NOT DESIGNATED FOR PUBLICATION

No. 125,009

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ELLIOTT JAMES SCHUCKMAN,
Appellant.

MEMORANDUM OPINION

Appeal from Finney District Court; KRISTI COTT, judge. Opinion filed May 26, 2023. Affirmed.

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

Isaac LeBlanc, assistant county attorney, *Susan Lynn Hillier Richmeier*, county attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before MALONE, P.J., GREEN and ISHERWOOD, JJ.

PER CURIAM: Elliott James Schuckman appeals the district court's denial of his presentence motion to withdraw his no-contest plea resulting in his conviction of distribution or possession with intent to distribute methamphetamine. He also claims the district court erred at sentencing by assessing a $400 Kansas Bureau of Investigation (KBI) lab fee as part of the costs of the case. After thoroughly reviewing the record and the parties' arguments, we find no error and affirm the district court's judgment.

FACTS

On October 15, 2021, law enforcement officers stopped and searched Schuckman's car in Garden City. There were four people in the car including Schuckman's infant son. The officers found methamphetamine, a digital scale, small plastic bags, and other drug paraphernalia inside the car. They found methamphetamine in the infant's diaper bag. The officers arrested Schuckman and took him into custody.

Four days later, the State charged Schuckman with distribution or possession with intent to distribute methamphetamine, possession of drug paraphernalia, and aggravated endangering of a child in case No. 21CR517. He had another case involving methamphetamine filed under case No. 21CR512. At his first appearance in both cases, Schuckman pleaded with the district court to be released from jail on his own recognizance (OR) so that he could start taking steps to "get my son back." The district court denied Schuckman's request for an OR bond but later reduced the bond to $7,000 cash or surety and set the case for a management conference on December 7, 2021. Schuckman still could not make bond.

On December 7, 2021, the parties announced that they had reached a plea agreement in both cases. Schuckman would plead no contest to one count of distribution or possession with intent to distribute methamphetamine in exchange for the State dismissing the remaining charges. The parties would jointly recommend the aggravated term of imprisonment under the sentencing guidelines and the State would support Schuckman's request for a dispositional departure to probation. The State also agreed that Schuckman could be released on his own recognizance pending sentencing.

The district court judge then engaged in an extended colloquy with Schuckman, asking if he understood his right to a preliminary hearing in both of his cases, the State's burden at the preliminary hearing, his right to present evidence at the hearing, and that he

could not be forced to testify at the hearing. Schuckman stated he understood all these considerations. The district court then inquired:

> "THE COURT: Has anyone forced you, coerced you, or promised you anything other than that's been outlined in the plea agreement in order to get you to waive your preliminary hearing?
>
> "[SCHUCKMAN]: No, Your Honor.
>
> "THE COURT: Are you under the influence of any alcohol, drugs, or prescription medication to the extent that you would not understand what's going on today?
>
> "[SCHUCKMAN]: No, Your Honor.
>
> "THE COURT: Have you had enough time to talk about your right to a preliminary hearing with [your attorney] or another attorney in her office?
>
> "[SCHUCKMAN]: Yes, I guess Zoom and coming to the jail. Yes.
>
> "THE COURT: Do you need more time to talk to her about your rights before we go further?
>
> "[SCHUCKMAN]: No. No, Your Honor."

Schuckman then waived his right to a preliminary hearing, and the district court bound him over for arraignment, at which he waived the formal reading of the amended complaint. Schuckman stated he understood the charge against him, that the possible sentence was 46 to 83 months' imprisonment, and that he could be subject to a fine.

