

NOT DESIGNATED FOR PUBLICATION

No. 125,010

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

DAVID MICHAEL MARTIN,
Appellant.

MEMORANDUM OPINION

Appeal from Franklin District Court; DOUGLAS P. WITTEMAN, judge. Opinion filed April 14, 2023. Affirmed.

Ryan J. Eddinger, of Kansas Appellate Defender Office, for appellant.

Natalie Chalmers, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before COBLE, P.J., HILL and ATCHESON, JJ.

PER CURIAM: The law gives a district court the discretion to allow a defendant, for good cause, to withdraw a no-contest plea before sentencing. After viewing the video evidence recorded by a deputy's body camera, the district court held that it was ambiguous and did not prove that someone planted drugs on the defendant. The court declined to allow David Michael Martin to withdraw his no-contest plea. This is a matter of discretion for the district court, and we see no reason to overturn the court's ruling.

David M. Martin pled no contest to possession of methamphetamine and driving while his license was suspended upon the advice of his attorney. That advice later came

into question when Martin suggested that a video recording from the deputy's body camera could show that someone must have planted the drugs on him. He moved to withdraw his plea. His motion was denied by the district court and Martin appeals.

Stopped for speeding, Martin is arrested on two outstanding warrants.

Martin was stopped for speeding by a sheriff's deputy. A record check revealed that Martin's driving license was suspended and there were two outstanding warrants for his arrest. Obeying the warrants, the deputy arrested Martin. Incident to the arrest, the deputy searched Martin and removed a small black container from Miller's person. The deputy did not search the container at that time.

After he was taken to the jail, during the booking process, Martin denied having any contraband such as illegal drugs in his possession. But methamphetamine was found by a corrections officer when the officer searched the black container the deputy had removed from Martin's person at the time of his arrest.

When asked about the drugs, Martin subsequently admitted to using methamphetamine about a month earlier, but he said he did not remember what was in his pockets.

The State charged Martin with trafficking contraband into a correctional facility, possession of methamphetamine, and driving while suspended. He subsequently entered into a plea agreement with the State. He pled no contest to possession of methamphetamine and driving while suspended. In exchange for his pleas, the State dismissed the trafficking contraband charge and also dismissed two other pending cases against Martin.

Before sentencing, Martin moved to withdraw his plea, claiming he was unsatisfied with his attorney's representation. In his motion, Martin admitted he was "represented by competent counsel" and his plea "was fairly and understandingly made." But Martin asserted he should be allowed to withdraw his plea because video from the deputy's body camera contradicted the statement in his report that a black pouch containing methamphetamine was removed from Martin's person. Martin asserted the drugs were planted on him and faulted his attorney for not showing him the video before he entered his plea. In other words, if he had seen the video first, he would not have entered a no-contest plea.

At the hearing on Martin's plea withdrawal motion, the district court reviewed the recording from the deputy's body camera. Martin testified at the hearing, claiming the drugs were planted on him and he knew the video would show as much. But when he entered the plea, he believed he could not pursue such a defense without proof of the same. He testified he pled because "[i]t's a big accusation to make without proof."

The district court denied Martin's plea withdrawal motion, finding the video was inconclusive. The district court expressed its doubt about what was depicted by the video recording:

"[A]t best it's ambiguous as to what some of the items may be, but to that extent it's really irrelevant. If you want to present evidence and prove you're not guilty, that's why we have matters set for trial. . . . Those are decisions that need to be made prior to the entry of the plea. The court doesn't see anything here that it believes qualifies as good cause for the withdrawal of the plea."

The court sentenced Martin to a suspended 20 months' imprisonment term, with 12 months' probation. The court further assessed a \$100 fine for the driving while suspended charge and ordered Martin to serve 30 days in jail on weekends.

We review a district court's decision to deny a 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). That means we must be convinced that the decision was

- arbitrary, fanciful, or unreasonable; or
- based on an error of law; or
- it is based on an error of fact.

State v. Levy, 313 Kan. 232, 237, 485 P.3d 605 (2021).

Martin has the burden to prove the district court erred in denying his motion. See *State v. Hutto*, 313 Kan. 741, 745, 490 P.3d 43 (2021).

Since Martin makes no argument about his no-contest plea for driving while suspended, we deem any such claim is now waived or abandoned under the rule in *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021).

On Martin's plea to possession of methamphetamine, the district court found Martin failed to show good cause to withdraw the plea as the law requires. That law is K.S.A. 2022 Supp. 22-3210(d)(1). It states that 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.

Martin argues that he decided to enter his plea because his attorney told him he would be unable to prove the methamphetamine was planted on his person. The district court found Miller's body camera video was, at best, ambiguous about what items he removed from Martin's person in his search incident to arrest. While the video was played at the hearing on Martin's plea withdrawal motion, it is not part of the record on appeal. What is in the record are accounts of the events depicted in the video. Those accounts reflect that the deputy removed Martin's cell phone, billfold, and another object that could not be readily identified. That is all we have in the record to make our ruling. The burden

is upon Martin to show that the district court erred. If the video clearly shows that the methamphetamine was planted on his person, then where is that video?

Martin has not shown us any error in the district court's finding that the body camera video was ambiguous. He has not shown us that, at the time of entering his plea, that he was misled, coerced, mistreated, or unfairly taken advantage of, as the caselaw requires. See *State v. Edgar*, 281 Kan. 30, 36, 127 P.3d 986 (2006). Thus, there is no proof showing the district court erred in denying his motion.

We are not persuaded that Martin's attorney provided lackluster advocacy by advising Martin that it would be unwise to pursue a defense the methamphetamine was planted on him without stronger evidence to support his claim. Frankly, that sounds like good advice to us. An ambiguous video depicting an object which could not be readily identified does not appear to be evidence supporting such a defense.

Martin also claimed that he knew all along he did not possess methamphetamine. If that was true, why did he enter his plea? After all, he stated at the time of making the plea he believed it was in his best interests. We see no error in the district court's conclusion that Martin's plea was knowingly and voluntarily made.

Simply put, we see no abuse of discretion by the district court. It properly denied his motion.

Affirmed.