at 63–64.

In *Wilson,* the court found the defendant was illegally seized or detained during execution of the search warrant. As a result, the court determined the defendant's consent to a search was tainted, and contraband found during the search was suppressed. In analyzing the case, the court followed the reasoning in *Vandiver,* noting the officer testified the defendant did not pose a reasonable threat, the officer did not observe drugs or contraband in the defendant's proximity, and the officer did not reasonably suspect that the defendant was involved in criminal activity. Consequently, the court determined the officer was not justified in his continued detention of the defendant after the house was secured and, further, the detention exceeded that addressed in *Vandiver* because the defendant was handcuffed during the entire interrogation process and the officers retained his identification card. *Wilson,* 30 Kan.App.2d at 106.

***6** The district court found the detention and search of Little was improper because officers had no reason to believe he was involved in criminal activity or presently armed and dangerous. As a result, the court suppressed the items removed from Little's pockets. But as stated above, Little's detention was constitutional under *Mena* and, more importantly, the State is not challenging the court's conclusion the search of Little's pockets was illegal or the suppression of the items removed from Little's pocket. We conclude the critical issue is whether Little's period of detention after the residence was searched but before the drug dog alerted on the vehicle was reasonably necessary to complete the search of the premises, including the four vehicles parked in the driveway.

We have noted *Mena* stands for the proposition that the duration of a detention may be coextensive with the period of a search and requires no further justification. See *Dawson v. City of Seattle,* 435 F.3d 1054, 1066 (9th Cir.2006); see also *State v.. Kirby,* 12 Kan.App.2d 346, 355, 744 P.2d 146 (1987), *aff'd* 242 Kan. 803, 751 P.2d 1041 (1988) (when analyzing whether the duration of a *Terry* stop is excessive, a court considers ' "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant" '). Also in *Mena,* the Supreme Court upheld the reasonableness of handcuffing an innocent occupant, and the 2– to 3–hour duration of the detention, as necessary given the nature of the search. 544 U.S. at 98–99.

We conclude the district court did not enter adequate findings addressing the issue of necessary time delay after the residence was secured but before the drug dog alerted

on the vehicle. Moreover, we are unable to determine from the record on appeal the length or reasons for any time delay. Accordingly, we will not entertain a presumption that delay, if any, was not reasonably necessary given the nature of the search authorized under the search warrant. We remand this case to the district court for further findings and a determination of whether any delay was reasonably necessary. On remand, the district may consider testimony previously presented under Little's motion to suppress, exhibits that have been introduced into evidence, and arguments of counsel.

Reversed and remanded with directions.

All Citations

259 P.3d 749 (Table), 2011 WL 4035796

367 P.3d 1284 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellant,
v.
Brian Dean WILSON, Appellee.

No. 114,203.
|
March 25, 2016.

Appeal from Shawnee District Court; Nancy E. Parrish, judge.

Attorneys and Law Firms

Jodi Litfin, assistant district attorney, Chadwick J. Taylor, district attorney, and Derek Schmidt, attorney general, for appellant.

Nicholas David, of The David Law Office LLC, of Topeka, for appellee.

Before PIERRON, P.J., BRUNS and GARDNER, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** This interlocutory appeal by the State of Kansas asks whether the district court abused its discretion in denying a motion for reconsideration of its decision suppressing evidence. Attached to the motion to reconsider was evidence that the district court admitted would have changed its decision about suppression had that evidence been timely presented. Nonetheless, for the reasons stated below, we find no abuse of discretion.

Procedural background

In December 2014, Wilson was arrested. Topeka police had come to Wilson's house in search of another man. After taking that man into custody, police arrested three other occupants, one of whom had drug paraphernalia in her pocket. Police learned that Wilson was on parole so they contacted Kansas Department of Corrections employees to determine what was required to conduct a search. Believing that they had reasonable suspicion that a crime had occurred or was about to occur, police searched Wilson's bedroom and found marijuana, ammunition, and a handgun. Wilson was then charged with criminal possession of a firearm, possession of marijuana, and unlawful use of drug paraphernalia.

