

No. 16-115599-A

**IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS**

STATE OF KANSAS
Plaintiff-Appellee

vs.

ULYSSES CLARK
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Geary County, Kansas
Honorable Maritza Segerra, Judge
District Court Case No. 08 CR 310

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Nature of the Case

Mr. Clark appeals the district court's denial of his motion to withdraw his plea.

Statement of the Issues

Issue: The district court erred in denying Mr. Clark's motion to withdraw his plea because both the district court and Mr. Clark's attorney had incorrectly informed him of the severity level and maximum penalty which could have been imposed when he accepted his plea.

Statement of the Facts

Ulysses Clark pled no contest to one count each of sale of methadone, sale of oxycodone, perjury, and solicitation to commit first degree murder. (R. IV, 25-27, 36). He was sentenced to a departure sentence of 108 months. (R. II, 192-211). Mr. Clark appealed from his sentencing. (R. II, 215).

During the course of Mr. Clark's direct appeal from sentencing, Mr. Clark filed a motion to withdraw his plea with the district court. (R. II, 221). In that plea withdrawal motion, Mr. Clark alleged that his plea was not knowingly and voluntarily made because his emotional health was compromised by isolation and charges levied against his family in addition to complaints about his trial counsel. (R. II, 221-223). That plea withdrawal was heard on its merits and denied by the district court. (R. II, 304).

On appeal, this Court reversed his sentence, finding that, although all parties below believed the sale counts at issue were severity level one felonies, there was insufficient evidence of the two prior convictions necessary to elevate

the two sale counts to severity level one. (R. II, 307). In a separate appeal, this Court affirmed the district court's denial of his post-sentencing motion to withdraw his plea. (R. III, 454).

At his resentencing, Mr. Clark again attempted to withdraw his plea, specifically expressing confusion over his resentencing and mentioning his plea contract. (R. XXVII, 18-19). However, before Mr. Clark could articulate more specific details as to why he wanted to withdraw his plea, the district court summarily denied that request. (R. XXVII, 18-19). In denying his plea withdrawal, the district court indicated that Mr. Clark had previously attempted to withdraw his plea in this case and that the plea withdrawal had already been litigated and denied. (R. XXVII, 18-19). Mr. Clark was again given a departure sentence of 108 months in the Department of Corrections with 36 months postrelease. (R. I, 289-303). He filed a timely notice of appeal from that resentencing hearing. (R. I, 316).

This Court reversed the district court's summary denial of Mr. Clark's motion to withdraw his plea, holding that the district court had a duty to inquire about Mr. Clark's motion to withdraw his plea and failed to do so. (R. III, 422). The panel remanded the case with directions that the district court hold a hearing and inquire about Mr. Clark's reasons for his motion to dismiss. (R. III, 423)

On September 14, 2015, the district court held the required hearing. (R. XXXIV). At the hearing, the attorney who represented Mr. Clark at the plea hearing testified that the State charged Mr. Clark with two counts of sale of

narcotics, both at a severity level 1. (R. XXXIV, 14). He testified that he told Mr. Clark that the maximum penalty for the crimes was 204 months, the level 1/criminal history A sentence at the time Mr. Clark allegedly committed the crimes. (R. XXXIV, 15). The attorney testified that, although there were other ancillary issues, Mr. Clark's primary concern was the amount of time he would receive. (R. XXXIV, 19). The attorney went over the plea agreement with Mr. Clark and advised him based upon the strength of the State's case and other charges against him, and the attorney's belief that the crimes charged were severity level 1 crimes. (R. XXXIV, 21).

Mr. Clark testified and confirmed that his attorney informed him that the sale counts were severity level one crimes and the penalties they discussed were those associated with severity level one crimes. (R. XXXIV, 34). Mr. Clark also testified that, in weighing whether to take the offered plea, he considered the maximum time he might serve if he went to trial and lost. (R. XXXIV, 37). He specifically stated that if he had known that he was only facing severity level two crimes, rather than severity level one crimes, he would not have taken the plea deal. (R. XXXIV, 38).

The district court found that, despite the undisputed fact that both it and his attorney had misadvised Mr. Clark regarding the maximum penalty, because that incorrect advice was actually to his benefit (i.e., the penalty of which Mr. Clark was advised was greater than what it actually was if he had gone to trial), there

was not good cause to allow Mr. Clark to withdraw his plea. (R. XXXV, 17). Mr. Clark appeals.

Arguments and Authorities

Issue: The district court erred in denying Mr. Clark’s motion to withdraw his plea because both the district court and Mr. Clark’s attorney had incorrectly informed him of the severity level and maximum penalty which could have been imposed when he accepted his plea.

