

NOT DESIGNATED FOR PUBLICATION

No. 124,761

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

LAROYCE DEJON THOMAS,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; TIMOTHY P. MCCARTHY, judge. Opinion filed July 28, 2023. Affirmed.

Hope E. Faflick Reynolds, of Kansas Appellate Defender Office, for appellant.

Shawn E. Minihan, assistant district attorney, *Stephen M. Howe*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before HILL, P.J., HURST, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: Before sentencing, Laroyce Dejon Thomas asked to withdraw his no-contest pleas to attempted second-degree murder, possession of a firearm by a felon, and attempted aggravated robbery. The district court declined, and Thomas appeals. Treating this appeal as a matter of judicial discretion, we affirm.

After a preliminary hearing, Thomas and the State enter a plea agreement.

The State charged Thomas with one count of attempted second-degree murder, possession of a firearm by a felon, and attempted aggravated robbery. The victim in the alleged crimes, Taylor Burford, testified and was cross-examined at the preliminary hearing. After Thomas was bound over for trial, a trial date was set for September 16, 2019. On September 7, 2019, the State moved to declare Burford as an unavailable witness and to admit her testimony from the preliminary hearing.

Less than a week later, Thomas agreed to enter a no-contest plea to the charges. In exchange for his plea, the State would recommend that his sentences be served concurrently. The State also would agree to a durational departure sentence and that Thomas' sentences would be served consecutively to a sentence in another case. The plea agreement did not mention that Thomas might be required to register under the Kansas Offender Registration Act, K.S.A. 2019 Supp. 22-4901 et seq. Nor was registration mentioned during the discussions in court when Thomas entered his plea.

After his conviction but before sentencing, Thomas moved, pro se, to withdraw his plea. The district court then appointed Thomas a different defense counsel who filed another motion to withdraw his plea. According to counsel's motion, Thomas' prior defense counsel, Zane Todd, did not tell him that the State moved to have the alleged victim declared unavailable and did not review any registration act requirements prior to Thomas entering his plea.

At a hearing on the motion, Todd testified that he talked to Thomas after the State moved to have Burford declared an unavailable witness but he did not recall specifically talking to Thomas about the motion. He thought that the State was worried about its witness and believed that he spoke to Thomas about the State's worries. Todd also

recalled speaking with Thomas the day that Thomas entered his plea but did not recall discussing the motion to declare Burford unavailable.

Todd did recall speaking about the registration requirements with Thomas after Thomas was charged in another case. Todd testified that he did "remember [he] had a conversation with him maybe at the time of the previous trial setting several months before about the registration requirements and what would be required if we entered a plea or if he was found guilty." But he also acknowledged that Thomas most likely did not receive a written notice to register.

On cross-examination, Todd testified that he had been working in criminal law for almost 26 years. According to Todd, in April 2019 he knew that there was an active warrant for Burford's arrest after she failed to appear in her own criminal case. Todd remembered talking about her failure to appear and the arrest warrant with Thomas. He also discussed with Thomas that because Burford testified at the preliminary hearing, there was at least a possibility that the State could use her preliminary hearing testimony at trial. Todd testified that he told Thomas they had the "best leverage" for a good plea agreement while Burford was unavailable.

From this position of perceived strength, Todd engaged in plea negotiations with the State and took the resulting plea offer back to Thomas. Todd explained that as far as he could remember, he told Thomas that if he was convicted, he would likely have registration requirements. Todd also explained that he had informed Thomas that if he went to trial and lost, he could be "facing a lot of time." According to Todd, he told Thomas that the plea offer was "significantly shorter than he was looking at" with his attempted murder charge.

After considering the evidence and arguments from the parties, the district court denied Thomas' motion to withdraw his plea but granted his request for a durational departure and sentenced him to 84 months' imprisonment.

In this appeal, Thomas argues that the district court abused its discretion by failing to apply the appropriate legal standard to his motion and by failing to make adequate findings.

We review the rules that guide us on questions such as this.

We review a district court's decision to deny a presentence motion to withdraw a guilty or no-contest plea for an abuse of discretion. *State v. Frazier*, 311 Kan. 378, 381, 461 P.3d 43 (2020). "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. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). The party asserting the district court abused its discretion bears the burden of showing such abuse of discretion. *State v. Crosby*, 312 Kan. 630, 635, 479 P.3d 167 (2021).