Wilson filed a motion to suppress the evidence, claiming that the search was unlawful. The State argued that Wilson had given consent and that the law enforcement officers had reasonable suspicion sufficient to search a parolee. After hearing testimony on April 14 and April 28, 2015, the district court ruled that the search was illegal and suppressed the evidence. The district court found that Wilson's consent had not been freely given and because no evidence showed that Wilson had agreed in writing to be subject to search, the police did not have authority to search Wilson's home. The district court relied in part on *State v. Chapman,* 51 Kan.App.2d 401, Syl. ¶¶ 4, 7, 347 P.3d 700 (2015), which found that K.S.A.2012 Supp. 22–3717(k)(3) allows law enforcement officers to search a parolee if they have reasonable suspicion of criminal activity or a parole violation and the parolee has agreed in writing to be subject to search.

Three days after that ruling, the State filed a motion to reconsider, requesting an additional evidentiary hearing and attaching a copy of Wilson's written consent to be searched. The State's motion referenced the district court's decision to suppress, then stated: "The State subsequently contacted the Defendant's Parole Officer, Jaclyn Steinbach, to determine if any such evidence even existed." Jaclyn Steinbach had testified during the suppression hearing.

The district court stated that the written consent would likely have changed its previous ruling on the motion to suppress, but it nonetheless denied the motion, reasoning as follows: The State had already had "ample opportunity" to present the evidence; the witness who ultimately provided the evidence had previously testified; and that conservation of judicial resources and the threat of prejudice against Wilson outweighed the State's

interests. The State now appeals the denial of its motion to reconsider.

Jurisdiction

***2** We first address our jurisdiction to hear this matter. K.S.A.2015 Supp. 22–3603 allows prosecutors to appeal a pretrial order suppressing evidence within 14 days after entry of the order suppressing evidence. Prosecutors must also show appellate courts that the order suppressing evidence substantially impairs the prosecution's ability to prosecute the case. *State v. Newman,* 235 Kan. 29, 35, 680 P.2d 257 (1984). Here, that requirement is met, as the district court's denial of the State's motion effectively reaffirmed its earlier decision granting the motion to suppress, barring the State's use of the primary, if not the sole, evidence against Wilson.

Wilson contends this court nonetheless lacks jurisdiction because the State's appeal is untimely. His rationale follows: The State's motion to reconsider tolled the deadline to appeal only if that motion is considered a K.S.A.2015 Supp. 60–259(f) motion; the State's motion was not a 60–259(f) motion because such a motion alters or amends a judgment; an order suppressing evidence is a sanction, not a judgment; and the motion to reconsider is akin to a K.S.A.2015 Supp. 60–260(b) motion which does not toll the appeal deadline.

Wilson is generally correct that a timely filed motion to alter or amend under K.S.A.2015 Supp. 60–259(f) tolls the running of the time for an appeal, while a timely filed motion under K.S.A.2015 Supp. 60–260 does not. See *Giles v. Russell,* 222 Kan. 629, 632, 567 P.2d 845 (1977); *In re Marriage of Webster,* No. 94, 112, 206 WL 2129130, at *2 (Kan.App.2006)(unpublished opinion).

We admit that Wilson's argument has a certain logical appeal. See *State v. Remlinger,* 266 Kan. 103, 106–07, 968 P.2d 671 (1998) (finding Kansas cases have repeatedly defined a criminal "judgment" as a pronouncement of guilt and the determination of punishment); *State v. Heigele,* 14 Kan.App.2d 286, 287–88 789 P .2d 218 (1990) (finding a suppression order is not a final judgment where the State does not appeal the order pursuant to K.S.A. 22–3603). But in support of his assertion that the State's appeal is untimely, Wilson cites cases from Missouri, Arizona, and Florida. Wilson cites no Kansas caselaw in support of the asserted final-judgment requirement in this context—where the State files an interlocutory appeal from the district court's order suppressing evidence.

