

NOT DESIGNATED FOR PUBLICATION

No. 124,850

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

CARRIE E. WALKER,
Appellant.

MEMORANDUM OPINION

Appeal from Montgomery District Court; JEFFREY GETTLER, judge. Opinion filed March 3, 2023.
Affirmed.

Kristen B. Patty, of Wichita, for appellant.

Michael R. Serra, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before GARDNER, P.J., MALONE and HILL, JJ.

PER CURIAM: Carrie Walker appeals the district court's summary denial of her motion for habeas corpus relief under K.S.A. 60-1507. Walker contends that the district court erred in denying her claim of ineffective assistance of counsel without first holding an evidentiary hearing. After review, we find no error and affirm.

Factual and Procedural Background

Following controlled undercover narcotics buys, the State charged Walker with multiple drug-related offenses. Although Walker's appointed counsel worked to negotiate

a plea agreement with the State, Walker chose to enter no-contest pleas to all charges without concessions from the State. In pleading to all charges within the complaint, Walker rejected a plea offer from the State. Although the record failed to specify the details of the rejected plea offer, Walker's motion alleged it contained these terms: the State would offer 13 years in prison, and she would waive the right to seek a sentencing departure.

At the plea hearing, Walker confirmed that she had read and understood a written acknowledgment of rights. That document advised Walker that the court was not bound to honor any agreement regarding sentencing and that the court could order the sentences to run consecutively up to twice the duration of the base offense. The acknowledgment of rights also disclosed the sentencing ranges for each offense. And at the plea hearing, the district court reviewed the charges with Walker and told her the applicable sentencing range for each offense. After advising Walker of her rights, the district court accepted Walker's no-contest pleas.

Before sentencing, Walker moved for a downward durational and dispositional sentencing departure. At sentencing, the district court denied that motion and sentenced her to consecutive prison terms for a controlling term of 292 months. She appealed to this court, but the court dismissed the appeal for lack of jurisdiction.

Walker then filed a timely pro se motion for habeas corpus relief under K.S.A. 60-1507, seeking to withdraw her no-contest pleas for ineffective assistance of trial and appellate counsel. She made only one claim against appellate counsel—failing to argue in her direct appeal that trial counsel was ineffective. Walker claimed that trial counsel was ineffective in these ways:

"(a) Manifest Injustice resulted when counsel coerced and misled client into pleading no contest and not explaining the possible outcome and promising that a downward departure would be granted by entering a plea of no contest.

"(b) Prejudice resulted by counsel violated Ms. Walker's Sixth Amendment right to effective counsel by encouraging Walker to turn down a plea offer and instead receive a harsher sentence. Counsel shows prejudice by representing other defendants in the same drug sting and now is prosecuting defendants from the same drug sting."

Without appointing counsel for Walker or holding a hearing, the district court summarily denied the motion.

Walker appeals.

Did the District Court Err in Summarily Denying Walker's Claim of Ineffective Assistance of Trial Counsel?

A prisoner in state custody may challenge a conviction or sentence on constitutional grounds by filing a motion under K.S.A. 60-1507(a). When, as here, the district court denies the motion without a hearing, this court is in an equal position to assess the merits of the motion. Thus, we apply an unlimited standard of review without deference to the district court's decision. See *State v. Adams*, 311 Kan. 569, 574, 465 P.3d 176 (2020) (summary denial of motion to withdraw plea); *Littlejohn v. State*, 310 Kan. 439, 443, 447 P.3d 375 (2019) (summary denial of K.S.A. 60-1507 motion).

The district court characterized Walker's motion as a request for habeas corpus relief under K.S.A. 60-1507(a) rather than as a motion to withdraw a plea under K.S.A. 2021 Supp. 22-3210. Either characterization is correct because, analytically, there is no distinction. Whether we characterize Walker's motion as a request for habeas corpus relief under K.S.A. 60-1507(a) or as a motion to withdraw a plea under 2021 Supp. K.S.A. 22-3210, the latter statute provides the framework for analyzing her claim. See

State v. Hill, 311 Kan. 872, 876, 467 P.3d 473 (2020) (characterizing motion challenging due process of plea entry as request to withdraw pleas); *State v. Kelly*, 291 Kan. 563, 566, 244 P.3d 639 (2010) (construing pro se motion under K.S.A. 60-1507 as a motion to withdraw plea under K.S.A. 22-3210).

