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2017 Jan 03 PM 12:51
CLERK OF THE APPELLATE COURT
CASE NUMBER: 115599

No. 16-115599-A

IN THE COURT OF APPEALS
OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

v.

ULYSSES JOHN ALLEN CLARK
Defendant-Appellant

Brief of Appellant

Appeal from the District Court of Geary County
The Honorable Maritza Segarra
District Court Case No. 08-CR-310

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NATURE OF THE CASE

The defendant pleaded to an amended complaint information in the above captioned case which resolved all of the defendant's pending cases in Geary County District Court. After a series of appeals, the district court re-litigated the defendant's motion to withdraw his plea. The district court denied his motion to withdraw his plea, and the defendant now appeals the latest denial of his motion to withdraw his plea.

STATEMENT OF THE ISSUES

ISSUE I: THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO WITHDRAW HIS PLEA.

STATEMENT OF FACTS

On August 24, 2009, the defendant and his counsel appeared before the Honorable Maritza Segarra for a plea to resolve all of the defendant's pending cases (See R. I, pp. 162-166). At the time, the defendant had four active felony cases, 08-CR-310, 09-CR-529, 09-CR-608, and 09-CR-608 (R. I, pp. 162-166). The State filed an amended complaint/information consolidating numerous charges from the four cases into a single case, 08-CR-310 (R. I, p. 159). The defendant pled to the following offenses: **Sale of Morphine**, a drug severity level 1, nonperson felony, in violation of K.S.A. 65-4161(a); **Sale of Oxycodone**, a drug severity level 1, nonperson felony, in violation of K.S.A. 65-4161(a); **Perjury**, a severity level 7, nonperson felony, in violation of K.S.A. 21-3805(a)(1); and **Solicitation to Commit first Degree Murder**, a severity level 3, person felon (R. I, pp. 167-171, R. V, pp. 1-43). The plea agreement in this matter was predicated on the defendant serving a controlling term of 108 months in the Department of Corrections (R. I, pp. 162-166(See Generally R. V).

The sentencing court granted the defendant's motion for a downward durational departure to comply with the agreement of the parties (R. I, pp. 192-

211)(See Generally R. XII). The defendant was sentenced to a controlling term of 108 months in the custody of the Department of Corrections (R. See Generally XII).

The defendant filed a Notice of Appeal (R. II, p. 215). The appeal was docketed out of time (See Appeal Case Number 105,614). The defendant filed a motion to withdraw his plea after his sentencing (R. II, pp. 221-223). The district court held an evidentiary hearing and denied the defendant's motion, and the defendant filed a Notice of Appeal (See Generally R. VI)(R. II, p. 254). That appeal was docketed as 109,346. This court upheld the district court's denial of the defendant's post-sentence motion to withdraw his plea in 109,346 (R. III, pp. 453-466). On the defendant's initial appeal, this court remanded the matter back for re-sentencing, after finding the defendant should have been sentenced to drug severity level 2 offenses, rather than level 1 offenses (R. II, pp. 303-308).

The defendant was re-sentenced on July 6, 2012 (See Generally R. XXVII). During the re-sentencing counsel for the defendant advised the court, after reviewing the case, that the plea reached by the parties was the best resolution, and was better than the presumptive sentences (R. XVII, pp. 12-14). This also took into consideration the defendant's other charges in other cases (R. III, pp. 447-450). The district court did not cut off the defendant when he advised the district court "I still think I would like to withdraw my plea" (R. XVII, p. 18-19). The

court merely responded to the defendant's statement, as the defendant had not filed a motion to withdraw his plea prior to re-sentencing (See R. I, II, and III). The district court advised the defendant that it had heard the motion, found there was no basis to withdraw the plea, denied the motion then and was denying the motion again (R. XXVII, pp. 18-19). The defendant immediately responded that he wanted to appeal the sentence, which had not yet been announced (R. XVII, p. 19). The defendant was sentenced pursuant to the plea agreement to a controlling term of 108 months in the custody of the Secretary of Corrections (R. XVII, pp. 19-25). The defendant filed a Notice of Appeal (R. II, p. 356-357). The defendant then filed another motion to withdraw his plea (R. III, pp. 359-362).

This court found that the district court had abused its discretion at the re-sentencing by not allowing the defendant to present evidence and ordered the court to address the defendant's oral motion to withdraw his plea, using the good cause standard (R. III, pp. 418-423). There was a delay in scheduling the evidentiary hearing on the defendant's oral motion to withdraw his plea, as the defendant had filed a petition for review in appellate case 110,290 (R. III, p. 452). The defendant ultimately withdrew that petition for review, and the court heard evidence on the defendant's oral motion to withdraw plea, which incorporated the defendant's subsequent written motion to withdraw his plea (R. III, pp. 438-445) on September 14, 2015 (See Generally R. XXXIV). The State had filed a response and objection

to the defendant's written motion to withdraw his plea (R. III, pp. 447-450).

