NOT DESIGNATED FOR PUBLICATION

No. 124,602

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

MCCLINTON BASS,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; TYLER J. ROUSH, judge. Opinion filed July 14, 2023. Convictions affirmed, sentences vacated, and case remanded with directions.

Jennifer C. Bates, of Kansas Appellate Defender Office, for appellant.

Matt J. Maloney, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before GREEN, P.J., HURST, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: McClinton Bass appeals the district court's calculation of his criminal history score and its denial of his presentence motion to withdraw plea. Bass argues that the district court erred in classifying two of his prior South Carolina felony convictions as person offenses. He additionally argues that the district court abused its discretion in finding that he failed to show good cause to withdraw his guilty plea.

Bass' argument is availing in part because the district court erred in classifying his two prior South Carolina felony convictions as person offenses. However, this court finds

that the district court did not abuse its discretion in determining that Bass failed to show good cause to withdraw his guilty plea. Accordingly, Bass' sentences are vacated and the case is remanded for resentencing based upon the accurate criminal history score reflecting those prior convictions as nonperson felonies. The district court's denial of Bass' presentence motion to withdraw plea is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Bass' case has an extensive procedural history. On January 4, 2018, Bass pled guilty to one count of attempted aggravated indecent liberties with a child and one count of possession of cocaine for acts he committed in September 2017. On May 24, 2018, the district court sentenced Bass to 122 months in prison. Bass timely appealed. On appeal, a panel of this court held that the district court violated Bass' Sixth Amendment right to self-representation because he was not allowed to represent himself during plea negotiations, resulting in structural error. *State v. Bass*, No. 119,572, 2019 WL 3242271, at *9 (Kan. App. 2019) (unpublished opinion). The panel therefore reversed Bass' convictions, vacated his sentences, and remanded the case for further proceedings. 2019 WL 3242271, at *9.

On September 16, 2019, the State filed an amended complaint charging Bass with one count of aggravated indecent liberties with a child and one count of possession of cocaine. Following a preliminary hearing, the State added three counts of indecent liberties with a child, one count of aggravated indecent liberties with a child, and one count of attempted criminal sodomy. The district court appointed an attorney to represent Bass.

Four days before the start of trial, Bass expressed his desire to accept a plea agreement. However, later in that same hearing, Bass changed his mind and stated, "[My attorney] been a good lawyer to me. I want [to] fight my case. I don't want to plea." The

next week, during a break in jury selection, Bass again changed his mind and decided to accept the plea agreement and pled guilty to one count of attempted aggravated indecent liberties with a child, one count of indecent liberties with a child, and one count of possession of cocaine. Following a plea colloquy in which the district court advised Bass of his maximum possible sentence, the district court accepted Bass' guilty plea and set the case for sentencing. Bass signed the plea agreement and an acknowledgment of rights and entry of plea which included sentencing ranges for each of the three offenses to which he pled guilty.

A few weeks later, Bass filed a pro se motion to withdraw his guilty plea, stating that he "may have misunderstood what the plea was" and that "it is clear upon reflection that defendant was so afraid of a biased jury, that he was driven toward a plea bargain." Bass' appointed attorney subsequently filed a motion to set aside his guilty plea. The district court held an evidentiary hearing on the motions, at which Bass was represented by a new attorney and both Bass and his former attorney testified.

At the hearing, Bass testified that he cannot read or write and explained his misunderstanding of the plea agreement:

> "I knew it was said that you did almost 5 years, you have 2 more years to do. In my knowledge, I'm thinking that I have to do 7 more years—I mean, 7 years and come out and be on paper the rest of my life. That's the term that I thought that's what he said.
>
> . . . .
>
> ". . . I said, 'I will take a plea.' [My former attorney] says, 'Well, you get 5 years.' And so I'm thinking that—so I did almost 5, so I'm looking at 2 and some change."

