NOT DESIGNATED FOR PUBLICATION

No. 123,930

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF E.J.P.

MEMORANDUM OPINION

Appeal from Douglas District Court; PAUL R. KLEPPER, judge pro tem. Opinion filed August 25, 2023. Affirmed in part and reversed in part.

Dakota T. Loomis, of Law Office of Dakota Loomis, LLC, of Lawrence, for appellant.

Brian Deiter, assistant district attorney, and *Suzanne Valdez*, district attorney, for appellee.

Before SCHROEDER, P.J., MALONE, J., and MARY E. CHRISTOPHER, S.J.

PER CURIAM: E.J.P. appeals the denial of his postsentence motion to withdraw plea. The district court found that the motion was filed outside the one-year statute of limitations and that E.J.P. failed to prove excusable neglect for the late filing. It also found that E.J.P. failed to show manifest injustice to withdraw his plea. E.J.P. argues that newly discovered evidence, in the form of the victim's recantation, constitutes excusable neglect allowing him to file his motion outside the time limitation. He also argues that he should be allowed to withdraw his no-contest plea to correct manifest injustice.

We find the district court erred in finding that the victim's recantation did not constitute new evidence sufficient to establish excusable neglect to permit the untimely motion. But we also find that the district court addressed whether E.J.P. showed manifest injustice to withdraw his plea and did not abuse its discretion in denying the motion on its merits. Thus, we affirm in part and reverse in part the district court's judgment.

FACTS

In 2005, the State charged E.J.P., then a juvenile, with three counts of aggravated assault for actions against J.G., T.H., and C.D. On May 5, 2005, E.J.P. pled no contest to a single count of criminal threat against J.G. The factual basis for the plea was stated on the record:

> "On Tuesday March 1st, 2005, Officer Meyer of Lawrence Police Department was dispatched to Southwest Junior High School at which time he met with [J.G.] and [T.H.] and [C.D.]. He obtained information that [J.G.] and [T.H.] and [C.D.] had been at [E.J.P.'s] vehicle, at which time [E.J.P.] held a knife to [J.G.'s] chest while she stayed outside the passenger side window and stated to her, 'I am going to kill you in your sleep.' Officer Meyer made contact with respondent and respondent's father, at which time, based on the consent to search the vehicle, he obtained the knife that was consistent with the description of the witnesses."

In a signed plea advisory, E.J.P. acknowledged that he had fully understood the rights he was giving up by pleading no contest. The district court found that his plea was "knowledgeable and voluntary." The district court adjudicated him a juvenile offender and sentenced E.J.P. to 20 hours of community service and placed him on probation until the community service was completed. E.J.P. completed the sentence.

Fourteen years later, on August 5, 2019, E.J.P. moved to withdraw his no-contest plea, claiming the district court should allow him to withdraw the plea to correct manifest injustice because the alleged victim, J.G., had recanted. E.J.P. attached to his motion an undated affidavit signed by J.G. stating that she had made up the allegation that E.J.P. had held a knife to her because at the time she was "very angry with him."

The district court held an evidentiary hearing on the motion. J.G. testified that when she was attending junior high school in Lawrence, E.J.P. was her boyfriend at one time. She admitted that in 2005 she stated to police that E.J.P. had threatened her with a knife. She then testified that it was a false statement. She stated that, at the time, she was angry with E.J.P. because even though they were dating, he had talked to other girls. She broke up with him and they argued. J.G. admitted that she had simply walked away, but then lied to police officers. She stated that she had recently filed an affidavit to set the record straight. On cross-examination, J.G. agreed that C.D. and T.H. were also present during the incident giving rise to the criminal charges. J.G. admitted that she sometimes talked to E.J.P.'s mother, and she had spoken with E.J.P. a handful of times before signing the affidavit. She denied that they had ever talked about her changing her story.

On February 5, 2021, the district court filed a six-page order denying E.J.P.'s motion to withdraw his plea. The district court found that J.G.'s recantation was "not new evidence" and that E.J.P. failed to show excusable neglect to permit his untimely motion. The district court also addressed whether E.J.P. showed manifest injustice to withdraw his plea. The district court stated, "[T]here were three witnesses to the incident in question and two of them have thus far not recanted. There was other evidence to support the charge and the factual basis for the conviction." The district court expressed reservations about J.G.'s truthfulness: "The Court pauses to consider the credibility of [J.G.] under these circumstances. If she is now admitting to having lied to law enforcement in such a way that resulted in the Juvenile's conviction, the Court has difficulty accepting her alleged honesty without scrutiny now." The district court also discussed *State v. Green*, 283 Kan. 531, 546, 153 P.3d 1216 (2007), a case that sets forth a three-part test to determine whether there is manifest injustice to withdraw a plea, and it found that E.J.P. had established none of the three elements of the test for manifest injustice.