We note that we often refer to a district court's decision suppressing evidence as a "judgment" when reviewing the State's interlocutory appeals. See, *e.g.,* *State v. Reed,* No. 113, 576, 2015 WL 9287062, at *1 (Kan.App.2015) (unpublished opinion); *State v. Cousins,* No. 112,497, 2015 WL 4879202, at *1 (Kan.App.2015). More importantly, we have previously found that K.S.A. 60–259(f) can apply to an order suppressing evidence. *State v. Little,* No. 105,221, 2011 WL 4035796, at *1–2 (Kan.App.2011) (unpublished opinion) (finding an argument similar to Wilson's has "no merit"), *rev. denied* 293 Kan. 1111 (2012). Although unpublished opinions from our court are "not binding precedent," they may have "persuasive value with respect to a material issue not addressed in a published opinion of a Kansas appellate court." Supreme Court Rule 7.04(g)(2) (2015 Kan. Ct. R. Annot. 65). Such is the case here.

***3** In *Little,* as here, the district court granted the defendant's motion to suppress then denied the prosecution's motion to reconsider, and the State appealed. We held that the prosecution's motion to reconsider was proper and tolled the time for appeal. 2011 WL 4035796, at *2 (citing K.S.A. 60–2103 [a]). The cited statute provides that the running of the time for appeal is terminated by a timely motion made pursuant to K.S.A.2015 Supp. 60–259, and "the full time for appeal fixed in this subsection commences to run and is to be computed from the entry of" the denial of a timely K.S.A.2015 Supp. 60–259 motion. K.S.A.2015 Supp. 60–2103(a).

Similarly, we consider the State's motion to reconsider the suppression decision to be a K.S.A.2015 Supp. 60–259(f) motion. When the State files a motion for reconsideration in a criminal case within 28 days of the district court's suppression decision, we thus construe that motion as a K.S.A.2015 Supp. 60–259(f) motion, and the time for interlocutory appeal is tolled until the date the motion for reconsideration is denied, on which date the time for appeal commences to run, restarting anew. See K.S.A.2015 Supp. 60–2103(a).

That rule, as applied to our facts, shows the State's appeal was timely. The district court's memorandum decision

granting Wilson's motion to suppress was entered on June 8, 2015. The State filed its motion to reconsider on June 11, 2015, 3 days later, well within the required 28 days for filing a K.S.A.2015 Supp. 60–259(f) motion. The district court's order denying the State's motion to reconsider was entered on July 9, 2015. The State filed its notice of appeal 13 days later on July 22, 2015, within the 14 days permitted for interlocutory appeals. K.S.A.2015 Supp. 22–3603. Because the State's appeal is timely, this court has jurisdiction. See *State v. Patton,* 287 Kan. 200, 206, 195 P.3d 753 (2008) (noting that "a timely notice of appeal ordinarily is jurisdictional").

Standard of Review

We review the denial of a motion to reconsider for an abuse of discretion. *Reinmuth v. Pride National. Ins. Co.,* No. 111,174, 2015 WL 1310804, at *4 (Kan.App.2015) (unpublished opinion), *rev. denied* 303 Kan.—— January 25, 2016). A district court abuses its discretion if its action:

> "(1) is arbitrary, fanciful, or unreasonable, *i.e.,* if no reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law, *i.e.,* if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact, *i.e.,* if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based." *State v. Ward,* 292 Kan. 541, 550, 256 P.3d 801 (2011), *cert. denied* 132 S.Ct. 1594 (2012).

The party claiming that the district court abused its discretion bears the burden of showing that judicial discretion was abused. *State v. Rojas–Marceleno,* 295 Kan. 525, 531, 285 P.3d 361 (2012).

Motion to Reconsider

***4** A motion to reconsider is generally not a creature of statute, but of caselaw. Kansas caselaw shows that in civil cases, a district court may grant a motion to reconsider when new evidence has been discovered. See *In re Marriage of Steele,* No. 110,593, 2014 WL 1708125, at *4 (Kan.App.2014) (unpublished opinion). K.S.A.2015 Supp. 60–259(f)'s purpose is to provide the district court with an opportunity to correct prior errors. *Denno v. Denno,* 12 Kan.App.2d 499, 501, 749 P.2d 46 (1988). Motions to alter and amend "may properly be denied where the moving party could have, with reasonable diligence," presented the evidence earlier. *Wenrich v. Employers Mut. Ins. Co.,* 35 Kan.App.2d 582, 590, 132 P.3d 970 (2006). The same is true for denials of motions to reconsider. See *In re Marriage of Mullokandova, & Kikirov* No. 112,921, 2016 WL 197743, at *12 (Kan.App.2016) (unpublished opinion) (affirming denial of motion to reconsider because "[t]he evidence itself must be newly discovered. Counsel's new realization that the evidence could perhaps have helped at the earlier hearing does not make the evidence newly discovered.").

