NOT DESIGNATED FOR PUBLICATION

No. 124,660

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

COLT FRANCIS WRIGHT,
Appellant.

MEMORANDUM OPINION

Appeal from Saline District Court; PATRICK H. THOMPSON, judge. Opinion filed June 23, 2023. Affirmed in part, reversed in part, and remanded with directions.

Debra J. Wilson, of Capital Appeals and Conflicts Defender Office, for appellant.

Natalie Chalmers, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before MALONE, P.J., GREEN and ISHERWOOD, JJ.

PER CURIAM: Cole Francis Wright appeals the district court's denial of the presentencing motion he filed seeking to withdraw his pleas to multiple violent felonies. The district court conducted an evidentiary hearing and ultimately concluded that Wright failed to verify his allegations that his plea was involuntary as the product of coercion and counsel's lackluster advocacy. Following a thorough review of the record we are satisfied the district court did not abuse its discretion in so finding. The parties also collectively assert that remand is necessary because it is unclear from the court's restitution order when Wright's payment obligation is due. We agree and remand with directions that the order be clarified to properly reflect the district court's intent.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2019, Wright stole a vehicle at gunpoint while at a Salina gas station. After the victim reported the carjacking, Salina police officers identified the stolen vehicle and pursued Wright. A car chase ensued during which Wright rammed the stolen vehicle into an officer's patrol vehicle and fired gunshots at three other officers in marked patrol vehicles who were attempting to stop him. One officer was injured when a bullet shattered his windshield and broken glass went into his eyes.

Wright eventually drove the vehicle off the road and down an embankment into a field. He exited the vehicle, and, believing that Wright was pointing a gun at them, four police officers engaged in a shootout with him. Wright ran further into the field but was ultimately shot and wounded. Officers took Wright into custody and recovered a Ruger GP100 handgun. The firearm contained four cartridge casings and two empty slots, suggesting Wright had fired at least four shots.

The State charged Wright with six counts of attempted capital murder, four counts of criminal damage to property, three counts of unlawful possession of a controlled substance, and a single count each of aggravated robbery, aggravated battery, fleeing and eluding, and unlawful possession of drug paraphernalia.

Before trial, Wright and his attorneys participated in a successful mediation session with the State. Retired district court judge Jerome Hellmer served as the mediator. Following mediation, the parties went before a district court judge and announced they had reached a plea agreement. Wright agreed to plead guilty to three counts of attempted first-degree murder and one count of aggravated battery in exchange for the State's assurance it would dismiss its motion for an upward departure. The parties agreed to jointly recommend a prison sentence of 30 years. Wright confirmed that he

thoroughly discussed the plea with his attorney, he fully understood the proposed agreement and was freely and voluntarily entering the plea.

A formal plea hearing followed, and Wright entered his guilty pleas to three counts of attempted first-degree murder and one count of aggravated battery. He reiterated that he was freely and voluntarily entering his plea and asserted that he was not under the influence of any substance that might impair his judgment. He also assured the court that no one coerced or intimidated him into entering his plea, and he was satisfied with his counsel's representation. The district court found there was a sufficient factual basis in the record to support the pleas, accepted the pleas, and found Wright guilty of the specified offenses.

A few weeks later, Wright moved to withdraw his plea and alleged that following the mediation session, Judge Hellmer ordered that Wright be segregated from other inmates so they would not persuade Wright to change his mind about the plea agreement. He also asserted that the harsh conditions of his isolated confinement compromised his ability to understand the plea agreement and reduced him to an unstable state of mind at the time of the plea hearing.

Wright's plea counsel withdrew, and new counsel was appointed to represent Wright on his claims. His new attorney filed a supplemental motion claiming that Wright's isolated confinement also resulted in a plea that emerged from deceit and coercion and that he did not have the benefit of competent counsel throughout the process.