"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. 2021 Supp. 22-3210(d)(2). The Kansas Supreme Court has defined manifest injustice in this context to mean something "obviously unfair" or "shocking to the conscience." *Adams*, 311 Kan. at 575; *White v. State*, 308 Kan. 491, 496, 421 P.3d 718 (2018). Walker bears the burden of establishing that a manifest injustice warrants setting aside her pleas. We review that decision for an abuse of discretion. See *State v. Johnson*, 307 Kan. 436, 443, 410 P.3d 913 (2018) (citing *State v. Edgar*, 281 Kan. 30, 38, 127 P.3d 986 [2006]). A district court abuses its discretion when its decision is arbitrary, fanciful, or unreasonable, or when the court bases its decision on an erroneous application of the facts or law. *Johnson*, 307 Kan. at 443.

Our court generally examines three factors in considering whether a movant has established manifest injustice to withdraw a plea: (1) the quality of representation; (2) the circumstances surrounding the plea that suggest the defendant might have been misled, coerced, mistreated, or unfairly taken advantage of; and (3) whether the plea was fairly and understandingly made. *State v. Shields*, 315 Kan. 131, 139, 504 P.3d 1061 (2022); *Edgar*, 281 Kan. at 36. Although these factors direct our inquiry, we should consider any factor bearing on the defendant's knowledge and voluntariness. See *Shields*, 315 Kan. at 139-40; *State v. Bricker*, 292 Kan. 239, 245, 252 P.3d 118 (2011).

Walker challenges her pleas on the quality of her representation. We thus apply the constitutional standard of ineffective assistance of counsel set by *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Shields*, 315

Kan. at 141 (citing *Johnson*, 307 Kan. at 447). This standard has two parts: The defendant must show that counsel's performance was objectively unreasonable under the circumstances, and the defendant must establish prejudice from counsel's deficient representation. *Shields*, 315 Kan. at 141.

Walker bears the burden of establishing her claim of ineffective assistance of counsel by a preponderance of the evidence. *Moll v. State*, 41 Kan. App. 2d 677, 683, 204 P.3d 659 (2009). Because the district court summarily dismissed Walker's claim without hearing evidence, however, we must accept the factual allegations within the motion as true. *Hogue v. Bruce*, 279 Kan. 848, Syl. ¶ 1, 113 P.3d 234 (2005). Summary dismissal of the claim is appropriate when, even accepting those facts as true, the claim cannot prevail. See *Swenson v. State*, 284 Kan. 931, Syl. ¶ 3, 169 P.3d 298 (2007).

In these cases, we employ a strong presumption that counsel's conduct fell within a broad range of reasonable professional assistance. *Kelly*, 298 Kan. at 970. In evaluating counsel's conduct, we must make every effort to eliminate the distorting effects of hindsight by evaluating the conduct from counsel's perspective at the time. *Crowther v. State*, 45 Kan. App. 2d 559, 564, 249 P.3d 1214 (2011).

If a party establishes deficient representation, the party must also convince us that the deficient representation prejudiced the outcome of his or her legal proceeding. *State v. Evans*, 315 Kan. 211, 218, 506 P.3d 260 (2022). Within the context of a plea withdrawal, a party establishes prejudice by convincing the court of a reasonable probability that, but for the deficient performance by counsel, he or she would have insisted on going to trial rather than enter the plea. A reasonable probability is objective information sufficient to undermine confidence in the outcome. *Shields*, 315 Kan. at 141; *Johnson*, 307 Kan. at 447. This standard is not subjective. See *Baker v. State*, 57 Kan. App. 2d 561, 572, 457 P.3d 183 (2019).

In her motion, Walker alleged several deficiencies in her trial representation. On appeal, she argues only that her defense counsel provided deficient representation in two ways: (1) Counsel failed to advise her of the potential consequences of pleading no-contest; and (2) counsel promised Walker that the court would grant her a downward departure. Walker therefore abandons the other allegations in her motion. Points incidentally raised but not argued or issues inadequately briefed are waived and abandoned. *State v. Bowser*, 312 Kan. 289, 305, 474 P.3d 744 (2020).

1. Potential Consequences of the Pleas

We first consider Walker's assertion that she entered her no-contest pleas because defense counsel failed to advise her of the potential consequences of doing so. We accept as true Walker's allegation that defense counsel failed to tell her about the direct consequences of entering the plea. Still, Walker cannot establish prejudice. The record shows that Walker entered the no-contest pleas against the advice of her counsel. Although the details of the agreement were not disclosed, the State offered Walker a plea agreement, and Walker rejected the plea offer against her counsel's advice.

