

NOT DESIGNATED FOR PUBLICATION

No. 120,314

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

RAMON NIKO AUSTIN,
Appellant.

MEMORANDUM OPINION

Appeal from Montgomery District Court; JEFFREY D. GOSSARD, judge. Opinion filed November 22, 2019. Affirmed.

Sam Schirer, of Kansas Appellate Defender Office, for appellant.

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

Before GREEN, P.J., BRUNS, J., and WALKER, S.J.

PER CURIAM: After he was sentenced to prison for 40 months by the district court, Ramon Niko Austin filed a motion to withdraw his no contest plea to one count of possessing methamphetamine. Austin argued he did not understand that the district court was not bound to follow the sentencing recommendation of the plea agreement he had entered into in the case. The district court denied Austin's motion to withdraw his plea after finding he did not establish manifest injustice. In this appeal by Austin from the district court's ruling, we find that the district court did not abuse its discretion in denying the motion to withdraw his plea and, thus, we affirm the denial.

FACTS

The State originally charged Austin with several misdemeanor driving offenses, misdemeanor possession of drug paraphernalia, misdemeanor possession of stolen property, and possession of methamphetamine. Pursuant to a plea agreement, Austin pled no contest to possession of the methamphetamine and, in exchange, the State dismissed all of the remaining charges. The plea agreement specified that the State would not oppose Austin's request for a dispositional departure if Austin qualified for Senate Bill 123 treatment, nor would the State oppose a motion for downward departure to 20 months in prison if Austin did not qualify for SB 123 treatment.

The plea agreement also stated that the district court was not bound to follow the plea agreement or the sentencing recommendations and that the district court could impose any lawful sentence. The plea agreement explained that the sentence Austin was to receive was "solely a matter within the control of the Judge" and "[i]f the Court rejects the [plea] agreement, I understand the Court will not give me the opportunity to withdraw my plea for that reason." Austin signed the agreement which also stated that he understood the contents and consequences of his plea.

At the plea hearing, Austin affirmed that he understood that the district court did not have to follow the plea agreement and that it could "impose the maximum legal sentence [the Court] feel[s] is appropriate." At the end of the plea hearing, Austin spontaneously admitted ownership of the drugs at issue in his possession charge.

The presentence investigation report classified Austin's criminal history score as A. Based on this criminal history score, Austin was ineligible for SB 123 treatment. Before sentencing, Austin filed a motion for disposition or durational departure. At sentencing, the district court denied Austin's motion for a departure of any kind and

reasoned that Austin was undeserving because he had 40 convictions over the last 32 years. The district court sentenced Austin to the presumptive 40-month prison sentence.

After sentencing, Austin moved to withdraw his plea. The district court held an evidentiary hearing on the motion. At the hearing, Austin testified that he believed his plea agreement required the sentencing judge to, at a minimum, impose a 20-month durational departure prison sentence. Austin claimed that if he would had known the district court could impose a presumptive 40-month prison sentence, he would have taken his case to trial. Austin believed that he could have been found not guilty if his case had gone to trial. In his testimony, Austin conceded that his plea agreement and the district court both informed him that the sentencing recommendations were not binding on the sentencing court. Austin acknowledged he had been advised of the district court's ability to refuse to follow the agreement, but argued he did not fully understand what it meant.

The district court found that Austin did not establish manifest injustice and denied the motion to withdraw his plea. The court noted that Austin's attorney and the district court had adequately informed Austin of the court's discretion in sentencing and found that Austin affirmatively stated that he understood.

Austin challenges the district court's denial of his motion in this timely appeal.

ANALYSIS

On appeal, Austin once again alleges that when he entered his no contest plea, he believed his plea agreement precluded the district court from imposing a 40-month prison sentence. Based upon this contention, Austin argues that the district court abused its discretion when he moved to withdraw his plea. In response, the State argues that this court is bound by the district court's credibility determination and that the district court

did not abuse its discretion when it concluded Austin did understand the court was not bound to follow the sentencing recommendation.