Kansas cases have held that motions to reconsider, treated as motions to alter or amend a judgment under K.S.A.2015 Supp. 60–259(f), apply in criminal cases in the absence of a specific statute to the contrary. *McPherson v. State,* 38 Kan.App.2d 276, 287, 163 P.3d 1257 (2007); *State v. Marks,* 14 Kan.App.2d 594, Syl. ¶ 2, 796 P.2d 174, *rev. denied* 247 Kan. 706 (1990). We believe the standards for evaluating a motion to reconsider in the civil context are relevant for evaluating a motion to reconsider in a criminal case, finding no good reason to distinguish between the two. See *United States v. D'Armond,* 80 F.Supp.2d 1157, 1170–71 (D.Kan.1999); *United States v. Becker,* No. 09–40008–01–JAR, 2010 WL 1424360, at *2 (D.Kan.2010).

Kansas cases, however, lack developed standards for motions for reconsideration in civil and criminal cases, and the Rules of the Kansas Supreme Court do not generally address them. Federal cases in Kansas, however, have well-developed standards for motions to reconsider. We find those standards, summarized below, to be persuasive here.

First, the decision whether to grant or deny a motion to reconsider is committed to the court's sound discretion. See *Hancock v. City of Oklahoma City,* 857 F.2d 1394, 1395 (10th Cir.1988).

Second, a motion to reconsider is not a second chance for the losing party to try again. "A motion to reconsider is not a second chance for the losing party to make its strongest case or to dress up arguments that previously failed." *Voelkel v. General Motors Corp.,* 846 F.Supp. 1482, 1483 (D.Kan.1994). "A court's rulings "are not intended as first drafts, subject to revision and reconsideration at a litigant's pleasure." *Koch v. Koch*

Industries, Inc., 6 F.Supp.2d 1207, 1209 (D.Kan.1998) (quoting *Quaker Alloy Casting v. Gulfco Industries, Inc.,* 123 F.R.D. 282, 288 [N.D.Ill.1988]), *aff'd* 203 F.3d 1202 (10th Cir.), *cert. denied* 531 U.S. 926, (2000).

***5** Instead, a motion to reconsider is limited to specific situations where limited circumstances warrant it.

> "We have held that a motion to reconsider may be granted when the court has misapprehended the facts, a party's position, or the law. *Servants of The Paraclete v. Does,* 204 F.3d 1005, 1012 (10th Cir.2000). Specific situations where circumstances may warrant reconsideration include '(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice.' *Id* ." *United States v. Huff,* 782 F.3d 1221, 1224 (10th Cir.), *cert. denied* 136 S.Ct. 537 (2015).

Lastly, a motion to reconsider is not appropriate to revisit issues already addressed or to advance arguments that could have been raised earlier. See *United States v. Christy,* 739 F.3d 534, 539 (10th Cir.2014).

> "A motion to reconsider is appropriate if the court has obviously misapprehended a party's position, the facts, or applicable law, or if the party produces new evidence that could not have been obtained through the exercise of due diligence. [Citations omitted.] A motion to reconsider is not appropriate if the movant only wants the court to revisit issues already addressed or to hear new arguments or supporting facts that could have been presented originally. *Comeau v. Rupp,* 810 F.Supp. [1172.] 1175." *Koch* [D. Kan. (1992)], 6 F.Supp.2d at, 1209.

We find these standards to be well reasoned, persuasive, and consistent with our statutes and limited caselaw regarding motions to reconsider, so we apply them here. See, *e.g.,* K.S.A.2015 Supp. 60–259(a)(i)(E) (stating a new trial may be granted based on "newly discovered evidence that is material for the moving party, which it could not, with reasonable diligence, have discovered and produced at the trial"); *cf.* K.S.A.2015 Supp. 60–260(b)(2) (providing a court may relieve a party from an order because of "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial" under K.S .A.2015 Supp. 60–259(b).