The court conducted an evidentiary hearing to resolve the matter. Wright testified that he had multiple disagreements with trial counsel about strategic theories before their mediation session with the State. Wright asserted that the investigation was biased because a former Salina Police Department officer was the lead investigator for the

Kansas Bureau of Investigation during the officer-involved shooting investigation associated with his case. He also alleged that counsel refused to file a *Brady* motion after assuring Wright that he would do so. See *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (prosecution must turn over all potentially exculpatory evidence to the defense). Wright believed that counsel should have hired an outside investigator because the officers' statements at the preliminary hearing did not match the evidence in discovery.

Wright told the court that he was held in the general population of the Saline County Jail up until the mediation. Consistent with his motion, he claimed that after he agreed to enter a guilty plea, Judge Hellmer directed that Wright be separated from the general population so that other inmates could not persuade Wright to change his mind about the plea deal. Wright testified that when he returned to the jail after mediation, the deputies told him they were holding him in booking on a "watch." Wright claimed that he refused to go because he did not want to be held in such notoriously deplorable conditions but that due to his alleged noncompliance, deputies tased and forcibly placed him in booking. Wright alleged that he endured lock down for 24 hours a day, accompanied by sleep deprivation borne of consistent bright lights and that he was deprived of the ability to make telephone calls.

Wright's prior counsel, Joseph Allen and Charles Lindberg, also testified at the hearing. Allen admitted that he told Wright the plea deal offered at mediation was the best offer Wright had received to date and explained that acceptance of the offer, which contemplated an on-grid known sentence with the possibility of good time credit, would enable Wright to know for certain when he might be released from prison. Whereas if he proceeded to trial on the full range of his current charges, his sentence was unpredictable and came with the possibility that he might never be released from prison. Allen testified that he was confident Wright would have been successful on some charges at trial, but

that his case was also plagued with problematic facts that made certain charges difficult to defend against.

Allen added that he and Lindberg discussed the option of a voluntary intoxication defense with Wright, but Allen was concerned how the jury might perceive this information. Thus, Allen thought using Wright's level of intoxication during the incident to mitigate a potential sentence was the more advantageous route to pursue. Allen and Lindberg also harbored concerns that Wright would have to admit to some drug crimes if he opted to testify and before the plea hearing they had not yet decided whether Wright would testify.

Allen explained that he did not file a *Brady* or a *Giglio* motion because they offered no benefit. See *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) (prosecution must disclose to defense all potential impeachment information regarding government witnesses). That is, much of the evidence consisted of interviews with law enforcement officers, and he did not believe there was any issue with their statements or reports. Additionally, any failure by the State to turn over exculpatory evidence in its control would be beneficial to Wright on appeal. Allen explained he opted not to hire an investigator because he did not want to risk uncovering other officers who claimed Wright also shot at them and who then might be added as new victims. In his professional opinion, Allen did not believe an independent investigation would change the complexion of the case.

Finally, Allen acknowledged that the jail placed Wright in isolation after the mediation session but had no recollection of any orders for Wright to be isolated from other inmates. To the extent any such comments were made Allen believed it was done in jest. Allen knew Wright was less than pleased about his placement in isolation and acknowledged it made him slightly concerned that Wright might change his mind about the plea. But when Allen spoke with Wright before the plea hearing, Wright advised

Allen that he wanted to proceed as planned. Finally, Allen asserted that he did not believe there was any evidence to support Wright's allegation that he was coerced, threatened, forced, or unduly pressured into entering a plea.

Lindberg testified that he was not present at the end of the mediation when Judge Hellmer made the alleged comment to hold Wright in isolated confinement, but believed if such an order was implemented it was deemed necessary for Wright's emotional benefit. Lindberg also recalled that Judge Hellmer explained that the proposed plea deal guaranteed Wright would have a release date, unlike a potential life sentence.

The district court declined to find that Wright demonstrated good cause to withdraw his plea through fulfillment of the *Edgar* factors and denied his motion. The case proceeded to sentencing and Wright received a prison term of 360 months, as well as an order to remit $2,596.06 in restitution. That amount reflected the out-of-pocket expenses law enforcement incurred as a result of the damage Wright caused to their patrol vehicles. Wright argued the amount was unworkable due to his lengthy prison sentence, but the State countered that Wright was able obtain a job during his incarceration to pay off the amount due. The district court concluded that the amount was not unworkable based on the State's arguments and specifically ordered that Wright make restitution payments while incarcerated. But the court failed to specify, at either the hearing or in its corresponding restitution order, when Wright's restitution was due.

