NOT DESIGNATED FOR PUBLICATION

No. 119,287

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ROBERT W. WHITFIELD,
Appellant.

MEMORANDUM OPINION

Appeal from Brown District Court; JOHN L. WEINGART, judge. Opinion filed June 7, 2019. Conviction reversed, sentence vacated, and case remanded with directions.

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

Kevin M. Hill, county attorney, and *Derek Schmidt*, attorney general, for appellee.

Before GARDNER, P.J., GREEN and ATCHESON, JJ.

PER CURIAM: Robert W. Whitfield appeals the trial court's denial of his postsentencing motion to withdraw plea. Whitfield argues that because he was misled about the length of his postrelease supervision during his hearing, his plea was not understandingly made. For this reason, he asserts that he established manifest injustice to withdraw his plea. Because the record reflects that both his plea attorney and the trial court incorrectly told him that his crime of aggravated criminal sodomy under K.S.A. 2012 Supp. 21-5504(b)(3) carried a sentence of 36 months' postrelease supervision, instead of lifetime postrelease supervision, we reverse the trial court's denial of

Whitfield's postsentencing motion to withdraw plea. We therefore reverse the conviction, vacate the sentence imposed below, and remand with directions to allow Whitfield to withdraw his plea.

The State charged Whitfield with one count of aggravated criminal sodomy, an off-grid person felony in violation of K.S.A. 2012 Supp. 21-5504(b)(1). The State alleged that N.S., the victim of Whitfield's crime, was nine years old.

Ultimately, the State and Whitfield entered into plea negotiations.

On June 12, 2013, at the plea hearing, the State announced that it had reached a plea agreement with Whitfield. Under the plea agreement, the State would amend Whitfield's charges from aggravated criminal sodomy under K.S.A. 2012 Supp. 21-5504(b)(1), an off-grid person felony, to aggravated criminal sodomy under K.S.A. 2012 Supp. 21-5504(b)(3), a severity level one person felony. Whitfield would plead no contest and he was allowed to move for a durational departure under the plea agreement.

After the State recited the terms of the plea agreement, the trial court asked Whitfield if this was his understanding of the plea agreement. Whitfield responded, "Yes, your Honor." He also stated that he had authorized his attorney, Gordon Olson, to negotiate the plea agreement for him. Because Whitfield made these statements, the trial court amended Whitfield's complaint.

Next, the trial court engaged in the plea colloquy. During the plea colloquy, the trial court told Whitfield that despite a departure, it could sentence him anywhere from 147 to 653 months' imprisonment. The trial court also told Whitfield that his "postrelease supervision [would] be 36 months from any prison sentence." When asked by the trial court if he understood the possible sentencing outcomes, Whitfield stated that he understood. Later, the trial court told Whitfield to review a copy of the sentencing grid

with his potential sentence and term of postrelease supervision for his crime. At this point, Whitfield conferred with his attorney, Olson, who then entered into an exchange with the trial court:

> "MR. OLSON: The level 1 is 36 months' post-release supervision, is what my—
> "THE COURT: Yes. I don't know if—I may have misspoke, but that's what it is.
> "MR. OLSON: Yes, your Honor. I understand that."

The trial court did not follow up on Whitfield's understanding of postrelease supervision. The trial court then asked if Whitfield had any additional questions about his ability to voluntarily and understandingly enter his plea. Based on Whitfield's answers and the State's factual basis, the trial court accepted Whitfield's no contest plea.

On September 9, 2013, over the State's objection, the trial court granted Whitfield's durational departure request. Instead of sentencing Whitfield to the standard presumptive prison sentence of 272 months' imprisonment, the trial court sentenced Whitfield to 144 months' imprisonment followed by lifetime postrelease supervision. After entering this sentence, the following discussion occurred:

> "MR. OLSON: "I believe that when we entered our plea, we were discussing the three-year post-release, May the—
> "THE COURT: The statute requires a lifetime post-release, doesn't it, Mr. Neibling, or not?
> "CSO NEIBLING: I believe.
> "THE COURT: What does—
> "MR. OLSON: Could we leave that open? We'll check on that.
> "THE COURT: No. We'll shut it right now. We need to know. What's the post-release supervision on it?
> . . . .
> "Normal level 1's carry [] 36 months, but some offenses have a lifetime, so we need to know which one.

. . . .

"Whatever the statute is, that's what we'll follow.

"CSO NEIBLING: It is a lifetime post-release.

"THE COURT: All right. This particular offense?

"CSO NEIBLING: Yes.

"THE COURT: Aggravated criminal sodomy, 21-5504(b)(3) carries lifetime post-release is that correct?

"CSO NEIBLING: That's correct.