Kansas law requires that, before a defendant pleads no contest to an offense, he must be advised of the severity level and the maximum penalty of the charges if he pleads no contest. K.S.A. 22-3210(a)(2); *State v. Shaw*, 259 Kan. 3, 12, 910 P.2d 809 (1996). Here, Mr. Clark was misadvised of both the severity level and the maximum penalty of the crime. This violated K.S.A. 22-3210(a)(2) and rendered his plea unknowingly made. The district court erred in denying his motion to withdraw his plea and Mr. Clark requests that this Court reverse and remand with directions that he be allowed to withdraw his plea.

Preservation of the Issue

Mr. Clark specifically raised the issue at his remand hearing that his plea should be withdrawn because he was not correctly advised of the maximum penalty of the crimes charged. (R. III, 438-44). The district court denied the issue on its merits. (R. XXXV, 17). The issue was preserved.

Standard of Review

K.S.A. 22–3210(d) addresses the withdrawal of a no contest or guilty plea. It establishes two standards for the district court. At any time before sentencing, a court may permit a plea to be withdrawn ‘for good cause shown and within the discretion of the court.’ After

a sentence has been adjudged, the court may permit a plea withdrawal only ‘[t]o correct manifest injustice.’ K.S.A. 22–3210(d). This case presents a situation in which the lesser, ‘good cause’ standard applies.

It is well established, however, that in reviewing a presentence denial of a motion to withdraw plea, an appellate court utilizes an abuse of discretion standard of review, as suggested by the language of K.S.A. 22–3210(d). But, as this court has explained, in order for the district court's decision to receive the full measure of that standard's deference, it must have been based upon a correct understanding of the law. *State v. Edgar*, 281 Kan. 30, 38, 127 P.3d 986 (2006); *see State v. Schow*, 287 Kan. 529, 541, 197 P.3d 825 (2008); *State v. Harned*, 281 Kan. 1023, 1042, 135 P.3d 1169 (2006). The defendant bears the burden of establishing the abuse of discretion. *Schow*, 287 Kan. at 541 [197 P.3d 825].

State v. Williams, 290 Kan. 1050, 1053, 236 P.3d 512 (2010). Here, Mr. Clark is arguing that the district court's decision was based on an incorrect understanding of the law that Mr. Clark's failure to understand the severity level and maximum penalty of the crime to which he was plead was harmless because the Court and his attorney informed of a penalty that was longer than what he actually faced.

Analysis

Mr. Clark was charged with possession of methamphetamine and possession of Oxycodone. (R. I, 159). Prior to entering his plea, all of the parties mistakenly believed that Mr. Clark was charged with two severity level one crimes. Under K.S.A. 2007 Supp. 65–4161(c), if a person “has two or more prior convictions under this section or substantially similar offenses under the laws of another jurisdiction, then such person shall be guilty of a drug severity level 1 felony.” If the person has one prior similar possession, as did Mr. Clark, such

person would be guilty of a severity level 2 felony. (R. I, 184); K.S.A. 2007 Supp. 65-4161(b).

However, as this Court found in *State v. Clark*, No. 105,614 (Kan. App. 2012) (*Clark I*), “there was no evidence in the record to support a finding that Mr. Clark had two similar prior convictions.” (R. II, 307). He therefore, could only have been convicted of a severity level two felony. Because Mr. Clark was charged with a severity level one crime, his attorney, when discussing the consequences of pleading guilty, advised him that his maximum sentence was for a severity level one crime. (R. XXXIV, 22). Similarly, during the plea hearing, the district court advised him, incorrectly, that he was charged with a severity level one crime and that the maximum penalty for each possession with intent to sell charge was 204 months. (R. XXXIV, 16).

Subsection (a) of K.S.A.2005 Supp. 22–3210 sets out the requirements for accepting a guilty plea:

“(a) Before or during trial a plea of guilty or nolo contendere may be accepted when:

- (1) The defendant or counsel for the defendant enter such plea in open court; and
- (2) in felony cases the court has informed 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; and
- (3) in felony cases the court has addressed the defendant personally and determined that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea; and

(4) the court is satisfied that there is a factual basis for the plea.”

State v. Beauclair, 281 Kan. 230, 236, 130 P.3d 40 (2006). At issue here is the second requirement, that before the district court may accept a plea of guilty or nolo contendere, it must inform “the defendant of the consequences of the plea, and including the specific sentencing guidelines level of any crime omitted on or after July 1, 1993, and of the maximum penalty provided by law which may be imposed upon acceptance of such a plea.” K.S.A. 22-3210(a)(2). It is undisputed here that the district court incorrectly informed Mr. Clark of both the severity level and the maximum penalty.

This case is similar to *State v. Shaw*, 259 Kan. 3, 910 P.2d 809 (2012). In *Shaw*, the defendant was charged with aggravated indecent liberties, a severity level 3 crime. *Shaw*, 259 Kan. at 4. However, the complaint erroneously listed the crime as a severity level 4 crime. *Shaw*, 259 Kan. at 4. At the plea hearing, the district court informed the defendant of the maximum penalties for the crime based upon its erroneous belief that the crime was a severity level 4 crime. *Shaw*, 259 Kan. at 5. The district court subsequently sentenced Shaw as if the severity level was a severity level 4. *Shaw*, 259 Kan. at 5.