Bass further testified that, in discussing his potential sentence under the plea agreement, his former attorney "never to spoke to me in [terms of] years" about the potential sentence, but only explained the sentence in terms of months, which Bass testified he struggled to understand. Bass' new attorney asked him multiple times at the evidentiary

hearing if Bass thought he was signing a plea deal for a seven-year sentence, and Bass responded yes. Bass further testified, however, that when he decided to plead guilty during jury selection, "I was under a lot of stress at that moment and I needed to stop the jury." Bass also testified that "when I went to court, everybody that you picked in the courtroom, in the jury trial, had the same sex case resemble to mine's, and I feel that I was against—everything was against me, so I took the easy way out." At the evidentiary hearing, Bass had this colloquy with his new attorney:

> "[Bass' Attorney]: Mr. Bass, did you—when you entered a plea in this case, do you feel like you were misled?
> "[Bass]: Yes, sir.
> "[Bass' Attorney]: Okay. And misled as to the—what the time would be that you would have to serve?
> "[Bass]: Yes, sir.
> "[Bass' Attorney]: And you're asking the Court to allow you to withdraw your plea because you were mislead [*sic*]?
> "[Bass]: Yes, sir."

Upon being asked by the State if his former attorney read the plea agreement to him, Bass testified, "I'm sure he probably did, ma'am."

Upon direct examination by the State, Bass' former attorney testified that he read the terms of the plea agreement out loud to Bass. He further testified that because Bass had "trouble understanding months versus years," he converted the months to years for Bass. Bass' former attorney also testified that he never promised Bass he would receive a seven-year sentence and explained:

> "I did explain, you know, the maximum amount of time. And also had explained that if he was convicted at trial and if his counts were ran consecutively that he would likely never get out of prison. I then tried to utilize my understanding of the plea agreement based on the criminal history score of an A box, figuring that would be the worst-case

scenario. And my calculation was that there would be 170 months, which is what I understood, I think, [the State was] going to be recommending. I then took off 15 percent for good-time credit and that—my calculations came out that there would be about 144 months. Then I subtracted what I was—my understanding of the amount of time that he had been in custody. And that was somewhere in the neighbor of about 45 months that he had already served. And so there—the—there was some talk that he would have, you know, an A box, about 9, 9 and a half years remaining. If, on the other hand, it got down into that he was maybe a C box, then it would be reduced even more. And the only thing that I'm thinking is that—that the 7 years may have come up on one of those scenarios, that that's how much time he would have remaining.

. . . .

". . . I never told him that he would have a total controlling sentence of 7 years.

. . . .

". . . I explained to him . . . [w]e couldn't guarantee what [his criminal history score] would be."

The district court subsequently denied the motions to withdraw plea and offered a lengthy explanation of its decision from the bench, which included the appropriate factors to consider when determining if a presentence plea can be withdrawn. The district court found that Bass was represented by competent counsel who filed appropriate motions and was well prepared, that Bass was not misled, coerced, mistreated, or unfairly taken advantage of, and that Bass' plea was fairly and understandingly made.

Prior to sentencing, Bass objected to the presentence investigation (PSI) report's classification of two of his prior South Carolina felony convictions—a 1997 conviction for threating a public official and a 2003 robbery conviction—as person offenses. Bass argued that, under the identical-or-narrower analysis established by the Kansas Supreme Court in *State v. Wetrich*, 307 Kan. 552, Syl. ¶ 3, 412 P.3d 984 (2018), these prior South Carolina felony convictions did not constitute person offenses for purposes of calculating his criminal history score. The district court overruled Bass' objection, classified both

prior convictions as person felonies—giving an explanation for the 1997 conviction but not the 2003 conviction, and calculated Bass' criminal history score as B.

On November 4, 2021, the district court sentenced Bass to 162 months in prison. Bass appealed.

DISCUSSION

Bass asserts just two claims in this appeal: (1) His sentence is illegal because the district court erred in calculating his criminal history score by classifying two of his prior South Carolina felony convictions as person offenses rather than nonperson offenses; and (2) the district court abused its discretion in finding that he failed to show good cause to withdraw his guilty plea.

