

No. 22-125269-A

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

STATE OF KANSAS
Plaintiff-Appellee

vs.

JASON W. PHIPPS
Defendant-Appellant

BRIEF OF APPELLANT

Appeal from the District Court of Sumner County
Honorable William R. Mott, Judge
District Court Cases 22-CR-02

Kai Tate Mann, #26234
Kansas Appellate Defender Office
Jayhawk Tower
700 Jackson, Suite 900
Topeka, Kansas 66603
(785) 296-5484
(785) 296-2869 Fax
adoservice@sbids.org

Table of Contents

<u>Nature of the Case</u>	1
<u>Statement of Issue</u>	1
<u>Statement of Facts</u>	1
<u>Arguments and Authorities</u>	2
Issue I: The district court erred in scoring Mr. Phipps’ prior criminal threat as a person felony, resulting in an illegal sentence.	
<i>State v. Roberts</i> , 314 Kan. 316, 498 P.3d 725 (2021).....	3
K.S.A. 21-6804(d).....	3
K.S.A. 21-6810(d)(9).	3
K.S.A. 2010 Supp. 21-3419(a)(1).	3
<i>State v. Boettger</i> , 310 Kan. 800, 450 P.3d 805 (2019).....	3
<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).	4
<i>State v. Obregon</i> , 309 Kan. 1267, 444 P.3d 331 (2019).	4
<i>Johnson v. United States</i> , 559 U.S. 133, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010).	4
<i>Mathis v. U.S.</i> , 579 U.S. 500, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016)	4-5
Sixth Amendment.....	4
K.S.A. 21-6810.....	5
<i>State v. Jackson</i> , No. 124,721, 2022 WL 1906940 (Kan. App. 2022).....	5-8
<i>State v. Martinez-Guerrero</i> , No. 123,447, 2022 WL 68543 (Kan. App. 2022)	6-8
<i>State v. Howell</i> , No. 124,650, 2022 WL 4003626 (Kan. App. 2022)	7-8
<i>State v. Garza</i> , 290 Kan. 1021, 236 P.3d 501 (2010)	7
Issue II: The district court erred in sentencing Mr. Phipps contrary to K.S.A. 21-6819(b), resulting in an illegal sentence.	
<i>State v. Sims</i> , 294 Kan. 821, 280 P.3d 780 (2012).....	8
K.S.A. 21-6819.....	8-11, 15, 22, 26-28
K.S.A. 22-3504(1)	9
<i>State v. Louis</i> , 305 Kan. 466, 384 P.3d 1 (2016).....	9
<i>State v. Spencer Gifts</i> , 304 Kan. 755, 374 P.3d 680 (2016).....	9-10
<i>State v. Williams</i> , 298 Kan. 1075, 319 P.3d 528 (2016)	9

<i>Merryfield v. Sullivan</i> , 301 Kan. 397, 343 P.3d 515 (2015)	10
<i>State v. Coman</i> , 294 Kan. 84, 173 P.3d 701 (2012).....	10
K.S.A. 21-6819(b)	10-12, 14, 16-17, 20-21, 23-24, 29
K.S.A. 21-6819(b)(6)	10-18, 28
K.S.A. 21-6819(b)(4)	10, 15, 18, 29
K.S.A. 21-6804(a)	11
K.S.A. 21-6819(a)	11, 26
K.S.A. 21-6606.....	11, 26
K.S.A. 21-6606(a)	11-12, 22, 24-26
K.S.A. 21-6819(b)(1)-(8)	12
K.S.A. 21-6819(b)(1)	12-14, 28-29
K.S.A. 21-6819(b)(2),(3), and (5)	13, 28
K.S.A. 21-6819(a)	13
K.S.A. 21-6803.....	13
K.S.A. 21-6803(m).....	13
K.S.A. 21-6803(r).....	14
K.S.A. 21-6814(b)	14
K.S.A. 21-6814(b)(6)	14
<i>State v. Huff</i> , 277 Kan. 195, 83 P.3d 206 (2004)	15-16
<i>State v. Scott</i> , No. 118,979, 2019 WL 2559515 (Kan. App. 2019).....	16
<i>State v. Lowe</i> , No. 117,943, 2018 WL 4655619 (Kan. App. 2018).....	16
<i>State v. Flores</i> , No. 116,853, 2018 WL 1022843 (Kan. App. 2018)	16
<i>State v. Maggett</i> , No. 118,057, 2018 WL 4840311 (Kan. App. 2018)	16
<i>State v. Reed</i> , 23 Kan. App. 2d 661, 934 P.2d 157 (1997), <i>rev. denied</i> , June 6, 1997.....	16-17, 19, 21, 23-25, 27-28
K.S.A. 1994 Supp. 21-4720(b).....	16-17, 21
K.S.A. 1994 Supp. 21-4720	17
K.S.A. 1994 Supp. 21-4720(b)(4)	17, 20-21
K.S.A. 1993 Supp. 21-4703(c)	17
K.S.A. 1994 Supp. 21-4703(r)	17
K.S.A. 1993 Supp. 21-4720(b).....	17, 24
K.S.A. 1993 Supp. 21-4701(b).....	18
K.S.A. 1993 Supp. 21-4720(b)(1)	18-19
K.S.A. 1993 Supp. 21-4702(b)(2),(3), and (5).....	18
K.S.A. 1993 Supp. 21-4720(b)(6)	18
K.S.A. 1994 Supp. 21-4720(b)(6)	18-19
K.S.A. 1993 Supp. 21-4720(b)(4)	18
K.S.A. 1993 Supp. 21-4703(c)	18-19
K.S.A. 1993 Supp. 21-4720(6).....	19
K.S.A. 1994 Supp. 21-4603d(a)(1)	19
K.S.A. 1994 Supp. 21-4502(1).....	19
K.S.A. 1994 Supp. 21-4603d(a)(2)	19-20

K.S.A. 21-6604(a)(1)..... 19
State v. Turner, 293 Kan. 1085, 272 P.3d 19 (2012) 20
 K.S.A. 1994 Supp. 21-4502(a) 20-21
 K.S.A. 21-6602(a) 20-21
State v. Huff, 31 Kan. App. 2d 717, 71 P.3d 1185 (2003) 21-23
 K.S.A. 2002 Supp. 21-4720(b)..... 22-23
 K.S.A. 2002 Supp. 21-4703(m) and (r),..... 22
 K.S.A. 2002 Supp. 21-4608(a) 22, 24-26
 K.S.A. 21-4720..... 22
State v. Huff, 277 Kan. 195, 83 P.3d 206 (2004). 23-28
State v. Peterson, 22 Kan. App. 2d 572, 920 P.2d 463,
 rev. denied 260 Kan. 1000 (1996)..... 23-24
 K.S.A. 1993 Supp. 21-4720(c) 24
 K.S.A. 21-6819(c) 24
 K.S.A. 2002 Supp. 21-3105 25
 K.S.A. 21-5102..... 25
 K.S.A. 21-4608..... 25
 K.S.A. 2002 Supp. 21-4720(a) 26
 K.S.A. 21-4608(a) 26
State v. Snow, 282 Kan. 323, 346, 144 P.3d 729 (2006) 26-27
State v. Guder, 293 Kan. 763, 267 P.3d 751 (2006) 26
 Eighth Amendment..... 26-27
 K.S.A. 2005 Supp. 21-4720(b)..... 27
 K.S.A. 21-4720..... 27
State v. Ottinger, 46 Kan. App. 2d 647, 264 P.3d 1027 (2011). 27
 K.S.A. 2005 Supp. 21-4720 27
 K.S.A. 2005 Supp. 21-4720(b)(4). 27
 K.S.A. 2002 Supp. 21-4720 27
Jamerson v. Heimgartner, 304 Kan. 678, 372 P.3d 1236 (2016) 28
City of Wichita v. Molitor, 301 Kan. 251, 341 P.3d 1275 (2015). 28
State v. Fanhert, 54 Kan. App. 2d 45, 396 P.3d 723 (2017)..... 28
Conclusion 29

Nature of the Case

Jason W. Phipps directly appeals his sentence.

Statement of Issues

Issue I: The district court erred in scoring Mr. Phipps' prior criminal threat as a person felony, resulting in an illegal sentence.

Issue II: The district court erred in sentencing Mr. Phipps contrary to K.S.A. 21-6819(b), resulting in an illegal sentence.

Statement of Facts

Jason Phipps pled no contest to two nonperson felonies, burglary and theft of a firearm; and two misdemeanors, theft and criminal trespass. (R. I, 33-37; IV, 9-13). The PSI scored Mr. Phipps' 2010 fleeing or eluding law enforcement and criminal threat convictions as person felonies, proposing a B criminal history score. (R. I, 45-46; II, 22-23). Regarding the criminal threat conviction, the PSI stated only that it was pursuant to "21-3141" in Sumner County case 09-CR-286. (R. I, 46; II, 23).

Mr. Phipps objected to the B criminal history score prior to sentencing. (R. I, 49-55, 58-67). Specifically, Mr. Phipps argued his criminal threat conviction could not be scored as a person felony because the PSI did not distinguish whether the conviction was for intentional criminal threat or reckless criminal threat, the latter ineligible for scoring due to its unconstitutionality per *State v. Boettger*, 310 Kan. 800, 450 P.3d 805 (2019). (R. I, 49-55, 58-67).

The district court employed a modified categorical approach, examined the eligible documents and plea colloquy, and determined Mr. Phipps' prior criminal threat conviction was properly scored as a person felony. (R. I, 100-09; V, 2-18). Doing so, the

district court found that because the factual basis of the plea supported both a conviction of reckless criminal threat or intentional criminal threat, Mr. Phipps had been found guilty of both versions charged in the same count, and the constitutional intentional criminal threat remained eligible for scoring. (R. I, 100-09; V, 2-18).

Using a criminal history score of B, the district court sentenced Mr. Phipps to consecutive sentences totaling 38 months' incarceration; 20 months in the Department of Corrections and 18 months in the county jail. (R. I, 83-99; V, 23-28). Mr. Phipps timely appealed his sentence. (R. I, 69, 110).

Arguments and Authorities

Issue I: The district court erred in scoring Mr. Phipps' prior criminal threat as a person felony, resulting in an illegal sentence.

Introduction

The district court erred in including Mr. Phipps' prior criminal threat conviction in his criminal history score. The district court's finding that the modified categorical approach showed that Mr. Phipps' was convicted of both reckless and intentional criminal threat charged in a single count makes clear that the prosecution failed to carry its burden of proof to demonstrate that the prior conviction was for intentional conduct only, and thus eligible for scoring. Because the prosecution failed to carry its burden, Mr. Phipps respectfully requests this Court vacate his sentence, and remand for resentencing with the correct criminal history score of D.

Jurisdiction and Preservation

Mr. Phipps objected to his criminal history score of B, specifically arguing that the

prior criminal threat conviction was incorrectly scored as a person felony. (R. I, 49-55, 58-66; V, 2-18; VI, 2-23). The district court denied Mr. Phipps’ challenge from the bench and in a written ruling. (R. I, 100-109; V, 17-18). This claim is preserved for appeal.

Standard of Review

Challenges to criminal history score calculations are illegal sentence claims, presenting questions of law subject to unlimited appellate review. *State v. Roberts*, 314 Kan. 316, 319-20, 498 P.3d 725 (2021).

Analysis

A defendant’s criminal history is one of the factors taken into account by the sentencing guidelines. K.S.A. 21-6804(d). However “[p]rior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes.” K.S.A. 21-6810(d)(9).

At the time of Mr. Phipps’ prior criminal threat conviction, that crime was defined in relevant part as “any threat to [c]ommit violence communicated with intent to terrorize another . . . or in reckless disregard of the risk of causing such terror” K.S.A. 2010 Supp. 21-3419(a)(1). But in *State v. Boettger*, 310 Kan. 800, 822, 450 P.3d 805 (2019), the Kansas Supreme Court held that the “reckless disregard” provision of Kansas’ criminal threat statute was unconstitutionally overbroad. Therefore, by operation of K.S.A. 21-6810(d)(9) and K.S.A. 21-6804(d) Mr. Phipps’ prior criminal threat conviction can only be scored in his criminal history if the conviction was explicitly for intentional conduct, as reckless criminal threat is an unconstitutional crime. See, *Boettger*, 310 Kan. 800 at Syl. ¶3.

Generally speaking, any fact, other than the existence of a prior conviction, used to enhance a defendant's sentence beyond the statutory maximum must be admitted or proven beyond a reasonable doubt to a jury. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Yet, with crimes that can be committed one of several ways, courts are able to look beyond just the fact of the conviction to determine if it should be counted in a defendant's criminal history. The "modified categorical approach" allows a court to look at certain documents to determine which statutory alternative the defendant was convicted of. *State v. Obregon*, 309 Kan. 1267, 1274, 444 P.3d 331 (2019). Those documents include "charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms." *Johnson v. United States*, 559 U.S. 133, 144, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010).

But it is crucial to note that the modified categorical approach does not allow a district court to open the prior case and make any findings of fact it wishes. The Sixth Amendment to the United States Constitution bars district courts from going "beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense," and cannot make "a disputed determination about 'what the defendant and state judge must have understood as the factual basis of the prior plea' or what the jury in a prior trial must have accepted as the theory of the crime." *Mathis v. U.S.*, 579 U.S. 500, 511, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016) (internal citations omitted). A district court simply "can do no more, consistent with the Sixth Amendment,

than determine what crime, with what elements, the defendant was convicted of.” *Mathis*, 579 U.S. at 511-12.

Pursuant to K.S.A. 21-6810, the prosecution bore the burden to show the challenged criminal threat conviction was not pursuant to the unconstitutional version of that crime. *State v. Jackson*, No. 124,721, 2022 WL 1906940 at *4 (Kan. App. 2022) (unpublished opinion). The findings of the district court show that the prosecution failed this burden.

In this case, the district court adamantly held that because Mr. Phipps plead no contest to criminal threat charged recklessly and intentionally and the factual basis supported both, the conviction must be included in his criminal history. (R. I, 100-09; V, 2-18). Or in the words of the district court, “the record conclusively shows that the defendant was found guilty of both alternatives – a constitutionally permissible one and an unconstitutionally permissible one. The conviction based on the constitutionally alternative still stands.” (R. I, 109)

In explicitly finding that the factual basis of Mr. Phipps’ prior criminal threat supported both the constitutional and unconstitutional versions, the district court clearly failed to determine what elements Mr. Phipps was convicted of. Instead, the district court simply found the factual basis supported both, and then subtracted the unconstitutional portion from the conviction by judicial fiat. It is crucial to note that the district court did not find that Mr. Phipps pled to intentional criminal threat; but that he pled to both.

This Court has recently rejected this line of reasoning. In *Jackson*, the prosecution appealed the district court’s refusal to score two prior criminal threat convictions because

the defendant pled guilty to both versions, and that the plea colloquy did not indicate one version or the other. *Jackson*, 2022 WL 1906940 at *2. On appeal, the prosecution argued that because Jackson pled no contest to both reckless and intentional threat, the reckless portion could be struck, leaving the intentional portion. *Jackson*, 2022 WL 1906940 at *3. But the prosecution's argument was unsuccessful, as this Court determined that because Jackson pled no contest to both versions of the crime, and there was nothing in the record to support a finding the conviction was for the intentional as opposed to reckless criminal threat, the district court correctly found the convictions could not be included. *Jackson*, 2022 WL 1906940 at *3-6.

