

NOT DESIGNATED FOR PUBLICATION

Nos. 124,363  
124,364

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellee,*

v.

TYREESE L. ATKINSON JR.,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Sedgwick District Court; STEPHEN J. TERNES, judge. Opinion filed March 10, 2023.  
Affirmed.

*Corrine E. Gunning*, of Kansas Appellate Defender Office, for appellant.

*Kristi D. Allen*, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before SCHROEDER, P.J., WARNER and CLINE, JJ.

PER CURIAM: Tyreese L. Atkinson Jr. timely appeals from the district court's denial of his presentence motion to withdraw his guilty pleas entered after the third day of his jury trial. Atkinson argues the district court erred in failing to find good cause allowing him to withdraw his pleas because he was misled, coerced, mistreated, or unfairly taken advantage of; his pleas were not fairly and understandingly made; and someone else was involved in the attempted murder. After an extensive review of the record, we find no error in the district court's decision. Accordingly, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

In July 2018, the State charged Atkinson in 18CR1893 with criminal possession of a weapon by a felon, fleeing or attempting to elude an officer, and possession of marijuana. The same month the State charged Atkinson in another case, 18CR1931, with attempted murder in the first degree, two counts of aggravated battery, and criminal possession of a weapon by a felon. Atkinson pled not guilty in both cases.

Trial began in May 2019 in 18CR1931. At the end of the third day of trial, before the State had rested its case-in-chief, Atkinson requested his trial counsel seek a plea agreement with the State to reduce his potential sentence of about 77 years. In exchange for a successful guilty plea to fleeing or attempting to elude an officer in 18CR1893 and an amended charge of attempted second-degree murder and one count of aggravated battery in 18CR1931, the State agreed to dismiss the remaining charges in both cases and all the charges pending in a third case, 19CR968. The plea agreement explained the following recommendations would be made to the district court at sentencing:

"a. The State will recommend the high number for all the felony counts.

Defendant is free to ask for [the] low number.

"b. The Parties will recommend the Court follow the presumption, which is prison.

"c. Defendant acknowledges his duty to register due to Count 1 in 18CR1931 being committed with a firearm and attempted murder.

"d. It is the belief of the Parties that Defendant will be criminal history 'B' in 18CR1931. If he is in fact a criminal history 'B' in 18CR1931, the State will be requesting the counts in 18CR1931 run concurrently to each other. Additionally, it is believed Defendant will be criminal history 'A' in 18CR1893. If Defendant is criminal history 'A' in 18CR1893, the State will request the two case[s] run concurrently to each other. If Defendant challenges his criminal history score or it comes back lower than expected, the State is free to ask for consecutive sentences on all the above mentioned counts not to exceed 228 months total for both cases.

"e. As a condition of this negotiated resolution, and as recognized in State v. Patton, 287 Kan. 200 (2008), the Defendant agrees to waive his right to appeal or collaterally attack the convictions, sentence or terms of this plea agreement.

"f. Defendant agrees to pay restitution if requested in this matter.

"g. The parties will request these cases to run consecutively to any other case.

"h. State agrees to dismiss 19CR968 in exchange for a successful plea in these cases."

The district court held a plea hearing in May 2019, summarized the plea agreement, and explained Atkinson's rights and the rights he would be giving up by entering the plea including his right to continue with the trial. After the district court summarized Atkinson's rights, Atkinson took a moment to speak with his attorney before entering his plea. Before proceeding, the district court verified Atkinson heard and understood the entire summary of the plea agreement and did not need more time to speak with his attorney.

In 18CR1893, Atkinson pled guilty to fleeing or attempting to elude an officer. Atkinson had an off-the-record discussion with his attorney before entering guilty pleas on the counts of attempted second-degree murder and aggravated battery in 18CR1931. The district court found a factual basis for the plea on each count, found Atkinson understood the nature of the charges against him as well as the consequences of his pleas, and found Atkinson guilty of each count.

After entering his guilty pleas and before sentencing, Atkinson filed a pro se motion to withdraw his pleas. He alleged his trial counsel never fully explained the terms of the plea agreement before the plea hearing, he was misled or coerced into taking the plea, and the plea was not fairly and understandingly made. The district court held a hearing on Atkinson's motion to withdraw plea in October 2019 and provided him with new counsel. At the hearing, Atkinson's trial counsel testified he had met with Atkinson on several occasions and discussed the options of seeking a plea agreement or going to

trial. Atkinson was adamant about proceeding with a jury trial. Trial counsel discussed with Atkinson the gravity of the State's charges and the potential penalties he faced, including how the two cases—18CR1893 and 18CR1931—would affect one another if he was convicted in both cases.