E.J.P. timely appealed. While the appeal was pending, E.J.P. moved the Court of Appeals for a remand for a *Van Cleave* hearing to determine whether his counsel at the plea withdrawal hearing was ineffective. See *State v. Van Cleave*, 239 Kan. 117, 119-21, 716 P.2d 580 (1986). The Court of Appeals granted the motion and remanded the case to the district court for a *Van Cleave* hearing. E.J.P. was represented by new counsel at the hearing. E.J.P. called a witness, T.W., who testified that she had witnessed the original incident between E.J.P. and J.G., and her original statement to the police back in 2005 corroborated J.G.'s recantation—that E.J.P. did not threaten J.G. with a knife. The district court ordered the parties to file briefs on the issue of ineffectiveness. E.J.P.'s brief asserted, among other arguments, that his prior counsel was ineffective for failing to call T.W. as a witness at the hearing on the motion to withdraw plea.

On October 28, 2022, the district court filed a journal entry on the *Van Cleave* hearing and ruled that prior counsel was not ineffective for failing to call T.W. as a witness. E.J.P. filed a separate notice of appeal from the district court's decision on the *Van Cleave* hearing. No separate appeal has been docketed, and E.J.P. has not briefed the ineffective assistance of counsel issue in this appeal, although his brief discusses T.W.'s testimony to argue that manifest injustice exists for the plea withdrawal. An issue not briefed is waived or abandoned. *State v. Davis*, 313 Kan 244, 248, 485 P.3d 174 (2021).

On appeal, E.J.P. claims the district court erred in denying his postsentence motion to withdraw plea. "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. 2022 Supp. 22-3210(d)(2). A district court's decision to deny a motion to withdraw plea after sentencing is reviewed for abuse of discretion, and the burden is on the defendant to establish it. *Green*, 283 Kan. at 545. A district court abuses its discretion when its decision is arbitrary, fanciful, or unreasonable or when it is based on an erroneous application of the facts or law. *State v. Johnson*, 307 Kan. 436, 443, 410 P.3d 913 (2018).

For E.J.P. to obtain relief on his motion to withdraw plea, he must overcome two hurdles: (1) E.J.P. must show excusable neglect to permit his untimely motion and (2) if he shows excusable neglect for the untimely motion, he must show manifest injustice to allow the postsentence plea withdrawal. We will address each of these issues in turn.

Excusable neglect for the untimely motion

E.J.P. first claims the district court erred by finding that he failed to show excusable neglect to permit his untimely motion to withdraw plea. The State argues that J.G.'s recantation was not new evidence, so the district court correctly found that E.J.P. failed to satisfy his burden of establishing excusable neglect for his untimely motion.

Generally, a postsentence motion to withdraw a plea must be filed within one year of the final order of the last appellate court to exercise jurisdiction on a direct appeal or the termination of such appellate jurisdiction or the denial of a petition for a writ of certiorari to the United States Supreme Court or the issuance of that court's final order following the granting of such a petition. K.S.A. 2022 Supp. 22-3210(e)(1). The one-year time limitation may be extended only "upon an additional, affirmative showing of excusable neglect by the defendant." K.S.A. 2022 Supp. 22-3210(e)(2).

But the one-year limitation period in K.S.A. 2022 Supp. 22-3210(e)(1) did not become effective until April 16, 2009. See L. 2009, ch. 61, § 1. The Kansas Supreme Court has held that "[t]he one-year statute of limitations for moving to withdraw a plea in K.S.A. 2019 Supp. 22-3210(e)(1) begins to run for preexisting claims on the date the amended statute became effective, April 16, 2009." *State v. Hill*, 311 Kan. 872, Syl. ¶ 2, 467 P.3d 473 (2020); see *State v. Fox*, 310 Kan. 939, Syl. ¶ 1, 453 P.3d 329 (2019). Thus, the one-year time limitation for E.J.P. to file his postsentence motion to withdraw plea expired on April 16, 2010, more than nine years before he filed the motion.

Our Supreme Court has noted that "excusable neglect resists clear definition and must be determined on a case by case basis." *Hill*, 311 Kan. at 878. That said, excusable neglect requires some justification beyond mere carelessness or ignorance of the law on the defendant's part. *State v. Davisson*, 303 Kan. 1062, 1069, 370 P.3d 423 (2016).

The district court found that the "statement by one of the witnesses, [J.G.], that she lied to the police about the incident, is not new evidence . . . ." It reasoned that E.J.P. must have known his own conduct in 2005, and thus he would have known in 2005 that J.G. was lying to the police. As such, it concluded that the recantation was not new evidence sufficient to show excusable neglect for the untimely filing of the motion.

But as E.J.P. points out, this exact reasoning was rejected by the Kansas Supreme Court in *State v. Betts*, 272 Kan. 369, 380, 33 P.3d 575 (2001) *overruled on other grounds by State v. Davis*, 283 Kan. 569, 158 P.3d 317 (2006). There the court found that recanted testimony was "newly discovered" and "could not, with reasonable diligence, have been produced at trial," even though, "the defendant knew [the] trial testimony was false at the time given." *Betts*, 272 Kan. at 380.

Although *Betts* involved a motion for new trial, not a motion to withdraw plea, that difference is not material. Because J.G.'s recanted statement was newly discovered and could not have been produced before E.J.P.'s plea, it constitutes an unavoidable hindrance to timely moving to withdraw plea. Based on *Betts*, the district court erred in finding that J.G.'s recantation was not new evidence sufficient to show excusable neglect for the untimely filing of the motion, and we reverse the district court on this issue.

