

NOT DESIGNATED FOR PUBLICATION

No. 124,267

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

BRIAN DOUGLAS BURNS,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; THOMAS KELLY RYAN, judge. Opinion filed April 7, 2023.
Affirmed.

Kai Tate Mann, of Kansas Appellate Defender Office, for appellant.

Jacob M. Gontesky, assistant district attorney, *Stephen M. Howe*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before CLINE, P.J., ISHERWOOD, J., and PATRICK D. MCANANY, S.J.

PER CURIAM: Brian Douglas Burns appeals the district court's denial of his presentencing motion to withdraw his guilty plea. He contends that he did not understand the consequences of the plea agreement. Finding no abuse of discretion, the district court's denial of Burns' motion is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

In early January 2020, Burns was stopped for speeding and ultimately arrested for driving under the influence (DUI). It marked his fourth or subsequent offense, in violation of K.S.A. 2019 Supp. 8-1567(b)(1)(E). The State extended a plea offer and, following consultation with his attorney, Burns decided it was in his best interest to accept.

At the plea hearing, the district court advised Burns as follows with respect to the consequences of his plea:

"[Y]ou could be sentenced up to one year in the custody of the Kansas Department of Corrections. That crime that you would serve for that one-year sentence, any of that time, would all be served locally here through the Johnson County Sheriff's Office at the detention facilities that they operate. You would be required to serve at least 90 days before being eligible for any type of probation or supervision.

"At the end of whatever time you served in custody towards that, you would then be on what's called post-imprisonment supervision, which is a form of probation, and that would be for 12 months. In addition to all of that, you'll also be subject to a fine in the amount of \$2,500 that you would be assessed."

Burns assured the court that no one made any threats against him or promised him anything other than what was contained in the plea agreement. He also confirmed that he had no questions for his attorney or for the court. Burns entered a no-contest plea and the trial court found him guilty of DUI.

Before sentencing, Burns moved to withdraw his plea as not knowingly entered. He claimed that at the time of the plea hearing he did not understand that he could serve his post-imprisonment supervision period in custody, and that such time could run consecutive to his underlying sentence.

The trial court allowed Burns' counsel to withdraw, appointed new counsel, and conducted an evidentiary hearing at which Burns and his original attorney, Emily Barclay, testified. Barclay informed the court she was aware how post-imprisonment supervision operated and understood that one who violated its terms could serve all 12 months of supervision in jail, along with having already served their underlying sentence. She also testified that she made it part of her practice to explain the sentencing structure to her clients charged with felony DUI.

Barclay asserted that her meeting with Burns tracked that practice. She reviewed each individual term of the proposed agreement with him and explained that post-imprisonment supervision worked like parole. That is, if Burns violated even one day of it, he risked serving the entire remaining term in custody. While she did not have an independent recollection of also ensuring that he understood any such term would run consecutive to the jail portion of his sentence, it was a distinct possibility that she did so. Barclay added that she shared a second meeting with Burns later in the plea process at which time she again provided him a detailed explanation of how post-imprisonment supervision operates. Her file notes reflected that she "confirmed that he understood he could finish all of his underlying sentence and then have to do another 12 months for post-imprisonment supervision." Finally, Barclay informed the court that she reviewed the concept of post-imprisonment supervision with Burns a third time during the actual plea hearing when the court afforded them a few moments to speak privately, and her explanation mirrored those she previously provided.

Burns then testified and stated that his primary concern in proceeding with a plea was the amount of time he might serve in custody. He asserted that he told Barclay he would not plead if it meant spending more than one year in custody. He also testified that he did not fully understand what Barclay meant by "underlying sentence" and her

explanation of it led him to believe that he could not possibly be subject to a total of two years of incarceration. His interpretation stemmed, in part, from his experience with probation, which Barclay used as an analogy for post-imprisonment supervision. As a result, he believed that in the event he violated his post-imprisonment supervision, he would only be subject to the rest of his one-year underlying sentence and then his case would conclude. He asserted that if he fully understood that a violation of his post-imprisonment terms could result in him actually being in custody longer than one year, then he would not have opted for the plea. When cross-examined about his conversations with Barclay, Burns testified, "That's the way she may think she said it, but that's not the way I understood it."

