NOT DESIGNATED FOR PUBLICATION

Nos. 124,947
124,950

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

MARVIN LEWIS REESE,
Appellant.

MEMORANDUM OPINION

Appeal from Atchison District Court; JOHN J. BRYANT, judge. Opinion filed June 2, 2023. Affirmed.

Emily Brandt, of Kansas Appellate Defender Office, for appellant.

Sherri L. Becker, county attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before CLINE, P.J., MALONE and ATCHESON, JJ.

PER CURIAM: After he was sentenced, Marvin Lewis Reese sought to set aside a guilty plea he entered as part of a plea agreement. He claims he misunderstood the plea agreement, due in part to his attorney's failure to properly explain it. The district court found Reese understood the plea agreement and its consequences and denied his motions. We find no error and so affirm the judgment of the district court.

FACTS

One evening in January 2020, Reese hatched an ill-fated and alcohol-infused plan to earn the money he needed to repair broken windows in his home. Reese had recently attempted to get his insurance company to cover the repairs, but the company denied the claim because his policy apparently only covered fire or storm damage. So Reese decided to set one of his windowsills on fire, thinking he could make a new insurance claim which would now be covered.

Reese lit a piece of plastic near one of his windows on fire. He then called the fire department to report the fire. When the Atchison Fire Department and law enforcement arrived, the bottom right corner of a plywood board covering that window was still burning. Reese at first blamed an ex-girlfriend, claiming she had recently threatened to burn down his house. But after one of the officers challenged inconsistencies in his story, Reese admitted he set the fire and turned over the grill lighter he used.

Reese was charged with arson and interference with a law enforcement officer. When he appeared for his arraignment in September 2020, his attorney announced that the parties had reached a plea agreement. Reese pleaded guilty to arson, and in exchange, the State dismissed the interference with a law enforcement officer charge and agreed to remain silent on Reese's motion for a sentencing departure to probation.

The district court questioned Reese about his plea and discussed various rights Reese waived by entering it. During this colloquy, Reese represented that he had enough time to discuss the matter with his attorney. He also agreed the State accurately recited the factual basis to support the plea, which included describing that Reese had caused the fire resulting in damage to his house, intending to make an insurance claim. The court accepted Reese's plea and found him guilty of arson.

In December 2020, Reese moved for a downward dispositional departure and imposition of a nonprison sanction or, in the alternative, a downward durational departure. At the hearing on Reese's motion, the district court noted Reese had 20 prior convictions and had been arrested twice on new charges during this case. The court concluded that Reese had not accepted responsibility for his actions and was not amenable to treatment and rehabilitation because he continuously violated the law. It thus found Reese posed a risk to the public's safety and denied his motion. The district court sentenced Reese to 36 months' imprisonment with 24 months' postrelease supervision.

Apart from filing a direct appeal, Reese filed at least 10 pro se motions to withdraw his plea, which were all based on nearly identical arguments. Reese claimed that he believed under the plea agreement (1) he would be sentenced to probation rather than imprisonment, (2) he would plead guilty to attempted arson rather than arson, and (3) both the State and his trial counsel misinformed him on the matter. He also filed a pro se K.S.A. 60-1507 motion alleging ineffective assistance of counsel in relation to the plea.

The district court appointed counsel to represent Reese on these motions and held an evidentiary hearing on December 7, 2021. Both Reese and his former attorney testified. Reese testified he agreed to plead to attempted arson, not arson, which he understood would result in a sentence of one year's probation. He first claimed he should have been charged with attempted arson instead of arson because he alleged his home suffered no damage from the fire. Later, he testified there was minimal damage to his home, but it was "already fixed."

When examined about the questions he answered during his plea hearing, which included questions about whether Reese understood the proceedings, nature of his plea, and potential sentence, Reese claimed he did not understand the judge's questions. But he admitted he told the district judge he was satisfied with the services of his attorney.

Reese's attorney testified that Reese did not appear confused about the plea negotiations and understood he was pleading guilty to arson, which would carry a presumptive prison sentence based on Reese's criminal history. He said he asked the prosecutor about amending the charges to attempted arson, to which the prosecutor responded with a "pretty firm no." He testified that he told Reese about the prosecutor's position, including that the prosecutor would not entertain any further negotiations and the plea agreement presented was the "best plea offer" they would get. He also said Reese knew he was facing a presumptive prison sentence since they discussed the departure motion at length. And when he spoke to Reese after the sentencing, he said although Reese was disappointed in the district court's ruling, he never expressed any misunderstanding about what had occurred.

The district court denied Reese's motions to withdraw his plea and his K.S.A. 60-1507 motion after finding the record of the plea hearing revealed "no question" about the fact that Reese was pleading to a charge of arson and not attempted arson. It also pointed out Reese's representations at that hearing that he had enough time to speak with his attorney about the plea and that he understood it. And as for the factual basis for the plea, it pointed out that Reese admitted at the evidentiary hearing that his home was damaged.