Wright timely brings the matter before us to analyze whether the district court erred in denying his request to withdraw the plea and issuing a restitution order with parameters that are unclear.

LEGAL ANALYSIS

The district court did not abuse its discretion when it concluded that Wright failed to establish good cause existed to allow him to withdraw his plea.

Wright contends that the poor conditions of his confinement and his lack of confidence in his attorney coerced him into entering an involuntary plea. The State responds that Wright's confinement did not affect his ability to enter a knowing and voluntary plea and he was represented by competent counsel.

Appellate courts review a district court's decision to deny a motion to withdraw a guilty or no contest plea before sentencing for an abuse of discretion. A judicial action constitutes an abuse of discretion if it (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. *State v. Frazier*, 311 Kan. 378, 381, 461 P.3d 43 (2020). Wright bears the burden to establish that the district court abused its discretion in denying his presentence motion to withdraw plea. See *State v. Woodring*, 309 Kan. 379, 380, 435 P.3d 54 (2019). Appellate courts review the district court's factual findings for substantial competent evidence. We do not reweigh the evidence or assess witness credibility but defer to the trial court's findings of fact when reviewing its decision to deny a motion to withdraw plea. *State v. Johnson*, 307 Kan. 436, 443, 410 P.3d 913 (2018).

"A plea of guilty or nolo contendere, for good cause shown and within the discretion of the court, may be withdrawn at any time before sentence is adjudged." K.S.A. 2022 Supp. 22-3210(d)(1). Good cause is a "'lesser standard'" for a defendant to meet, when compared to the manifest injustice standard for postsentence motions. *State v. Aguilar*, 290 Kan. 506, 512, 231 P.3d 563 (2010). When determining whether a defendant has established good cause to withdraw their plea, a district court generally looks to these three factors from *State v. Edgar*, 281 Kan. 30, 36, 127 P.3d 986 (2006): (1) whether the defendant was represented by competent counsel; (2) whether the

defendant was misled, coerced, mistreated, or unfairly taken advantage of; and (3) whether the plea was fairly and understandingly made. *Frazier*, 311 Kan. at 381. These factors should not "be applied mechanically and to the exclusion of other factors." *State v. Fritz*, 299 Kan. 153, 154, 321 P.3d 763 (2014).

Wright's arguments to us encompass all three *Edgar* factors. Under the first of those he asserts that his deteriorating relationship with Allen caused him to accept the plea offer because he had lost confidence in his counsel's ability and willingness to go to trial. Under the second and third factors, Wright contends the harsh conditions of his confinement adversely affected his mental state, which in turn compromised his ability to enter a voluntary plea.

Although the first *Edgar* factor permits counsel's performance or lack thereof to be one of the appellate court's considerations, the defendant need not show ineffective assistance rising to the level of a violation of the Sixth Amendment to demonstrate good cause. *Aguilar*, 290 Kan. at 512-13. Rather, the Kansas Supreme Court clarified that the district court must use the lesser "lackluster advocacy" standard when determining whether counsel provided competent representation in this context. *State v. Herring*, 312 Kan. 192, 474 P.3d 285 (2020); *Aguilar*, 290 Kan at 513 ("Merely lackluster advocacy . . . may be plenty to support the first *Edgar* factor and thus statutory good cause for presentence withdrawal of a plea."). At the same time, the district court need not expressly use the words "lackluster advocacy" on the record in ruling on a motion to withdraw plea under the first *Edgar* factor. *State v. Bilbrey*, 317 Kan. 57, 66, 523 P.3d 1078 (2023).

In thoroughly examining each of Wright's allegations under the first *Edgar* factor, the district court concluded that Allen and Lindberg vigorously defended Wright at multiple hearings, answered his questions, maintained communication, and provided their honest and open professional opinion with Wright regarding his chances at trial.