The only difference in this case and *Jackson* is that the *Jackson* district court correctly found that the prosecution failed to prove the convictions were for intentional conduct only and did not count the convictions, whereas in this case, the district court determined the modified categorical approach did not show Mr. Phipps' prior conviction was solely for intentional conduct, but counted the conviction anyway. This is error and requires reversal.

Furthermore, the district court's finding that Mr. Phipps had been convicted of both reckless and intentional criminal threat in the same count is suspect. Instead, what truly occurred is that Mr. Phipps pled no contest to either reckless or intentional criminal threat and the prosecution failed to prove which.

In *State v. Martinez-Guerrero*, No. 123,447, 2022 WL 68543 (Kan. App. 2022) (unpublished opinion), this Court was faced with a nearly identical situation as in this case. In that case, a panel of this Court neatly summed the issue:

“By entering into a no-contest plea, Martinez-Guerrero did not admit to the underlying facts of the case. Strictly speaking, Martinez-Guerrero pled no contest to reckless or intentional criminal threat. A factual basis only needed to be established for reckless or intentional criminal threat for the district court to accept Martinez-Guerrero's plea because that was how he was charged. Thus, Martinez-Guerrero's no-contest plea does not help the State in this instance because his plea does not establish which version of criminal threat he pled to—intentional or reckless criminal threat. The State still had to prove Martinez-Guerrero's prior criminal threat conviction was for an intentional threat. It failed to do so on the record before us.” *Martinez-Guerrero*, 2022 WL 68543 at *6.

Stated even more succinctly, “conduct can only constitute – and give rise to a conviction of – either reckless or an intentional criminal threat.” *State v. Howell*, No. 124,650, 2022 WL 4003626 at *3 (Kan. App. 2022) (unpublished opinion) citing, *Jackson*, 2022 WL 1906940 at *5; *Martinez-Guerrero*, 2022 WL 68543 at *6; and *State v. Garza*, 290 Kan. 1021, 1035-36, 236 P.3d 501 (2010) (defendants can only be convicted of one crime when charged alternatively).

Howell is directly on point in exposing the district court's error. In that case, the district court also found Howell had pled no contest to both reckless and intentional criminal threat, and included the conviction in his criminal history. *Howell*, 2022 WL 4003626 at *1. But this Court reversed, noting the logical result that if the district court is correct and the factual basis discloses a plea to both intentional and reckless criminal threat, the conviction cannot be counted. As *Howell* explains:

“Even if we agreed with the State that Howell's plea to intentional or reckless criminal threat demanded a factual basis for each version of that offense, that determination would not resolve the question before us. Instead, we come full circle to our initial observation—that the State failed to prove which version of the offense he was ultimately adjudicated of.” *Howell*, 2022 WL 4003626 at *4.

This case is nearly identical to *Howell*, as the district court made the same findings, and is incorrect for the same reasons. This case is also a mirror image of *Jackson* in that the same situation was present, but the district court made the correct decision in that case. And the logic and law as explained in this Court's reversal in *Martinez-Guerrero* demands reversal of this case, as explained above. The same outcome is required as in those cases; exclusion of Mr. Phipps' criminal threat conviction from his criminal history.

Conclusion

Simply, if a district court can only determine the modified categorical approach supports both versions; it cannot be said that the conviction was for any one version. The prosecution failed to prove Mr. Phipps' prior criminal threat conviction was gained for only intentional conduct and thus eligible for inclusion in his criminal history. Because the prosecution failed to carry its burden, Mr. Phipps respectfully requests this Court vacate his sentence, and remand for resentencing with the correct criminal history score of D.

Issue II: The district court erred in sentencing Mr. Phipps contrary to K.S.A. 21-6819(b), resulting in an illegal sentence.

Introduction

A sentence that does not conform to the statutory provision, either in character or term of punishment authorized, is an illegal sentence. *State v. Sims*, 294 Kan. 821, 825, 280 P.3d 780 (2012). Mr. Phipps' aggregate 38-month sentence is illegal. The plain language of K.S.A. 21-6819(b), mandates that not only should Mr. Phipps' entire

underlying sentence be served within the Department of Corrections, but that the entire term of imprisonment cannot exceed 26 months.

As a result, the sentence pronounced by the district court is illegal both as it fails to conform to the applicable statutory provision either in character or term. Mr. Phipps respectfully requests this Court vacate his sentences, and remand this case to the district court so that it may impose a sentence that conforms to the plain language of K.S.A. 21-6819(b).

Preservation of the Issue

While Mr. Phipps did not raise this issue in the district court, an illegal sentence can be corrected at any time. K.S.A. 22-3504(1). See also, *State v. Louis*, 305 Kan. 466, 384 P.3d 1 (2016).

Standard of Review

Resolution of this issue turns on statutory interpretation of K.S.A. 21-6819, a question over which the appellate courts exercise unlimited review. *Louis*, 305 Kan. at 466.

Analysis

Principles of statutory interpretation

When an appellate court is called upon to interpret a statute, the fundamental rule of statutory construction is that the intent of the legislature governs. *State v. Spencer Gifts*, 304 Kan. 755, 761, 374 P.3d 680 (2016). When a statute is plain and unambiguous, appellate courts are bound to implement that expressed intent. *State v. Williams*, 298 Kan. 1075, 1079, 319 P.3d 528 (2016). So long as it does not conflict with constitutional

mandates, the language selected by the legislature “trumps both judicial decisions and the policies advocated by the parties.” *Spencer Gifts, LLC*, 304 Kan. at 761, quoting, *Merryfield v. Sullivan*, 301 Kan. 397, 399, 343 P.3d 515 (2015). When construing statutes to determine legislative intent, the appellate courts must construe the statute as a whole, with a view of reconciling and harmonizing the provisions into workable harmony if possible. *State v. Coman*, 294 Kan. 84, 93, 173 P.3d 701 (2012).

Mr. Phipps’ sentence is doubly illegal

K.S.A. 21-6819 governs sentencing in multiple conviction cases involving application of the sentencing grid. The plain language of K.S.A. 21-6819(b) discloses that Mr. Phipps is serving an illegal sentence in two distinct ways.

First, the district court erred in ordering Mr. Phipps to serve his misdemeanor sentences in the county jail. K.S.A. 21-6819(b)(6) states that “if the sentence for the primary crime is a prison term, the entire imprisonment term of the consecutive sentences will be served in prison.” The district court violated this subsection when sentencing Mr. Phipps to serve his misdemeanor sentences in jail consecutively to a prison sentence. (R. V, 23-24). Because Mr. Phipps’ primary crime of conviction required the sentence be served in prison, as K.S.A. 21-6819(b)(6) explicitly and unambiguously requires the entire consecutive sentence be served in prison.

Second, the length of Mr. Phipps’ aggregate consecutive sentence is illegally long. Pursuant to K.S.A. 21-6819(b)(4), and with a correct criminal history score of “D” as argued in Issue I, Mr. Phipps’ total consecutive sentence could not exceed 26 months.

K.S.A. 21-6819(b)(4) states:

“The total prison sentence imposed in a case involving multiple convictions arising from multiple counts within an information, complaint or indictment cannot exceed twice the base sentence. This limit shall apply only to the total sentence, and it shall not be necessary to reduce the duration of any of the nonbase sentences imposed to be served consecutively to the base sentence. The postrelease supervision term will reflect only the longest such term assigned to any of the crimes for which consecutive sentences are imposed. Supervision periods shall not be aggregated.” (emphasis added).

Because both Mr. Phipps’ current felony convictions are level nine and his criminal history score a “D” as explained in Issue I, the total aggregate sentence Mr. Phipps could legally serve is 26 months, twice the highest possible base sentence within the D-9 box. See, K.S.A. 21-6804(a).

The above analysis is not a trick of perspective, yielding a different outcome if other provisions of K.S.A. 21-6819(b) are consulted. Instead, viewing those provisions within the rest of K.S.A. 21-6819 and the larger sentencing scheme, it is clear Mr. Phipps is serving an illegal sentence.

Pari Materia: Articles 68 and 66 of the criminal code are not mutually exclusive

K.S.A. 21-6819(a) states, relevant to this issue, that “The provisions of subsections (a), (b), (c), (d), (e), and (h), of K.S.A 21-6606 . . . regarding multiple sentences shall apply to the sentencing of offenders pursuant to the sentencing guidelines.” The only sentencing provision related to K.S.A. 21-6819 pertinent for this issue is K.S.A. 21-6606(a), which provides:

“When separate sentences of imprisonment for different crimes are imposed on a defendant on the same date, including sentences for crimes for which suspended sentences, probation or assignment to a community

correctional services program have been revoked, such sentences shall run concurrently or consecutively as the court directs. Whenever the record is silent as to the manner in which two or more sentences imposed at the same time shall be served, they shall be served concurrently, except as otherwise provided in subsections (c), (d) and (e).” K.S.A. 21-6606(a).

As can be seen, K.S.A. 21-6606(a) simply provides the district court discretion to order sentences imposed on the same defendant on the same date to run consecutively. But this is not the only statute dealing with consecutive sentences. K.S.A. 21-6819(b) provides for additional provisions as relating to consecutive sentences within a multiple conviction case implicating the sentencing grid.

Pari Materia: Consecutive sentencing pursuant to K.S.A. 21-6819(b)

K.S.A. 21-6819(b) expressly provides the district court with discretion to impose both concurrent and consecutive sentences in a multiple conviction case, and directs the district court to state on the record if the sentences are to be served concurrently or consecutively. However, if the district court orders the sentences to run consecutively, the district court’s discretion is constrained by K.S.A. 21-6819(b)(1)-(8).

K.S.A. 21-6819(b)(1) states, relevant here, that if consecutive sentencing is invoked, “the consecutive sentences shall consist of *an imprisonment term* which may not exceed the sum of the consecutive imprisonment terms, and a supervision term.” (emphasis added). Stated another way, once the district court orders consecutive sentences pursuant to K.S.A. 21-6819(b), the aggregation of those terms merge into a single term of imprisonment.

K.S.A. 21-6819(b)(2),(3), and (5) provide the district court instruction on determining the primary crime of conviction, setting of the base sentence using the offender's criminal history score on the primary crime of conviction, and calculating all other sentences without regard to the offender's criminal history. These rules were followed here, as the district court applied Mr. Phipps's (disputed) criminal history score of "B" to his primary crime of conviction, the severity level nine burglary, resulting in an underlying 14 month sentence for that count. (R. I, 84-86).

But in sentencing Mr. Phipps to county jail for his misdemeanor convictions, the district court first erred. This is because K.S.A. 21-6819(b)(6), clearly and unambiguously states that "If the sentence for the primary crime is a prison term, the entire imprisonment term of the consecutive sentences will be served in prison." As a result, in sentencing Mr. Phipps to the county jail as part of his sentence, the district court erred. K.S.A. 21-6819(b)(6) mandates that if the primary crime of conviction receives a prison term, the entire sentence must be served in prison as discussed above. This result is also consistent with K.S.A. 21-6819(a), which, as noted above, provides that once sentences are run consecutively pursuant to K.S.A. 21-6819(b)(1), the sentences cease to be separate and distinct as "the consecutive sentences shall consist of *an imprisonment term* which may not exceed the sum of the consecutive imprisonment terms." (emphasis added).

Further, the definitional section of the guidelines, found at K.S.A. 21-6803, provides no barrier to this interpretation. K.S.A. 21-6803(m) states that "'imprisonment' means imprisonment in a facility operated by the Kansas Department of Corrections and

K.S.A. 21-6803(r) defines “prison” as “a facility operated by the Kansas Department of Corrections.

But restricting K.S.A. 21-6814(b) to only felony convictions, which are already served in prison, makes K.S.A. 21-6814(b)(6) a useless and redundant provision. For example, if felonies are already served in prison, and misdemeanors are served in jail, what could K.S.A. 21-6819(b)(6) possibly reach if misdemeanors are excluded from coverage in a multiple conviction case? This is contrary to the general rule requiring courts to read statutes to avoid unreasonable results and presume the legislature does not enact useless or meaningless legislation.

Instead, the “imprisonment term” as used in K.S.A. 21-6819(b)(6) is actually referring back to K.S.A. 21-6819(b)(1), which, as previously noted, states that once the district court imposes consecutive sentences in a multiple conviction case, “the consecutive sentences shall consist of *an imprisonment term*, the sum of which may not exceed the sum of the consecutive imprisonment terms. . . .” (emphasis added). This interpretation makes sense, and results in the provisions of K.S.A. 21-6819(b) working in harmony with each other to provide for one scheme of sentencing in every case in which two conditions are present: (1) Multiple sentences for convictions in the same case being run consecutively, and (2) at least one of the consecutively ordered sentences is a felony conviction serving as the primary crime requiring application of the grid.

The word “imprisonment” should not be given outsized influence in the context of the Kansas Criminal Code. Our Supreme Court has held that “the terms imprisonment and confinement are used interchangeably through the Kansas Criminal Code” *State*

v. Huff, 277 Kan. 195, 200, 83 P.3d 206 (2004). As a result, basing any distinction between misdemeanor and felony sentences in a multiple conviction case solely upon the use of the word “imprisonment” would be in error.

Once K.S.A. 21-6819(a), (b)(1), and (b)(6) are consulted in *pari materia*, and Mr. Phipps’ misdemeanor and felony sentences are correctly considered a single, unitary, imprisonment term, it is plainly evident the district court violated the “double rule.” The double rule is found in K.S.A. 21-6819(b)(4), which states:

“The total prison sentence imposed in a case involving multiple convictions arising from multiple counts within an information, complaint or indictment cannot exceed twice the base sentence. This limit shall apply only to the total sentence, and it shall not be necessary to reduce the duration of any of the nonbase sentences imposed to be served consecutively to the base sentence. The postrelease supervision term will reflect only the longest such term assigned to any of the crimes for which consecutive sentences are imposed. Supervision periods shall not be aggregated.”

The double rule requires that in cases with more than one conviction emanating from a single charging document, the sentence cannot exceed twice the base sentence, the sentence given for the primary crime of conviction with the full criminal history score applied. Put another way, the double rule relieves an offender from serving any portion of his unitary “imprisonment term,” resulting from multiple convictions contained in a single charging document that is more than twice the base sentence. The plain language of K.S.A. 21-6819 demands that not only Mr. Phipps serve the entirety of his sentence within the Department of Corrections, but also that such sentence cannot exceed 26 months.

Prior precedent is incorrect, based on dicta, and should be discarded as such

But Mr. Phipps recognizes that this Court has previously and repeatedly found that K.S.A. 21-6819(b) does not apply to misdemeanor cases. See, *State v. Huff*, 277 Kan. 195, 197-99, 83 P.3d 206 (2004); see also, *State v. Scott*, No. 118,979, 2019 WL 2559515 at *8-10 (Kan. App. 2019) (relying on *Huff* for proposition that K.S.A. 21-6819(b) does not apply to misdemeanors), *State v. Lowe*, No. 117,943, 2018 WL 4655619 at *4-5 (Kan. App. 2018) (same), *State v. Flores*, No. 116,853, 2018 WL 1022843 at *2 (Kan. App. 2018) (same), and *State v. Maggett*, No. 118,057, 2018 WL 4840311 at *3-4 (Kan. App. 2018) (same). These decisions stem from fundamental flaws in prior case law that are contrary to the plain language of the sentencing scheme.

Soon after the Kansas Sentencing Guidelines were introduced, this Court was faced with a similar issue in *State v. Reed*, 23 Kan. App. 2d 661, 934 P.2d 157 (1997), *rev. denied*, June 6, 1997. In *Reed*, the defendant appealed when the district court, in converting his pre-guidelines indeterminate sentences to a guidelines sentence, sentenced him to 11 months imprisonment for each felony count and one year for each of his three misdemeanor counts, resulting in a 58 month controlling sentence. *Reed*, 23 Kan. App. 2d at 661-62. After determining the district court erred in utilizing his full criminal history score applied to both felony counts, the *Reed* panel then turned to whether K.S.A. 1994 Supp. 21-4720(b), the predecessor of K.S.A. 21-6819(b), applied to his misdemeanor sentences.