Reese appealed the denial of both his motions to withdraw his plea and the denial of his K.S.A. 60-1507 motion. At his request, we consolidated these appeals. But Reese only addressed the denial of his motions to withdraw his plea in his appellate briefing. Therefore, we consider his appeal of the denial of his K.S.A. 60-1507 motion to be abandoned. See *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021). Accordingly, we affirm the district court's denial of that motion on this basis.

ANALYSIS

Generally, appellate courts review a district court's decision to deny a postsentencing motion to withdraw a guilty or no-contest plea for an abuse of discretion. See *State v. Ellington*, 314 Kan. 260, 261, 496 P.3d 536 (2021) (postsentencing motion to withdraw plea). "A district court abuses its discretion if its decision is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. [Citation omitted.]" *State v. Moore*, 302 Kan. 685, 692, 357 P.3d 275 (2015).

An appellate court defers to the district court's factual findings so long as those findings are supported by substantial competent evidence. *State v. Anderson*, 291 Kan. 849, 855, 249 P.3d 425 (2011). Substantial competent evidence "'is evidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved.'" *In re D.D.M.*, 291 Kan. 883, 893, 249 P.3d 5 (2011). "The movant bears the burden to prove the district court erred in denying the motion. [Citation omitted.]" *State v. Hutto*, 313 Kan. 741, 745, 490 P.3d 43 (2021).

The only reason a district court may set aside a conviction and permit the defendant to withdraw a plea after sentencing is "[t]o correct manifest injustice." K.S.A. 2022 Supp. 22-3210(d)(2). "Factors a court generally considers in determining whether a defendant has shown the manifest injustice necessary to withdraw a plea after sentencing mirror those considered when reviewing for good cause to support a presentence motion." *Hutto*, 313 Kan. at 745.

The district court "should evaluate 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. [Citations omitted.]'" *State v. Edgar*, 281 Kan. 30, 36, 127 P.3d 986 (2006). These considerations are often called the *Edgar* factors. See also *State v. Shields*, 315 Kan. 131, 139-40, 504 P.3d 1061

(2022) (all *Edgar* factors do not have to apply in defendant's favor, and court may consider other relevant factors); *State v. Moses*, 280 Kan. 939, 950-54, 127 P.3d 330 (2006) (noting other factors that may support denial of postsentence motion to withdraw plea include: reasonable promptness of motion, defendant's failure to raise issue in prior direct appeal or K.S.A. 60-1507 proceeding, prejudice to State, defendant's prior involvement in criminal justice system, and defendant's receipt of favorable plea bargain).

Reese argues that two of the *Edgar* factors apply: whether he was represented by competent trial counsel and whether he misunderstood the plea agreement.

The plea agreement was fairly and understandingly made.

Reese relies heavily on his testimony at the evidentiary hearing that he did not understand the plea agreement because he claims he believed (1) he was pleading to attempted arson and not arson and (2) he would receive one year of probation in exchange for his guilty plea. "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 the relevant circumstances and likely consequences.'" *Edgar*, 281 Kan. at 36-37 (quoting *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 [1975]).

The trouble with Reese's argument is, as the district court noted, it overlooks his discussion with the district court at the plea hearing. To begin, a charge of attempted arson was never mentioned at the plea hearing. The only charge mentioned—and, indeed, it was mentioned three times—was count I charging Reese with arson. Reese's attorney announced at the beginning of the hearing that the parties agreed Reese would plead guilty to arson, the district court explicitly asked Reese how he wanted to plead "to the charge of arson, a Level 6 Felony, carrying with it a potential sentence of 17 months to

46 months with the Kansas Department of Corrections," and the court found Reese "guilty of arson, a Level 6 Felony." At no time did Reese question this charge or express any confusion or misunderstanding as to the charge to which he had agreed to plead. Instead, when the court asked him how he wished to plead to the charge of arson, he simply said, "Guilty."

As for his claimed confusion about his potential sentence, the record also belies this claim. First, when the district court asked Reese for his plea, it explained that the charge of arson carried a potential prison sentence of 17 to 46 months. And when Reese's attorney described the plea agreement to the court at the plea hearing, he mentioned the State had agreed to dismiss count II and stand silent on Reese's motion for a downward departure sentence in exchange for Reese's plea. No one mentioned any agreement that Reese would be sentenced to probation.

Next, Reese admitted at the evidentiary hearing on his motions to withdraw his plea that he understood probation was a "possibility . . . not a guarantee." He also acknowledged that the district court told him at the plea hearing it was not a party to the plea agreement and could sentence Reese according to Kansas law.