Trial counsel testified that at the end of the third day of trial, Atkinson asked if it was still possible to get a plea agreement. Trial counsel, upon Atkinson's request, approached the State about a possible plea deal. The State later that evening offered Atkinson a plea agreement amounting to 21 years' imprisonment in exchange for guilty pleas in both cases. After receiving the State's plea offer, trial counsel went to the jail to discuss the offer with Atkinson. As the parties were still in negotiations and the agreement was not finalized, trial counsel orally discussed the offer with Atkinson but did not present a written plea agreement at the time. Trial counsel again discussed Atkinson's potential penalties in the case if he were to proceed with his jury trial or accept the plea agreement. Prior to reviewing the plea documents with Atkinson, trial counsel negotiated a further reduction with the State, making the proposed sentence about 18 to 19 years. Trial counsel testified he reviewed the acknowledgment of rights and entry of plea document with Atkinson as well as the plea agreement itself for about 45 minutes, reading or paraphrasing each paragraph of the plea agreement to Atkinson. Because this plea deal was taking place between the third and fourth day of the trial, Atkinson had a limited amount of time to digest the terms and conditions of the plea agreement. Atkinson acknowledged to his trial counsel he understood the terms without confusion.

The hearing on the motion to withdraw pleas was longer than anticipated, and the district court continued the hearing. At the continued hearing in July 2020, the State admitted two jail calls into evidence in which Atkinson stated:

- "[The State's] got too many pieces . . . . If I would've finished my trial, they was going to give me 77 years."
- "I can try to find some loopholes and try and withdraw my plea at any time."

The hearing was again continued to January 2021. At that hearing, Atkinson called his trial counsel back to the stand. Trial counsel testified he had reviewed all available discovery with Atkinson before trial, including witness statements and the preliminary hearing transcript. Trial counsel explained 18CR1931—the case involving an attempted murder charge—came down to identification of the perpetrator and attacking witness credibility. During trial, Atkinson's sister and his sister's girlfriend testified, changing the course of the trial. After hearing their testimony, Atkinson asked his trial counsel if there was still a chance of getting a plea agreement. Trial counsel again testified he reviewed the plea agreement and acknowledgment of rights form with Atkinson and discussed the potential penalties Atkinson faced in his two cases.

Also at the January 2021 hearing, Atkinson testified his trial counsel had not shared all the discovery with him, which prevented him from making a knowing, intelligent, and voluntary waiver of his rights when he pled. Specifically, Atkinson claimed his trial counsel never shared any photographs, dialog from recorded phone calls, videos, or interviews with him. All Atkinson claimed to receive were police reports, which was what he based his decision to go to trial on. Atkinson claimed he never requested a plea agreement. He explained when trial counsel visited him in jail and presented the State's plea offer, he was told he would be found guilty and likely spend the rest of his life in prison if he did not take the plea.

Atkinson felt the plea was not voluntary and claimed he was confused when the district court asked him whether he was making a knowing, voluntary acceptance of responsibility and saw no other way to proceed. Atkinson testified he never saw the plea agreement documents, did not understand them, and just signed papers because he was

told to do so. Atkinson also testified he was rushed and given three minutes to review and sign the plea agreement, which trial counsel had never explained to him. The district court took the matter under advisement.

At a hearing in February 2021, the district court presented its ruling on Atkinson's motion to withdraw his pleas. The district court ultimately found trial counsel's testimony was credible. The district court explained:

"It is obvious to this Court that the defendant understood what was at stake with the jury trial, and after hearing most of the State's evidence as it was presented in open court during the jury trial, the defendant decided the trial was not going his way and asked [trial counsel] to see if a plea could be had."

The district court found Atkinson was represented by competent counsel and was not misled, coerced, mistreated, or unfairly taken advantage of. Atkinson's plea was knowingly and voluntarily made, and he understood the benefits of the bargain he was receiving. The district court determined Atkinson failed to show good cause to withdraw his pleas and denied his motion.