At issue was whether the 1993 or 1994 version of the double rule applied. In 1993, when the defendant was sentenced, the double rule stated “in pertinent part that ‘[t]he

total sentence assigned for a current conviction event cannot exceed twice the base sentence.” *Reed*, 23 Kan. App. 2d at 662. See also, K.S.A. 1993 Supp. 21-4720(b). The 1994 version is identical to the current version of K.S.A. 21-6819(b). See, K.S.A. 1994 Supp. 21-4720. Noting the statutory amendment, the *Reed* panel emphasized that the first sentence of K.S.A. 1994 Supp. 21-4720(b)(4) stated that, “The total *prison* sentence imposed in a case involving multiple convictions arising from multiple counts within an information, complaint or indictment cannot exceed twice the base sentence. . . .” *Reed*, 23 Kan. App. 2d at 662 (emphasis in original).

The *Reed* panel determined that misdemeanor convictions were not covered by either the 1993 or 1994 version of K.S.A. 21-4720. *Reed*, 23 Kan. App. 2d at 663. Regarding the 1993 version, the court found that as K.S.A. 1993 Supp. 21-4703(c) defined a “conviction event” as “one or more *felony* convictions occurring on the same day and within a single court,” (emphasis in original), the misdemeanors were plainly not included.

Regarding the 1994 version, which mirrors the current version, the *Reed* panel determined that since K.S.A. 1994 Supp. 21-4703(r) defined “prison” as a facility operated by the Kansas Department of Corrections, and “Since misdemeanor convictions are served in county jails, those type of sentences cannot meet the definition of prison sentences under the KSGA.” *Reed*, 23 Kan. App. 2d at 663. However, the *Reed* panel was wrong on both conclusions.

First, it should be noted that the K.S.A. 1993 Supp. 21-4720(b), K.S.A. 1994 Supp. 21-4720(b), and K.S.A. 21-6819(b) are actually very similar. K.S.A. 1993 Supp.

21-4701(b) much like the 1994 and current versions, gives the sentencing judge discretion to impose consecutive sentences, and K.S.A. 1993 Supp. 21-4720(b)(1) states in pertinent part that when sentences are imposed consecutively, “the consecutive sentences shall consist of an imprisonment term and supervision term” again reinforcing that once sentences are run consecutively pursuant to the guidelines, they form one unitary imprisonment term. Again nearly identical to the current and 1994 versions, K.S.A. 1993 Supp. 21-4720(b)(2),(3), and (5), instruct the district court in determining the base sentence using the full criminal history score of the primary crime of conviction, and applying no criminal history to the non-base sentences. Finally, K.S.A. 1993 Supp. 21-4720(b)(6) uses the exact same language of K.S.A. 1994 Supp. 21-4720(b)(6) and K.S.A. 21-6819(b)(6): “If the sentence for the primary crime is a prison term, the entire imprisonment term of the consecutive sentences will be served in prison.”

As noted above, K.S.A. 1993 Supp. 21-4720(b)(4) differed from the 1994 version and K.S.A. 21-6819(b)(4) as it referred to the total sentence for a current “conviction event.” However, the definition of conviction event, “one or more felony convictions occurring on the same day within the same court” does not necessarily exclude misdemeanor sentences. See, K.S.A. 1993 Supp. 21-4703(c) (defining conviction event). For example, if a criminal defendant is charged and convicted of one felony and two misdemeanors, a conviction event has occurred, as there was a felony conviction. But if that defendant was acquitted of the felony and convicted of the misdemeanors, then no conviction event occurred. There is simply nothing in K.S.A. 1993 Supp. 21-4703(c) excluding misdemeanors.

Instead, pursuant to the plain language of K.S.A. 1993 Supp. 21-4703(c) a conviction event was triggered by the presence of a felony conviction. If a conviction event was had and the sentences run consecutively, then pursuant to K.S.A. 1993 Supp. 21-4720(b)(1) “the consecutive sentences shall consist of **an imprisonment term** . . .” the entirety of which is served in prison if the sentence for the primary crime calls for a prison sentence, pursuant to K.S.A. 1993 Supp. 21-4720(6).

The analysis of the 1994 version is even more flawed. As noted above, the *Reed* panel rested its entire decision upon the fact that misdemeanor sentences are served in county jails. *Reed*, 23 Kan. App. 2d at 663. While the *Reed* panel does not provide a citation for this proposition, it likely relied on two statutory provisions, K.S.A. 1994 Supp. 21-4603d(a)(1) and K.S.A. 1994 Supp. 21-4502(1).

K.S.A. 1994 Supp. 21-4603d(a)(2) is the predecessor and identical to K.S.A. 21-6604(a)(1), and states:

“(a)Whenever any person has been found guilty of a crime, the court may adjudge any of the following:
 (1) Commit the defendant to the custody of the secretary of corrections if the current crime of conviction is a felony and the sentence presumes imprisonment, or the sentence imposed is a dispositional departure to imprisonment, or, if the confinement is for a misdemeanor, to jail for the term provided by law.”

However, there is a conflict between this provision and K.S.A. 1994 Supp. 21-4720(b). This is because K.S.A. 1994 Supp. 21-4720(b)(6) states that “If the sentence for the primary crime is a prison term, the entire imprisonment term of the consecutive sentences will be served in prison” whereas K.S.A. 21-4720(b)(1) states when sentences are imposed consecutively, “the consecutive sentences shall consist of **an imprisonment**

term and supervision term.” Therefore, just like the current version, once the sentences are pronounced consecutively pursuant to the guidelines, there becomes one term of imprisonment, which must be served in prison pursuant to K.S.A. 1994 Supp. 21-4720(b)(6).

In resolving this conflict, it is fundamental to recognize that K.S.A.1994 Supp. 21-4603d(a)(2), and its current counterpart, K.S.A. 21-6604(a)(2) provide for the authorized dispositions of all crimes generally. However, K.S.A. 1994 Supp. 21-4720(b), like K.S.A. 21-6819(b), applies only in those cases where there are multiple convictions, at least one of which requiring application of the sentencing guidelines. As a result, it is clear that in any conflict between the two subsections, K.S.A. 1994 Supp. 21-4720(b) as the more specific provision, would control over the more general provisions of K.S.A. 1994 Supp. 21-4603d(a)(2) because:

“It is a cardinal rule of law that statutes complete in themselves, relating to a specific thing, take precedence over general statutes or over other statutes which deal only incidentally with the same question, or which might be construed to relate to it. Where there is a conflict between a statute dealing generally with a subject, and another dealing specifically with a certain phase of it, the specific legislation controls in a proper case. [Citations omitted.]” *State v. Turner*, 293 Kan. 1085, 1088, 272 P.3d 19 (2012) [Citations omitted].

Likewise, the same is true of K.S.A. 1994 Supp. 21-4502(a), the predecessor of and identical to K.S.A. 21-6602(a), which states:

“(1) For the purpose of sentencing, the following classes of misdemeanors and the punishment and the terms of confinement authorized for each class are established:

- (a) Class A, the sentence for which shall be a definite term of confinement in the county jail which shall be fixed by the court and shall not exceed one year;
- (b) Class B, the sentence for which shall be a definite term of confinement in the county jail which shall be fixed by the court and shall not exceed six months;
- (c) Class C, the sentence for which shall be a definite term of confinement in the county jail which shall be fixed by the court and shall not exceed one month;
- (d) Unclassified misdemeanors, which shall include all crimes declared to be misdemeanors without specification as to class, the sentence for which shall be in accordance with the sentence specified in the statute that defines the crime; if no penalty is provided in such law, the sentence shall be the same penalty as provided herein for a class C misdemeanor.”

As above, this provision deals only with sentencing of misdemeanors generally, whereas the provisions of K.S.A. 1994 Supp. 21-4720(b) and K.S.A. 21-6819(b) deal specifically with the context of imposing consecutive sentences in cases where the guidelines are implicated by a felony conviction. Therefore, K.S.A. 1994 Supp. 21-4720(b) and K.S.A. 21-6819(b) would then control over K.S.A. 1994 Supp. 21-4502(a) and K.S.A. 21-6602(a) respectively.

These errors in *Reed* were carried forward in *State v. Huff*, 31 Kan. App. 2d 717, 71 P.3d 1185 (2003), *aff'd* in *State v. Huff*, 277 Kan. 195, 83 P.3d 2016 (2004). In *Huff*, the defendant plead guilty to two felonies and three misdemeanors, and at sentencing, the district court granted a probation term of 36 months, but ran all the underlying sentences consecutively, resulting in a prison term of 16 months and a jail term of 36 months. *Huff*, 31 Kan. App. 2d at 717.

On appeal, the defendant argued, *inter alia*, the district court was without jurisdiction to impose consecutive misdemeanor sentences, because even though K.S.A.

2002 Supp. 21-4720(b) provides the district court discretion to impose consecutive sentences in a multiple conviction case, that provision only applied to felony sentences as it was part of the guidelines. Furthermore, the defendant argued that because the definitional terms of “imprisonment” and “prison” as found in K.S.A. 2002 Supp. 21-4703(m) and (r), referred only to those facilities operated by the Department of Corrections, then K.S.A. 2002 Supp. 21-4608(a) (the predecessor of K.S.A. 21-6606(a)) also did not provide for consecutive misdemeanor sentences as that subsection grants the district court to run “separate sentences of imprisonment for different crimes” consecutively, so long as they are imposed on the same date. *Huff*, 31 Kan. App. 2d at 718-19. As a result, while *Huff* dealt with whether misdemeanor sentences can be run consecutively at all, and not whether they are subject to K.S.A. 21-4720 or K.S.A. 21-6819, the *Huff* panel applied the rationale of *Reed* to reach its result, thrusting the erroneous interpretation forward.

The *Huff* panel rejected the defendant’s argument, finding that the definition of “imprisonment” found in the definitional section of the KSGA, as part of the KSGA, could only apply to KSGA sentences for felony convictions. *Huff*, 31 Kan. App. 2d at 719. Turning to article 46 (now codified as article 66) of the criminal code, the *Huff* panel noted that that the term “imprisonment” was not defined by that article, and found that “imprisonment” has been used to in reference to both felonies and misdemeanors in different parts of the criminal code; and as a result, had authority to impose consecutive misdemeanor sentences pursuant to K.S.A. 2002 Supp. 21-4608(a) (currently K.S.A. 21-6606[a]). *Huff*, 31 Kan. App. 2d at 719-20.

Our Supreme Court granted review of *Huff* for the sole issue of whether there was statutory authority for running misdemeanor sentences consecutively. *State v. Huff*, 277 Kan. 195, 195, 83 P.3d 206 (2004). Beginning its analysis with a review of the Court of Appeals decision, our Supreme Court, noting that the Court of Appeals had relied on *Reed*, followed suit, finding that K.S.A. 2002 Supp. 21-4720(b) “governs the imposition of consecutive presumptive felony sentences,” citing to *State v. Peterson*, 22 Kan. App. 2d 572, 575, 920 P.2d 463, *rev. denied* 260 Kan. 1000 (1996). Based on this and the definition of a “presumptive sentence,” i.e. the sentence assigned to the offender from the applicable grid box pursuant to the conviction’s severity and the offender’s criminal history, our Supreme Court found that “the Court of Appeals correctly concluded that K.S.A. 2002 Supp. 21-4720(b) does not apply to misdemeanor cases.” *Huff*, 277 Kan. at 197-98. However, this conclusion is in stark contrast to the plain language of the statute.

First, as discussed above, there is nothing in either K.S.A. 2002 Supp. 21-4720(b) or K.S.A. 21-6819(b) limiting those provisions presumptive felony sentences. Instead, effectively the same as current K.S.A. 21-6819(b), K.S.A. 2002 Supp. 22-4720(b) states that the “The sentencing judge shall have discretion to impose concurrent or consecutive *sentences* in multiple *conviction* cases.” (emphasis added). There is nothing in this subsection limiting it to presumptive felony sentences. It applies to all sentences from all convictions contained in the same charging document, without reference to misdemeanors or felonies.

Second, the Supreme Court’s reliance on *Peterson* was misplaced. In *Peterson*, the defendant argued, inter alia, that the district court’s upward departure for his two felony

sentences were erroneously imposed, arguing that K.S.A. 1993 Supp. 21-4720(b) limited his sentence to twice the base sentence. *Peterson*, 22 Kan. App. 2d at 575. The *Peterson* panel rejected this argument, stating “K.S.A.1993 Supp. 21-4720(b) governs the imposition of consecutive presumptive sentences. A separate provision governing consecutive departure sentences is set forth in K.S.A.1993 Supp. 21-4720(c)” citing to no authority. *Peterson*, 22 Kan. App. 2d at 575.

However, the *Peterson* panel was only half right. It is true that K.S.A. 1993 Supp. 21-4720(c), and its modern counterpart, K.S.A. 21-6819(c) govern upward departures in the context of consecutive sentencing when the grid is implicated. But the *Peterson* panel was incorrect that K.S.A. 1993 Supp. 21-4720(b) applies only to presumptive sentences. This is because, again, there is nothing in K.S.A. 1993 Supp. 21-4720(b) or K.S.A. 21-6819(b) limiting the subsection to presumptive sentences. It plainly covers all sentences imposed for all convictions in a multiple conviction case implicating the grid.

In its analysis section, the *Huff* Court first noted that “the terms imprisonment and confinement are used interchangeably throughout the Kansas Criminal Code (Code) and in Kansas statutes defining misdemeanor crimes outside the Code.” *Huff*, 277 Kan. 195, 200, 83 P.3d 206 (2004). After noting this, the *Huff* Court, then undertook an examination of the structure of the criminal code, demonstrating that K.S.A. 2002 Supp. 21-4608(a), now codified at K.S.A. 22-6606(a) provides the district court authority to order misdemeanor sentences run consecutively. *Huff*, 277 Kan. at 207. However, while answering a different question than Mr. Phipps presents, the analysis in *Huff*

demonstrates that the erroneous analysis of *Reed* continues to infect the analysis of misdemeanor sentencing in this State.

The *Huff* Court noted that the definition of a crime in Kansas encompasses acts and omissions provided by law and which, upon conviction, “a sentence of death, imprisonment or fine or both imprisonment and fine is authorized” *Huff*, 277 Kan. at 201. See also K.S.A. 2002 Supp. 21-3105, and K.S.A. 21-5102. Crimes are then divided into classifications, with a felony being “a crime punishable by death or imprisonment in any state correctional institution or a crime which is defined by law” whereas a misdemeanor is any other crime that is not a felony, traffic infraction, or cigarette or tobacco infraction. See, K.S.A. 2002 Supp. 21-3105, and K.S.A. 21-5102. As a result, the term “imprisonment” can refer to both felonies and misdemeanors. *Huff*, 277 Kan. at 201.

However, the *Huff* Court did note that K.S.A. 2002 Supp. 21-4608(a), the predecessor of K.S.A. 21-6606(a), provides the district court the discretion to run sentences consecutively when “separate sentences *for different crimes* are imposed on a defendant on the same date” (emphasis added). Drawing upon the “for different crimes committed” language, and noting that K.S.A. 2002 Supp. 21-3105 defines “crimes” to include felonies and misdemeanors, the *Huff* Court found that exclusion of the misdemeanors under K.S.A. 21-4608:

“would deny the overall sense and logic of our Code. Article 47 applies only to felony sentences under the Kansas Sentencing Guidelines. Thus, it becomes clear that when viewing K.S.A. 21-4608 in context of the Code, the sentencing provision contained in Article 46 were meant to apply to sentencing for both misdemeanors and felonies.” *Huff*, 277 Kan. at 202-03.