The district court denied Burns' motion. It acknowledged his adamancy about a one-year sentence, but also noted that Barclay thoroughly reviewed the post-imprisonment supervision part of the plea agreement with him. It also observed that his criminal history worksheet reflected that this offense constituted Burns' 17th DUI or related conviction, and that his previous experience undercut the notion that Burns was confused about the terms of his plea agreement. Burns was subsequently sentenced to 12 months in jail, followed by 12 months' post-imprisonment supervision.

Burns timely brings the matter to us for a determination of whether the district court erred in denying his motion.

LEGAL ANALYSIS

The district court properly exercised its discretion in denying Burns' presentence motion to withdraw his plea.

Burns contends the trial court should have allowed him to withdraw his plea because, due to counsel's "lackluster advocacy," the concept of post-imprisonment supervision was unclear to him, and it resulted in a plea that was not understandingly

made. The State argues that Burns was adequately informed of the terms of his plea agreement.

Generally, appellate courts review a trial court's decision to deny a motion to withdraw a guilty or no-contest plea for an abuse of discretion. "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). "The movant bears the burden to prove the district court erred in denying the motion." *State v. Hutto*, 313 Kan. 741, 745, 490 P.3d 43 (2021).

K.S.A. 2022 Supp. 22-3210(a) lists the requirements for entering a guilty or nolo contendere plea before or during trial. It embodies due process requirements and adds statutory conditions precedent to the acceptance of a plea. See *State v. Edgar*, 281 Kan. 30, 37, 127 P.3d 986 (2006). A criminal defendant must be fully informed as to the consequences of their plea and the mere language of a written plea agreement, standing alone, will not suffice. Rather, the district court must ensure an offender knows and understands the terms and sentence to which they are subject as a result of the plea. *State v. Moses*, 280 Kan. 939, 948-49, 127 P.3d 330 (2006). But see *State v. Moody*, 282 Kan. 181, 194-95, 144 P.3d 612 (2006) (due process does not require that a defendant be informed of collateral consequences of guilty plea; distinguishing direct and collateral consequences).

"[T]he failure to strictly comply with K.S.A. 22-3210 may be reversible error unless a review of the entire record demonstrates that the plea was knowingly and voluntarily made and otherwise accepted by the trial judge in compliance with the statute. [Citations omitted.]" *State v. Ebaben*, 294 Kan. 807, 816, 281 P.3d 129 (2012). The

inquiry is whether the failure to comply results in the defendant not fully understanding the nature of the charge or consequences of entering a plea. See *State v. Morris*, 298 Kan. 1091, 1105, 319 P.3d 539 (2014) (postsentence motion); *Edgar*, 281 Kan. at 37-38 (presentence motion). See also *State v. Reu-El*, 306 Kan. 460, 473-74, 394 P.3d 884 (2017) (stating that courts should look at the entire plea process in pre- or postsentence motions to determine whether defendant understood nature and consequences of plea).

"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). When determining whether a defendant has shown good cause to withdraw their plea, a trial court generally looks to these three factors from *Edgar*: (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 but should instead operate as "viable benchmarks" for the district court when exercising its discretion. *State v. Schaefer*, 305 Kan. 581, 588, 385 P.3d 918 (2016). See also *Frazier*, 311 Kan. at 382 (applying contract principles to good cause showing).

When endeavoring to establish that issues with counsel's representation provide the good cause required to allow withdrawal of a plea prior to sentencing, a defendant need not "demonstrate ineffective assistance arising to the level of a violation of the Sixth Amendment." Rather, he or she may rely on counsel's "lackluster advocacy" to fulfill the first *Edgar* factor. *State v. Herring*, 312 Kan. 192, 198, 474 P.3d 285 (2020).