Although Wright had multiple disagreements with counsel concerning what strategy to pursue, the district court properly determined that trial tactics lie within the discretion and decision of the defense attorney, and Allen made competent strategic decisions within the scope of his professional representation. The court also found that mere disagreements with counsel do not establish incompetent representation.

Substantial competent evidence supports the district court's ruling that Wright received adequate representation throughout the process just before the plea hearing as well as at the hearing specifically. The record before us reflects that Allen and Lindberg dutifully represented Wright at his preliminary hearing, motion hearings, mediation, and the plea hearing. Allen provided Wright with his honest, professional opinion about Wright's chances at trial so that Wright could fully understand his decisions and their potential impact; that is, the ramifications of agreeing to an on-grid sentence with an ascertainable release date compared to potentially facing an off-grid sentence at trial. Given that Wright was facing a potential life sentence and there were indisputable facts unfavorable to Wright's defense, Allen told Wright that the plea was the best option available if he wanted a guaranteed release date. We agree with the district court that Allen's honest advice about the consequences of the plea offer versus the likelihood of success at trial does not support a finding that Allen's representation was lackluster.

Wright had disagreements with Allen on what strategy to pursue and Allen acknowledged the same but there is evidence in the record, from Allen's testimony, that they consistently worked through those struggles, and he always provided the best answers possible to all of Wright's questions. For example, when Wright sought advice on a voluntary intoxication defense, counsel discussed controlling caselaw with him and explained the potential effectiveness of such a defense. They shared similar discussions on the benefit, or lack thereof, in hiring an independent investigator. Lindberg testified that he maintained good rapport with Wright, and he would often provide Wright with caselaw upon Wright's request. Therefore, we are satisfied that the record confirms the

district court's conclusion that Wright's counsel answered his questions and maintained communication.

Next, the disagreements between Wright and Allen do not support a finding of deficient representation. Allen explained he had concerns about a potential jury's perception of a voluntary intoxication defense and therefore, preferred to use that information as a mitigating factor for a whatever sentence might be imposed. Allen adequately addressed the *Brady* and *Giglio* matters and offered a satisfactory explanation for opting not to pursue those avenues—that nearly all the evidence consisted of video recordings of the incident made by officers during the incident, and there was no indication the State failed to honor its obligation to turn over all relevant evidence. As far as the independent investigator, Allen's concern that it risked uncovering additional victims is a plausible one and he correctly surmised it would not be beneficial to Wright's defense.

Nor does the record support Wright's allegations that these disagreements jettisoned his confidence in Allen's ability or willingness to proceed with trial, leaving him with the sense that his only option was to enter a plea. Wright directs us to the justifiable dissatisfaction standard that attends motions seeking substitute counsel to try to illustrate that the conflict between him and his counsel had a coercive effect. Such occurrences arise when there is a conflict of interest, an irreconcilable disagreement, or a complete breakdown in communication between counsel and the defendant. *State v. Marshall*, 303 Kan. 438, 448, 362 P.3d 587 (2015). Wright argues that, under the totality of the circumstances, his irreconcilable differences and complete breakdown of communication with Allen should establish good cause to withdraw his plea.

Even if we entertained Wright's efforts to pull an extraneous legal standard into the purview of a plea withdrawal claim, the record reflects there was simply no evidence of irreconcilable differences or an absolute breakdown in the communication between

them. To the contrary, Allen's and Lindberg's testimonies suggest a free flow of communication. They adequately discussed trial strategy with Wright, answered any questions he might have and, from counsel's perspective, Wright and his attorneys "were on the same page on 90 percent of the things, and on 10 percent of the things we had struggles and we talked through those struggles." Further, it cannot be overlooked that during the plea hearing, Wright acknowledged he had sufficient time to discuss all the facts and potential defenses of this case with counsel and he was satisfied with the representation he received. Wright fails in his burden to persuade us that Allen's and Lindberg's representation was subpar.