The analysis of Article 46 is proper, and comes to its logical conclusion in determining that K.S.A. 2002 Supp. 21-4608(a), and therefore K.S.A. 21-6606(a) allows the district court to impose consecutive sentences for both misdemeanor and felony convictions. *Huff*, 277 Kan. 205-07. Regardless, *Huff* still suffers from some logical inconsistency, in finding that Article 47, and therefore current Article 68, only applies to felony sentences.

As stated above, K.S.A. 21-6819(a), as well as K.S.A. 2002 Supp. 21-4720(a) expressly incorporate K.S.A. 21-6606(a) and K.S.A. 21-4608(a) respectively. As a result, it is error to find that either former Article 47 or Current Article 68 cannot apply to misdemeanors, as K.S.A. 21-6819 clearly states: “The provisions of subsections (a), (b), (c), (d), (e) and (h) of K.S.A. 21-6606, and amendments thereto, regarding multiple sentences shall apply to the sentencing of offenders pursuant to the sentencing guidelines.” It is therefore incorrect for one to say that Article 68 applies only to felony sentences. More accurately stated, Article 68 only applies to felony sentences AND consecutive sentences in which the primary crime is a grid felony. While this was ultimately immaterial for the question involved in *Huff*, it demonstrates that the proper conceptualization of misdemeanor sentencing continues to be prevented by a fundamental misreading of K.S.A. 21-6819 and its predecessors.

This can be seen in *State v. Snow*, 282 Kan. 323, 346, 144 P.3d 729 (2006) disapproved of on other grounds by *State v. Guder*, 293 Kan. 763, 267 P.3d 751 (2006). In *Snow*, responding to an Eighth Amendment claim that subjecting a misdemeanant to a higher sentence than he would have received had his misdemeanor been a felony was

cruel and unusual punishment, the *Snow* Court simply relied on *Huff* to determine that K.S.A. 2005 Supp. 21-4720(b) does not apply to misdemeanors, with no further analysis on that point. See, *Snow*, 282 Kan. at 346-47.

There has been no true analysis of any of the iterations of K.S.A. 21-6819 that seek to actually interpret the scheme clearly contained within it. Instead, the deficient analysis of *Reed* continues to be passed on wholesale through citation to *Huff*, without any true understanding of the plain language of K.S.A. 21-6819. New and accurate interpretation of the entire text of K.S.A. 21-6819 is necessary.

Dicta not binding

Mr. Phipps recognizes that our Supreme Court in *Snow* and *Huff* have stated that K.S.A. 21-4720, and by extension K.S.A. 21-6819, cannot apply to misdemeanor sentences. Generally speaking, the Court of Appeals is duty bound to follow Kansas Supreme Court precedent, absent some indication the Court is departing from its current or previous position. *State v. Ottinger*, 46 Kan. App. 2d 647, 264 P.3d 1027 (2011).

Mr. Phipps respectfully notes that this Court is not bound by either *Huff* or *Snow*. This is because the issue in *Snow* was whether the misdemeanor sentences bringing the total sentence above the double rule violated the Eighth Amendment to the United States Constitution. As such, *Snow* was not attacking the interpretation of K.S.A. 2005 Supp. 21-4720, but rather attacking the constitutionality of the exclusion of misdemeanors from coverage under K.S.A. 2005 Supp. 21-4720(b)(4). See, *Snow*, 282 Kan. at 346-47. Likewise, in *Huff*, the issue was not whether K.S.A. 2002 Supp. 21-4720 applied to misdemeanors, but rather whether there was any sentencing provision allowing for

consecutive misdemeanor sentencing. See, *Huff*, 277 Kan. at 195.

At best, when relating to the double rule, both of these decisions represent judicial dictum. See, *Jamerson v. Heimgartner*, 304 Kan. 678, 686, 372 P.3d 1236 (2016) (“We note an opinion that is not essential to the decision constitutes judicial dictum” citing, *City of Wichita v. Molitor*, 301 Kan. 251, 264, 341 P.3d 1275 [2015]). While judicial dictum is entitled to more weight than obiter dictum, it is not binding. *Jamerson*, 304 Kan. at 686.

As demonstrated above, there are serious deficiencies in the analysis regarding interpretation of K.S.A. 21-6819, emanating from the flawed decision in *Reed*. But *Reed* is not controlling as this panel is not bound by decisions from a previous panel of this Court. *State v. Fanhert*, 54 Kan. App. 2d 45, 55-56, 396 P.3d 723 (2017). Given the infirmity demonstrated above, K.S.A. 21-6819 is in dire need of new interpretation conforming with the plain language of the entire statute. Mr. Phipps respectfully urges this Court to interpret K.S.A. 21-6819 without deference to *Reed*, or any of the cases flowing from it, and correct his plainly illegal sentence.

Conclusion

K.S.A. 21-6819(b)(1) provides that once sentences in a multiple conviction case implicating the guidelines are run consecutively, those sentences become a unitary imprisonment term, the length of which is determined by consulting K.S.A. 21-6819(b)(1),(2),(3),and (5). K.S.A. 21-6819(b)(6) provides that if the primary crime of conviction calls for a prison term, “the entire imprisonment term of the consecutive sentences will be served in prison.” As a result, if the imprisonment term as defined in

K.S.A. 6819(b)(1) is in excess of double the base sentence, then K.S.A. 21-6819(b)(4) relieves the offender from serving the excess portion.

The statutory scheme is plain, and simply does not exclude misdemeanors from coverage. Mr. Phipps respectfully requests this Court vacate his illegal sentence, and remand with instructions that the district court to resentence him correctly pursuant to K.S.A. 21-6819.

Conclusion

Mr. Phipps' is currently serving an illegal sentence. Not only was his criminal history incorrectly determined, but prior incorrect interpretation of K.S.A. 21-6819 has led to him serving an illegally long sentence in the incorrect place. For these reasons, Mr. Phipps respectfully requests this Court vacate his sentence, and remand for resentencing with a correct criminal history score of D and proper application of K.S.A. 21-6819.

Respectfully submitted,

/s/ Kai Tate Mann

Kai Tate Mann, #26234

Kansas Appellate Defender Office

Jayhawk Tower

700 Jackson, Suite 900

Topeka, KS 66603

(785) 296-5484

(785) 296-2869 Fax

adoservice@sbids.org

Attorney for Appellant

510 P.3d 727 (Table)
Unpublished Disposition

This decision without published opinion is
referenced in the Pacific Reporter. See Kan. Sup. Ct.
Rules, Rule 7.04.

NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellant,
v.
William Cody JACKSON Sr., Appellee.

No. 124,271

Opinion filed June 3, 2022.

Appeal from Shawnee District Court; JASON E. GEIER,
judge.

Attorneys and Law Firms

Jodi Litfin, assistant solicitor general, Natalie Chalmers,
assistant solicitor general, and Derek Schmidt, attorney
general, for appellant.

Patrick H. Dunn, of Kansas Appellate Defender Office, for
appellee.

Before Hill, P.J., Malone, J., and Patrick D. McAnany, S.J.

MEMORANDUM OPINION

Per Curiam:

*1 The State appeals the district court’s criminal history
classification used to determine William Cody Jackson
Sr.’s sentence following his guilty plea to aggravated
burglary. More specifically, the State claims the district
court erred in calculating Jackson’s criminal history score
by not including his two prior Kansas criminal threat
convictions as part of his criminal history and by
classifying his prior Missouri sodomy conviction as a
nonperson felony. For the reasons stated in this opinion, we
reject the State’s claims and affirm the district court’s
judgment.

FACTS

On September 22, 2018, Jackson committed criminal acts
that the State later charged as aggravated burglary, two
counts of theft, and attempted aggravated escape from
custody. In February 2020, Jackson pled guilty to
aggravated burglary in exchange for dismissal of the other
charges. The presentence investigation (PSI) report
showed that Jackson had a criminal history score of A. The
PSI report counted four person felonies in Jackson’s
criminal history: a 2015 Kansas aggravated battery
conviction, a 2017 Kansas criminal threat conviction, a
2016 Kansas criminal threat conviction, and a 2002
Missouri statutory sodomy in the first-degree conviction.

Jackson objected to his criminal score, challenging the
person classification of the two criminal threat convictions
and the Missouri sodomy conviction. Jackson asserted that
(1) the criminal threat convictions could not be counted in
his criminal history because of *State v. Boettger*, 310 Kan.
800, 822-23, 450 P.3d 805 (2019), *cert. denied*, 140 S. Ct.
1956 (2020), and (2) the sodomy conviction could not be
scored as a person felony because the statutory elements of
the offense were not narrower than or identical to the
elements of comparable Kansas statutes as required under
the test set out in *State v. Wetrich*, 307 Kan. 552, 562, 412
P.3d 984 (2018).

The district court held an initial hearing on Jackson’s
objection and requested additional briefing. The parties
filed supplemental briefing, and the State included various
documents for the district court to consider in deciding
Jackson’s criminal history score under the modified
categorical approach. For Jackson’s 2016 criminal threat
conviction, the State included a copy of the charging
document, charging Jackson with communicating a threat
to commit violence “with the intent to place another in fear
or in reckless disregard of the risk of causing such fear.”
The State also included the transcript from the plea hearing
which reflected that Jackson pled no contest to the charge
of criminal threat. The proffered factual statement for the
charge was that Jackson kissed the victim “and told her it
would be the last kiss she received from him, which caused
[the victim] to be fearful for her own physical safety due to
its threatening manner.”

For the 2017 criminal threat conviction, the State provided
the charging document which again showed that Jackson
was charged with communicating a threat to commit
violence “with the intent to place another in the fear or in
reckless disregard of the risk of causing such fear” to two
separate victims. The State also provided the plea hearing
transcript which showed Jackson pled no contest to the
charge of criminal threat and stated the proffered factual

basis for the plea was that Jackson entered a Dollar General store and began threatening to physically harm an employee.

*2 Finally, the State included the amended information for Jackson’s Missouri conviction for sodomy, which alleged Jackson “committed the felony of statutory sodomy in the first degree” by having “deviate sexual intercourse with [the victim], who was then less than fourteen years old.”

On January 8, 2021, the district court issued its ruling at the continued hearing. For the Missouri conviction, the district court found *Wetrich* applied, and under that analysis, the Missouri conviction must be scored as a nonperson felony. The court explained that the Missouri sodomy crime was broader than Kansas aggravated criminal sodomy because the Missouri crime could involve “the hand and genitalia.” The district court then found that the Missouri crime was broader than the Kansas crime of rape because the Missouri statute “would allow the use of a hand and no penetration.” The district court found that the Missouri crime was also broader than the Kansas crime of aggravated indecent liberties with a child because the Missouri statute allowed the gratification to be for any person, not only the child or the offender.

As for the Kansas criminal threat convictions, the district court found that the charging documents contained both intentional and reckless language and because Jackson simply pled to the criminal threat charge, the district court could not determine which version of the statute Jackson pled to. The district court stated it did not believe Jackson could plead to both intentional and reckless behavior at the same time, that it did not believe it could consider the plea transcripts and “act as a factfinder to weigh in on which particular portion of that statute the defendant was entering a plea to,” and that even if it did consider the plea transcript it was still not evident which version Jackson pled to. Thus, the district court ruled that the Kansas criminal threat convictions could not be counted in Jackson’s criminal history.

The district court ordered a new PSI report that reflected Jackson had a criminal history score of C. The amended PSI report showed that Jackson had one person felony—the 2015 Kansas aggravated battery conviction—and counted the Missouri sodomy conviction and the two Kansas criminal threat convictions as nonperson felonies.

The State moved to reconsider, asserting the district court erred in finding the Missouri crime broader than the Kansas crimes and that the State only needed to prove that Jackson “was not convicted solely of reckless criminal threat.” On July 29, 2021, the district court sentenced Jackson. The district court denied the State’s motion to reconsider, reiterating its prior rulings. The district court found Jackson’s criminal history score to be C and imposed a sentence of 53 months’ imprisonment and 24 months’

postrelease supervision. The State timely appealed Jackson’s sentence.

DID THE DISTRICT COURT ERR IN CALCULATING JACKSON’S CRIMINAL HISTORY SCORE?

The State claims the “district court erred when it classified Jackson’s two Kansas criminal threat convictions and Missouri statutory sodomy conviction as nonperson felonies in his criminal history score.” Jackson responds and argues that the district court correctly excluded his prior criminal threat convictions from his criminal history. He also argues that the district court correctly classified his Missouri conviction for statutory sodomy in the first-degree as a nonperson felony.

*3 Under the revised Kansas Sentencing Guidelines Act (KSGA), a defendant’s sentence depends on the crime of conviction and the defendant’s criminal history score. K.S.A. 2020 Supp. 21-6804(d). As discussed above, the district court found Jackson’s criminal history score to be C. But if one or two of the challenged offenses should have been a person felony, then Jackson’s criminal history score should have been either B or A, thus increasing his presumptive sentence. See K.S.A. 2020 Supp. 21-6804(a).

“Classification of prior offenses for criminal history purposes involves statutory interpretation. This is a question of law subject to unlimited review.” *State v. Coleman*, 311 Kan. 305, 308, 460 P.3d 368 (2020).

Did the district court err in finding Jackson’s two prior criminal threat convictions could not be counted in his criminal history?

“Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes.” K.S.A. 2020 Supp. 21-6810(d)(9). In October 2019, the Kansas Supreme Court held “the portion of K.S.A. 2018 Supp. 21-5415(a)(1) allowing for a conviction if a threat of violence is made in reckless disregard for causing fear causes the statute to be unconstitutionally overbroad because it can apply to statements made without the intent to cause fear of violence.” *Boettger*, 310 Kan. at 822-23.

Jackson had a 2016 and a 2017 conviction for criminal threat. The district court examined the charging document, the plea, and the factual basis for the plea in each case and found that none of the documents allowed it to determine which version of criminal threat—reckless or intentional—Jackson was convicted of. As a result, the district court

ruled the convictions could not be counted as it was not clear that Jackson was not convicted of the reckless version of criminal threat, a statute that had since been determined unconstitutional.

The State concedes that Jackson pled to both alternatives of criminal threat—reckless and intentional. But the State argues that the district court erred in excluding the convictions. First, the State asserts that Jackson should not be permitted to attack his prior pleas because the convictions have not been declared invalid. Second, the State argues that it only had to prove the validity of Jackson’s prior convictions by a preponderance of the evidence and that it met that burden because Jackson pled to both versions of the crime. The State asserts that if the reckless language is struck from the charging documents and the plea, then Jackson did in fact plead to the intentional version.

Jackson argues the district court properly engaged in the modified categorical analysis and found that it could not determine under which version of criminal threat Jackson was convicted. Jackson argues that the factual basis for the pleas established that he communicated a threat of violence, but nothing established his intent. Jackson argues that because the State failed to establish that he committed the intentional version of criminal threat, the district court properly excluded his two prior criminal threat convictions from his criminal history.

First, the State incorrectly asserts that by claiming the convictions cannot count in his criminal history, Jackson must be collaterally attacking the validity of his prior convictions. Jackson states he is not seeking to have the convictions overturned; instead, he is only asserting that they cannot be used in his criminal history based on K.S.A. 2018 Supp. 21-6810(d)(9). By raising his objection at sentencing he was merely challenging the classification and scoring of the convictions. The district court’s ruling on the exclusion of the convictions from his criminal history score does not affect the existence or validity of his plea in each prior case or the convictions themselves.