After the district court pronounced its ruling, Atkinson argued the plea agreement was defective because it prohibited him from challenging his criminal history score and because there was newly discovered evidence about who committed the attempted murder. Though the district court had denied Atkinson's motion, it gave him 30 days to prepare an amended motion to withdraw plea and continued the hearing.

In his second motion to withdraw plea, Atkinson claimed the plea agreement forced him to waive his right to challenge his criminal history score, creating the possibility of an illegal sentence. As such, Atkinson argued, his plea resulted from fraud or mutual mistake. Atkinson also asserted the acknowledgment of rights—stating he

could appeal and challenge his criminal history score—directly contradicted paragraph "d" of the plea agreement, which stated: "If [Atkinson] challenges his criminal history score or it comes back lower than expected, the State is free to ask for consecutive sentences on all the above mentioned counts not to exceed 228 months total for both cases."

At the next motion to withdraw plea hearing in August 2021, the district court found the plea agreement was a bargained-for exchange in which Atkinson gave up certain rights and, in exchange, the State dismissed several counts, reduced one count, and dismissed all the counts in 19CR968. The district court again noted Atkinson's trial counsel's testimony was credible and found Atkinson made a knowing and intelligent waiver of his right to continue his jury trial. The district court also explained there was no conflict between the acknowledgment of rights and entry of plea document and the plea agreement itself; rather, the documents explained the maximum sentence the State would ask for. The district court also found Atkinson's claim of newly discovered evidence, alleging someone else committed the attempted murder, was unsubstantiated as he provided no evidence of his claim. Finally, the district court found no good cause for Atkinson to withdraw his pleas and denied Atkinson's second motion to withdraw plea.

The district court sentenced Atkinson to 16 months' imprisonment for fleeing or attempting to elude a law enforcement officer, 233 months' imprisonment for attempted second-degree murder, and 41 months' imprisonment for aggravated battery. The district court denied Atkinson's departure motion and ordered Atkinson's sentences run concurrent to each other for a total term of 233 months' imprisonment.

## ANALYSIS

### *The District Court Did Not Abuse Its Discretion in Denying Atkinson's Presentence Motion to Withdraw His Pleas*

Atkinson argues the district court abused its discretion in denying his motion to withdraw pleas as he established good cause to withdraw. Atkinson contends he was misled, coerced, mistreated, or unfairly taken advantage of, resulting in a plea agreement that was not fairly and understandingly made.

When the district court denies a defendant's motion to withdraw a plea before sentencing, the defendant must establish on appeal the district court abused its discretion in denying the motion. "A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact." *State v. Frazier*, 311 Kan. 378, 381, 461 P.3d 43 (2020). "Appellate courts do not reweigh the evidence or assess witness credibility. Instead, appellate courts give deference to the trial court's findings of fact." *State v. Anderson*, 291 Kan. 849, 855, 249 P.3d 425 (2011). Atkinson bears the burden to establish the district court abused its discretion in denying his presentence motion to withdraw his plea. See *State v. Woodring*, 309 Kan. 379, 380, 435 P.3d 54 (2019).

"Entry of a plea of guilty or nolo contendere necessarily implies acknowledgment by all concerned—the defendant, the State, and the court—that a jury could go either way and that a risk-benefit analysis has taken place on both sides. The prosecution and the defense have something to gain and something to lose in any plea bargain." *State v. Green*, 283 Kan. 531, 547, 153 P.3d 1216 (2007).

"[A] defendant should not get relief from a plea decision simply because he or she determines, in hindsight, that it was not the most intelligent course of action." *State v. Schow*, 287 Kan. 529, 542, 197 P.3d 825 (2008).



Under K.S.A. 2022 Supp. 22-3210(d)(1), a guilty plea may be withdrawn before sentencing "for good cause shown and within the discretion of the court." When determining whether a defendant has shown good cause, a district court should consider whether "(1) the defendant was represented by competent counsel, (2) the defendant was misled, coerced, mistreated, or unfairly taken advantage of, and (3) the plea was fairly and understandingly made. [Citation omitted.]" *State v. Edgar*, 281 Kan. 30, 36, 127 P.3d 986 (2006). Other non-*Edgar* factors that could impact a plea withdrawal should not be ignored. *Frazier*, 311 Kan. at 381.