Manifest injustice for the plea withdrawal

Although E.J.P. has overcome his first hurdle of showing excusable neglect for the untimely filing of his motion, he must still show that the district court erred in finding

there was no manifest injustice to allow the plea withdrawal. E.J.P. suggests that the district court did not go beyond its finding that E.J.P. lacked excusable neglect to address the merits of his motion. We disagree. We acknowledge that the district court's written order denying the plea withdrawal motion does not explicitly state that E.J.P. failed to show manifest injustice to allow the plea withdrawal. But a review of the district court's six-page order makes clear that the court went beyond finding no excusable neglect to permit the untimely filing. The district court also addressed the merits of the motion and whether E.J.P. established manifest injustice to withdraw his plea.

The district court observed that it need not believe J.G.'s recantation and noted that two other witnesses had not come forward to change their statements. More importantly, the district court discussed *Green* extensively, which sets forth a three-part test to determine whether there is manifest injustice to allow a defendant to withdraw a plea. The district court found that E.J.P. had established none of the three elements of the test for manifest injustice. The record sufficiently reflects that the district court found that E.J.P. failed to show manifest injustice to withdraw his plea. Thus, we must decide whether the district court erred in making this finding.

As stated earlier, a district court may permit a defendant to withdraw a plea after sentencing "to correct manifest injustice." K.S.A. 2022 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.'" *White v. State*, 308 Kan. 491, 496, 421 P.3d 718 (2018). E.J.P. bears the burden of establishing that manifest injustice warrants setting aside his plea, and an appellate court reviews the district court's decision for an abuse of discretion. See *Johnson*, 307 Kan. at 443 (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.

A reviewing 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. These factors are designed to direct the inquiry, but any factor bearing on the defendant's knowledge and voluntariness should be considered by the court. See *Shields*, 315 Kan. at 139-40; *State v. Bricker*, 292 Kan. 239, 245, 252 P.3d 118 (2011).

As the State concedes, new evidence can sometimes establish the manifest injustice required to withdraw a plea. See *Green*, 283 Kan. at 547.

> "It is a defendant's burden to prove that the factual basis of a plea is so undercut by new evidence that the prosecution could not have proved its case beyond a reasonable doubt. In such a situation, the court may permit withdrawal of the plea and may set aside the resulting conviction, because doing so corrects manifest injustice under K.S.A. 22-3210(d) and comports with due process." 283 Kan. at 547.

But the *Green* court stopped short of mandating that district courts grant motions to withdraw pleas anytime new evidence is presented. "The decision remains a permissive one entrusted to the district court's sound discretion considering all of the case specific circumstances." *State v. Gray*, No. 123,730, 2022 WL 879744, at *6 (Kan. App. 2022) (unpublished opinion). A district court can still deny a motion to withdraw plea despite new evidence when that plea was found to be "'informed and voluntary'" and where the evidence "'did not exonerate'" the defendant. 2022 WL 879744, at *6 (quoting *Green*, 283 Kan. at 546).

That is what happened here. E.J.P. negotiated a plea bargain with the State for valuable consideration—dropping three charges of aggravated assault, severity level 7

crimes, in exchange for pleading to a single severity level 9 crime. E.J.P. acknowledged in his plea advisory that his plea was knowing and voluntary. There is no evidence that E.J.P. was misled, coerced, mistreated, or unfairly taken advantage of when he entered his plea. And J.G.'s recantation does not amount to exoneration. It merely creates uncertainty as to whether a jury would have convicted him, given that the other two witnesses did not recant. A mere uncertainty does not rise to the level of manifest injustice. See *Pendleton v. State*, No. 116,301, 2017 WL 4700137, at *5 (Kan. App. 2017) (unpublished opinion). This is especially true when the recantation was viewed by the district court as not entirely credible.

E.J.P. concedes that he may be unable to succeed on the merits of his claim based solely on J.G.'s recantation; so, he relies on the testimony of T.W., made during the *Van Cleave* hearing, to bolster his claim. But the issue in the *Van Cleave* hearing was whether E.J.P.'s counsel at the plea withdrawal hearing was ineffective. T.W.'s testimony at that hearing, held after this appeal was filed, cannot be considered in deciding whether E.J.P. showed manifest injustice to withdraw his plea at the initial hearing on the matter.

E.J.P. has failed to satisfy his burden of proving the district court abused its discretion in finding that no manifest injustice existed to allow the plea withdrawal. It cannot be said that the district court's decision denying the attempted plea withdrawal after 14 years was "'obviously unfair'" or "'shocking to the conscience.'" *White*, 308 Kan. at 496. Thus, we conclude the district court did not err in denying E.J.P.'s motion to withdraw plea. See *State v. Overman*, 301 Kan. 704, 712, 348 P.3d 516 (2015) (finding that if a district court reaches the correct result, its decision will be upheld even though it relied on the wrong ground or assigned erroneous reasons for its decision).

Affirmed in part and reversed in part.