*4 And the State incorrectly asserts that by merely proving the existence of the prior convictions, it met its burden of proving Jackson’s criminal history. The State cites K.S.A. 2018 Supp. 21-6810(d)(1) and (d)(2) in support of its assertion. Those provisions stand for the proposition that all prior felony convictions will be considered and scored in determining a defendant’s criminal history. But K.S.A. 2018 Supp. 21-6810(d)(9), which is the basis for Jackson’s argument here, then states that prior convictions for a statute that has since been determined unconstitutional shall not be counted in the defendant’s criminal history. Reading the provisions together, all prior felony convictions should be considered and scored in determining a defendant’s criminal history except for those under a statute that has since been determined

unconstitutional. Thus, the State must prove the challenged convictions are not under a statute that has since been determined unconstitutional.

The State correctly asserts that it needed to prove Jackson’s criminal history by a preponderance of the evidence. See K.S.A. 2018 Supp. 21-6814(a) (“The offender’s criminal history shall be ... determined by a preponderance of the evidence at the sentencing hearing by the sentencing judge.”); *State v. Obregon*, 309 Kan. 1267, 1275, 444 P.3d 331 (2019) (stating it is the State’s burden to prove a defendant’s criminal history). But the State then incorrectly asserts that the district court applied the wrong standard. The State’s argument on this point is confusing, but it seems to assert the district court applied a beyond a reasonable doubt standard presumably because the district court cited a case—*State v. Johnson*, 310 Kan. 835, 450 P.3d 790 (2019)—that dealt with the sufficiency of evidence at a jury trial to establish which version of the criminal threat offense the defendant committed.

Johnson, decided the same day as *Boettger*, discussed the sufficiency of the evidence when Johnson was charged with intentional or reckless criminal threat, the jury was instructed on both, and the verdict form merely asked whether Johnson committed the crime of criminal threat. *Johnson*, 310 Kan. at 839. The court found that sufficient evidence existed to support a conviction under either version of the statute but because of *Boettger* and because nothing in the record established which version of the offense the jury relied on to convict Johnson, his conviction had to be vacated. *Johnson*, 310 Kan. at 839-44. In so finding, the court noted that a jury could have found the defendant committed the reckless version if it determined that the defendant did not intend his threat to be taken literally but the victim was still fearful. 310 Kan. at 844.

The district court did not apply the wrong standard. It cited *Johnson* to support its assertion that it could not determine which version of the offense Jackson committed given the factual basis in each case does not solely support an intentional version of criminal threat. The district court was stating that, like the court found in *Johnson*, the evidence could support either version depending on Jackson’s intent in issuing the threat.

As mentioned above, it is the State’s burden prove an offender’s criminal history by a preponderance of the evidence. When the PSI report alone does not establish which version of the offense the defendant committed, the district court is directed to apply the “ ‘modified categorical approach’ ”—which allows the examination of “ ‘charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms’ ”—to determine which statutory alternative was the basis for conviction. See *Obregon*, 309 Kan. at 1274 (discussing the modified categorical approach in relation to alternative

means out-of-state crimes). The district court properly engaged in the modified categorical approach and determined that the State had not, by a preponderance of the evidence, proved that Jackson committed the intentional version of criminal threat.

*5 Jackson was charged and pled no contest to both versions of criminal threat in both cases. The proffered factual statement for one case was that Jackson kissed the victim “and told her it would be the last kiss she received from him, which caused [the victim] to be fearful for her own physical safety due to its threatening manner.” The proffered factual basis in the other was that Jackson entered a Dollar General store and began threatening to physically harm an employee. The district court correctly reasoned that the proffered factual statements did not establish which version—intentional or reckless—of criminal threat Jackson committed. Jackson could have intended his statements to be a threat—supporting an intentional version of the offense—or he could have simply made the statements in the heat of the moment or in anger without intending them to be a threat—supporting a reckless version of the offense. Because there was nothing in the record to support that Jackson’s conviction was for the intentional version of criminal threat rather than the reckless version of criminal threat, the district court correctly found that the convictions could not be included in his criminal history score.

A recent case from this court supports the district court’s decision. In *State v. Martinez-Guerrero*, No. 123,447, 2022 WL 68543 (Kan. App. 2022) (unpublished opinion), the defendant also challenged the inclusion of prior criminal threat convictions in his criminal history score. Like Jackson, Martinez-Guerrero pled to committing a threat of violence with the intent of causing fear or with reckless disregard of causing fear to the victim. The factual basis for the plea stated that during a confrontation with police, Martinez-Guerrero “ ‘did threaten to shoot [a police officer]. That he said that during this altercation they had with him in reference to him not complying to their orders for him to come forward as they did have a warrant to arrest him.’ ” 2022 WL 68543, at *1. The district court took the evidence in the light most favorable to the State and determined that beyond a reasonable doubt, Martinez-Guerrero committed intentional criminal threat and thus the conviction could be included in his criminal history score. Martinez-Guerrero appealed.

The panel first noted that the district court correctly used the modified categorical approach to determine which version of criminal threat Martinez-Guerrero committed. The panel then found that the district court applied the wrong standard—using a sufficiency of the evidence standard—instead of the preponderance of the evidence standard, which included no deference to the State. 2022 WL 68543, at *3. The panel then applied the preponderance of the evidence standard to the plea

information provided to determine whether the State had met its burden. 2022 WL 68543, at *3-4. The panel found that the record before it did not establish whether the threat was intentional or reckless. 2022 WL 68543, at *6. The panel explained that from the factual basis, Martinez-Guerrero could have either made the comment in the heat of the moment or in anger over what he believed to be an unlawful arrest, or he could have intentionally threatened the officer. 2022 WL 68543, at *6. Thus, the panel held that because it could not affirmatively find that the Martinez-Guerrero’s prior criminal threat conviction was for intentional conduct, rather than reckless conduct, the prior conviction could not be included in his criminal history score. 2022 WL 68543, at *6.

Jackson’s case is nearly identical to *Martinez-Guerrero*. Jackson, as discussed above, pled no contest to both versions of the offense and the factual basis proffered at the plea hearing, and the other documents provided by the State for the sentencing court to consider in its modified categorical approach, did not establish which version of the offense he committed. Based on the record before it, the district court correctly found that the State had not established that Jackson’s prior convictions were for the intentional version of criminal threat. Thus, the district court did not err in excluding Jackson’s two prior criminal threat convictions from his criminal history.

*6 As a final observation on the criminal threat convictions, the amended PSI report still counted the criminal threat convictions as nonperson offenses when they should not have been not counted at all. But their inclusion as nonperson felonies did not affect Jackson’s criminal history score because the Missouri conviction, as explained below, was properly considered a nonperson felony, which would mean his criminal history score was properly calculated as C based on that conviction and Jackson’s 2015 Kansas aggravated battery conviction. See K.S.A. 2018 Supp. 21-6804(a) (stating a criminal history score of C requires 1 person and 1 nonperson felony).

Did the district court err in scoring Jackson’s Missouri sodomy conviction as a nonperson felony?

The State next claims the district court erred by classifying Jackson’s prior Missouri sodomy conviction as a nonperson felony. The KSGA enumerates how an out-of-state conviction should be scored. See generally K.S.A. 2020 Supp. 21-6811. We note that the Legislature substantially amended K.S.A. 21-6811, effective May 23, 2019, changing the analysis for classifying a defendant’s out-of-state conviction as a person or nonperson crime. See K.S.A. 2019 Supp. 21-6811(e). The district court sentenced Jackson in July 2021. But the district court did not apply the 2019 amendment in sentencing Jackson, instead citing

the version of K.S.A. 2018 Supp. 21-6811 in effect on September 22, 2018, the date Jackson committed his crimes of conviction. The district court correctly applied the classification statutes in effect on the date Jackson committed his crimes. See *State v. McLinn*, 307 Kan. 307, 337, 409 P.3d 1 (2018) (“ [T]he fundamental rule for sentencing is that the person convicted of a crime is sentenced in accordance with the sentencing provisions in effect at the time the crime was committed.”).

K.S.A. 2018 Supp. 21-6811(e)(3) states:

“The state of Kansas shall classify the crime as person or nonperson. In designating a crime as person or nonperson, *comparable offenses* under the Kansas criminal code in effect on the date the current crime of conviction was committed shall be referred to. If the state of Kansas does not have a comparable offense in effect on the date the current crime of conviction was committed, the out-of-state crime shall be classified as a nonperson crime.”

The 2018 version of the statute focused on comparable offenses for the court to decide whether an out-of-state crime should be classified as person or nonperson. The Kansas Supreme Court interpreted the term “comparable offense” to require that “the elements of the out-of-state crime must be identical to, or narrower than, the elements of the Kansas crime to which it is being referenced.” *Wetrich*, 307 Kan. at 562. Both Jackson and the State agree the *Wetrich* comparable offense test governs this issue. The State argues on appeal that the district court erred in finding that the Missouri crime of sodomy was not comparable to the Kansas crimes of aggravated criminal sodomy, rape, or aggravated indecent liberties with a child.

The PSI report showed Jackson committed statutory sodomy in the first degree in Missouri in 2002. The Missouri crime of statutory sodomy in the first degree occurs when a person “has deviate sexual intercourse with another person who is less than fourteen years old.” Mo. Rev. Stat. § 566.062(1) (2001). “ ‘Deviate sexual intercourse’ ” is:

“any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person.” Mo. Rev. Stat. § 566.010(1) (2001).

*7 The Missouri Supreme Court has explained that under the definition of deviate sexual intercourse:

“[T]here are two types of acts: (1) any act involving the genitals of one person and the hand, mouth, tongue or anus of another person (which might be labeled ‘contact sodomy’) and (2) a sexual act involving the penetration

of the sex organ or anus by a finger, instrument or object (which might be labeled ‘penetration sodomy’). All of these acts require the same mens rea—that they were ‘done for the purpose of arousing or gratifying the sexual desire of any person.’ ” *Soto v. State*, 226 S.W.3d 164, 166 (Mo. 2007).

Thus, sodomy in the first degree in Missouri is divisible statute—a statute that comprises multiple, alternative versions of the crime, see *Obregon*, 309 Kan. at 1274. The elements of “contact sodomy” require that (1) the defendant engage in any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person, (2) with the purpose of arousing or gratifying the sexual desire of any person, and (3) did so with another person who is less than 14 years old. *Soto*, 226 S.W.3d at 166. “Penetration sodomy” requires that (1) the defendant engage in a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object, (2) with the purpose of arousing or gratifying the sexual desire of any person, and (3) did so with another person who is less than 14 years old. *Soto*, 226 S.W.3d at 166.

Neither the district court nor the parties recognized that the Missouri statute is divisible. When a statute is divisible, it is usually important to know which version of the offense the defendant committed to complete the elemental comparison required by *Wetrich*. But as we will explain below, both versions of the Missouri offense are broader than the Kansas crimes advanced by the State. As a result, the fact that the parties and the district court failed to recognize that the Missouri statute is divisible and which version of the statute Jackson violated is harmless.

The district court did not err in determining that the Missouri offense was broader than the comparable crimes advanced by the State. Aggravated criminal sodomy in Kansas is “[s]odomy with a child who is under 14 years of age.” K.S.A. 2020 Supp. 21-5504(b)(1). Kansas defines sodomy as “oral contact or oral penetration of the female genitalia or oral contact of the male genitalia; anal penetration, however slight, of a male or female by any body part or object; or oral or anal copulation or sexual intercourse between a person and an animal.” K.S.A. 2020 Supp. 21-5501(b). The Missouri crime of sodomy, when the act stems from contact sodomy, is broader than the Kansas crime of aggravated criminal sodomy because Missouri contact sodomy criminalizes contact of the genitals by a hand while Kansas requires oral contact of the genitals. Likewise, the Missouri crime under the penetration version of the statute is broader than the Kansas crime of aggravated criminal sodomy because it includes penetration of the male or female sex organ while the Kansas crime only covers anal penetration.

*8 Similarly, the Missouri crime of sodomy is not comparable to the Kansas crime of rape. The relevant

version of rape in Kansas is defined as “sexual intercourse with a child who is under 14 years of age.” K.S.A. 2020 Supp. 21-5503(a)(3). Sexual intercourse is then defined as “any penetration of the female sex organ by a finger, the male sex organ or any object. Any penetration, however slight, is sufficient to constitute sexual intercourse.” K.S.A. 2020 Supp. 21-5501(a). The contact version of the Missouri crime of sodomy is broader as it requires no penetration, mere contact suffices. The penetration version of the Missouri crime is also broader because it criminalizes anal penetration, an act not mentioned by the Kansas crime of rape.

Finally, the Kansas crime of aggravated indecent liberties with a child is the “lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender, or both” with a child under 14 years old. See K.S.A. 2020 Supp. 21-5506(b)(3)(A). As the State concedes, the Missouri crime of sodomy is broader than the Kansas crime of aggravated indecent liberties with a child because Missouri requires the action—the contact or the penetration—be done with the purpose of arousing or gratifying the sexual desire of any person while Kansas requires the intent to arouse or satisfy the sexual desires of either the child, defendant, or both. Thus, the district court did not err in finding that Jackson’s Missouri sodomy conviction was not comparable to the Kansas crime of aggravated indecent liberties with a child.

The State advances one final argument, based in policy, pointing out the “disparity in the application of the identical or narrower rule” and asserting that the test requires a “hyper-technical comparison of the words” which was not the Legislature’s intent. The State is correct that there seems to be a logical disconnect in the idea that

sexual offenses against a child could be a nonperson crime. The Kansas Legislature enacted the 2019 amendments to K.S.A. 21-6811(e) to overrule *Wetrich* and avoid the absurd results that sometimes followed from applying the comparable offense analysis in that decision. But as the parties agree, the *Wetrich* comparable offense test governs Jackson’s case, and this court is bound to apply *Wetrich* to Jackson’s case despite any logical disconnect or policy argument. *State v. Rodriguez*, 305 Kan. 1139, 1144, 390 P.3d 903 (2017) (holding that court of appeals is duty bound to follow Kansas Supreme Court precedent absent some indication that the court is departing from its earlier position).

In sum, the district court did not err in finding that Jackson’s two Kansas criminal threat convictions could not be counted in his criminal history because the State failed to prove by a preponderance of the evidence that Jackson was convicted of the intentional version of the crime. The district court also correctly found that the Missouri crime of statutory sodomy in the first degree was not comparable to the Kansas crimes of aggravated criminal sodomy, rape, or aggravated indecent liberties with a child because the elements of the Missouri crime were broader than the comparable Kansas crimes. Thus, the district court properly sentenced Jackson with a criminal history score of C.

Affirmed.

All Citations

510 P.3d 727 (Table), 2022 WL 1906940

501 P.3d 378 (Table)
 Unpublished Disposition

This decision without published opinion is
 referenced in the Pacific Reporter. See Kan. Sup. Ct.
 Rules, Rule 7.04.

NOT DESIGNATED FOR PUBLICATION
 Court of Appeals of Kansas.

STATE of Kansas, Appellee,
 v.

Frank Julian MARTINEZ-GUERRERO, Appellant.

No. 123,447

Opinion filed January 7, 2022.

Appeal from Finney District Court; WENDEL W.
 WURST, judge.

Attorneys and Law Firms

Korey A. Kaul, of Kansas Appellate Defender Office, for
 appellant.