Atkinson focuses on the second and third *Edgar* factors. Atkinson contends he was provided less than 24 hours either to seek, negotiate, and approve a plea agreement with the State or to continue with his jury trial, and such conditions were coercive. Because of time constraints, Atkinson contends his trial counsel did not fully explain the terms and conditions of the State's plea offer. Atkinson also claims his counsel failed to provide him with all the discovery in his case and, therefore, he lacked the information necessary to make an informed decision whether to enter a plea agreement with the State or to continue with his jury trial.

Atkinson's trial counsel testified he had reviewed all available discovery with Atkinson before trial and spoke with Atkinson at length the evening he asked for a plea agreement. Trial counsel discussed where they were in trial when Atkinson asked for a plea agreement, the potential penalties Atkinson faced, as well as the plea agreement and acknowledgment of rights.

Atkinson was adamant about proceeding to trial but, after hearing nearly all the State's evidence at trial, decided he wanted to seek a plea agreement. While Atkinson had little time to digest the State's plea offer before accepting it, he knew the strength of the evidence against him before asking for a plea agreement. The plea agreement was fairly entered into by Atkinson and the State; each had something to gain and something to lose

from doing so. And the parties each received their respective contemplated benefits by accepting the corresponding burdens of their agreement.

Atkinson also suggests his plea was not fairly and understandingly made because his trial counsel orally explained the State's initial plea offer but did not provide him with formal documentation explicitly listing the terms and conditions. Atkinson further argues the acknowledgment of rights and the plea agreement contradicted each other and such disparity could not establish a meeting of the minds. But the district court reasonably found the acknowledgment of rights and entry of plea coincided with the plea agreement. Though more specific than the acknowledgment of rights, the plea agreement simply explained the maximum sentence the State would request and the district court was not restricted by the plea agreements as to what sentence it could impose in compliance with the sentencing guidelines.

At the plea hearing, the district court ensured Atkinson entered his pleas freely, voluntarily, and understandingly. The district court also ensured Atkinson had not used or consumed any alcohol, medication, or other drugs within the 48 hours before the plea hearing that would have affected his ability to understand the proceedings. The district court thoroughly explained Atkinson's rights as well as the consequences of entering a plea:

"THE COURT: At trial you would have other rights and presumptions. First, you are presumed innocent unless proven guilty. Do you understand that?

"THE DEFENDANT: Yes, sir.

"THE COURT: Secondly, the State must prove to a judge or a jury each element of each offense charged beyond a reasonable doubt. Do you understand that?

"THE DEFENDANT: Yes, sir.

"THE COURT: No. 3, you have a right to see and hear the witnesses and other evidence against you. Do you understand that?

"THE DEFENDANT: Yes, sir.

"THE COURT: No. 4, you have a right to have your attorney cross-examine the State's witnesses and fully review the other evidence presented by the prosecution. Do you understand that?

"THE DEFENDANT: Yes, sir.

"THE COURT: No. 5, you have a right to present witnesses of your own to testify for you and to compel their attendance at your trial. Do you understand that?

"THE DEFENDANT: Yes, sir.

"THE COURT: No. 6, you have a right to testify on your own behalf if you wish but the law does not require you to do so, and your decision to not testify at trial cannot be used against you in any way. Do you understand that?

"THE DEFENDANT: Yes, sir.

"THE COURT: Do you understand that your decision to either testify or not testify at trial should be made after fully discussing that issue with your attorney?

"THE DEFENDANT: Yes, sir.

"THE COURT: If you decided to testify at trial, you would take the witness stand. You would answer your own attorney's questions under oath. Then the prosecutor would have the opportunity to cross-examine you about that testimony. Do you understand that?

"THE DEFENDANT: Yes, sir.

"THE COURT: If you decided that you did not wish to testify at trial, that decision could not be held against you. If it was a jury trial, the jury would be given a written instruction that would tell them as a matter of law that they may not consider the fact that you did not testify in reaching their verdict. Do you understand that?

"THE DEFENDANT: Yes, sir.

"THE COURT: No. 7, if you are found guilty at trial, you can file a motion for a new trial. If that motion's denied, you can appeal your conviction to the Court of Appeals. Do you understand that?

"THE DEFENDANT: Yes, sir.

"THE COURT: Is it your wish to give up these rights and enter a plea today to the charges against you?

"THE DEFENDANT: Yes, sir.

"THE COURT: You are represented in this case by Mr. Cotton, the attorney seated next to you, is that right?

