NOT DESIGNATED FOR PUBLICATION

No. 119,067

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

DERRICK D. WATIE,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JEFFREY SYRIOS, judge. Opinion filed December 13, 2019. Affirmed.

Korey A. Kaul, of Kansas Appellate Defender Office, for appellant.

Julie A. Koon, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before BRUNS, P.J., LEBEN, J., and BURGESS, S.J.

PER CURIAM: Derrick D. Watie moved to withdraw his no-contest plea, alleging that he wasn't represented by competent counsel. The district court denied the motion, finding that Watie's counsel provided competent representation and that Watie hadn't shown manifest injustice, which is required when the motion to withdraw plea comes after the defendant has been sentenced.

On appeal, Watie argues that the district court abused its discretion in finding that he hadn't shown manifest injustice. He also argues that the district court should have

applied the less-rigorous good-cause standard that applies when the motion is made *before* sentencing. That's because while Watie's motion was made after his initial sentencing, the district court resentenced Watie after the motion was filed after an error in the original sentences was discovered. So Watie's motion came after his initial sentencing but before his resentencing.

Based on our review, we conclude that it doesn't matter which standard applies. Either way, the district court did not abuse its discretion in denying Watie's motion to withdraw his plea. We therefore affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Plea and Original Sentencing

Watie had several criminal charges in the district court—brought in separate cases—so we will start with an overview of them since they all relate either to the plea agreement Watie entered into or to the sentences he received in the case now before us on appeal.

In that case, 15 CR 673, the State charged Watie with cocaine possession with intent to distribute, marijuana possession after a prior conviction, criminal possession of a weapon by a felon, driving with a suspended license, fleeing a police officer, and failing to signal when turning. Watie's family hired David Leon to represent Watie. Leon also represented Watie in a separate domestic-violence felony case, 15 CR 657. Another attorney represented Leon in a third case, 15 CR 3119. In that case, a judge found Watie guilty after a bench trial of possessing marijuana after a prior conviction, interfering with law enforcement, and driving while suspended.

In our case, 15 CR 673, Watie entered a no-contest plea to three charges: possession of cocaine with intent to distribute, possession of marijuana after a prior conviction, and criminal possession of a weapon by a felon. The State dismissed the other charges in 15 CR 673 and dismissed 15 CR 657, the domestic-violence case. It recommended the high number in the relevant sentencing-guideline boxes and that the court follow the presumption of imprisonment.

On September 15, 2016, the district court held a sentencing hearing for both of the cases in which Watie had been convicted, 15 CR 673 and 15 CR 3119. Leon had filed a motion requesting concurrent sentences and a durational departure. The court denied that motion and followed the State's recommendation in the plea agreement. It sentenced Watie to an 89-month prison term in 15 CR 673 followed by a consecutive 40-month prison term in 15 CR 3119.

The Motion to Withdraw

One week later, Watie filed a pro se motion to withdraw his plea. The motion contained several allegations about Leon's representation, including that Leon didn't obtain a durational departure, prepare a defense, call any witnesses, meet with him to discuss the case, or file a motion to suppress. The district court appointed new counsel to represent Watie on his motion. Both Watie and Leon testified at an evidentiary hearing.

Watie testified that he wanted to go to trial because he didn't think he was guilty. Watie testified that on the day of his plea hearing, he thought he was going to the courthouse for a trial. Watie said that Leon had never met with him at the jail before the plea hearing to review his case and develop a defense. Watie said that his defense was to prove his innocence and beat the State's case. Watie also testified that Leon never responded to his letters. So Watie filed two pro se motions: one to suppress evidence that he believed the police illegally seized without consent and the other to remove Leon as

counsel. Watie testified that he withdrew the motion to remove counsel because Leon promised that Watie would get probation.

Watie said that he accepted the plea because he felt like he had no other choice. When Watie entered his plea, he told the judge that he had read the plea documents and understood the potential sentence for each count. Watie testified that he knew the State was seeking a prison sentence but thought he'd get probation based on Leon's statements.