The defense called the defendant's trial counsel, James Chappas, who testified he represented the defendant on four cases (R. XXXIV, p. 13). Mr. Chappas testified that he felt the cases against the defendant were all strong cases, so the only real issue was the amount of time the defendant would be serving (R. XXXIV, pp. 18-22). Defense counsel testified he had reviewed the defendant's Triple I, had spoken to the defendant about his criminal history, and had reviewed journal entries of the defendant's prior convictions (R. XXXIV, pp. 25-26). Mr. Chappas testified the State had properly charged the defendant with level 1 drug offenses in this case (R. XXXIV, p. 26). On cross examination, Mr. Chappas testified that out of the four criminal cases filed against the defendant, three were committed on felony bond, thus all four had to run consecutive to each other (R. XXXIV, pp. 26-27). According to Mr. Chappas, this dramatically increased the defendant's exposure, in part, as the cases would have also cross-scored against each other (R. XXXIV, p. 27). Mr. Chappas also testified there were other significant criminal charges that the State had the potential of filing and the plea negotiations would address the uncharged crimes as well (R. XXXIV, p. 28).

The defendant chose to testify and when reviewing the plea agreement, claimed he received the plea agreement at his home on December 4 even though the defendant had entered his pleas months prior, on August 24, 2009 (R. XXXIV,

p. 35; R. I, pp. 162-171). The defendant then claimed the State had interlineated the plea agreement the day of his sentencing, despite the fac that the plea agreement was filed in the district court on August 26, 2009 (R. XXXIV, pp. 162-166). When asked about his potential sentence, the defendant admitted he was only looking at the penalties for the three charges in 08-CR-310 (R. XXXIV, pp. 37-38). The defendant also advised that he was advised by Mr. Chappas that if the defendant accepted the plea, the State would do him a favor by releasing his family members that were also in jail (R. XXXIV, pp. 40-41). The defendant also claimed he was deliberately placed in an isolation cell, which impacted his decision to accept the State's plea offer (R. XXXIV, pp. 38-39).

The State recalled Mr. Chappas (R. XXXIV, pp. 50-57). Mr. Chappas testified that the defendant had initialed the interlineations to the plea agreement that Mr. Chappas had made (R. XXXIV, pp. 51-52). Mr. Chappas also contradicted the defendant's testimony concerning his aching tooth the day the plea was entered, and testified the defendant absolutely wanted to enter the plea, despite being advised the plea hearing could be continued (R. XXXIV, p. 52). Mr. Chappas also denied that the State had agreed to dismiss his family members charges (R. XXXIV, p. 53).

The State called Donna Regalado, a corrections officer for the Gary County jail (R. XXXIV, pp. 27-). Ms. Reagaldo testified that the defendant had been

housed in one of their medical cells (R. XXXIV, p. 58). The cell had a bunk, a sink and toilet (R. XXXIV, pp. 58-59). The cell did not have a TV, as it was also their suicide watch cell, and for safety reasons, it did not have a TV (R. XXXIV, p.59). Ms. Regalado also testified that the defendant was allowed to go to other pods, with TV's (R. XXXIV, pp. 59-60).

The district court took argument from the parties and took the matter under advisement to review the transcript of the previous motion to withdraw plea (R. XXXIV, pp. 82-84). On September 30, 2015, the district court announced its decision (See Generally R. XXXV). The court noted the main impetus to the defendant entering the plea was the amount of prison time he would be serving and resolving all four of his felony cases (R. XXXV, pp. 12-13). The court also pointed out that the public defender's office prepared the plea agreement in this case, which contradicted defense counsel's argument the plea agreement was drafted by the State (R. XXXV, pp. 14-15). The court noted that the plea agreement encompassed four felony cases, involving numerous charges, which would all have to run consecutive to one another, thus exposing the defendant to much mor prison time than merely the charges in the amended complaint information (R. XXXV, pp. 12-17). The court denied the defendant's motion to withdraw his plea, finding he had not proven good cause to do so (R. XXXV, p.17).

ARGUMENTS AND AUTHORITY

ISSUE I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO WITHDRAW HIS PLEA.

Standard of Review

In reviewing a pre-sentence denial of a motion to withdraw plea, this Court employs an abuse of discretion standard of review, as suggested by the language of the statute. Further, we require the defendant to bear the burden of establishing the abuse of discretion. *State v. Harned*, 281 Kan. 1023, 1042, 135 P.3d 1169 (2006). However, 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. Schow*, 287 Kan. 529, 198 p.3d 825 (2008).

Arguments and Authority

The defendant argues the district court erred in denying the defendant's motion to with draw his plea, due to the district court erroneously providing the defendant the maximum penalty for a severity level 1, as opposed to a severity level 2. The defendant argues K.S.A. 22-3210(a)(2) requires strict compliance, and has cited *State v. Shaw*, 259 Kan. 14 (1996). However, the defendant's reliance on *Shaw* is misplaced. K.S.A. 22-3210(a)(2) requires the district court, when accepting a plea, to advise a defendant of the maximum penalty. In *Shaw*, the district court under advised the defendant of a lower maximum penalty than the

one actually allowed by law. Shaw was informed the offense charged was a severity level 4 offense, when it actually was a severity level 3 offense. Although the district court sentenced the defendant to 41 months in prison, which was consistent with the sentencing range of a severity level 4 offense, the sentence was illegal because the minimum presumptive sentence for a severity level 4 offense was 46 months. This court held that the trial court in *Shaw* failed to make the requisite findings of substantial and compelling reasons to grant a dispositional departure, thus making the sentence illegal. *State v. Shaw*, 259 Kan. 11-12. The facts in *Shaw* are substantially different than the facts in this case, as the district court in this case, over-informed the defendant of the maximum sentence, rather than under-informing the defendant, which resulted in the defendant not being advised of the maximum legal sentence that could be imposed. The difference is significant as a defendant cannot be sentenced to a greater penalty than he was informed. *State v. Chesbro*, 35 Kan.App.2d 662, 134 P.3d 1 (2006).