Tyler B. Pettigrew, assistant county attorney, Susan L.
 Hillier Richmeier, county attorney, and Derek Schmidt,
 attorney general, for appellee.

Before Powell, P.J., Atcheson, J., and Richard B. Walker,
 S.J.

MEMORANDUM OPINION

Powell, J.:

*1 Frank Julian Martinez-Guerrero pleaded guilty to aggravated domestic battery, a severity level 7 person felony, and was sentenced to a presumptive sentence according to the severity level of his crime and his criminal history score. Martinez-Guerrero now appeals his sentence, arguing his prior 2018 conviction of criminal threat should not have been included in his criminal history, making his criminal history score incorrect and his sentence illegal. He contends the State was required to prove his prior conviction was for intentional criminal threat but failed to do so. After a careful review of the record, we agree with Martinez-Guerrero. We therefore vacate his sentence and remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

On February 26, 2020, Martinez-Guerrero pled guilty (the journal entry of judgment erroneously shows the no-contest box checked) to one count of aggravated domestic battery for acts committed in December 2019. A presentence investigation (PSI) report was filed, calculating Martinez-Guerrero's criminal history score as A based upon three prior criminal threat convictions. Martinez-Guerrero filed an objection to the score.

At sentencing on July 20, 2020, Martinez-Guerrero again objected to the scoring of his three prior criminal threat convictions. He argued the State could not prove that the threats serving as the basis for these convictions were intentional ones, which rendered the convictions illegal and, therefore, unable to be used in the calculation of his criminal history score.

The district court agreed, in part, and found that two of Martinez-Guerrero's prior criminal threat convictions—19 CR 309 and 17 JV 6—should be excluded. For the remaining conviction—18 CR 469, a 2018 conviction from Finney County—the PSI report did not specify if Martinez-Guerrero was convicted of intentional or reckless criminal threat. Thus, the district court looked at the plea transcript from that conviction in an attempt to discern which version of the statute was applicable to the crime.

According to the plea transcript from 18 CR 469, Martinez-Guerrero pled no contest to “unlawfully and feloniously commit[ing] a threat to commit violence with the intent of placing Jason Chase [a law enforcement officer] in fear or with reckless disregard of causing such fear.” At that plea hearing, the State provided the following factual basis:

“[W]e would present evidence that the Garden City Police Department sent officers to a residence on Chesterfield here in Garden City, Finney County, Kansas, on October 27th of 2018. At that time they were looking for Mr. Martinez. That they had contact with him in the home. That during that confrontation that he had with law enforcement, he did threaten to shoot Jason Chase. That he said that during this altercation they had with him in reference to him not complying to their orders for him to come forward as they did have a warrant to arrest him. That this all occurred in and around the residence on that Chesterfield Street.”

*2 When arguing this prior criminal threat conviction should be included in Martinez-Guerrero's criminal history score calculation, the State argued:

“Your Honor, on [case] 18 CR 469, we are arguing that in fact it does count because of the situation involving the facts in this case. He is being arrested. He does state

to the law enforcement officer that he's going to shoot him. That—that is a direct threat to the officer at the time. It's not some, oh, I randomly spoke something in the general population. He was directing that statement directly to Officer Chase at the time when he was highly agitated. That indicates that it was done—it was not done recklessly. So we believe that the—the conviction in the—that case should count on his criminal history.”

The district court held that Martinez-Guerrero was challenging the sufficiency of the evidence of the prior conviction and, therefore, reviewed “the facts in the light most favorable to the State to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt” of the intentional criminal threat. In so doing, the district court held that the 2018 criminal threat conviction could be included in Martinez-Guerrero's criminal history score because the facts presented established beyond a reasonable doubt that Martinez-Guerrero wanted Chase to believe that he intended to act violently. The district judge elaborated:

“*State v. Williams*, 303 Kan. [at] 762 and 763 indicates the Court's belief that intent can be inferred from circumstances presented. The uncontroverted facts in this case, evidence that the language Martinez used and the circumstances in which he threatened to shoot Officer Chase [establish] beyond a reasonable doubt that he wanted Chase to believe that the defendant intended to act violently and provide proof beyond a reasonable doubt of every fact necessary to constitute the crime of criminal threat in that he intended to place Officer Chase in fear when he communicated his threat to shoot him.

“I will therefore find the conviction of the level 9 person felony crime of criminal threat in 18 CR 469 places the defendant in the D criminal history category”

Accordingly, the district court sentenced Martinez-Guerrero to a presumptive sentence of 24 months in prison but placed him on probation from that sentence for a period of 24 months.

Martinez-Guerrero timely appeals.

DID THE DISTRICT COURT CORRECTLY CALCULATE MARTINEZ-GUERRERO'S CRIMINAL HISTORY SCORE?

Martinez-Guerrero argues the district court erred in calculating his criminal history score as D when it included his 2018 criminal threat conviction in his criminal history. Had Martinez-Guerrero's prior criminal threat conviction not been included in his criminal history and classified as a person felony, his criminal history score would have been I, which would have resulted in a lower presumptive

sentencing range. See K.S.A. 2020 Supp. 21-6804(a); K.S.A. 2020 Supp. 21-6809.

Standard of Review

A challenge to a district court's criminal history score calculation is an illegal sentence claim, which is a question of law over which we exercise unlimited review. *State v. Roberts*, 314 Kan. —, 498 P.3d 725, 728 (2021).

Analysis

*3 Before delving into Martinez-Guerrero's arguments, some background on criminal threat convictions is necessary. In *State v. Boettger*, 310 Kan. 800, 822, 450 P.3d 805 (2019), the Kansas Supreme Court held that reckless criminal threat under K.S.A. 2018 Supp. 21-5415(a)(1) was unconstitutional. And K.S.A. 2020 Supp. 21-6810(d)(9) prohibits a district court from using a prior conviction that has “since been determined unconstitutional by an appellate court” to calculate a defendant's criminal history score. The Kansas Supreme Court decided *Boettger* on October 25, 2019, before Martinez-Guerrero was sentenced on July 20, 2020.

“The legality of a sentence under K.S.A. 22-3504 is controlled by the law in effect at the time the sentence was pronounced [and] is fixed at a discrete moment in time—the moment the sentence was pronounced.” *State v. Murdock*, 309 Kan. 585, 591, 439 P.3d 307 (2019). Thus, when the district court calculated Martinez-Guerrero's criminal history score and pronounced sentence, a reckless criminal threat conviction was unconstitutional, so the inclusion of any prior criminal threat convictions in Martinez-Guerrero's criminal history would not have been proper unless the State could prove that they were for intentional criminal threats. Therefore, the question before us is whether Martinez-Guerrero's prior 2018 criminal threat conviction was for an intentional criminal threat.

Martinez-Guerrero advances two arguments in support of his claim that the district court improperly calculated his criminal history score. First, he argues the district court applied the improper standard of proof in determining if the criminal threat conviction should have been included in his criminal history. Second, he argues the district court erred in finding that the State proved his 2018 criminal threat conviction was an intentional criminal threat.

A. The State must prove a prior conviction by a preponderance of the evidence.

At sentencing, the district court correctly framed the question before it as whether the 2018 threat was communicated with the intention to place another in fear. As part of its examination, the district court described the State’s burden of proof in that inquiry as a challenge to the sufficiency of the evidence of the prior conviction, in which “the facts [are reviewed] in the light most favorable to the State to determine whether a rational factfinder could have found the defendant guilty [of intentional criminal threat] beyond a reasonable doubt.” This burden of proof is incorrect.

Martinez-Guerrero was not challenging the sufficiency of the evidence of his prior conviction per se. Rather, he was challenging whether his 2018 conviction for criminal threat was a constitutionally valid conviction and, therefore, scorable in his criminal history. In *State v. Obregon*, 309 Kan. 1267, 1275, 444 P.3d 331 (2019), the Kansas Supreme Court held that the State bears the burden of proving a defendant’s criminal history by a preponderance of the evidence. See K.S.A. 2020 Supp. 21-6814; see also *State v. Louis*, 59 Kan. App. 2d 14, 25, 476 P.3d 837 (2020) (applying preponderance of evidence standard to challenge of using prior criminal threat conviction in criminal history score calculation). Thus, the district court did not apply the correct burden of proof by viewing the evidence in the light most favorable to the State to determine whether a rational fact-finder could have found Martinez-Guerrero guilty of intentional criminal threat beyond a reasonable doubt. Instead, the district court should have reviewed the evidence without deference to the State and determined whether Martinez-Guerrero had been convicted of intentional criminal threat by a preponderance of the evidence.

B. The evidence in the record does not support a finding that Martinez-Guerrero’s prior 2018 conviction was for intentional criminal threat.

*4 Although the district court did not place the correct burden of proof upon the State in proving that Martinez-Guerrero’s 2018 criminal threat conviction was from intentional conduct, it is of no import here because we are in as good a position as the district court to make that determination. Typically, we would review a district court’s finding that the State met its burden to include a prior conviction in a defendant’s criminal history for substantial competent evidence. See *Obregon*, 309 Kan. at 1275. But here, the evidence centering on whether Martinez-Guerrero’s prior criminal threat conviction was intentional or reckless is uncontroverted. The State presented only the plea hearing transcript from the prior case as evidence to support its claim that the 2018 criminal

threat conviction was for an intentional criminal threat. Because that evidence is uncontroverted, and we can review the transcript just as the district court did, whether Martinez-Guerrero’s 2018 criminal threat conviction was based upon an intentional threat is a question of law over which we may decide de novo without deference to the district court’s findings. See *State v. Bennett*, 51 Kan. App. 2d 356, 361, 347 P.3d 229 (2015) (undisputed facts contained in plea transcript; thus, question is one of law); *State v. McCammon*, 45 Kan. App. 2d 482, 488, 250 P.3d 838 (2011) (appellate court exercises de novo review over sufficiency of evidence question where facts stipulated to).

As discussed, before Martinez-Guerrero was sentenced, the Kansas Supreme Court held that reckless criminal threat under K.S.A. 2018 Supp. 21-5415(a)(1) was unconstitutional and, therefore, such a prior conviction can no longer be used in the calculation of a defendant’s criminal history score. *Boettger*, 310 Kan. at 822; see K.S.A. 2020 Supp. 21-6810(d)(9). However, the intentional portion of K.S.A. 2018 Supp. 21-5415(a)(1) remains.

K.S.A. 2018 Supp. 21-5415(a)(1) defines a criminal threat as

“any threat to ... [c]ommit violence communicated with intent to place another in fear, or to cause the evacuation, lock down or disruption in regular, ongoing activities of any building, place of assembly or facility of transportation, or in reckless disregard of the risk of causing such fear or evacuation, lock down or disruption in regular, ongoing activities.”

Prior to the reckless version of the statute being held unconstitutional, the criminal threat statute provided distinct alternatives for a material element of the crime, intentional or reckless states of mind. Thus, criminal threat was an alternative means crime with respect to the two mental states. *State v. Williams*, 303 Kan. 750, 761, 368 P.3d 1065 (2016) (“[T]he legislature created alternative means when it defined two mental states” in previous version of K.S.A. 2018 Supp. 21-5415[a][1]).

However, the alternative means nature of Martinez-Guerrero’s prior conviction creates a legal problem because the sentencing court cannot just look at the elements of his prior 2018 criminal threat conviction to determine whether Martinez-Guerrero was convicted of the unconstitutional reckless version or the constitutional intentional version. Thus, the State bore the burden of presenting additional evidence to establish the intentional nature of the criminal threat if it wanted the prior conviction to be scored. But any fact, other than the fact of a prior conviction, which has not been proven to a jury beyond a reasonable doubt may not be used to increase a defendant’s sentence beyond the statutory maximum. *Appendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct.

2348, 147 L. Ed. 2d 435 (2000); see *State v. Gould*, 271 Kan. 394, 411, 23 P.3d 801 (2001).

To avoid this problem, district courts are permitted to look beyond just the fact of the prior conviction to determine if and how that conviction should be counted in a defendant’s criminal history score. The modified categorical approach allows a district court to look at certain documents to determine which statutory alternative forms the basis for the defendant’s conviction. *Obregon*, 309 Kan. at 1274. This set of documents includes “charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms.” *Johnson v. United States*, 559 U.S. 133, 144, 130 S. Ct. 1265, 176 L. Ed. 2d 1 (2010).

*5 Here, the district court relied on the transcript of the plea hearing for Martinez-Guerrero’s 2018 criminal threat conviction to determine whether that conviction was for intentional conduct. At that 2018 plea hearing, Martinez-Guerrero pled no contest to “unlawfully and feloniously commit[ting] a threat to commit violence with the intent of placing Jason Chase in fear or with reckless disregard of causing such fear.”

At that plea hearing, the State provided the following factual basis:

“[W]e would present evidence that the Garden City Police Department sent officers to a residence on Chesterfield here in Garden City, Finney County, Kansas, on October 27th of 2018. At that time they were looking for Mr. Martinez. That they had contact with him in the home. That during that confrontation that he had with law enforcement, he did threaten to shoot Jason Chase. That he said that during this altercation they had with him in reference to him not complying to their orders for him to come forward as they did have a warrant to arrest him. That this all occurred in and around the residence on that Chesterfield Street.”

Relying solely on this evidence from the plea hearing transcript, the sentencing court found that the uncontroverted facts and evidence established beyond a reasonable doubt that Martinez-Guerrero committed the crime of criminal threat “in that he intended to place Officer Chase in fear when he communicated his threat to shoot him.” Accordingly, the district court included the prior 2018 criminal threat conviction in the calculation of Martinez-Guerrero’s criminal history score.

In support of his argument that his threat to shoot the officer was reckless and not intentional, Martinez-Guerrero cites to three cases where our appellate courts found that a threat made could have been intentional or reckless: *State v. Lindemuth*, 312 Kan. 12, 14, 19, 470 P.3d 1279 (2020) (finding evidence at trial could have supported a conviction of reckless criminal threat when defendant stated, “ ‘I’ll

just shoot ya. You come up here, I’ll kill you. I want my money,’ ” over the phone while in Topeka and victim was in Oklahoma and victim still chose to come to Topeka after threat); *State v. Johnson*, 310 Kan. 835, 837, 844, 450 P.3d 790 (2019) (finding evidence at trial could have supported a conviction of reckless criminal threat when defendant stated to his mother, after ripping the phone off the wall, “ ‘I’m going to fucking kill your ass’ ”); *State v. Cardillo*, No. 120,606, 2021 WL 1149145, at *2, 5 (Kan. App. 2021) (unpublished opinion) (finding evidence at trial could have supported a conviction of reckless criminal threat when defendant stated to friend, while both were in the back of a police car, “ ‘I will kill you’; ‘This is not going to end nice ‘cause I’m going to be out eventually’; and ‘You know what I’m capable of’ ”).

In those cases cited by Martinez-Guerrero, our appellate courts were attempting to resolve an alternative means problem and, thus, had to determine whether the evidence presented was sufficient to support a reckless criminal threat conviction in addition to an intentional criminal threat conviction. While those cases are contextually different than the case before us, they are still helpful because they are factually similar and give us clues as to what evidence is sufficient to convict of reckless criminal threat.

Our Supreme Court has characterized a reckless threat as one made “in the heat of argument,” as “the result of unthinking rage,” or “impulsive bluster” *Lindemuth*, 312 Kan. at 18. In striking down the reckless criminal threat portion of the statute,

*6 “[A]s we said in *Boettger*, ‘ “[A] prohibition on true threats ‘protects individuals from the fear of violence’ and ‘from the disruption that fear engenders,’ in addition to protecting people ‘from the possibility that the threatened violence will occur.’ ” ’ 310 Kan. at 807 (quoting *Black*, 538 U.S. at 360); 310 Kan. at 821 (‘ “[I]t is not enough that a reasonable person might have understood the words as a threat—a jury must find that the speaker actually intended to convey a threat.” ’).” *Lindemuth*, 312 Kan. at 19.