Leon testified that he and Watie had developed and agreed to a defense strategy. Watie told Leon that Watie's focus was on his third case, 15 CR 3119. Leon said he would work to secure a plea deal. Leon also testified that he discussed the details of the State's case and potential defenses with Watie. Leon testified that he never met with Watie in jail because they would meet before each of Watie's many court appearances. Leon also testified that he received and read each of Watie's letters and discussed them with Watie during their meetings.

Leon denied promising Watie that he would receive probation. Leon testified that he would have withdrawn his representation if Watie had wanted him off the case. Leon said he and Watie never discussed removing Leon as counsel and that he couldn't recall Watie moving to remove Leon as counsel.

Leon also discussed a 90-minute conversation he had with Watie about whether to enter a plea agreement or go to trial. Although Leon thought Watie would enter a plea, he advised Watie that they could go to trial if Watie chose that option. Leon testified that on the day the court had scheduled Watie's case for a bench trial, Leon was prepared for trial. Leon said that he didn't prepare a motion to suppress a firearm that Watie believed police officers illegally seized because the officers had observed the firearm in plain view.

The Resentencing and Denial of Watie's Motion

During the evidentiary hearing, Watie's attorney discovered an issue with Watie's sentencing. The presentence report had included a six-month sentence enhancement on one of Watie's three charges under a special rule. But that rule should have triggered the enhancement only if the "trier of fact" made certain findings. Because Watie had entered a no-contest plea, no trier of fact (judge or jury) had made those findings, so Watie shouldn't have received a six-month enhancement.

The State moved to correct the illegal six-month enhancement. The correction affected the sentence on only one of Watie's three convictions. The district court granted the State's motion and resentenced Watie to a reduced 83-month prison term.

A few days after the resentencing, the district court announced its factual findings and legal conclusions on Watie's motion. K.S.A. 2018 Supp. 22-3210(d)(2) provides that a defendant must show "manifest injustice" to withdraw a plea if the motion to withdraw is made after sentencing. The court applied that manifest-injustice standard to Watie's motion. The court relied on a three-factor test from *State v. Edgar*, 281 Kan. 30, 36, 127 P.3d 986 (2006), to determine whether Watie had shown manifest injustice. Those factors are: (1) whether the defendant was represented by competent counsel; (2) whether the defendant was misled, coerced, mistreated, or unfairly exploited; and (3) whether the plea was fairly and understandingly made. 281 Kan. at 36.

Considering the first factor, the court found that Leon had provided Watie with competent and reasonable representation. The court cited Leon's testimony that he had developed a strategy with Watie to negotiate a plea deal covering all of Watie's cases and found that Watie had agreed to that strategy. The court found that Leon had adequately communicated with Watie about his case, citing Leon's testimony that he had read each of Watie's letters. The court also found that Leon had been prepared to go to trial because

the issues in the case were simple. And it cited Watie's failure to articulate a specific issue that he would've discussed with Leon had Leon communicated more often. Given these facts, the court found that Watie failed to establish manifest injustice under the first *Edgar* factor.

The court also found that Watie failed to show manifest injustice on the other *Edgar* factors. The court found that Leon had not exploited Watie or coerced him into accepting the plea agreement. Instead, it found that Watie had fairly and understandably entered his plea. It also found that Watie had understood the plea agreement because he had discussed its contents with Leon at length and had not had questions about it on the day he entered the plea. And it found that Watie had known that he could receive a prison sentence by entering the plea agreement. Finally, the court found that no one had misled, coerced, or unfairly exploited Watie during the plea proceedings.

Because Watie hadn't established any *Edgar* factor, the district court denied his motion for failing to establish manifest injustice. When the court specifically asked Watie's counsel if he had any issues to raise with the court before the court concluded its findings, Watie's counsel said no.

Watie then appealed the district court's denial of his motion to this court.