After sentencing, Shaw filed a motion to withdraw his plea arguing, *inter alia*, he was misinformed about the severity level of the crime. *Shaw*, 259 Kan. at 6. The district court denied that motion. *Shaw*, 259 Kan. at 6. The Supreme

Court reversed. *Shaw*, 259 Kan. at 14. After noting that strict compliance with K.S.A. 22-3210(a) is not required, the Court held

The purpose of K.S.A. 22-3210(a) is to require the trial court to satisfy itself that the defendant's plea is made voluntarily and understandingly; to be so made, the record must show that the defendant fully understood his or her rights and was aware of the consequences of his or her plea. This case involves more than the imposition of an illegal sentence. In this case the defendant's plea was not knowing and voluntary because he was misinformed of the sentencing consequences of his plea. In a proceeding to withdraw a plea under K.S.A. 22-3210(d), where 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.

Shaw, 259 Kan. at 14.

The same situation exists here. The following quote from *Shaw* applies here: “The record reflects that the defendant was incorrectly informed of the maximum penalty provided by law before entering the plea[, therefore] the conviction must be reversed and the defendant allowed to withdraw his or her plea.” *See Shaw*, 259 Kan. at 14.

In this case, the district court held that *Shaw* did not apply because there, the defendant was advised that the maximum sentence was less than it actually was, whereas here, Mr. Clark was advised that the maximum sentence was more than it actually was. (R. XXXV, 14). The Court held “Mr. Clark’s exposure to his time – to the time is never going to be above what the Court had told him. As a matter of fact, it could only be under the time that he was actually exposed to, which could only be less by law, not more.” (R. XXXV, 14). This Price is Right

approach, where it is assumed that the defendant is only harmed if his sentence goes over the number he was advised before pleading 1) misses the point of K.S.A. 2007 22-3210(a)(2) and *Shaw* and 2) is incorrect.

In *Shaw*, as in K.S.A. 22-3210(a)(2), the concern is that the defendant be given information about the maximum penalty he faces to allow him to make a knowing and voluntary decision of whether to plead to the charges. *Shaw* concluded with

Here, 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. Because Shaw did not understand the consequences of his plea, the district court was required to set aside the judgment of conviction and allow the defendant to withdraw his plea.

Shaw, 259 Kan. at 15.

Although the district court was correct that in *Shaw*, the defendant faced greater charges than what he had been advised, that fact was completely absent from the Court's analysis. Instead, the analysis focused on Shaw's lack of understanding of the consequences of his plea and not having the requisite information to knowingly and voluntarily enter a plea. K.S.A. 22-3210(a)(2) requires that the district court, before accepting a plea, advise the defendant of the maximum penalty imposed if the plea is accepted. In fact, the Court specifically noted that the issue was not about the illegality of the sentence, but rather whether the defendant had the correct information with which to make a knowing and voluntary plea. *Shaw*, 259 Kan. at 14. ("This case involves more than the

imposition of an illegal sentence. In this case the defendant's plea was not knowing and voluntary because he was misinformed of the sentencing consequences of his plea.”)

Whether the district court's erroneous recitation of the maximum penalty is too high or too low is immaterial. The key, under *Shaw*, is that the information was erroneous and the defendant could not, therefore, make a knowing and voluntary plea.

The district court was also incorrect in holding that the erroneous statement of the maximum penalty did not affect Mr. Clark because the correct maximum penalty was less than the misstated maximum penalty. (R. XXXV, 14). In this case, as part of the plea agreement, the State offered Mr. Clark a departure to 108 months. (R. V, 9). When Mr. Clark was weighing the value of the State's recommended 108 month sentence, the correct maximum penalty played a large role in that calculus. (R. XXXIV, 42).

According to his motion to withdraw filed in the district court, Mr. Clark believed he was getting a 267 month reduction in sentence if the district court based its sentence on the recommendation. (R. III, 442). But, in reality, that recommendation only represented an 81 month reduction in time. (R. III, 42). By giving Mr. Clark an incorrect maximum, the district court inadvertently made the State's offer much more attractive than it otherwise would have been. Without knowing the actual consequences of pleading guilty to the crime charged, Mr. Clark could not knowingly weigh the plea offer from the State.

Conclusion

Here, it is undisputed that the district court and Mr. Clark's attorney misadvised him about both the severity level and the maximum penalty of the crime to which he was pleading no contest. Without this information, the plea was not knowingly made and the district court erred in denying his motion to withdraw his plea.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that service of the above and foregoing brief was sent by emailing a copy to Steve Opat, Geary County Attorney, at geca@nqks.com; and by e-mailing a copy to Derek Schmidt, Attorney General, at ksagappealsoffice@ag.ks.gov on the 12th day of October, 2016.

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