Under Walker's version of the facts, defense counsel did not falsely advise her of the potential legal consequences but failed to advise her of those consequences at all. Even so, undisputed evidence in the record establishes that Walker was informed in other ways of the potential consequences of pleading to any or all of the charged offenses. The written acknowledgment of rights, which Walker admitted she had reviewed with defense counsel, listed the potential sentencing ranges for each offense and noted that the maximum sentence could be up to double the sentence for the base offense. The State had charged Walker with two severity level 1 drug felonies, which carried a potential sentencing range of 138 months to 204 months. Doubled, the potential controlling sentence could be between 276 months and 408 months. And the district court reviewed these sentencing ranges with Walker at the plea hearing before it accepted her plea.

Walker's decision to enter her no-contest pleas after the district court reviewed the potential direct consequences of her plea undermines her claim of prejudice from defense counsel's alleged failure to review these potential consequences with her. Having heard what prison terms she potentially faced, Walker insisted on moving ahead with her plea. This establishes that the potential consequences weighed lightly in her decision to enter pleas. She cannot objectively establish that, but for defense counsel's failure to advise her of the potential consequences of the pleas, she would have insisted on going to trial.

2. Promise of Sentencing Departure

We next consider Walker's allegation that defense counsel promised her that she would receive a sentencing departure if she entered no-contest pleas. The court did not entertain conflicting evidence on this issue or make a credibility determination or otherwise weigh the evidence. As a result, we must accept Walker's allegations as true, if they are plausible given the other facts of the case. See *Skaggs v. State*, 59 Kan. App. 2d 121, 137, 479 P.3d 499 (2020) (requiring an evidentiary hearing on allegations of actual innocence if the new facts alleged are not contradicted by the record).

But Walker's assertions are largely contradicted by the record. Her motion alleges that her trial counsel advised her to turn down the State's plea offer of 13 years in prison. But at the plea hearing, the State made a record that Walker's decision to turn down the plea agreement was against the advice of counsel. Yet Walker did not object to that characterization or inform the court that counsel had advised her not to take the State's plea offer. Her silence then cuts against her assertions now.

Walker's allegations about her trial counsel's advice are logically inconsistent with defense counsel's position at the plea hearing. Trial counsel could not advise Walker both to accept the State's plea offer for 13 years and also to reject that offer and pursue a sentencing departure. Trial counsel may have presented both possibilities as options,

allowing Walker to choose the option she believed most advantageous. But presentation of a client's legal options does not constitute deficient legal representation and would not support Walker's request to withdraw her pleas. See *Adams*, 311 Kan. at 578 (withdrawal of a plea after sentencing based on legal representation requires proponent to establish both prongs of *Strickland* standard for ineffective assistance of counsel); *State v. Solomon*, 257 Kan. 212, 223, 891 P.2d 407 (1995) ("Defense counsel has an obligation to advise a defendant as to the range of permissible penalties and to discuss the possible choices available to the defendant. A mere inaccurate prediction by defense counsel, however, does not constitute ineffective assistance of counsel. [Citations omitted.]"). Walker rejected the option her trial counsel advocated, even if trial counsel had presented the option Walker chose as viable. An undesirable result does not alone establish ineffective assistance of counsel. See *Strickland*, 466 U.S. at 690 ("Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense.").

To credit Walker's allegations as a basis to withdraw her pleas, the district court would have to conclude that trial counsel told Walker one thing but told the court another—that counsel privately advised Walker to reject the State's plea offer for 13 years in prison to pursue a sentencing departure but then publicly told the court that she had advised Walker to accept the State's plea offer. Yet trial counsel gained nothing by asserting to the court that Walker had rejected the State's plea offer against the advice of counsel. If she had advised Walker to plead to all charges and pursue a sentencing departure, trial counsel could have simply told the court that she had discussed the plea offer with Walker and that Walker rejected it. There would be no need for trial counsel to falsely assert that Walker's rejection of the plea offer went against counsel's advice.

Although the record contains nothing about trial counsel's private discussions with Walker, the record contradicts Walker's assertions that she rejected the State's plea offer on the advice of counsel. Walker did not allege sufficient facts to justify holding an

evidentiary hearing on her allegations. The district court properly dismissed Walker's motion to withdraw her pleas.

Affirmed.