Wright further argues that the conditions of his confinement coerced him into entering an involuntary plea which provided good cause to withdraw his plea in accordance with the second and third *Edgar* factors. To be constitutionally valid, guilty pleas and their resulting waiver of rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of relevant circumstances and likely consequences. *State v. Shields*, 315 Kan. 131, 140, 504 P.3d 1061 (2022). Wright acknowledges that confinement in isolation is not sufficient by itself to sustain a finding that a guilty plea was entered involuntarily or under coercion. See *Reid v. State*, 213 Kan. 298, Syl. ¶ 1, 515 P.2d 1040 (1973). In an effort to illustrate a necessary distinction he focuses on the fact his cell allegedly contained blood and human waste, lacked any sort of bed, and was consistently illuminated. He also asserts that incessant screaming from other inmates caused him to suffer sleep deprivation, which rendered him unable to fully understand the consequences of his plea.

The record does not support Wright's contentions. Although both parties agree that he experienced rather unpleasant conditions while at the jail and that the reason for his placement is unclear, the fact remains that Wright had already agreed to plead guilty during mediation, before he was ever placed in isolated confinement. The record reflects that following mediation, Wright appeared before the district court alongside his

attorneys, and with Judge Hellmer present, and acknowledged that he understood the terms of the agreement, he had sufficient time to discuss its details with counsel, and his decision to enter the plea was made freely and voluntarily. Then, even after Wright was placed in isolation following mediation and the aforementioned hearing, he confirmed to his attorneys that it remained his desire to move forward with the plea. At the formal plea hearing, Wright reiterated to the district court that he reviewed the agreement with his attorneys, he clearly understood its terms, he was not forced, threatened, or intimidated into entering his plea, and was freely and voluntarily pleading guilty to the charges outlined in the agreement.

Substantial competent evidence supports the district court's finding that Wright understood the consequences of his plea and that his decision to enter the same was neither the product of coercion nor helplessness borne of lackluster advocacy from counsel.

Wright waived his claim there was not sufficient evidence to support the factual basis of his guilty plea by failing to preserve the issue for appeal.

Wright next argues for the first time on appeal there was insufficient evidence to support the factual basis of his guilty plea.

Generally, issues not raised before the district court cannot be raised on appeal. See *State v. Green*, 315 Kan. 178, 182, 505 P.3d 377 (2022). There are several exceptions to this general rule, including that (1) the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) the district court was right for the wrong reason. *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021).

Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36) requires an appellant to explain why an issue that was not raised below should be considered for the first time on appeal. *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019). In *State v. Williams*, 298 Kan. 1075, 1085, 319 P.3d 528 (2014), and *State v. Godfrey*, 301 Kan. 1041, 1044, 350 P.3d 1068 (2015), the Kansas Supreme Court warned that Supreme Court Rule 6.02(a)(5) would be strictly enforced, and litigants who skirted this rule risked a ruling that the issue is improperly briefed, and the issue will be deemed waived or abandoned. See *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018).

Wright's motion to withdraw plea contained no allegations that his plea lacked a sufficient factual basis. Therefore, we construe Wright's claim as raised for the first time on appeal. Wright acknowledges that he did not present this issue to the district court for consideration and offers two arguments as potential avenues for our first-time review.

First, Wright contends that his claim constitutes an alternative means challenge, which he alleges can be raised for the first time on appeal because it implicates the sufficiency of the evidence to support a conviction. See *State v. Eddy*, 299 Kan. 29, 32, 321 P.3d 12 (2014); *State v. Farmer*, 285 Kan. 541, Syl. ¶ 1, 175 P.3d 221 (2008). But both those cases concerned sufficiency of the evidence to support convictions stemming from a jury trial. 299 Kan. at 31; 285 Kan. at 544. Wright does not provide a persuasive argument for how these two cases cast doubt on the longstanding rule that appellate courts will not review a guilty or nolo contendere plea absent a timely motion to withdraw that plea.