Finally, at the sentencing hearing Reese's attorney mentioned Reese's presumptive sentence was prison, but he argued the presence of mitigating factors justified a departure to probation. And Reese admitted at the evidentiary hearing on his motions to withdraw his plea that he understood he was "pleading for probation, knowing that [he] could have received a prison sentence" at the sentencing hearing. He acknowledged that his attorney argued for a downward departure to probation at his sentencing hearing, while the State simply stood silent on that issue and did not request probation. And he admitted it would "seem odd" that the State stayed silent and did not argue for probation at the sentencing hearing if the State had agreed to a sentence of probation. He also acknowledged that he

had an opportunity to address the district court directly at the sentencing hearing, yet he expressed no confusion or objection to the State's position on his sentence.

Based on this record, we see no error in the district court's finding that Reese failed to satisfy his burden to prove his plea was not fairly or understandingly made.

Reese was represented by competent trial counsel.

Reese also alleges he was not represented by competent trial counsel and that, but for this deficiency, he would have gone to trial rather than take the plea deal.

"When a postsentence motion to withdraw a plea alleges ineffective assistance of counsel, the constitutional test for ineffective assistance must be met to establish manifest injustice. [Citation omitted.]" *State v. Kelly*, 298 Kan. 965, 969, 318 P.3d 987 (2014). Thus, Reese must demonstrate that (1) his trial counsel's performance fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for these errors, the result of the proceeding would have been different. 298 Kan. at 969 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 [1984]). In the context of a guilty plea, "prejudice means a reasonable probability that, but for the deficient performance, the defendant would have insisted on going to trial instead of entering the plea." *Kelly*, 298 Kan. at 970. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Chamberlain v. State*, 236 Kan. 650, 657, 694 P.2d 468 (1985). Lastly, as is often stated, there is a strong presumption that trial counsel "'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" 236 Kan. at 655.

Reese alleges his attorney's representation was defective because (1) he failed to adequately communicate with Reese about the plea agreement and ensure Reese understood it and (2) he failed to investigate Reese's defense of innocence to the charge

of arson. Reese claims if his attorney had not failed him in this regard, he would not have accepted the plea and would have gone to trial instead because he believed the State could not prove he committed arson.

As for his first claim, Reese complains that he had "minimal conversations with trial counsel about the plea agreement" and none of those conversations took place in person. Reese emphasizes that the plea agreement was not put into writing. Reese also contends that his trial counsel "had concerns" about his "cognitive abilities," but failed to take "documented steps" to ensure Reese understood the plea agreement.

We are not persuaded by Reese's arguments. First, Reese has not established that his attorney's representation was objectively unreasonable. His attorney testified that he met with Reese several times in person, but once the COVID-19 pandemic started, they met by phone. And while his attorney prefers to go over a plea advisory in writing, this was not possible when they were meeting via Zoom during the pandemic. He testified that while he was initially concerned as to whether Reese understood the nature and seriousness of the charges, after spending time going through the discovery and his criminal history, it became clear to him that Reese knew what was going on.

Regardless of the nature of Reese's discussions with his attorney, the important point is the district court found them sufficient since it found that Reese understood the plea agreement. And the record supports this finding, as explained above.

Reese's second argument is similarly unavailing. He maintains that he was innocent of the charge of arson because his property suffered no damage, and his attorney would have seen that if he had viewed the crime scene. Reese stresses that his trial counsel believed that it was in Reese's best interests to accept the plea offer rather than go to trial. He implies that if his attorney had learned his property suffered no damage, he

would not have "pushed Mr. Reese to plead guilty to a crime for which Mr. Reese maintains his innocence."

Again, Reese's argument ignores substantial competent evidence in the record which supports the court's finding. Reese admitted his property suffered damage both at the plea hearing and at the evidentiary hearing on his motions to withdraw his plea. At the plea hearing, the district court asked the State to provide the factual basis of the charge before it accepted Reese's plea. The State described this basis as follows:

> "On January 21 of this year, at [address omitted], located in Atchison, Kansas, Atchison County, which is the defendant's home, he did call law enforcement to report a fire.
>
> "During the fire investigation as well as the subsequent police investigation into the case, the defendant admitted that he set a piece of plastic on fire, which then caught a piece of wood on fire near a window, which caused the fire resulting in the damage to his house.
>
> "He indicated that he was upset about the insurance company not paying for damage to some broken windows in a previous claim and thought if he set the window on fire, he could have a claim for the damage to the house from the fire and then get the windows replaced."

Reese confirmed this is what happened.

Reese also testified at the evidentiary hearing on his motions that his home was damaged because "one piece of sheetrock . . . around where the plug-in was at" was burned, which he replaced.

Therefore, even if we assume (without deciding) that Reese's attorney should have visited his home, we do not find a reasonable probability that this visit would have altered the result of the proceeding. Reese admitted to facts sufficient to support the arson

charge, and he knowingly plead guilty to it. He has failed to sustain his burden to prove manifest injustice based on ineffective assistance of counsel as well.

Given this record, we find the district court did not abuse its discretion in denying Reese's motions to withdraw his plea. And, as noted above, since Reese abandoned his appeal as to his K.S.A. 60-1507 motion, we affirm the denial of that motion as well.

Affirmed.