"THE DEFENDANT: Yes, sir.

"THE COURT: Have you had enough time to discuss with him the charges filed against you, your rights in these cases and the consequences of changing your plea?

"THE DEFENDANT: Yes, sir.

"THE COURT: Are you satisfied with the services he's provided for you in this case, in these cases?

"THE DEFENDANT: Yes, sir.

"THE COURT: Have the Courts treated you in a professional and courteous manner up to this point?

"THE DEFENDANT: Yes, sir.

"THE COURT: Mr. Atkinson, I received three documents. The first two are entitled defendant's acknowledgments of rights and entries of plea. They are each four pages long and your signature's here dated May 31, 2019. It appears on the fourth page. The first I'll show you here is in 18 CR 1893. Is that your signature, sir?

"THE DEFENDANT: Yes, sir.

"THE COURT: The second in 19 CR 1931—I think it should be 18 CR.

. . . .

"THE COURT: . . . In 18 CR 1931, also your signature's here at the top of the fourth page. Is that your signature, sir?

"THE DEFENDANT: Yes, sir.

"THE COURT: Was it your decision alone to sign both of these documents?

"THE DEFENDANT: Yes, sir.

"THE COURT: Have you had enough time to review them completely with your attorney?

"THE DEFENDANT: Yes, sir.

"THE COURT: Has he answered any and all questions about what is in both of these documents?

"THE DEFENDANT: Yes, sir."

The district court then explained the three charges Atkinson faced under the plea agreement—fleeing or attempting to elude a law enforcement officer, attempted murder in the second degree, and aggravated battery. The district court also explained the sentencing range Atkinson faced for each of those crimes. Atkinson stated he understood. The district court proceeded:

"THE COURT: The second document or the third document, I should say, is a plea agreement. It is three pages long. Your signature's here on the third page, again dated May 31, 2019. Is that your signature, sir?

"THE DEFENDANT: Yes, sir.

....

"THE COURT: All right. I will, referencing Page 1 of the plea agreement under 19—pardon me, under 18 CR 1931, count 3 is labeled a nonperson felony. I will strike the word non in front of person. I will initial that as well.

"Mr. Atkinson, do you understand the change I'm making?

"THE DEFENDANT: Yes, sir.

"THE COURT: Okay. Do you have any objection to that change?

"THE DEFENDANT: No, sir."

The district court then summarized the plea agreement. Atkinson took a moment to speak with his counsel before confirming he heard the district judge's summary of the agreement, understood the agreement, and did not need to discuss the agreement further with his attorney at that time. The district court continued to explain the implications of agreeing to a plea:

"THE COURT: Do you understand the Court is not a party to this agreement and is not bound by this agreement?

"THE DEFENDANT: Yes, sir.

"THE COURT: Do you understand the Court can impose any legal sentence it deems appropriate?

"THE DEFENDANT: Yes, sir.

"THE COURT: Has anyone promised you anything other than what's set forth in the plea agreement in order to get you to change your plea?

"THE DEFENDANT: No, sir."

When the district court denied Atkinson's first motion to withdraw plea, it explained:

"It is obvious to this Court that the defendant understood what was at stake with the jury trial, and after hearing most of the State's evidence as it was presented in open court during the jury trial, the defendant decided the trial was not going his way and asked [trial counsel] to see if a plea could be had."

At the hearing on Atkinson's second motion to withdraw plea, the district court found Atkinson's claim that another person committed the attempted murder was "simply unsubstantiated" and again found no good cause for Atkinson to withdraw his pleas. And at both hearings on Atkinson's motions to withdraw his pleas, the district court found Atkinson's trial counsel's testimony was credible—a finding we do not reweigh or assess. See *Anderson*, 291 Kan. at 855.

Atkinson has failed to show good cause to withdraw his pleas. He presented no evidence on his claim someone else committed the attempted murder. And he has failed to convince us he was misled, coerced, mistreated, or unfairly take advantage of—given the timing of his plea after the third day of trial—or that his pleas were not fairly and understandingly made.

Atkinson has not established the district court's decision to deny his presentence motion to withdraw his pleas was based on an error of fact or law or was otherwise arbitrary, fanciful, or unreasonable. The district court considered the circumstances giving rise to the claims, and its decision was reasonable. The district court was within its statutory authority and sound discretion to deny Atkinson's motion to withdraw his pleas.

Affirmed.