"THE COURT: That'll be the order of the Court."

On July 24, 2014, Whitfield moved pro se to withdraw his no contest plea. In his motion, Whitfield cited the manifest injustice standard. He then argued that the trial court should allow him to withdraw his plea because it was not knowingly or voluntarily made for several reasons. In particular, Whitfield stressed that he believed he would serve just 36 months' postrelease supervision when he entered his plea.

After Whitfield moved pro se to withdraw his plea, the trial court appointed counsel to represent Whitfield. On October 5, 2015, Whitfield's counsel filed an amended motion to withdraw plea that expounded on Whitfield's pro se arguments, as well as added new arguments.

The trial court held an evidentiary hearing on Whitfield's motion. At the hearing, Whitfield and Olson testified.

Whitfield testified that when he entered his plea he believed that he was going to serve 36 months' postrelease supervision. Whitfield explained that he believed this "not only due to the conversation [he] had with Mr. Olson, but also with Judge Weingart." Whitfield explicitly testified that the 36-month term of postrelease supervision was a factor in his decision to enter his plea.

Olson testified that five days after sentencing, Whitfield signed a document stating (1) that the trial court sentenced him to lifetime postrelease supervision and (2) that he was waiving his right to direct appeal. Olson provided no other testimony on Whitfield's understanding about postrelease supervision.

At the end of the hearing the trial court took Whitfield's arguments under advisement. The trial court eventually denied Whitfield's postsentencing motion to withdraw his plea. The trial court found that Whitfield "was not misled" and that Olson had provided proficient representation. The trial court's order consisted of a list of nearly 50 findings of fact and conclusions of law, which included the following: (1) that at Whitfield's plea hearing, "the parties agreed that [Whitfield] would be sentenced as a level 1 person felony"; (2) that at Whitfield's plea hearing, it instructed Whitfield that entering his plea based on "inaccurate or false information regarding his prior sentence, [] would not serve as a basis for withdrawing his plea at a future date"; (3) that Whitfield considered but declined to withdraw his plea before sentencing; and (4) that Whitfield waived his right to direct appeal.

Whitfield timely appealed.

Did the Trial Court Err by Denying Whitfield's Postsentencing Motion to Withdraw Plea?

"To correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw the plea." K.S.A. 2012 Supp. 22-3210(d)(2). Courts consider the following nonexclusive factors when determining whether the defendant established manifest injustice: "'(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.' [Citation omitted.]" *State v. Johnson*, 307 Kan. 436, 443, 410

P.3d 913 (2018) (citing *State v. Edgar*, 281 Kan. 30, 36, 127 P.3d 986 [2006]). Other factors that courts may consider include the following: (1) whether the defendant promptly filed the motion to withdraw plea; (2) whether the defendant failed to raise the argument in a prior direct appeal; (3) whether allowing the defendant to withdraw plea would prejudice the State; (4) whether the defendant had previous involvement in the criminal justice system, and (5) whether the defendant received a favorable plea agreement. *State v. Moses*, 280 Kan. 939, 952-54, 127 P.3d 330 (2006).

This court reviews the trial court's denial of a postsentencing motion to withdraw plea for an abuse of discretion. A trial court abuses its discretion if it makes an error of law, makes an error of fact, or makes an otherwise unreasonable decision. The defendant has the burden of establishing that the trial court abused its discretion. Moreover, while engaging in this analysis, this court does not reweigh the evidence or reassess the credibility of witnesses. This court reviews the trial court's findings for substantial competent evidence. *Johnson*, 307 Kan. at 443.

On appeal, Whitfield argues that he established manifest injustice to withdraw plea because his plea was not knowingly or voluntarily made for the following reasons: (1) he entered his plea believing that he was going to serve 36 months' postrelease supervision; (2) he entered his plea believing the prosecutor would remove his grandchildren from his son's custody unless he entered his plea; (3) he entered his plea even though the State actively impeded his defense; and (4) he entered his plea even though he could not understand its terms because of medical problems. As a result, he argues that the trial court erred when it denied his motion.

On the other hand, the State argues that none of Whitfield's arguments meet the manifest injustice standard entitling Whitfield to withdraw plea.

To begin our inquiry, there is no dispute that the proper term of postrelease supervision for Whitfield's crime of aggravated criminal sodomy under K.S.A. 2012 Supp. 21-5504(b)(3) is lifetime postrelease supervision. See K.S.A. 2012 Supp. 22-3717(d)(1)(G), (2)(E). And although the State alleges that Whitfield failed to raise some of his arguments within K.S.A. 2012 Supp. 22-3210(e)(1)'s one-year time limit, Whitfield raised his argument about misunderstanding the length of his postrelease supervision term in his pro se motion to withdraw plea. He filed his pro se motion within one year of sentencing. Thus, any argument that Whitfield's postrelease supervision argument is untimely fails.