We find the limited evidence before us similar to that in *Cardillo*. The *Cardillo* panel found a direct threat made to another in close proximity in a vehicle sufficient for a jury to conclude that such a threat could be reckless. 2021 WL 1149145, at *5. Although the threat here was direct and made in close proximity, the evidence from the plea hearing transcript is not enough to establish whether Martinez-Guerrero actually intended to threaten Officer Chase or whether it was a comment made in the heat of the moment or in anger over what Martinez-Guerrero thought was an unlawful arrest. Nor is there any evidence in the record that Officer Chase experienced any fear from Martinez-Guerrero’s threat. Given that we cannot be sure from the limited record before us whether Martinez-

Guerrero’s threat was intentional or reckless, we cannot make the affirmative finding that his 2018 criminal threat conviction was for intentional conduct. Thus, this prior conviction cannot be included in Martinez-Guerrero’s criminal history, making his criminal history score incorrect.

The State attempts to avoid this result by claiming that because Martinez-Guerrero entered into a no-contest plea, he waived all nonjurisdictional defects, including constitutional rights violations. See *State v. Browning*, 245 Kan. 26, 32, 774 P.2d 935 (1989); *In re Habeas Corpus Application of Coulter*, 18 Kan. App. 2d 795, 797, 860 P.2d 51 (1993). Although “ ‘a defendant does not expressly admit his [or her] guilt’ ” under a no-contest plea, such a plea “ ‘authorizes the court for purposes of the case to treat him [or her] as if he [or she] were guilty.’ ” During such pleas a defendant is agreeing to refrain from contesting, rather than affirmatively voicing his [or her] guilt to, the charge or charges.’ Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions*, 93 Minn. L. Rev. 670, 729-30 (2008).” *State v. Case*, 289 Kan. 457, 461, 213 P.3d 429 (2009). A district court is required to establish a factual basis for the crime charged before it can accept a no-contest plea. K.S.A. 2020 Supp. 22-3210(a)(4).

By entering into a no-contest plea, Martinez-Guerrero did

End of Document

not admit to the underlying facts of the case. Strictly speaking, Martinez-Guerrero pled no contest to reckless or intentional criminal threat. A factual basis only needed to be established for reckless or intentional criminal threat for the district court to accept Martinez-Guerrero’s plea because that was how he was charged. Thus, Martinez-Guerrero’s no-contest plea does not help the State in this instance because his plea does not establish which version of criminal threat he pled to—intentional or reckless criminal threat. The State still had to prove Martinez-Guerrero’s prior criminal threat conviction was for an intentional threat. It failed to do so on the record before us.

Because the State has failed to establish that Martinez-Guerrero’s prior 2018 conviction for criminal threat was for an intentional threat, it cannot be included in his criminal history. Thus, Martinez-Guerrero’s criminal history score is incorrect and his sentence is illegal. We vacate the district court’s sentence and remand for resentencing consistent with this opinion.

*7 Sentence vacated and case remanded with directions.

All Citations

501 P.3d 378 (Table), 2022 WL 68543

515 P.3d 755 (Table)
Unpublished Disposition

This decision without published opinion is
referenced in the Pacific Reporter. See Kan. Sup. Ct.
Rules, Rule 7.04.

NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Andrew Michael HOWELL, Appellant.

No. 124,650

|
Opinion filed September 2, 2022.

Appeal from Sedgwick District Court; JEFFREY SYRIOS,
judge.

Attorneys and Law Firms

James M. Latta, of Kansas Appellate Defender Office, for
appellant.

Lance J. Gillett, assistant district attorney, Marc Bennett,
district attorney, and Derek Schmidt, attorney general, for
appellee.

Before Arnold-Burger, C.J., Schroeder and Warner, JJ.

MEMORANDUM OPINION

Per Curiam:

*1 Andrew Howell appeals his sentence, claiming the district court erroneously included a juvenile adjudication for reckless criminal threat in its calculation of his criminal-history score. After reviewing the record and the parties' arguments, we agree that Howell's criminal-threat adjudication should not have been considered as part of his criminal history at sentencing. We therefore vacate Howell's sentence and remand the case for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

Howell pleaded no contest to one count each of criminal possession of a weapon and fleeing or attempting to elude an officer, charges arising from an incident in October 2020. After the district court accepted Howell's plea, the State prepared a presentence investigation report to aggregate Howell's criminal history and calculate his presumptive sentence. The summary of Howell's criminal history in that report included a 2019 juvenile adjudication for criminal threat—his only person felony. Based in part on this adjudication, the report calculated Howell's criminal-history score as C.

Howell's criminal-threat adjudication resulted from a no-contest plea to "unlawfully threaten[ing] to commit violence, communicated with the intent to place another ... in fear or in reckless disregard of the risk of causing such fear." A few months after Howell served his sentence for that offense, the Kansas Supreme Court decided *State v. Boettger*, 310 Kan. 800, 450 P.3d 805 (2019), *cert denied*, 140 S. Ct. 1956 (2020). That case found the offense of reckless criminal threat under K.S.A. 2018 Supp. 21-5415(a)(1) to be unconstitutional. 310 Kan. 800, Syl. ¶ 3.

Relying on *Boettger*, Howell challenged the report's inclusion of his previous criminal-threat adjudication when calculating his criminal-history score for his sentence in this case. In response, the State submitted the complaint from Howell's juvenile adjudication in an effort to show that Howell's criminal-threat offense had been intentional, not reckless, and therefore should be considered part of his criminal history. The district court denied Howell's challenge, finding the complaint showed Howell had pleaded no contest to committing *both* intentional and reckless criminal threat. Thus, the court found that Howell's previous adjudication should be included in his criminal-history score. The court then followed the plea agreement, imposing an underlying 22-month prison sentence and granting Howell 18 months' probation. Howell appeals.

DISCUSSION

Howell argues that the district court erred in using his criminal-threat adjudication to calculate his criminal-history score. He asserts that the State failed to prove he was convicted of the intentional version of that offense—the only crime that may be considered after *Boettger*—so the district court could not use the adjudication to calculate his criminal-history score. We agree.

As a preliminary matter, we note that appellate courts typically lack jurisdiction to review a sentence that is

within the presumptive range under the Kansas Sentencing Guidelines or results from a plea agreement. K.S.A. 2021 Supp. 21-6820(c)(1)-(2). Howell’s sentence falls into both categories. But an appellate court may consider a claim that “the sentencing court erred in either including or excluding recognition of a prior conviction or juvenile adjudication for criminal history scoring purposes.” K.S.A. 2021 Supp. 21-6820(e)(2). A court can also correct an illegal sentence at any time. K.S.A. 2021 Supp. 22-3504(a). We thus have jurisdiction over Howell’s appeal, which raises an issue over which our review is unlimited. See *State v. Roberts*, 314 Kan. 316, 319-20, 498 P.3d 725 (2021).

***2** Under Kansas law, a person’s sentence generally results from a combination of the severity of the crime and his or her criminal history. See K.S.A. 2021 Supp. 21-6804(a); K.S.A. 2021 Supp. 21-6805(a). The State has the burden to prove a person’s criminal history by a preponderance of the evidence. *State v. Obregon*, 309 Kan. 1267, 1275, 444 P.3d 331 (2019). When calculating someone’s criminal-history score, the district court may not use a previous juvenile adjudication under a statute that an appellate court has since declared unconstitutional. K.S.A. 2021 Supp. 21-6810(d)(9). The question we must consider is whether the State presented sufficient evidence at sentencing to show that Howell had been adjudicated for making an intentional criminal threat. See *State v. Martinez-Guerrero*, No. 123,447, 2022 WL 68543, at *3 (Kan. App. 2022) (unpublished opinion).

The only evidence offered by the State regarding Howell’s criminal-threat adjudication was the complaint charging him with the crime. That complaint shows that Howell pleaded no contest to “unlawfully threaten[ing] to commit violence, communicated with the intent to place another ... in fear *or* in reckless disregard of the risk of causing such fear; contrary to K.S.A. 2018 Supp. 21-5415(a)(1)(c)(1).” (Emphasis added.) Howell argues that the plain language of the complaint shows he pleaded to intentional “or” reckless criminal threat, while the State asserts this same language shows he pleaded to both versions.

Previous panels of this court have considered this issue and have agreed with Howell’s interpretation. In *Martinez-Guerrero*, the defendant also challenged the decision to include a past criminal-threat conviction when calculating his criminal-history score. The conviction at issue resulted from a no-contest plea to “ ‘unlawfully and feloniously commit[ting] a threat to commit violence with the intent of placing [the victim] in fear or with reckless disregard of causing such fear.’ ” 2022 WL 68543, at *1. At sentencing for the new offense, the State presented this criminal-threat plea, along with a more detailed factual basis that described the circumstances behind the threat. The district court found that this was enough to prove the defendant had committed the intentional version of the crime.

This court reversed on appeal. The panel found that the

State had not submitted sufficient evidence to show the defendant had been convicted of intentional criminal threat. 2022 WL 68543, at *6. The panel noted that “[a] factual basis only needed to be established for reckless or intentional criminal threat for the district court to accept [the defendant]’s plea because that was how he was charged.” 2022 WL 68543, at *6. So the defendant had not necessarily pleaded to both versions, and “[t]he State still had to prove [the defendant]’s prior criminal threat conviction was for an intentional threat.” 2022 WL 68543, at *6. Because the State failed to do so, the panel vacated the sentence and remanded for resentencing. 2022 WL 68543, at *6-7.

The issue arose again recently in *State v. Jackson*, No. 124,271, 2022 WL 1906940 (Kan. App. 2022) (unpublished opinion), *petition for rev. filed* June 8, 2022. There, the defendant had twice pleaded no contest to making a threat “ ‘with the intent to place another in fear or in reckless disregard of the risk of causing such fear.’ ” 2022 WL 1906940, at *1. Besides the charging documents from these convictions, the State also provided the plea-hearing transcripts, which outlined the factual bases for the charges. The district court decided it could not determine whether the defendant had pleaded to the intentional or reckless versions and thus did not count the convictions in its criminal-history-score calculations. The State appealed. 2022 WL 1906940, at *2.

***3** This court affirmed. Despite noting that the defendant “was charged and [pleaded] no contest to *both* versions of criminal threat in both cases,” the court agreed that the charging documents and plea transcripts did not show whether the defendant had committed intentional or reckless criminal threat. (Emphasis added.) 2022 WL 1906940, at *5. The court then discussed *Martinez-Guerrero*, which it found “nearly identical,” before concluding that the district court properly excluded the criminal-threat convictions from its criminal-history-score calculations. *Jackson*, 2022 WL 1906940, at *5.

These cases illustrate that regardless of how one interprets this disjunctive plea language, conduct can only constitute—and give rise to a conviction of—either a reckless or an intentional criminal threat. *Jackson*, 2022 WL 1906940, at *5; *Martinez-Guerrero*, 2022 WL 68543, at *6; see also *State v. Garza*, 290 Kan. 1021, 1035-36, 236 P.3d 501 (2010) (defendant can only be convicted of one crime when charged with two in the alternative). While we are not bound by *Martinez-Guerrero* or *Jackson*, we find this reasoning persuasive.

Here, the State presented even sparser evidence at sentencing than in *Martinez-Guerrero* and *Jackson*. The State provided no information about the criminal-threat charge that would allow a court to determine whether the threat was intentional or reckless. Instead, it relied solely on the complaint. But the plain language of the complaint

shows that Howell pleaded no contest to making a threat “with the intent to place another ... in fear *or* in reckless disregard of the risk of causing such fear.” (Emphasis added.) In other words, Howell did not contest that he committed *either* a reckless criminal threat *or* an intentional criminal threat. This statement is insufficient to show that Howell’s adjudication resulted from intentional conduct.

Recognizing this evidentiary deficiency, the State argues that Howell waived any challenge to how the district court might score his criminal-threat adjudication when he pleaded no contest to that offense. The State also argues that his plea to an alternative-means crime carried a “super-sufficiency” evidentiary requirement, meaning that the fact that the court accepted his plea necessarily means there was sufficient evidence that he committed both versions of the crime. Neither argument is persuasive.

Criminal defendants waive all nonjurisdictional challenges to a conviction, including constitutional defects, when they enter no-contest pleas. *State v. Reu-El*, 306 Kan. 460, 475, 394 P.3d 884 (2017); see K.S.A. 2021 Supp. 22-3602(a). But Howell is not challenging his previous criminal-threat adjudication; he is challenging his current sentence in this case. He does not dispute the existence of his previous criminal-threat adjudication; he only disputes whether the district court could use that adjudication when calculating his criminal-history score. And Kansas law explicitly allows such challenges, with no restrictions against convictions that result from a plea. See K.S.A. 2021 Supp. 21-6810(d)(9); K.S.A. 2021 Supp. 22-3504(a). Howell’s past criminal-threat plea did not waive his current sentencing challenge. See *Martinez-Guerrero*, 2022 WL 68543, at *6.

We are similarly unpersuaded by the State’s efforts to impute an alternative-means finding to the district court’s acceptance of Howell’s criminal-threat plea. It is true that our caselaw has imposed a “super-sufficiency” requirement when a jury considers an alternative-means crime, meaning the evidence must support each alternative

means of committing the offense. This rule protects a criminal defendant’s right to jury unanimity. *State v. Brown*, 295 Kan. 181, 188, 284 P.3d 977 (2012). But Howell’s criminal-threat adjudication resulted from a plea, not a jury verdict. As *Martinez-Guerrero* noted, a defendant pleading no contest “ ‘is agreeing to refrain from contesting, rather than affirmatively voicing his [or her] guilt to, the charge or charges.’ ” 2022 WL 68543, at *6 (quoting *State v. Case*, 289 Kan. 457, 461, 213 P.3d 429 [2009]).

*4 Even if we agreed with the State that Howell’s plea to intentional or reckless criminal threat demanded a factual basis for each version of that offense, that determination would not resolve the question before us. Instead, we come full circle to our initial observation—that the State failed to prove which version of the offense he was ultimately adjudicated of. See *State v. Johnson*, 310 Kan. 835, 843, 450 P.3d 790 (2019) (evidence supported findings of both reckless and intentional criminal threat, but that was not enough to show jury convicted defendant of the intentional offense); *Jackson*, 2022 WL 1906940, at *5 (State failed to prove convictions were for intentional version even though defendant “was charged and pled no contest to both versions”).

Thus, the State did not carry its burden of proof at sentencing to show Howell had committed an intentional criminal threat, and the district court should not have included Howell’s criminal-threat adjudication in his criminal-history score. We thus vacate Howell’s sentence and remand the case for resentencing consistent with this opinion.

Sentence vacated and case remanded with directions.

All Citations

515 P.3d 755 (Table), 2022 WL 4003626

442 P.3d 1067 (Table)
Unpublished Disposition

This decision without published opinion is
referenced in the Pacific Reporter. See Kan. Sup. Ct.
Rules, Rule 7.04.

NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
John Willie SCOTT Jr., Appellant.

No. 118,979

Opinion filed June 21, 2019

Review Denied February 27, 2020

Appeal from Geary District Court; RYAN W. ROSAUER,
judge.

Attorneys and Law Firms

Kai Tate Mann, of Kansas Appellate Defender Office, for
appellant.

Michelle L. Brown, assistant county attorney, and Derek
Schmidt, attorney general, for appellee.