In this case, the defendant was sentenced to 42 months based on a departure that was agreed upon by the parties, and the district court made the appropriate findings, which are not in dispute. The defendant was advised of a maximum penalty greater than the actual severity level of his crime, which is the complete opposite of *Shaw*. In *State v. Beauclair*, 281 Kan. 230, 130 P.3d 230 (2006), the defendant was misinformed about his potential maximum penalty. In *Beuclair*, the

district court used the incorrect year of the sentencing guidelines, thus over-informing the defendant of his maximum penalties. The Kansas Supreme court found that despite the defendant being misinformed about his maximum penalties, the district court had substantially complied with K.S.A. 22-3210(a)(2). 281 Kan. at 241.

In *Noble v. State*, 240 Kan. 162, 727 P.2d 473 (1986), the district court failed to provide the defendant with the maximum penalties when he entered his plea. The Kansas Supreme court held that strict compliance with K.S.A. 22-3210(a)(2) is not required.

The defendant further argues that the district court's misstatement made the State's offer look better than what it turned out to be. This is an incorrect statement, as it overlooks the fact that the plea agreement in this case resolved the defendant's four, felony cases, in which the penalties would have had to run consecutive by operation of law, as they were committed while on felony bond, if the defendant had taken each to trial. These offenses would have also scored against each other, thus elevating his perceived criminal history. The defendant was charged with three level 1's offenses in 08-CR-310 (R. I, pp. 49). In 09-CR-86, he was charged with three level 2 offenses, in which the sentences would have to run consecutive to 08-CR-310, by operation of law (R. III, p. 448). In 09-CR-525, he was charged with two level 3, person felonies, which likewise, the

sentences would have to run consecutive, by operation of law, to both 08-CR-310 and 09-CR-86 (R. III, p. 448). Finally he was also charged with a level 7, person felony in 09-CR-608 (R. I, pp. 162-163, R. III, p. 448). Depending on the sequence in which these cases went to trial and were sentenced, the defendant's minimum criminal history could be as low as an "E", not an "F", and the maximum criminal history score would have been a "B" (R. III, p. 449). The defendant claims his maximum sentence would have only been 189 months (R. III, pp. 442). This calculation is incorrect and highly misleading. Assuming a criminal history score of "E" in 08-CR-310, the defendant would have sentences of 59 months, 49 months and 49 months, with the potential maximum sentence of 157 months (this would comply with the "double-double" rule)(R. III, pp.448-449). Assuming the defendant was a "B" due to his convictions in 09-CR-525 for solicitation to commit first degree murder, he would be facing 73 months plus 98 months (49 months on each subsequent count), for a total of 172 months (R. III, pp.448-449). In 09-CR-86, he likewise would have faced a maximum of 157 months (If an 'E") or 172 months (If a "B"), and these would have to run consecutive to each other for a possible maximum sentence of 314 months to 344 months (R. III, pp.448-449). Then tack on 88 months for each count in 09-CR-525, for a maximum of 176 months, consecutive to 09-CR-86 and 08-CR-310, for a maximum sentence of 490 months to 520 months (R. III, pp.448-449). Then add the sentence for 09-CR-608

for a range of 21-29 months (R. III, pp.448-449). So potentially, the defendant faced upwards of 549 months in DOC (R. III, pp.448-449). This assumes six, level 2 drug offenses in 08-CR-310 and 09-CR-86 (R. III, pp.448-449). It cannot be said trial counsel misled, or that the defendant was unaware of the potential maximum penalties involving all of his cases. The court may not have strictly complied with K.S.A. 22-3210(a)(2), but there was substantial compliance to place the defendant on notice of the maximum penalties, in light of all of the cases he was charged with and the requirement that they run consecutive to each other, resulting in a significant length of incarceration, far in excess of the terms of his plea agreement. The district court did not abuse its discretion in denying the defendant's motion to withdraw his plea.

CONCLUSION

The district court did not abuse its discretion in denying the defendant's motion to withdraw his plea. The defendant was made aware of the maximum potential penalty he faced, especially given his plea agreement consolidated four felony cases. The length of incarceration if convicted on all four cases was significantly higher than the agreed upon 108 months. This court should affirm the district court's denial of the defendant's motion to withdraw his plea.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I delivered filed electronically original appellee brief with the Clerk of the Appellate Court on January 3, 2017. Opposing counsel was served via the electronic notification system on this 3rd day of January, 2017 to:

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