Next, Whitfield argues that because Olson and the trial court misinformed him about his term of postrelease supervision, he has established manifest injustice. The State responds by pointing out that Whitfield's presentencing investigation (PSI) report stated that he would serve lifetime postrelease supervision. Thus, the State asserts that Whitfield should have known that he would serve lifetime postrelease supervision before sentencing. The State also asserts that manifest injustice does not exist for three more reasons: (1) because Whitfield did not move to withdraw his plea at his sentencing hearing, (2) because Whitfield did not file a direct appeal, and (3) because Whitfield "waited nearly a year to file a motion to withdraw plea."

Yet, the State ignores that Whitfield had no PSI report until after he entered his no contest plea. More important, at sentencing, the trial court merely confirmed that Whitfield did not want to withdraw his plea before his sentence because his counsel had just discovered that his criminal history score was higher than expected. Because the parties could agree to sentence him with a criminal history score of C, Whitfield did not withdraw his plea. Then, the trial court sentenced Whitfield to 144 months' imprisonment followed by lifetime postrelease supervision. Olson's on-the-record discussion with the trial court about whether Whitfield should receive 36 months' postrelease supervision or lifetime postrelease supervision right after the trial court pronounced Whitfield's sentence

supports the position that Olson still believed that Whitfield would receive a term of 36 months' postrelease supervision at sentencing. Again, Olson stated, "I believe that when we entered our plea, we were discussing the three-year post-release." Thus, Olson was advising Whitfield that the court would sentence Whitfield to 36 months' postrelease supervision.

Indeed, Olson's notes from Whitfield's client meetings, which the trial court reviewed before making its decision, supports the 36-month postrelease supervision period. Olson's notes for June 12, 2013—the date of Whitfield's plea hearing—stated: "Defendant did not want lifetime postrelease. By departing to the guidelines postrelease is 36 months and Judge Weingart told him on the record that post release was 36 months." Olson also stated that by pleading, Whitfield "has 36 months['] postrelease rather than the lifetime postrelease." Thus, it is readily apparent that Olson was telling Whitfield that the trial court would sentence him to 36 months' postrelease supervision during plea negotiations and during sentencing. The trial court compounded Olson's error by telling Whitfield it would sentence him to 36 months' postrelease supervision at the plea hearing.

As for Whitfield's failure to file a direct appeal, it is true that our Supreme Court has considered a defendant's failure to raise any plea withdrawal complaints in *a previous appeal* in deciding whether manifest justice exists. *Moses*, 280 Kan. at 952-53. But Whitfield chose not to file a direct appeal. K.S.A. 2012 Supp. 22-3210(e)(1)(A) just requires that a defendant bring a postsentencing motion to withdraw plea within one year of the "last appellate court in this state to exercise jurisdiction on direct appeal *or the termination of such appellate jurisdiction*." (Emphasis added.) By including the language "or the termination of such appellate jurisdiction" in K.S.A. 2012 Supp. 22-3210(e)(1)(A), the Legislature wrote the statute so defendants who did not exercise their right to a direct appeal could still move to withdraw their plea after sentencing. Thus,

Whitfield's decision not to file a direct appeal does not prohibit him from successfully challenging his plea.

As a result, none of the State's arguments are persuasive. Moreover, the State has not argued that allowing Whitfield to withdraw his plea would cause it prejudice, which is another factor this court may consider when determining whether manifest injustice exists. *Moses*, 280 Kan. at 953. And the trial court did not rely on this factor below when denying Whitfield's motion.

Next, Kansas law supports the granting of Whitfield's postsentencing motion to withdraw plea. For starters, K.S.A. 2012 Supp. 22-3210(a)(2) provides that before a trial court can accept a defendant's guilty or no contest plea, the court must "inform[] the defendant of the consequences of the plea, including the specific sentencing guidelines level of any crime committed on or after July 1, 1993, and of the maximum penalty provided by law which may be imposed upon acceptance of such plea." In the past, when trial courts have violated this rule, our Supreme Court has allowed defendants to withdraw their plea postsentence because of manifest injustice.

For example, Whitfield points to *State v. Shaw*, 259 Kan. 3, 14, 910 P.2d 809 (1996). In *Shaw*, the trial court told Shaw that his offense was a severity level 4 crime, when it was a severity level 3 crime. The trial court sentenced Shaw under the assumption it was a severity level 4 crime. 259 Kan. at 5. Shaw moved to withdraw his plea postsentencing because the trial court told him the wrong severity level when he entered his plea. The trial court denied Shaw's motion. 259 Kan. at 6. Our Supreme Court reversed the trial court. 259 Kan. at 15.