I. *The district court erred in classifying Bass' two prior South Carolina felony convictions as person offenses.*

A defendant may challenge the district court's classification of their prior convictions and the resulting criminal history score as an illegal sentence. *State v. Dickey*, 301 Kan. 1018, Syl. ¶ 3, 350 P.3d 1054 (2015). An illegal sentence is:

> "(1) a sentence imposed by a court without jurisdiction; (2) a sentence that does not conform to the applicable statutory provision, either in character or the term of authorized punishment; or (3) a sentence that is ambiguous with respect to the time and manner in which it is to be served." *State v. Juiliano*, 315 Kan. 76, 78-79, 504 P.3d 399 (2022).

See K.S.A. 2022 Supp. 22-3504(c)(1). If the district court erroneously classified a prior conviction in calculating the defendant's criminal history score, the resulting sentence is

illegal because it does not conform to the statutorily authorized imprisonment term. *Dickey*, 301 Kan. 1018, Syl. ¶ 3.

Appellate courts exercise unlimited review over the question of whether a sentence is illegal. *State v. Gales*, 312 Kan. 475, Syl. ¶ 1, 476 P.3d 412 (2020). In determining the appropriate sentence, the district court must first calculate the defendant's criminal history score, which requires the court to interpret the Revised Kansas Sentencing Guidelines Act (KSGA), K.S.A. 2022 Supp. 21-6801 et seq., which "presents a question of law subject to unlimited appellate review." *State v. Terrell*, 315 Kan. 68, Syl. ¶ 1, 504 P.3d 405 (2022); see *State v. Baker*, 58 Kan. App. 2d 735, Syl. ¶ 1, 475 P.3d 24 (2020) ("Whether a sentencing court has correctly interpreted and applied the provisions of the KSGA is a question of law which this court reviews de novo.").

The KSGA is a graduated sentencing scheme that provides presumptive sentences based upon the severity of the current crime of conviction and the defendant's criminal history score. *State v. Albano*, 313 Kan. 638, 641, 487 P.3d 750 (2021). "Under this sentencing scheme, defendants with a higher criminal history score face longer terms of imprisonment." 313 Kan. at 641. Therefore, the accurate calculation of a defendant's criminal history score is essential to the district court imposing a legal sentence. The State bears the burden at sentencing to prove an offender's criminal history by a preponderance of the evidence. K.S.A. 2022 Supp. 21-6814; *State v. Obregon*, 309 Kan. 1267, Syl. ¶ 4, 444 P.3d 331 (2019).

"The penalty parameters for an offense are fixed on the date the offense was committed. And the legality of a sentence is controlled by the law in effect at the time the sentence was pronounced under K.S.A. 22-3504. [Citations omitted.]" *Gales*, 312 Kan. at 481; see *State v. Clark*, 313 Kan. 556, Syl. ¶ 5, 486 P.3d 591 (2021) ("The legality of a sentence under K.S.A. 2020 Supp. 22-3504 is controlled by the law in effect at the time the sentence was pronounced."). This court therefore applies the version of the KSGA in

effect at the time Bass committed his current crimes of conviction—K.S.A. 2017 Supp. 21-6801 et seq.—and reviews the legality of his sentence under the law in effect at the time his sentence was pronounced—November 2021. See *State v. Hill*, 313 Kan. 1010, Syl. ¶ 2, 492 P.3d 1190 (2021) ("A person convicted of a crime is sentenced in accordance with the sentencing provisions in effect at the time the crime was committed."); *State v. Samuels*, 313 Kan. 876, 878-79, 492 P.3d 404 (2021). This is Bass' direct appeal, and thus he is entitled to the benefit of any change in the law since he was sentenced. *State v. Williams*, 311 Kan. 88, Syl. ¶ 4, 456 P.3d 540 (2020); *State v. Murdock*, 309 Kan. 585, 591-92, 439 P.3d 307 (2019) (*Murdock II*) ("[A] party may seek and obtain the benefit of a change in the law during the pendency of a direct appeal.").