The district court then went over Schuckman's rights to and at a jury trial, including the right to an attorney to represent him, the right to confront and cross-examine witnesses, the right to present a defense, the right to testify at trial and the right to not be compelled to do so, "the right to expect that you do not have to prove your innocence but that the State must prove your guilt beyond a reasonable doubt," and the right to appeal in the event of a conviction at trial, all of which Schuckman stated he understood. Schuckman told the court he was happy with his attorney's representation

and he did not need more time to talk with her before entering a plea, nor did he have any questions. Finally, the district judge inquired:

> "THE COURT: Do you understand that at time of sentencing that this court is not bound by the recommendations of counsel? What that means is that I'm allowed to sentence you to whatever the law allows me to do.
>
> "[SCHUCKMAN]: Yes, Your Honor.
>
> "THE COURT: And has anybody promised you that the court would be lenient with you or grant you probation in exchange for your no contest or guilty pleas today?
>
> "[SCHUCKMAN]: No, Your Honor."

With these assurances in mind, Schuckman pleaded no contest to distribution or possession with intent to distribute methamphetamine. After the State presented its factual basis, the district court found Schuckman guilty. The district court released Schuckman on an OR bond until his sentencing and ordered him to register as a drug offender. Sentencing was scheduled for late January 2022.

On January 7, 2022, Schuckman moved to withdraw his plea. In his motion, Schuckman asserted he should be permitted to withdraw his plea because at the time of his plea, he "was desperate to be released from jail in order to attend a critical juncture in a pending child custody case. He was under emotional duress and was not fully considering the legal implications of his no contest plea." The State opposed Schuckman's motion, arguing that he failed to show good cause to withdraw his plea.

On March 22, 2022, the district court held a hearing on Schuckman's motion. Schuckman's counsel argued that Schuckman regretted entering the plea and felt "impaled by wanting to try to deal with his child's custody situation." Schuckman testified that he believed if he pled, he would get his son back, but he learned after that the two cases were not linked together like he thought—"come to find out that this—this tied nothing in with that other thing." Schuckman entered his plea at a critical time in the

custody case, and when things in the custody case "didn't go the way [he had] planned" he informed his attorney he wanted to withdraw his plea. On cross-examination, Schuckman admitted that the custody proceedings were never mentioned at the plea hearing.

After hearing the evidence and arguments, the district court denied Schuckman's motion, finding that he failed to show good cause to withdraw his plea. The district court judge, who was the same judge that presided over the plea hearing, elaborated:

> "The testimony today was that the defendant felt that he was—or the argument is that he was under duress. The testimony today was conflicting. He testified that he knew there was a CINC case, but he didn't fully understand the extent of it, which would indicate to the court that at the time that he entered his plea that he did not know everything about the CINC case, and that is where he's claiming his duress came from and his stress. So that's conflicting and it's also conflicting with what he acknowledged to the court on the day he entered his plea.
>
> "This court specifically asked if anyone had forced him, coerced him, or promised him anything that—other that's been outlined in the plea agreement in order to get him to waive his preliminary hearing and enter his plea. He responded 'no' to the Court. We also asked him if he understood what was going on during the court hearing. He indicated that he did understand what was going on in the proceedings. The Court also inquired if he was under the influence of any alcohol, drugs, or prescription medication to the extent that he would not understand what's going on. He indicated that, no, he was not under the influence and that he was able to understand what was going on.
>
> "The Court also inquired if he'd had enough time to talk with his counsel about the plea agreement and his rights that he'd be giving up. He indicated that he had had enough time. The Court then even offered if he wanted more time to talk with his counsel for any questions, and he indicated that, no, he did not need more time to talk to his attorney.
>
> "Just looking at the transcript of what happened at the court hearing and then hearing the testimony today, the Court is finding that the defendant has failed to show

> that there is good cause to withdraw his plea agreement. So as I stated earlier, your motion is denied."

The case proceeded to sentencing, at which the district court sentenced Schuckman to 83 months' imprisonment but granted probation for 36 months. The district court also assessed a $400 KBI fee as part of the costs of the case. Schuckman timely appealed the district court's judgment.

DID THE DISTRICT COURT ERR IN DENYING SCHUCKMAN'S MOTION TO WITHDRAW HIS PLEA?