When deciding whether a defendant has shown good cause to withdraw his or her plea, a district court must look at three factors listed in *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. But the 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). A defendant need not show that his or her counsel was unconstitutionally ineffective; instead, the defendant may rely on "'lackluster advocacy'" to support good cause under the first *Edgar* factor. *State v. Herring*, 312 Kan. 192, 198, 474 P.3d 285 (2020).

Thomas focuses on the first *Edgar* factor—whether Thomas was represented by competent counsel. Thomas argues that the district court did not apply the proper standard or make sufficient findings to support its decision and, instead, relied on its own opinion of defense counsel's general competency based on experience. In his brief, Thomas points to the district court's statement, "I do believe that Mr. Thomas was represented by competent counsel. Mr. Todd is a very experienced criminal defense attorney, and I don't think that that's a factor that the Court is going to consider here."

To support his argument, Thomas cites *State v. Aguilar*, 290 Kan. 506, 515, 231 P.3d 563 (2010), where the Kansas Supreme Court held that a district court abused its discretion by denying the defendant's motion to withdraw her plea after the court stated that it had "[defense counsel] in this courtroom a lot of times. I think he does a good job." The Kansas Supreme Court reasoned that the "mere acquaintance with [defense counsel's] earlier performances and the judge's awareness that Aguilar had reviewed the plea agreement with her counsel were not enough" to satisfy the first of the *Edgar* factors. 290 Kan. at 515. But see *State v. Egan*, No. 122,566, 2021 WL 1228129, at *3 (Kan. App. 2021) (unpublished opinion) (finding no error where district court relied, in part, on experience with defense counsel to determine defense counsel was competent).

The factual differences in this case cause us to look deeper into *Aguilar*. There, we see that the defendant and a codefendant were both represented by the same counsel who offered them a deal if they kept their cases together and both pled guilty. Shortly after entering her plea, Aguilar moved to withdraw her plea, making three claims: that she had ineffective assistance of counsel; that counsel had a conflict of interest due to his simultaneous representation of the two codefendants; and that she felt pressured due to the financial aspects involved in the case.

On appeal, the Kansas Supreme Court reversed and remanded because

"[u]nder the particularly egregious facts of this case—in which the conflict of interest between the defendant and her jointly represented codefendant was insurmountable, and the record reveals no sufficient disclosure by counsel and waiver by the client—Aguilar met her burden to show good cause to grant her presentence motion to withdraw her plea." 290 Kan. at 515.

The district court's failure to properly address the conflict of interest and its influence on the first *Edgar* factor was an abuse of discretion under the circumstances. 290 Kan. at 515.

The facts here are not insurmountable problems like those found in *Aguilar*. They are not even close. In *Aguilar*, the Supreme Court held the conduct of defense counsel and the conflict of interest created problems that were "insurmountable." 290 Kan. at 515. In contrast, the only allegation about incompetent or lackluster assistance here involves whether Todd told Thomas about the possibility that the State's witness would be unavailable and the registration requirements that could occur in the event of a conviction.

And the record shows that Todd provided testimony against Thomas' assertions. According to Todd, he spoke with Thomas in depth about the State's witness potentially being unavailable and the possible impact—good and bad—that could have on a trial. Todd also testified about speaking with Thomas about "all the details of what would be required if he got convicted," which included registration. Todd specifically recalled "a conversation with [Thomas] maybe at the time of the previous trial setting several months before about the registration requirements and what would be required if we entered a plea or if he was found guilty."

Even though the district court spent little time on Todd's competency when making its decision, there is evidence that supports a finding that Todd acted competently when counseling Thomas about the risks and benefits of entering into the plea agreement. Thomas could have objected to the district court's findings, or lack thereof, on the issue but failed to do so. Thomas has not convinced us that Todd provided lackluster advocacy here. Evidence supports a finding that Todd acted as an effective advocate for Thomas.

Thomas has failed to show that the district court's decision was an abuse of discretion. The district court was clearly aware of the *Edgar* factors and considered them, even if the court's oral ruling did not discuss the first factor in detail. There was sufficient evidence to support the district court's decision to deny Thomas' motion to withdraw his plea. Based on a review of the record, we conclude that the district court properly determined that Todd provided competent counsel; that Thomas was not misled, coerced, mistreated, or unfairly taken advantage of; and that his plea was fairly and understandingly made. See 281 Kan. at 36.

The district court did not abuse its discretion by denying Thomas' motion to withdraw his plea.

Affirmed.