When Bass was sentenced in November 2021, the test in *Wetrich* dictated how to compare a defendant's prior out-of-state convictions to Kansas offenses for the purpose of classifying those out-of-state offenses as person or nonperson:

> "For an out-of-state conviction to be comparable to an offense under the Kansas criminal code, within the meaning of K.S.A. 2017 Supp. 21-6811(e)(3) . . . the elements of the out-of-state crime must be identical to, or narrower than, the elements of the Kansas crime to which it is being referenced." *Wetrich*, 307 Kan. 552, Syl. ¶ 3.

First, the district court was required to classify the prior out-of-state conviction as either a felony or misdemeanor based upon the crime's classification in the convicting jurisdiction—here, South Carolina. K.S.A. 2017 Supp. 21-6811(e)(2). "If a crime is a felony in the convicting jurisdiction, it will be counted as a felony in Kansas." K.S.A. 2017 Supp. 21-6811(e)(2)(A). Second, the KSGA directed the sentencing court to classify the prior out-of-state conviction as either a person or nonperson offense by referring to comparable offenses under the Kansas Criminal Code in effect on the date the current crimes of conviction were committed—here, September 2017. K.S.A. 2017 Supp. 21-6811(e)(3); *Wetrich*, 307 Kan. 552, Syl. ¶ 2. "If the state of Kansas does not have a

comparable offense in effect on the date the current crime of conviction was committed, the out-of-state conviction shall be classified as a nonperson crime." K.S.A. 2017 Supp. 21-6811(e)(3); see *Samuels*, 313 Kan. at 879 (describing the KSGA's two-step process for classifying a defendant's prior out-of-state convictions for criminal history purposes under K.S.A. 2017 Supp. 21-6811[e]).

To date, the *Wetrich* test remains the governing method of classifying prior out-of-state convictions as person or nonperson offenses under K.S.A. 2017 Supp. 21-6811(e)(3). See *Samuels*, 313 Kan. 876, Syl. ¶ 1 ("The sentencing judge considering the comparability of the crimes needed to decide whether the elements of the out-of-state crime were identical to or narrower than a Kansas person crime."); *State v. Sartin*, 310 Kan. 367, 372, 446 P.3d 1068 (2019) ("The legality of [the offender]'s sentence must be assessed by the comparability test applicable when his sentence was pronounced.").

In applying the *Wetrich* test, this court merely analyzes the elements of the prior out-of-state conviction to determine if they appropriately correspond to the Kansas crime without considering the underlying facts of the conviction. *State v. Mejia*, 58 Kan. App. 2d 229, 239-40, 466 P.3d 1217 (2020). However, if the prior out-of-state offense contained alternative means for conviction, the district court must determine under which version of the out-of-state offense the defendant was convicted. *Obregon*, 309 Kan. at 1273-75. If the State fails to prove by a preponderance of the evidence that the defendant was convicted of the version of the prior out-of-state offense with elements identical to or narrower than the elements of the corresponding Kansas person offense, then the district court must classify the prior out-of-state conviction as a nonperson offense. "[W]hen the crime in question is an out-of-state offense with alternative means—some of which would not be comparable to Kansas person crimes—the State's burden is to establish that the defendant committed a version of the offense supporting the person classification." 309 Kan. at 1275 ("[I]t is the State's burden to prove by a preponderance of the evidence that the defendant committed a crime for which classification is appropriate.").