Analysis

Our analysis of whether the district court abused its discretion in denying the State's motion to reconsider focuses on whether the evidence the State presented in support of that motion could have been discovered earlier with reasonable diligence.

In its motion to reconsider and its accompanying memorandum, the State suggests that it was unaware of the need to present evidence that Wilson had agreed in writing to be subject to a search. At the hearing on the motion to reconsider, the State said it would have presented that evidence had it been available. But during oral argument at the suppression hearing, the State had argued that written evidence was not required, yet it also drew the district court's attention to *Chapman* which held law enforcement officers may search a parolee if they have reasonable suspicion of criminal activity or a parole violation and if the parolee has agreed in writing to be subject to a search. Thus, the State had notice of *Chapman's* evidentiary requirement.

***6** Yet during the suppression hearing, the State neither showed evidence that all parolees in Kansas consent in writing to a reasonable suspicion law-enforcement search of their residence as one of many conditions precedent to their release on parole, nor evidence that Wilson, as a parolee, had so consented. The State had not one but two opportunities to do so during the continued suppression hearing—once on April 14 and again on April 28, 2015.

Further, as the district court mentioned, Parole Officer Steinbach, from whom the State eventually obtained the written consent, had testified at the suppression hearing. The State asked her very few questions and did not ask if she knew whether Wilson had consented in writing to be subject to search. While arguing its motion to reconsider,

the State claimed that it had asked three of its witness if they had documents showing that Wilson had agreed to be subject to search and was told that they did not have any or that they did not know that they had any. But Steinbach was not among those witnesses.

The State suggests that after the district court granted Wilson's motion, it asked Steinbach *again* about any documents. But the State's motion to reconsider makes clear that it *initially* contacted Steinbach about documents after the district court issued its decision by referencing the district court's decision to suppress and then stating: "The State *subsequently* contacted the Defendant's Parole Officer, Jaclyn Steinbach, to determine if any such evidence even existed." (Emphasis added.) The State has not shown that it asked Steinbach before the motion to suppress was granted whether she knew of Wilson's signed consent, even though, as Wilson's supervising parole officer, she was likely to have had knowledge of that document.

The State cites several cases showing that a district court may allow additional evidence to be presented after a motion to suppress has been granted. See, *e.g., City of Prairie Village v. Hof,* No. 106,491, 2012 WL 2924615, at *1–3 (Kan.App.2012) (unpublished opinion). We have no doubt that a district court has discretion to do so. But those cases, including *Hof,* show only that a district court may consider additional evidence after granting or denying a motion to suppress if it believes the facts of the case warrant reconsideration. They do not show that reconsideration is mandatory or was warranted here. More importantly, these cases are not illustrative of the State's diligence or lack of diligence, which is the pivotal issue here.

The State also argues that the district court's denial of its motion to reconsider was unreasonable because it was an "extreme measure" which prejudiced the State. The State claims that this appeal might be its only remedy because the doctrines of res judicata or law of the case could bar it from relitigating this issue. But the State does not provide sufficient authority or analysis to show whether either doctrine would likely apply in this context or that such prejudice warrants a different result. Even assuming such a bar to relitigation of this case, the State could have avoided this prejudice by the exercise of reasonable diligence. Had it been reasonably diligent during the continued suppression hearing it could have discovered the crucial evidence before the district court granted Wilson's motion to suppress. The district court properly concluded that the State had already had "ample opportunity" to present the evidence and that the witness who ultimately provided Wilson's signed consent form had previously testified.

***7** The district court additionally weighed the "conservation of judicial resources" in finding the balance tipped against the State. That is a legitimate and important interest in the administration of justice. See *State v. Parry,* 51 Kan.App.2d 928, 935–6, 358 P.3d 101 (2015) (Gardner J., dissenting) (agreeing with majority that the State cannot not piece-meal its theories about the legality of a search and try them seriatim).

The district court weighed the relevant factors and chose not to reconsider its decision when the State tardily proffered the crucial evidence. We believe a reasonable person could have come to that same conclusion, so we find the district court did not abuse its discretion by denying the State's motion to reconsider even though that motion presented evidence that, had it been timely, would have changed the outcome of the suppression motion.

Affirmed.

All Citations

367 P.3d 1284 (Table), 2016 WL 1169487