Schuckman first claims the district court erred in denying his motion to withdraw his plea. He argues that the record shows he had good cause to withdraw his plea because he was under duress because of the pending child in need of care (CINC) case involving his son. The State responds that the district court's decision to deny Schuckman's motion to withdraw his plea was proper because Schuckman failed to show good cause and the decision to deny the motion was within the district court's discretion.

Generally, appellate courts review a district court's decision to deny a motion to withdraw a guilty or no contest plea for an abuse of discretion. See *State v. Frazier*, 311 Kan. 378, 381, 461 P.3d 43 (2020). "A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact." *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). As the movant, Schuckman bears the burden to prove the district court erred in denying his motion to withdraw his plea. *State v. Hutto*, 313 Kan. 741, 745, 490 P.3d 43 (2021).

K.S.A. 2022 Supp. 22-3210(d)(1) states that a plea of guilty or no contest may be withdrawn at any time before sentence is adjudged "for good cause shown and within the discretion of the court." When reviewing the evidence before the district court, "[a]ppellate courts do not reweigh the evidence or assess witness credibility. Instead,

appellate courts give deference to the trial court's findings of fact." *State v. Anderson*, 291 Kan. 849, 855, 249 P.3d 425 (2011).

When determining whether a defendant has shown good cause to withdraw their plea, a district court generally looks to these three factors from *State v. Edgar*, 281 Kan. 30, 36, 127 P.3d 986 (2006): (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. *Frazier*, 311 Kan. at 381. But these factors should not "be applied mechanically and to the exclusion of other factors." *State v. Fritz*, 299 Kan. 153, 154, 321 P.3d 763 (2014). Instead, these factors establish "'viable benchmarks'" for the district court when exercising its discretion, but the "court should not ignore other factors that might exist in a particular case." *State v. Schaefer*, 305 Kan. 581, 588, 385 P.3d 918 (2016).

Schuckman argues that his request to withdraw his plea "implicates the second *Edgar* factor, but even if it does not fit neatly there, this Court may consider non-*Edgar* factors." Schuckman asserts he was under duress to take a plea deal because of the pending CINC case and his inability to post bond to attend to matters in that case. He also mistakenly believed that by pleading in the criminal case the CINC case would be resolved.

The record reflects that Schuckman's plea was understandingly made. At the plea hearing, the district court judge clarified that Schuckman understood the plea agreement and was allowed to ask his attorney any additional questions he might have. Schuckman stated that no one had "forced," "coerced," or "promised" him "anything other than that's been outlined in the plea agreement." There was no mention of the CINC case during this hearing. Schuckman expressed no understanding—correct or incorrect—that the two cases were linked or that he would be negatively (or positively) affected in the CINC case by pleading in his criminal case. See *State v. Bloom*, No. 98,492, 2008 WL 4291546, at

*5 (Kan. App. 2008) (unpublished opinion) (holding the defendant failed to show good cause to withdraw her plea when no evidence supported her alleged belief that she needed to plead guilty or risk losing her children).

Schuckman attacks the district court's finding that his testimony was conflicting. But Schuckman's testimony was conflicting with the statements he made at the plea hearing. Schuckman made clear statements and assurances to the district court at his plea hearing about his motivations to plead no contest and then tried to retract those statements at the motion hearing. The district judge—as the judge who presided over both the plea and motion hearing—was in the best position to resolve this conflict, and we must defer to the district court's findings of fact. *Anderson*, 291 Kan. at 855.

The district court listened to Schuckman's testimony but found that he failed to show good cause to withdraw his plea. On appeal, Schuckman is simply asking this court to reweigh the evidence and to reassess witness credibility. Schuckman fails to show that the district court abused its discretion in denying his motion to withdraw his plea.

DID THE DISTRICT COURT ERR IN ASSESSING A KBI LAB FEE?