First our Supreme Court explained that "[t]he problem here is that in addition to actually receiving an illegal sentence, Shaw was misinformed as to the maximum sentence which could be imposed before he entered his plea. It is that fact which prevents

this court from simply remanding for correction of the illegal sentence." 259 Kan. at 12. Then, our Supreme Court held: "[W]here the record reflects that the defendant was incorrectly informed of the maximum penalty provided by law before entering the plea, the conviction must be reversed and the defendant allowed to withdraw his or her plea." 259 Kan. at 14. Our Supreme Court found that because "the trial court incorrectly informed Shaw of the sentencing range for his offense, Shaw was not aware of the maximum penalty provided by law which could be imposed." 259 Kan. at 15. In turn, the trial court "was required" to set aside Shaw's plea because it was not understandingly made. 259 Kan. at 15.

Here, the record establishes that both Olson and the trial court made on the record statements that Whitfield would serve 36 months' postrelease supervision for his aggravated criminal sodomy conviction under K.S.A. 2012 Supp. 21-5504(b)(3). In its order denying Whitfield's motion, even though the trial court stressed that it told Whitfield that he would serve the sentence for a severity level one crime, the trial court ignored its own statement that Whitfield would serve 36 months' postrelease supervision, as well as Olson's statements from the plea and sentencing hearings. As a result, like in *Shaw*, the trial court misinformed him about the maximum penalty provided by law on his sentencing range. See *State v. Mossman*, 294 Kan. 901, 907, 281 P.3d 153 (2012) (holding that "postrelease supervision is undeniably part of a defendant's sentence."). This court is duty bound to follow our Supreme Court precedent. *State v. Meyer*, 51 Kan. App. 2d 1066, 1072, 360 P.3d 467 (2015). The *Shaw* court's holding requires this court to reverse because the trial court told Whitfield the wrong maximum penalty provided by law when he entered his plea.

Yet, even if we ignored our Supreme Court precedent, this court has considered a mistake involving postrelease supervision and reversed. In *State v. Metzger*, No. 115,056, 2017 WL 2838268 (Kan. App. 2017), *rev. denied* 307 Kan. 992 (2018), the trial court told Metzger that his sentence carried a term of 24 months' postrelease supervision even

though his sentence carried a term of lifetime postrelease supervision. The trial court then sentenced Metzger to 24 months' postrelease supervision. 2017 WL 2838268, at *1-2. The State successfully moved to correct Metzger's illegal sentence. But the trial court denied Metzger's contemporaneous postsentencing motion to withdraw plea. On appeal, this court reversed the trial court, ruling that Metzger established manifest injustice to withdraw his plea by establishing that he did not understandingly enter his pleas because the trial court and his attorney told him he would receive 24 months' postrelease supervision. 2017 WL 2838268, at *7. The *Metzger* court also stressed that it found manifest injustice because evidence supporting Metzger's decision to take the plea agreement hinged on the term of postrelease sentence. This evidence countered the fact that Metzger had a favorable plea agreement—a fact the *Metzger* court believed weighed against a finding of manifest injustice. 2017 WL 2838268, at *8.

Here, Whitfield's attorney and the trial court certainly misled him about his term of postrelease supervision. He also certainly received a favorable plea deal. At the same time, however, Whitfield testified that the promise of 36 months' postrelease supervision was a factor in his decision to plead no contest. Olson's notes stated that Whitfield "did not want lifetime postrelease." Thus, despite the favorability of Whitfield's plea, Whitfield's comments that the term of postrelease supervision was important to his decision to enter his plea support that Whitfield would not have entered this favorable plea had he known it included a term of lifetime postrelease supervision.

In summary, the record establishes that both Olson and the trial court misinformed Whitfield about the term of his postrelease supervision. It further establishes that Whitfield's term of postrelease was an important factor in his decision to plead no contest. The *Shaw* decision establishes that because Olson and the trial court misinformed Whitfield about the length of his postrelease supervision, Whitfield did not knowingly or understandingly enter his plea. As a result, Whitfield established manifest injustice to withdraw his plea.

As a result, the trial court abused its discretion when it denied Whitfield's postsentencing motion to withdraw plea. Simply put, the trial court ignored Olson's statements and its own statements when determining that Whitfield failed to establish manifest injustice. The trial court's finding that Whitfield was not misled when he entered his plea was not supported by substantial competent evidence. Because we have reversed the trial court's judgment denying Whitfield's postsentencing motion to withdraw his plea, it is unnecessary for us to consider Whitfield's remaining arguments.

Conviction reversed, sentence vacated, and remanded with directions to allow Whitfield to withdraw his plea.