Wright next directs us to *State v. Ford*, 23 Kan. App. 2d 248, 253, 930 P.2d 1089 (1996) (*abrogated on other grounds by State v. Schow*, 287 Kan. 529, 197 P.3d 825 [2008]), in which a panel from this court elected to consider whether there was a sufficient factual basis for the defendant's plea for the first time on appeal. The *Ford* panel reasoned that the case fit under the first and second exceptions to the general rule

preventing appellate review of constitutional issues for the first time on appeal. 23 Kan. App. 2d at 253. But Wright does not address how the circumstances of his case fall under the exceptions. He merely directs us to one instance in which another panel of this court decided to review a similar issue for the first time on appeal where substantive arguments were presented with respect to the exceptions. Even so, we are not bound by the decision of a previous panel of this court. *State v. Cottrell*, 53 Kan. App. 2d 425, 434, 390 P.3d 44 (2017), *aff'd* 310 Kan. 150, 445 P.3d 1132 (2019).

Wright also cites to *State v. Shaw*, 21 Kan. App. 2d 460, 464, 901 P.2d 49 (1995), in which another panel of this court sua sponte raised whether there was a sufficient factual basis for the defendant's plea. See also *State v. Shaw*, 259 Kan. 3, 11, 910 P.2d 809 (1996) (affirming the court of appeals' decision to consider the issue for first time on appeal). But again, Wright does not explain how the panel's analysis in *Shaw* is relevant or persuasive to the circumstances of his case. Wright has not adequately briefed whether he preserved the issue for appeal and has thus abandoned and waived any claim related to the factual basis of his plea. See *State v. Logsdon*, 304 Kan. 3, 29, 371 P.3d 836 (2016) ("a failure to adequately brief an issue results in abandonment or waiver").

The district court abused its discretion when it failed to specify in the restitution order when payment became due.

In his final issue on appeal, Wright argues that his restitution order is perhaps unworkable because the district court neglected to specify when payment became due, and given his incarceration, the option to satisfy the obligation within 60 days of the order is not feasible.

An appellate court reviews a restitution order for an abuse of discretion. *State v. Tucker*, 311 Kan. 565, 566, 465 P.3d 173 (2020). "Judicial discretion is abused if no

reasonable person would agree with the decision or if the decision is based on an error of law or fact." *State v. Meeks*, 307 Kan. 813, 816, 415 P.3d 400 (2018).

Under K.S.A. 2022 Supp. 21-6604(b)(l) restitution ordered as part of the defendant's sentence is "due immediately unless: (A) the court orders that the defendant be given a specified time to pay or be allowed to pay in specified installments; or (B) the court finds compelling circumstances that would render restitution unworkable, either in whole or in part." If the defendant does not comply with the order within 60 days, "the court shall assign an agent procured by the judicial administrator pursuant to K.S.A. 20-169, and amendments thereto, to collect the restitution on behalf of the victim." K.S.A. 2022 Supp. 21-6604(b)(2). The defendant is then required to also pay the costs of collection, including collector's fee, filing fees, and debts owed to the court such as "any interest or penalties on such unpaid amounts as provided for in the judgment or by law." K.S.A. 2022 Supp. 20-169(b)(3), and (4).

At sentencing, the State argued that Wright would have a chance to pay the restitution amount over his 30-year sentence if he obtained a job in prison. Wright responded that the State's proposed restitution would be unworkable because due to the nature of his convictions he would be placed in a maximum-security facility and unable to participate in a work program. The district court found the restitution order workable because Wright may have opportunities for employment during his incarceration. The court stated that the restitution and other costs would be made payable while Wright is incarcerated, but it did not articulate whether Wright must fulfill the obligation by a date certain or whether he would be permitted to pay in installments. The sentencing journal entry likewise does not shed any light on the issue.

From the transcript it appears it was the district court's intention for Wright to make restitution payments over the course of his incarceration, but it failed to make the findings required to reflect such intentions. That type of inaction constitutes an error of

law. Thus, we must reverse and remand Wright's restitution order for further clarification on the sole issue of when payment is due.

Affirmed in part, reversed in part, and remanded with directions.