The parties do not dispute that the district court properly classified the prior convictions at issue in this appeal as felonies because the convicting jurisdiction—South Carolina—classified the crimes as felonies. See K.S.A. 2017 Supp. 21-6811(e)(2)(A). However, the parties dispute whether the elements of each of the prior South Carolina felony convictions have elements identical to or narrower than the comparable Kansas person crime.

a. *The elements of Bass' 1997 felony conviction in South Carolina for threatening a public official are broader than the elements of the Kansas person felony of criminal threat under K.S.A. 2017 Supp. 21-5415(a).*

The parties agree that Bass' 1997 South Carolina felony conviction for threatening a public official should be compared to the Kansas person felony of criminal threat under K.S.A. 2017 Supp. 21-5415(a). The Kansas felony of criminal threat is classified as a person offense. See K.S.A. 2017 Supp. 21-5415(c)(1) ("A criminal threat is a severity level 9, person felony."). Therefore, if the 1997 South Carolina conviction of threatening a public official is identical to or narrower than the Kansas criminal threat offense, then the district court properly classified the conviction. The South Carolina offense provided:

> "It is unlawful for any person to knowingly and willfully deliver or convey to a public official or to a teacher or principal of an elementary or secondary school any letter or paper, writing, print, missive, document, or electronic communication or any verbal or electronic communication which contains any threat to take the life of or to inflict bodily harm upon the public official, teacher, or principal, or members of [their] immediate family . . . ." S.C. Code Annot. § 16-3-1040(A) (1997).

See *State v. Bridgers*, 329 S.C. 11, 13, 495 S.E.2d 196 (1997) (confirming the language and elements of the South Carolina statute under which Bass was convicted in 1997); *State v. Carter*, 324 S.C. 383, 87, 478 S.E.2d 86 (S.C. Ct. App. 1996) (same).

The comparable Kansas offense provided:

> "(a) A criminal threat is any threat to:
>
> (1) Commit violence communicated with intent to place another in fear, or to cause the evacuation, lock down or disruption in regular, ongoing activities of any building, place of assembly or facility of transportation, or in reckless disregard of the risk of causing such fear or evacuation, lock down or disruption in regular, ongoing activities;
>
> (2) adulterate or contaminate any food, raw agricultural commodity, beverage, drug, animal feed, plant or public water supply; or
>
> (3) expose any animal in this state to any contagious or infectious disease."
>
> K.S.A. 2017 Supp. 21-5415(a).

The 2019 Kansas Supreme Court decision that "[t]he portion of K.S.A. 2018 Supp. 21-5415(a)(1) allowing for a conviction if a threat of violence is made in reckless disregard for causing fear is unconstitutionally overbroad" does not impact this court's analysis in this case. See *State v. Boettger*, 310 Kan. 800, Syl. ¶ 3, 450 P.3d 805 (2019), *cert. denied* 140 S. Ct. 1956 (2020).

It is readily apparent that the South Carolina statute is broader than the Kansas statute in at least one important manner. Unlike the Kansas statute, the South Carolina statute does not require that the offender communicate the threat with any particular intent. For example, an offender could violate the South Carolina statute by knowingly and willfully threatening to take the life of or inflict bodily harm upon a public official with the intent to make the official laugh or with no intent at all. Therefore, as written, it was possible for conduct that satisfied the statutory elements of the South Carolina conviction to not constitute a criminal threat under the comparable Kansas offense in K.S.A. 2017 Supp. 21-5415(a).

Despite the clear language of the statutes, the State argues that the elements of the South Carolina statute are nevertheless identical to or narrower than those of the Kansas statute because United States Supreme Court precedent requires that the South Carolina

statute be interpreted to only apply to "true threats" where "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003). The State's argument is unpersuasive for several reasons. First, the State presented no evidence that South Carolina courts had, in fact, relied upon the authority cited by the State to read an intent element into S.C. Code Annot. § 16-3-1040(A). The State failed to demonstrate that a particular intent was, in fact, an element of the offense; instead, the State argues that it *should have been* an element of the offense to comport with the First Amendment to the United States Constitution. There is no evidence that in 1997 the South Carolina court required the prosecutor to prove, as an element of the offense, that Bass acted with an intent to place anyone in fear of violence—even if it should have in order to comport with the First Amendment as the State argues.