Schuckman next claims the district court erred in assessing a $400 KBI lab fee at sentencing as part of the costs of the case. He argues there "was no evidence presented that the KBI actually performed testing, and, even if it did, there was no evidence what charge(s) the test related to." The State responds that Schuckman did not object to the lab fee at sentencing and the issue is not preserved for appeal. Alternatively, the State argues that the district court properly assessed the lab fee because the record sufficiently reflects that the KBI conducted drug testing in connection with the investigation of the case.

The State is correct that Schuckman did not object to the assessment of the KBI lab fee at sentencing, and he is raising this issue for the first time on appeal. Generally,

issues not raised before the district court cannot be raised on appeal. See *State v. Green*, 315 Kan. 178, 182, 505 P.3d 377 (2022). But there are several exceptions to the general rule that a new legal theory may not be asserted for the first time on appeal, including the following: (1) the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights; and (3) the district court was right for the wrong reason. *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021). Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36) requires an appellant to explain why an issue that was not raised below should be considered for the first time on appeal.

Schuckman asserts this issue involves only a question of law arising on proved or admitted facts and is finally determinative of the case. We disagree. Had Schuckman objected to the lab fee at the sentencing hearing, it would have provided the State with the chance to better clarify that the KBI performed drug testing in connection with Schuckman's conviction. Instead, Schuckman did not object to the fee at sentencing and is now trying to benefit from what he perceives as an unclear record on this issue. This issue is not a question of law arising on "proved or admitted facts." *Allen*, 314 Kan. at 283. If anything, the issue involves a question of law based on incomplete or unproven facts. We agree with the State that the issue is not properly preserved for appeal.

Even if we ignore the preservation problem, Schuckman's claim fails on the merits. To the extent Schuckman's claim raises a question of statutory interpretation, our review is unlimited. *State v. Stoll*, 312 Kan. 726, 736, 480 P.3d 158 (2021).

K.S.A. 28-176(a) allows a sentencing court to assess a $400 KBI lab fee if the record shows that forensic science or laboratory services were provided in connection with the investigation of the case. In laying the factual basis for Schuckman's no contest plea, the prosecutor described the seizure of methamphetamine from Schuckman's car on

October 15, 2021. The prosecutor stated the methamphetamine weighed between 1 gram and 3.5 grams and "was transported to the KBI lab in Great Bend where we would anticipate being able to proffer KBI confirmation results for methamphetamine." Schuckman did not object to the sufficiency of the factual basis for his crime of conviction. Then at the sentencing hearing, the district court asked whether "there [was] any KBI lab testing?" The prosecutor responded that "[t]here is one $400 KBI lab fee." The prosecutor's answer to the question was somewhat nonresponsive, but Schuckman raised no objection to the assessment of the fee. The State only charged Schuckman with one crime committed on October 15, 2021, that would have involved KBI drug testing, so there is no confusion as to what charge the lab fee related to.

Schuckman cites *State v. Peeples*, No. 120,010, 2020 WL 110868, at *7 (Kan. App. 2020) (unpublished opinion), to support his claim that the district court erred in assessing the lab fee. In that case, the State originally charged Peeples with drug offenses, but those charges were dismissed, and he only pleaded guilty to forgery, identity theft, and burglary of a vehicle. The State provided no information on KBI lab testing at the plea hearing or at sentencing, yet the district court assessed a $400 KBI lab fee as part of the costs of the case. On appeal, this court determined that the district court erred in assessing the lab fee because there was no evidence in the record that laboratory services were provided in connection with the investigation of the case. 2020 WL 110868, at *7.

Peeples is not on point. In that case, the State dismissed the drug charges and Peeples only pleaded guilty to nondrug crimes. There was no evidence in the record that drug testing was actually performed. Schuckman pleaded guilty to the only charge that would have involved KBI drug testing and the factual basis for the plea established that the methamphetamine was transported to the KBI lab in Great Bend for testing.

We conclude the record sufficiently reflects that the KBI provided laboratory services in connection with the investigation of the crime for which Schuckman was convicted. Thus, the district court did not err in assessing the KBI lab fee at sentencing.

Affirmed.