Our caselaw is clear that we cannot reverse a district court's ruling on a motion to withdraw a plea after sentencing, absent an abuse of discretion. *State v. Johnson*, 307 Kan. 436, 443, 410 P.3d 913 (2018). "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." *State v. Moore*, 302 Kan. 685, 692, 357 P.3d 275 (2015). Austin bears the burden of establishing such abuse of discretion. See *Johnson*, 307 Kan. at 443. "A district court's factual findings are reviewed for substantial competent evidence. . . . Appellate courts do not reweigh the evidence or assess witness credibility. Instead, appellate courts give deference to the trial court's findings of fact. [Citations omitted.]" *State v. Anderson*, 291 Kan. 849, 855, 249 P.3d 425 (2011).

After sentencing, a district court may permit a defendant to withdraw a plea, if doing so will correct a manifest injustice. See K.S.A. 2018 Supp. 22-3210(d)(2). Courts generally consider three factors, known as the *Edgar* factors, to determine whether a movant has 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." *State v. Morris*, 298 Kan. 1091, 1100, 319 P.3d 539 (2014) (citing *State v. Edgar*, 281 Kan. 30, 36, 127 P.3d 986 [2006]). "The *Edgar* factors are 'viable benchmarks for judicial discretion,' but they are not the exclusive factors for this court to consider when reviewing the denial of a motion to withdraw plea." *Morris*, 298 Kan. at 1100-01 (quoting *State v. Aguilar*, 290 Kan. 506, 512, 231 P.3d 536 [2010]).

Here, Austin only claims that the third *Edgar* factor applies to his case. Austin argues that the district court violated his constitutional due process rights when it denied his motion to withdraw because he "did not enter a plea with an accurate understanding

of the maximum penalty to which he was subjecting himself." Austin concedes that he was given plea advisements from the language in the plea agreement itself, as well as hearing the same warnings directly from the district court at his plea hearing. But he argues that these advisements "do not *make* a plea knowing and voluntary, so much as they tend to *show* that plea is knowing and voluntary." Austin contends that these constitutional safeguards were not effective for him because he "simply didn't understand important advisements which were conveyed to him at the time he pled."

Austin's argument is as basic as it sounds—that Austin was informed orally and in writing that the district court did not have to follow the sentencing recommendation in the plea agreement, but he did not fully understand what this meant. But Austin bears the burden of establishing manifest injustice and the only evidence he presented to support this assertion was his own testimony. Although the district court did not make an explicit credibility determination, its denial of Austin's motion to withdraw his plea makes plain that it did not believe Austin did not understand. On appeal, Austin's argument fails because it requires us to reweigh the district court's credibility determination, something we cannot do. Hence, we must defer to the district court's credibility determination so long as there is some basis in fact for that determination. See *Anderson*, 291 Kan. at 855.

In fact there is support for the district court's determination because nothing in the record suggests that Austin could not understand the terms of his plea agreement, and substantial competent evidence supports the district court's conclusion that Austin understood what the consequences of his plea would be. A review of the plea hearing transcripts leave little doubt as to Austin's understanding of his plea.

At the plea hearing, Austin confirmed that he understood the charge against him; he understood the rights he was waiving; he believed his attorney handled his case appropriately; he understood the consequences of entering his plea; and he understood that the district court did not have to follow the plea agreement or sentencing

recommendations. Austin also advised the district court that he did not have any physical or mental disabilities that would prevent him from understanding his rights, and he denied being under the influence of alcohol or drugs. Additionally, Austin spontaneously admitted guilt at the end of the plea hearing. The district court noted this admission when it denied Austin's motion to withdraw his plea, stating, "[T]he Defendant stated all drugs involved in the crime belonged to him and that statement along with—lead me to believe that he understood what he was pleading to and what the consequences could be."

On appeal, Austin does not offer any new evidence to suggest the district court abused its discretion when it denied his motion to withdraw his plea. Austin does not claim he has any mental or intellectual disability that would preclude him from understanding, nor does he claim he does not speak English or was taking any medications that would prohibit him from understanding the terms of his plea. And the district court denied Austin's motion for departure because Austin had 40 criminal convictions in the last 32 years, with the most recent felony occurring in 2015. Austin is no stranger to the criminal justice system and, presumably, has entered guilty or no contest pleas in the past.

The district court did not rely on an error of fact or law, and under these circumstances, reasonable people could agree that the district court properly denied Austin's motion to withdraw his plea. The district court therefore did not abuse its discretion in refusing to allow Austin to withdraw his plea.

Affirmed.