Second, the United States Supreme Court's decision in *Black*—as well as other decisions cited by the State—do not support its assertion that an intent element must be read into the South Carolina statute to satisfy the First Amendment. The Kansas Supreme Court has explained that "*Black* did not directly address whether the First Amendment tolerates a conviction for making a threat even though there was no intent to cause fear." *Boettger*, 310 Kan. at 812. A panel of this court likewise noted that "[t]he United States Supreme Court in *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003), did not directly address whether the First Amendment tolerates a conviction for making a threat even though there was no intent to cause fear." *State v. Louis*, 59 Kan. App. 2d 14, Syl. ¶ 7, 476 P.3d 837 (2020). Accordingly, the State cannot rely upon *Black* to create and presume an intent element in the South Carolina statute. Even if the cited authority supported the State's proposition that South Carolina's statute conflicts with the First Amendment because it lacks an intent element, that only relates to the statute's constitutionality—not the breadth of its elements or Bass' conviction.

Because the South Carolina statute lacks an intent element that is present in the Kansas statute, the elements of the South Carolina statute are not identical to or narrower than the elements of the comparable Kansas statute. The district court therefore erred in classifying Bass' 1997 South Carolina felony conviction for threatening a public official as a person offense. See K.S.A. 2017 Supp. 21-6811(e)(3); *Wetrich*, 307 Kan. 552, Syl. ¶ 2.

b. *The elements of Bass' 2003 felony robbery conviction in South Carolina are broader than the elements of the Kansas person felony of robbery under K.S.A. 2017 Supp. 21-5420(a).*

The parties agree that Bass' 2003 South Carolina robbery conviction should be compared to the Kansas person felony of robbery under K.S.A. 2017 Supp. 21-5420(a). K.S.A. 2017 Supp. 21-5420(c)(1) ("Robbery is a severity level 5, person felony."). The South Carolina robbery statute simply stated that "[t]he common law offense of robbery is a felony." S.C. Code Annot. § 16-11-325 (2003). The elements of the relevant South Carolina robbery offense were "the felonious or unlawful taking of personal property of any value from the person of another, or in the person's presence, by violence or putting the person in fear." *Broom v. State*, 351 S.C. 219, 220, 569 S.E.2d 336 (2002). The elements of the 2017 comparable Kansas offense are "knowingly taking property from the person or presence of another by force or by threat of bodily harm to any person." K.S.A. 2017 Supp. 21-5420(a).

The elements of South Carolina's robbery offense are broader than its Kansas counterpart in that robbery in South Carolina could be accomplished by "putting the person in fear," whereas the Kansas statute required that the offender make a "threat of bodily harm to any person." For example, under of the South Carolina robbery statute, an offender could have committed robbery by threatening to harm the victim's pet. Whereas in Kansas, the offender was required to threaten bodily harm to a person. Therefore, it was possible for an offender to be convicted of robbery in South Carolina at the time of

Bass' conviction for conduct that would not have constituted robbery in Kansas under the comparable statute in K.S.A. 2017 Supp. 21-5420(a).

The State argues the elements of South Carolina robbery are nevertheless identical to or narrower than those of the Kansas statute because the South Carolina Supreme Court has interpreted the element of "putting the person in fear" as requiring that "an ordinary, reasonable person in the victim's position would feel a threat of bodily harm from the perpetrator's acts." *State v. Rosemond*, 356 S.C. 426, 430, 589 S.E.2d 757 (2003). The South Carolina Supreme Court's interpretation in *Rosemond* would make that element of South Carolina's robbery offense narrower than the corresponding element in the Kansas statute. The problem with the State's argument is that the South Carolina Supreme Court's decision in *Rosemond* was issued more than eight months *after* Bass pled guilty to robbery in South Carolina. The State cites no authority demonstrating that when Bass was convicted of robbery in South Carolina, the element of "putting the person in fear" required that "an ordinary, reasonable person in the victim's position would feel a threat of bodily harm from the perpetrator's acts," as stated in *Rosemond*, 356 S.C. at 430. Therefore, when Bass was convicted, it was possible to be convicted of robbery in South Carolina for conduct that would not have constituted robbery in Kansas under K.S.A. 2017 Supp. 21-5420(a), and thus, the elements of South Carolina robbery were broader than those of the Kansas statute.