Burns asserts that he sufficiently demonstrated good cause to withdraw his plea and directs us to his own testimony that he would not have entered a plea if he fully understood that doing so meant risking a stint in custody that exceeded one year. He then argues that his misunderstanding essentially satisfies all three *Edgar* factors. As support

he states that (1) his plea counsel gave lackluster advice because she neglected to explain how post-imprisonment supervision works; (2) he was misled because his counsel told him that post-imprisonment supervision is like probation that works like parole, which is not true; and (3) his plea was not understandingly made because he did not understand the full consequences of entering a no-contest plea.

There is a measure of guidance to be drawn from *State v. Schwartz*, No. 99,969, 2009 WL 2506285 (Kan. App. 2009) (unpublished opinion). In that case, Joseph Schwartz moved to withdraw his no-contest plea in part because he was allegedly unaware of the sanctions he risked if he violated his postrelease supervision. The *Schwartz* court first noted that postrelease supervision is a direct consequence of a plea and a trial court must allow a defendant to withdraw their plea if he or she did not know that a period of postrelease supervision would be imposed. 2009 WL 2506285, at *2. The court then addressed whether sanctions for violating supervision constitute direct or collateral consequences of the plea and stated:

"We conclude that a defendant who is told the extent of the potential sentence and the length of the postrelease-supervision period is adequately informed about the direct consequences of the plea. It would be a better practice for the court to advise a defendant that a variety of conditions may be placed on the defendant while on supervision—much as conditions are placed on the defendant while on bail—and that the defendant may be sent back to prison for the remainder of the postrelease-supervision period if the conditions of release are violated. We conclude, however, that a reasonable person would assume that there will be some conditions accompanying continued supervision and that violation of those conditions would bring some level of sanction." 2009 WL 2506285, at *3.

In denying Burns' motion to withdraw his plea, the district court cited *Schwartz* and determined that Burns was adequately informed. It also found that while compliance with K.S.A. 2022 Supp. 22-3210 demands that Burns be informed that post-

imprisonment supervision is a direct consequence of his plea, it does not also require his awareness of the collateral consequences associated with violating that supervision.

Burns argues that *Schwartz* is inapplicable because it addresses a different form of supervision—postrelease rather than post-imprisonment. Burns notes that under both probation and parole, the most incarceration one could serve is the underlying sentence. But post-imprisonment supervision violators can be ordered to serve both the underlying sentence and the supervision period in custody. Thus, Burns asserts that describing post-imprisonment supervision as "probation that works like parole," as his attorney did, is misleading and amounts to lackluster advocacy.

Burns makes a fair point about whether the explanation he received was legally sufficient. But the dispositive question here is ultimately a fact question and whether the record as a whole sustains the conclusion that Burns was adequately informed. Barclay testified that Burns confirmed that he understood he could be made to complete his underlying sentence and then do additional time in custody under post-imprisonment supervision. The district court observed Burns and Barclay at the plea hearing and received their testimony at the hearing on Burns' motion. It ultimately determined that Barclay was the more credible of the two and accepted her assertion that Burns knew he could serve his underlying sentence in custody and then serve the post-imprisonment supervision term in custody as well if he violated the terms of that supervision. Its conclusion was also informed, to some degree, by Burns' extensive prior experiences with the criminal justice system.

"When employing an abuse of discretion standard, an appellate court does not reweigh evidence or assess witness credibility." *State v. DeAnda*, 307 Kan. 500, 503, 411 P.3d 330 (2018). The district court's ruling includes an implicit finding that Burns did in fact understand post-imprisonment supervision and what it entailed. The record before us contains substantial competent evidence to support that conclusion. Thus, we decline to

find that the district court abused its discretion when it denied Burns' presentence motion to withdraw his plea.

Affirmed.