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120 P.3d 381 (Table), 2005 WL 2416076 (Kan.App.)
 Unpublished Disposition

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H**Briefs and Other Related Documents**

(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation.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.
 Robert L. THURMAN Sr., Appellant,
 v.
 STATE of Kansas, Appellee.
 No. 93,494.

Sept. 30, 2005.
 Review Denied Dec. 20, 2005.

Appeal from Sedgwick District Court; Paul W. Clark, judge. Opinion filed September 30, 2005. Affirmed.

Robert L. Thurman, appellant pro se.

Kristi L. Barton, assistant district attorney, Nola Tedesco Foulston, district attorney, and Phill Kline, attorney general, for the appellee.

Before PIERRON, P.J., CAPLINGER, J., and BUKATY, S.J.

MEMORANDUM OPINION**PER CURIAM.**

****]** Robert L. Thurman appeals pro se from the district court's summary dismissal of his K.S.A. 60-1507 motion in which he argued ineffective assistance of appellate counsel. On appeal, he

argues ineffective assistance of trial counsel.

In October 2000, the district court sentenced Thurman to 120 months in prison after a jury convicted him of one count each of aggravated burglary, aggravated assault, and battery. This court later denied his direct appeal in which he claimed the district court erred in admitting evidence.

On January 6, 2003, Thurman filed a pro se petition with this court in which he claimed "ineffective assistance of appellate counsel for failure to raise issues that could and should have been raised on direct appeal." This court transferred Thurman's action to the district court because it had not been heard below in a 60-1507 proceeding before being appealed.

At some point after its transfer, the State apparently filed a response to Thurman's petition, but the record is unclear when that occurred. On May 14, 2003, Thurman moved for a memorandum decision and order from the district court's criminal department. The criminal department's response filed on June 4, 2003, referred Thurman to the clerk of the civil court. Two days later, the district's civil court determined appearances were unnecessary, adopted the State's written response as its findings, and denied Thurman's motion.

On May 10, 2004, Thurman's court-appointed counsel filed a 60-1507 motion claiming ineffective assistance of appellate counsel on the direct appeal. After hearing arguments at a nonevidentiary hearing in August 2004, the district court adopted the State's written response as its findings and denied Thurman's petition.

Thurman claims he was denied effective assistance of trial counsel and argues that although he raised the issue of ineffective assistance of appellate counsel at his nonevidentiary hearing, his trial

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counsel's ineffectiveness was never considered or assessed by the district court. The State contends this issue is not properly before this court because Thurman raises it for the first time on appeal. Accordingly, to determine whether our standard of review in an ineffective assistance of counsel claim applies, it is first necessary to determine whether Thurman's claim is properly before us.

As a general rule, issues not raised before the trial court cannot be raised on appeal. *State v. Williams*, 275 Kan. 284, 288, 64 P.3d 353 (2003). This court considered a situation similar to the one at bar in *Sanders v. State*, 26 Kan.App.2d 826, 829, 995 P.2d 397 (1999), *rev. denied* 269 Kan. 934 (2000). On appeal, Sanders claimed ineffective assistance of both trial counsel and appellate counsel. However, he only complained of his trial counsel's assistance in his petition to the district court. As a result, this court concluded the issue of his appellate counsel's assistance had not been preserved for appeal. 26 Kan.App.2d at 829.

****2** Here, Thurman claims ineffective assistance of trial counsel on appeal. But the record demonstrates that he only raised the issue of ineffective assistance of appellate counsel before the district court. The record is devoid of any evidence that the district court considered any claims of ineffective assistance of trial counsel. Thurman acknowledges the court never considered such a claim. The burden is on the appellant to furnish a record which affirmatively shows that prejudicial error occurred in the trial court. *State v. Holmes*, 278 Kan. 603, 612, 102 P.3d 406 (2004). Without evidence that Thurman raised his claim of ineffective assistance of trial counsel before the district court, the issue has not been preserved for appeal.

Additionally, despite Thurman's claim of ineffective assistance of appellate counsel raised in his two 60-1507 motions, he has failed to brief the issue to this court. An issue not briefed by the appellant is deemed waived or abandoned. *Holmes*, 278 Kan. at 622.

Even if we were to liberally construe Thurman's

various pro se motions and brief, there is no basis for considering his claim. A pro se litigant must follow the same rules of procedure as one represented by counsel and is afforded neither special advantages nor disadvantages. See *Mangiaracina v. Gutierrez*, 11 Kan.App.2d 594, 595-96, 730 P.2d 1109 (1986).

This court must find the issue of ineffective assistance of trial counsel is not properly before us. By Thurman's failure to brief the ineffective assistance of appellate counsel issue in his appeal, the claim he raised before the district court is deemed abandoned.

Affirmed.

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Briefs and Other Related Documents (Back to top)

- (Appellate Brief) Brief of Appellee (Apr. 21, 2005)Original Image of this Document (PDF)
- (Appellate Brief) Brief of Appellant (Feb. 03, 2005)Original Image of this Document with Appendix (PDF)

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