However, South Carolina robbery is an alternative means crime that could have been committed "by violence *or* putting the person in fear." (Emphasis added.) *Broom*, 351 S.C. at 220. Therefore, the State could have avoided Bass' argument that the South Carolina elements were broader than the comparable Kansas elements if it had shown by a preponderance of the evidence that Bass was convicted of the version of South Carolina robbery achieved by violence. See *Obregon*, 306 Kan. at 1273-75. But the State did not present any evidence demonstrating that Bass was convicted of that version of the offense. However, even if the State had shown such evidence, it appears the elements of

South Carolina's robbery offense are broader than its Kansas counterpart in another way because the South Carolina robbery offense does not have a clear mens rea element. In South Carolina, the taking is defined as "felonious or unlawful," whereas in Kansas robbery is "knowingly taking." The State cites no authority demonstrating that South Carolina robbery had a mens rea element identical to or narrower than the mens rea element of the Kansas statute.

Therefore, the district court erred in classifying Bass' 2003 South Carolina felony robbery conviction as a person offense. See K.S.A. 2017 Supp. 21-6811(e)(3); *Wetrich*, 307 Kan. 552, Syl. ¶ 2.

c. *This court need not address Bass' constitutional argument.*

Bass argues that the *Wetrich* identical-or-narrower test is constitutionally mandated based upon three United States Supreme Court decisions: *Mathis v. United States*, 579 U.S. 500, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016); *Descamps v. United States*, 570 U.S. 254, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2014); and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Because this court has determined that the *Wetrich* test is the appropriate method of analyzing the applicable statute, and Bass prevails under that analysis, this court need not reach Bass' constitutional argument. See *Butler v. Shawnee Mission School District Board of Education*, 314 Kan. 553, 554, 502 P.3d 89 (2022) (explaining that the doctrine of constitutional avoidance "strongly counsels against courts deciding a case on a constitutional question if it can be resolved in some other fashion").

II. *The district court did not abuse its discretion in denying Bass' presentence motion to withdraw plea.*

A defendant can withdraw a guilty plea at any time before sentencing "'for good cause shown.'" *State v. Frazier*, 311 Kan. 378, Syl. ¶ 2, 461 P.3d 43 (2020). Courts consider the following three factors when determining whether a defendant has shown good cause to set aside a presentence guilty plea: "(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. Barber*, 313 Kan. 55, Syl. ¶ 1, 482 P.3d 1113 (2021).

These three factors are commonly referred to as the "*Edgar*" factors. *State v. Edgar*, 281 Kan. 30, 36, 127 P.3d 986 (2006).

The district court applied the *Edgar* factors and found that each weighed against a finding that Bass had shown good cause to withdraw his guilty plea. Bass argues that the district court abused its discretion in finding that the first and third *Edgar* factors did not support his claim.

This court reviews the district court's denial of a presentence motion to withdraw plea for an abuse of discretion. *Barber*, 313 Kan. at 58; see K.S.A. 2022 Supp. 22-3210(d)(1). The district court abuses its discretion when its decision is: (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. 313 Kan. at 58. As the party asserting that the district court abused its discretion, Bass bears the burden of demonstrating such an abuse of discretion. See 313 Kan. at 58. The district court commits an error of fact when its findings are unsupported by substantial competent evidence. *State v. Schaal*, 305 Kan. 445, 452, 383 P.3d 1284 (2016). Substantial competent evidence is legal and relevant evidence that a reasonable person might accept as being sufficient to support a conclusion. *State v. Smith*, 312 Kan. 876,

887, 482 P.3d 586 (2021). "When reviewing a district court's consideration of a motion to withdraw a guilty plea before sentencing, an appellate court does not reweigh evidence or reassess witness credibility." *State v. Newman*, 311 Kan. 155, Syl. ¶ 1, 457 P.3d 923 (2020).

a. *The district court did not abuse its discretion in finding that Bass was represented by competent counsel.*

Under the first *Edgar* factor, Bass argues that his trial counsel "provided lackluster advice . . . by failing to explain adequately that Mr. Bass would be serving more than 7 years . . . especially considering Mr. Bass' limited understanding and processing skills." A showing of lackluster advocacy can support a finding of incompetent representation used to show good cause. *Barber*, 313 Kan. 55, Syl. ¶ 2.