ANALYSIS

We review the denial of a motion to withdraw a no-contest plea for abuse of discretion. *State v. Johnson*, 307 Kan. 436, 443, 410 P.3d 913 (2018). The district court abuses its discretion if its decision is based on a legal or factual error or if it is arbitrary or unreasonable. 307 Kan. at 443. The district court's factual findings must be supported by substantial evidence. 307 Kan. at 443. We defer to the district court's factual findings and do not reweigh evidence or reassess witness credibility. 307 Kan. at 443.

Watie first argues that the district court abused its discretion in finding that he hadn't shown manifest injustice. To withdraw a no-contest plea after sentencing, the defendant must show manifest injustice. K.S.A. 2018 Supp. 22-3210(d)(2). As we have already noted, when deciding whether a defendant has shown manifest injustice, courts consider the three *Edgar* factors: (1) whether the defendant was represented by competent counsel; (2) whether the defendant was misled, coerced, mistreated, or unfairly exploited; and (3) whether the plea was fairly and understandingly made. *Edgar*, 281 Kan. at 36. These factors aren't exclusive, so other circumstances may be considered, and the defendant doesn't need to prove each factor to establish manifest injustice. *Johnson*, 307 Kan. at 443. But Watie never asked the district court to consider additional factors, and his appeal only disputes the court's findings on the first *Edgar* factor: competence of counsel.

To show manifest injustice under *Edgar*'s competence factor, the defendant must show that counsel's representation was constitutionally ineffective. *State v. Bricker*, 292 Kan. 239, 245, 252 P.3d 118 (2011). In other words, the defendant must show that counsel's representation violated the two-prong test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). So counsel's performance must have (1) been incompetent, meaning objectively unreasonable, and (2) prejudiced the defendant, meaning there's a reasonable probability that but for the incompetent representation the result of the proceeding would've been different. *Bricker*, 292 Kan. at 246. Counsel's performance isn't incompetent if counsel reasonably communicates with the defendant and the defendant agrees to a particular defense strategy. See *State v. Betancourt*, 301 Kan. 282, 308, 342 P.3d 916 (2015).

The district court found that Leon provided competent representation. It described Leon's representation as "competent, reasonable, and . . . clearly understood and agreed to

by Mr. Watie." Watie says Leon provided incompetent representation, but substantial evidence supports the district court's contrary finding.

Watie says Leon didn't communicate with him about his defense and ignored his case. But the court found otherwise and noted, as Leon testified, that Watie's primary concern was his other case. It also found that Watie agreed to Leon's strategy of securing a "package deal" covering both of Watie's cases. So Leon's communication was appropriate given the "secondary status" of this case compared to Watie's other case.

Substantial evidence supported the court's finding about Leon's communication with Watie. Leon testified that Watie said his "main concern" was 15 CR 3119 because the charges were more severe in that case. Leon also said that Watie told him to get a plea deal encompassing both cases. Leon admitted that he never met with Watie in jail, but he said that they met before each of Watie's many court appearances. Leon also read each of Watie's 35 letters and discussed them with Watie each time they'd meet before a hearing. Leon's testimony provided substantial evidence supporting the court's finding that Leon communicated appropriately with Watie about his case.

The court also rejected Watie's allegation that Watie felt compelled to accept the plea agreement. The court found Leon's testimony credible on whether he was prepared to proceed to trial. The uncomplicated nature of the issues in Watie's case bolstered that finding. The court also found that Leon didn't coerce Watie into taking a plea deal and that he voluntarily entered the plea.

As with the court's communication findings, here too the court's finding that Watie wasn't compelled to accept the plea was supported by substantial evidence. Leon and Watie both testified that they discussed the plea deal for about 90 minutes. And Watie testified that Leon went over the agreement with him on the day of his plea hearing. If Watie decided not to take the plea deal, Leon said he had read the discovery and was

ready to proceed to trial. Leon also testified that he never promised Watie that he would get probation. Substantial evidence supported the court's finding that Leon provided competent representation, so the district court didn't abuse its discretion in concluding that Watie hadn't shown manifest injustice.