At the evidentiary hearing, Bass' former attorney testified extensively about how he explained to Bass his potential sentence under the plea agreement, including:

(1) reading the plea agreement out loud to Bass;

(2) converting months to years;

(3) explaining the maximum possible sentence; and

(4) explaining different sentencing scenarios based upon different calculations of Bass' criminal history score.

His former attorney also testified that he never promised Bass that his sentence under the plea agreement would be seven years. The district court found the attorney's testimony credible, and this court cannot "reassess witness credibility." *Newman*, 311 Kan. 155, Syl. ¶ 1. Based upon that witness-credibility determination and the attorney's testimony, it was not unreasonable for the district court to find that Bass was represented by competent counsel.

b. *The district court did not abuse its discretion in finding that Bass' guilty plea was fairly and understandingly made.*

Bass argues that, under the third *Edgar* factor, he "did not understandingly plead guilty because there was a fundamental misunderstanding regarding his sentence." Bass argues that, because he could not read and had difficulty understanding, he "did not understand the consequences of his plea."

In denying Bass' motion to withdraw his guilty plea, the district court made a factual finding that Bass understood "what he was signing up for." As the district court noted, it explained to Bass his maximum possible sentence before accepting his guilty plea. The district court also relied upon his former attorney's testimony—which it deemed credible—that he had discussed with Bass his potential maximum sentence, explained different sentencing scenarios based on potential criminal history scores, and had converted months to years in his explanation. Bass also signed the plea agreement and an acknowledgment of rights and entry of plea which included sentencing ranges for each of the three offenses to which Bass was pleading guilty. The district court also relied upon its interactions with Bass during various hearings in finding that Bass understood the potential sentence from the plea agreement when he accepted it. Contrary to Bass' assertion, the district court's determination that Bass understood the plea he was accepting was supported by substantial competent evidence.

The district court further determined that Bass' desire to withdraw his plea was not based upon misunderstanding the plea agreement but rather because Bass wanted to avoid being tried by the jury panel that was being selected. There is substantial competent evidence in the record to support the court's determination. Bass stated in his pro se motion to withdraw his guilty plea that "it is clear upon reflection that defendant was so afraid of a biased jury, that he was driven toward a plea bargain." Bass testified that when he decided to plead guilty during jury selection, he "needed to stop the jury." Bass further

testified at the evidentiary hearing that "when I went to court, everybody that you picked in the courtroom, in the jury trial, had the same sex case resemble to mine's, and I feel that I was against—everything was against me, so I took the easy way out." The district court further observed that it was Bass, not his attorney, who initiated the conversation about the plea agreement during jury selection.

Substantial competent evidence supported the district court's factual finding that Bass understood the plea agreement and its consequences, and it was not unreasonable for the district court to find that Bass' guilty plea was fairly and understandingly made. The district court applied the correct legal analysis, made factual findings supported by substantial competent evidence, and reached reasonable conclusions. Thus, it did not abuse its discretion in denying Bass' presentence motion to withdraw his guilty plea for failure to show good cause.

CONCLUSION

The district court erred in classifying Bass' two prior South Carolina felony convictions as person offenses when calculating his criminal history score. This court therefore vacates Bass' sentences and remands the case for resentencing based upon the accurate criminal history score reflecting those prior convictions as nonperson felonies. However, the district court did not abuse its discretion in finding that Bass failed to show good cause to withdraw his guilty plea, and its decision on that issue is therefore affirmed.

Convictions affirmed, sentences vacated, and case remanded with directions.