From what we've said so far, we've established that Watie has not shown error by the district court if the manifest-injustice standard applied. But Watie also argues that the district court abused its discretion by applying that standard. Watie says it should've applied the less-rigorous good-cause standard. The good-cause standard applies to motions filed "before sentence is adjudged." K.S.A. 2018 Supp. 22-3210(d)(1). Watie filed his motion after his original sentencing but before his resentencing. He contends that his sentence wasn't "adjudged" until his resentencing, so the court should've treated his motion as a presentence motion and applied the good-cause standard. The State counters that Watie's sentence was "adjudged" at his original sentencing, so the district court correctly treated his motion as a postsentence motion and applied the manifest-injustice standard. The State also argues that even if the district court should've applied the good-cause standard, it didn't abuse its discretion because Watie can't show good cause.

In a similar case, the Kansas Supreme Court declined to decide which standard applied when a resentencing had taken place. In that case, *State v. Fritz*, 299 Kan. 153, 321 P.3d 763 (2014), the defendant had moved to withdraw his plea after his original sentencing but before resentencing. The district court found that the motion didn't establish either good cause or manifest injustice. The Supreme Court affirmed that finding without deciding what standard should apply. 299 Kan. at 157. In other cases, our court has also found it unnecessary to decide which standard applied when a motion to withdraw plea was filed before a resentencing hearing. See *State v. Hill*, No. 112,985, 2016 WL 562919, at *2-4 (Kan. App. 2016) (unpublished opinion) (holding that the defendant couldn't show good cause even if the good-cause standard applied); *State v. Pride*, No. 110,093, 2014 WL 3630381, at *2-3 (Kan. App. 2014) (unpublished opinion)

(declining to decide what standard applied because the defendant couldn't meet either standard). We need not decide which standard applies, either, because Watie's motion would not have succeeded under either one.

Good cause is a "lesser standard" than manifest injustice. *State v. Schow*, 287 Kan. 529, 540-41, 197 P.3d 825 (2008). Yet courts use the same *Edgar* factors to evaluate motions under both standards. See *State v. Edwards*, 309 Kan. 830, 836, 440 P.3d 557 (2019) (good cause); *Johnson*, 307 Kan. at 443 (manifest injustice). And only one of those *Edgar* factors' application changes depending on whether the defendant filed a motion before or after sentencing. That factor is the competence factor.

Showing manifest injustice requires that defense counsel's performance be constitutionally ineffective under *Strickland*. *Bricker*, 292 Kan. at 245-46. So counsel's performance must be incompetent, meaning objectively unreasonable, and prejudicial. 292 Kan. at 246. In short, the defendant can't show manifest injustice under *Edgar*'s competence factor without running the "constitutional gauntlet" that is *Strickland*. *State v. Aguilar*, 290 Kan. 506, 513, 231 P.3d 563 (2010).

But the defendant doesn't have to run the *Strickland* gauntlet to show good cause. The defendant might show good cause if defense counsel provided "lackluster advocacy" in the plea proceedings. *Aguilar*, 290 Kan. at 513. Our Supreme Court hasn't clarified what conduct qualifies as lackluster advocacy, but it's at least somewhat less difficult to prove than *Strickland* incompetence. *Aguilar*, 290 Kan. at 513. So it's possible that in some cases an attorney's inadequate representation won't meet the *Strickland*-incompetence test needed to show manifest injustice but still will meet the lackluster-advocacy test needed to show good cause. E.g., *State v. Schaefer*, 305 Kan. 581, 590, 385 P.3d 918 (2016) (noting that counsel's performance could "constitute good cause . . . to withdraw [a] plea before sentencing, notwithstanding that counsel's performance could not be deemed constitutionally deficient").

Having compared the two standards, Watie's motion fails under both. As was noted earlier, the district court found that Watie didn't show manifest injustice because Leon's representation was "competent, reasonable, and . . . clearly understood and agreed to by Mr. Watie." Competent and reasonable representation designed to meet the client's objectives does not meet either the *Strickland*-incompetence standard or the lackluster-advocacy standard. So Watie's claim would fail no matter which standard the district court applied.

We therefore affirm the district court's judgment.