Before Malone, P.J., Schroeder, J., and McAnany, S.J.

MEMORANDUM OPINION

Per Curiam:

*1 On July 21, 2016, the State charged John Willie Scott Jr., with kidnapping (with an alternative charge of criminal restraint), aggravated assault, and domestic battery. The charges arose out of an altercation between Scott and his wife. Scott's wife testified at his preliminary hearing on November 10, 2016. Scott was bound over for trial on charges of kidnapping and two counts of aggravated assault with a deadly weapon. Scott pled not guilty to the charges at his arraignment on December 16, 2016. Scott remained in jail from the time of his arrest.

In January 2017, Scott's appointed counsel left the public defender's office and withdrew from the case. The court appointed a second lawyer to represent Scott. Thereafter, at a pretrial status hearing on January 20, 2017, Scott

entered a written plea agreement under which he pled no contest to amended charges of criminal threat, criminal restraint, and domestic battery. The district court set Scott's sentencing date for April 24, 2017, and released him from jail on a recognizance bond.

While out on bond, Scott left Kansas and went to New York to visit family. His bond was revoked and he was arrested in New York and returned to Kansas where he remained in the county jail until his sentencing hearing.

At Scott's originally scheduled sentencing hearing, he told the court that he wished to withdraw his pleas to the amended charges and go to trial. The court allowed Scott's second lawyer to withdraw and appointed a third lawyer to represent Scott. On June 7, 2017, Scott's third lawyer filed a formal motion requesting that the court allow Scott to withdraw his pleas.

At the initial hearing on Scott's motion, he told the court that he wanted to withdraw his pleas because his wife testified at the preliminary hearing contrary to statements made to the police after the altercation. He said he entered his pleas simply as a way to get out of jail. He told the court that he had requested a transcript of the preliminary hearing testimony, and his third lawyer said it would be forthcoming but Scott had not received it. As a result, he no longer wanted his third lawyer to represent him. The court allowed lawyer No. 3 to withdraw and appointed a fourth lawyer.

Evidentiary Hearing on Scott's Motion to Withdraw His Pleas

The initial hearing on Scott's motion was continued to December 19, 2017, at which time the court held a full evidentiary hearing. Scott, along with his first two lawyers, testified at the hearing.

Scott's First Lawyer's Testimony

Scott's first lawyer testified that in November or December 2016, Scott authorized him to negotiate a plea deal with the State. He and Scott talked about a plea agreement "between five and ten [times]. I don't know for sure." He reached out to the prosecutor about the possibility of a plea agreement, but the prosecutor never responded. Scott's lawyer did not order a transcript of Scott's preliminary hearing. He normally would not do so if he was trying to negotiate a plea agreement with the State. If plea negotiations would not pan out, he would order a transcript and seek a

continuance of the trial to make sure the transcript was completed and available for the trial. When he withdrew from the case, he prepared a written memorandum on the case and discussed the case with Scott's second lawyer. He told Scott's second lawyer about Scott's desire for a quick resolution of the matter and the unsuccessful plea negotiations.

Scott's Second Lawyer's Testimony

*2 Scott's second lawyer testified that he reviewed the file, including the first lawyer's "transfer memorandum," and discussed the case with Scott's first lawyer. The second lawyer had no concern about Scott's competency since Scott had had a successful competency evaluation before the second lawyer entered the case.

In discussing the matter with Scott, he understood that Scott wanted a plea agreement. He discussed with Scott the conflicting statements made by Scott's wife, but Scott wished to get the case resolved quickly so he could get out of jail. Accordingly, the lawyer did not order a transcript of the preliminary hearing, "[which] would have taken weeks, if not months."

Scott's second lawyer negotiated the plea agreement on Scott's behalf, and the agreement accomplished Scott's goal of a speedy resolution that would get him out of jail. The lawyer's typical routine, which he followed with Scott, was to give the client a copy of the proposed agreement, review it with the client, and give the client a chance to ask questions. Under the plea agreement, Scott would plead nolo contendere to reduced charges of criminal threat and two misdemeanors. At the conclusion of the plea hearing, Scott was released on an OR bond. After the plea hearing, Scott never contacted him about withdrawing his pleas.

Scott's Testimony

Scott was age 27 at the time of the hearing. He graduated from high school and attended Erie Community College for 12 credit hours.

Scott testified that he discussed his wife's inconsistent statements with his first lawyer. According to Scott, his lawyer told him that his wife's inconsistent statements would cause the State to seek a plea agreement to resolve the case. Scott said he discussed a possible plea agreement with his first lawyer at nearly all of their meetings, though it was Scott's desire to go to trial.

Scott testified that he told his second lawyer that he wanted the case resolved quickly, but by this he meant he wanted

to go to trial as quickly as possible. When his second lawyer told him it would take weeks or months to get the preliminary hearing transcript, Scott understood that to mean the transcript would be unavailable for trial. He had wanted to have the transcript available for use at trial.

Regarding the plea agreement discussions, "[m]y attorney was just saying that I was going to get probation ... and get out ... that was just the main things, that was being discussed." Scott read the proposed plea agreement with his lawyer in the county jail. Scott did not have any questions for his lawyer after reading it.

Scott testified that at the plea hearing he followed his lawyer's directions about what to say. Scott had been taking some unspecified medication off and on before the plea hearing, but he apparently was not taking any medications at or around the time of the plea hearing.

According to Scott, his lawyer told him that he would be able to withdraw his pleas, and Scott understood this to mean that he could do so without court approval. Scott decided to withdraw his pleas after visiting with his family in New York when he was released on bond.

"So, I was talking to my aunt, about how my wife lied at the prelim, and how there was different information on the transcripts and the—and the affidavit. And she was telling me that if I can prove that in trial, that it would be to my benefit. So, I was just, like, well, I shouldn't have signed the plea, you know, how come my attorneys never told me that. And that was part of the reason why, like I say, I felt like they were in cahoots. I felt like that's probably the reason why I did not get my transcripts, when I asked for them."

*3 When asked directly why the court should allow him to withdraw his pleas, Scott said the court should do so because he did not understand the plea process and felt tricked by his attorneys into pleading based on their description of his chances for success at trial.

Scott's Closing Argument

In closing argument, Scott's current counsel argued that under the first factor in *State v. Edgar*, 281 Kan. 30, 36, 127 P.3d 986 (2006)—the competency of counsel—"I don't think that the ... Court has any doubt that the counsel that was appointed to Mr. Scott, was competent counsel. What happened here is a chaos of the system, at the particular time that Mr. Scott was faced with his case ... that actually caused the failures here." She cited "the changeover, in the prosecution, the changeover for Mr. Scott, for his attorney." She later noted that "because everything that was going on within our judicial system, at that point in time, it led to Mr. Scott not being fairly

represented.”

She argued that Scott’s attorneys “fell down” in counseling Scott “on the defense that he had in this case.” This related to Scott’s wife’s conflicting statements, which counsel described in detail:

“[H]er statement is that he grabbed her from the side. Her testimony was that he grabbed her from the back.

“... [Scott’s wife] gave conflicting statements about ... how and when the telephone was dropped, ... when it was given to Mr. Scott, by her

“There’s the issue of ... the razor, that [Scott] supposedly had in his hand ... then he had a knife; that basically was not clear; that he still had the razor, that he still had the knife; there was conflicting statements.

“... [Scott’s wife] stated she was going to break the window and jump out of the third-floor window. But that isn’t what the testimony was. The testimony at the prelim was that she was just trying to get somebody’s attention, when she went to the window.”

Counsel also argued that Scott was misled in entering his pleas and his pleas were not fairly and understandingly made.

The District Court’s Ruling

The district court provided an extensive analysis from the bench in denying relief on Scott’s motion. The court looked at the first factor in *Edgar*, 281 Kan. at 36. “The [first] is competent counsel. And the defense agrees that the counsel in this case are competent.” The court found that Scott’s first and second attorneys were competent “in terms of the ... appropriateness of what they advised Mr. Scott, and their knowledge of the law, and their ability to perform the duties.”

The court then considered whether Scott was coerced, mistreated, misled, or unfairly taken advantage of. Here, Scott was charged with a level 3 felony that called for presumptive prison of 55 to 61 months and offender registration. He was also charged with aggravated assault which “will add another year onto the sentencing, if the matters are run consecutively.” Scott was also charged with a misdemeanor. These were “bargained down to two misdemeanors and a nonregistration felony, with probation. It was on paper ..., at least, a good deal.”

The court found no coercion beyond the “inherent pressures that any defendant faces, when they’re in pretrial confinement.” Moreover, Scott was not misled about the plea agreement.

Regarding Scott’s wife’s inconsistent statements at the preliminary hearing, the court noted that Scott was well acquainted with them. The court observed, “what I’m really hearing is that, looking back on it, perhaps defense counsel gave short shrift to inconsistent statements that were made.” But

*4 “any prosecutor with a basic skill set is going to be able to explain to the jury that in the heat of the moment, the victim is not going to remember [every] last detail, and when they recite the case under the pressure of being on the witness stand months later, they’re going to get certain things wrong.”

The court also noted that in memorializing a witness’ statement, the police are “probably going to get some things wrong too.” The court concluded that the differences would not be “enough for a jury to find compelling.”

The court did not believe Scott’s testimony that his counsel told him he could withdraw his plea whenever he wanted. The court did not believe that Scott, in entering into the plea agreement, thought “[w]ell, I’ll make the plea agreement now. And then, if I change my mind before sentencing, 60 to 90 days out, I’ll ... just change my mind.”

The court found no evidence that Scott was incompetent at the time of his plea. Moreover, Scott’s plea was understandingly made. “[H]e was aware of the inconsistencies leading up to the hearing. He knew what his choices were. He knew what he was getting out of the plea agreement.” There was no dispute that Scott read and understood the plea agreement. In sum, there was no believable evidence that any of the *Edgar* factors supported setting aside Scott’s pleas.

Sentencing

Ten days later the district court sentenced Scott to consecutive sentences of six months in prison for the criminal threat conviction, six months in the county jail for the criminal restraint conviction, and six months in the county jail for the domestic battery conviction. The court then suspended Scott’s sentences and placed him on 12 months of unsupervised probation.

Scott’s Appeal

Scott appeals. He contends that the district court abused its discretion in denying his motion to withdraw his pleas. He also contends that the court erred in imposing an illegal sentence.

Analysis

With regard to Scott’s first contention, the rule regarding motions to withdraw a plea before sentencing is that “[a] plea of guilty or nolo contendere, for good cause shown and within the discretion of the court, may be withdrawn at any time before sentence is adjudged.” K.S.A. 2018 Supp. 22-3210(d)(1). We review the district court’s ruling to determine if it abused its discretion in denying the motion. *State v. DeAnda*, 307 Kan. 500, 503, 411 P.3d 330 (2018); *State v. Schaal*, 305 Kan. 445, 449, 383 P.3d 1284 (2016). A judicial action constitutes an abuse of discretion if (1) no reasonable person would take the view adopted by the trial court; (2) it is based on an error of law; or (3) it is based on an error of fact. *State v. Marshall*, 303 Kan. 438, 445, 362 P.3d 587 (2015).

The District Court’s Standard for Counsel’s Performance

Scott claims on appeal that the lackluster advice and representation of his first two lawyers caused him to enter his guilty pleas. He argues that the district court abused its discretion by erroneously applying the constitutional competency standard rather than the lackluster advocacy standard in evaluating the performance of his counsel.

The three *Edgar* factors generally guide a district court’s consideration of whether a defendant has shown the good cause required by K.S.A. 2018 Supp. 22-3210(d)(1) to withdraw a plea prior to sentencing: (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. See *Edgar*, 281 Kan. at 36. 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). These factors establish “viable benchmarks” for the district court when exercising its discretion, but the court should not ignore other facts that might exist in a particular case. *State v. Schaefer*, 305 Kan. 581, 588, 385 P.3d 918 (2016).

*5 Scott argues the first *Edgar* factor regarding competency of counsel, standing alone, gave him good cause to withdraw his plea.

To understand Scott’s contention, we must first examine in detail our Supreme Court’s four to three ruling in *State v. Aguilar*, 290 Kan. 506, 231 P.3d 563 (2010), upon which Scott relies.

In *Aguilar* the court found “particularly egregious facts.”

290 Kan. at 515. Aguilar and her close family friend, Leona Ayalla, were the subject of a traffic stop. There were outstanding arrest warrants for both of them. The police conducted an inventory search of the car and discovered cocaine under the seat where Aguilar was sitting and additional drugs on Ayalla’s person. Both were charged with drug crimes.

Ayalla and Aguilar retained the same attorney to represent them. His fee was \$1,500 if they both pled guilty and \$3,000 if they went to trial. He later moved to withdraw in Aguilar’s case because she had failed to pay the agreed fee, and the attorney asserted that this made it impossible for him to zealously represent her. Nevertheless, three days later, and before the motion was ruled on, both Ayalla and Aguilar entered guilty pleas in line with plea agreements with the State. At the plea hearing that followed, the district court accepted the pleas without inquiring into the possible conflict arising from the lawyer representing both Ayalla and Aguilar on charges arising out of the same transaction.

Then, before sentencing, Aguilar moved to withdraw her plea. She contended that she entered into the plea agreement and pled guilty under duress because of her close relationship with Ayalla and the fact that her lawyer said she could save substantial legal fees, which she could not afford, by pleading guilty along with Ayalla. She claimed that her lawyer had a conflict of interests in representing both her and Ayalla in these cases. The district court denied relief following the evidentiary hearing on Aguilar’s motion.

On appeal, the Supreme Court cited *State v. Schow*, 287 Kan. 529, 541, 197 P.3d 825 (2008), for the distinction drawn between a motion to withdraw a plea before sentencing and such a motion asserted after sentencing. The good cause needed to withdraw a plea before sentencing is a lesser standard for a defendant to meet than the manifest injustice standard needed to set aside a plea after sentencing. Deciding whether a defendant has met the good cause standard for setting aside a plea before sentencing is within the district court’s discretion. Success for such a motion asserted after sentencing is predicated on a showing of manifest injustice, a more stringent requirement. *Schow*, 287 Kan. at 541.

“[I]t may be logical and fair to equate the K.S.A. 22-3210(d) manifest injustice standard governing a post-sentence plea withdrawal motion to the high burden imposed on a constitutional claim of ineffective assistance. [Citations omitted.] ... [T]he plain language of the statute—‘for good cause shown *and within the discretion of the court*’—should not be ignored. A district court has no discretion to fail to remedy a constitutional violation.

“It is neither logical nor fair to equate the lesser K.S.A. 22-3210(d) good cause standard governing a

presentence plea withdrawal motion to the high constitutional burden. The *Edgar* factors do not transform the lower good cause standard of the statute’s plain language into a constitutional gauntlet. Merely lackluster advocacy—or, as here, evidence of an insurmountable conflict of interest[s] among jointly represented codefendants that is ignored by a district judge—may be plenty to support the first *Edgar* factor and thus statutory good cause for presentence withdrawal of a plea.” *Aguilar*, 290 Kan. at 513.

*6 The district judge who took Aguilar’s plea failed to address counsel’s conflict of interests and “the financial pressure placed on Aguilar by [her lawyer’s] package deal for her representation, good only as long as she remained joined at the hip to Ayalla.” 290 Kan. at 515. With respect to the first *Edgar* factor regarding competency of counsel, the judge merely observed that he was familiar with Aguilar’s lawyer and “ ‘I think he does a good job.’ ” *Aguilar*, 290 Kan. at 515. This observation did not address the performance of Aguilar’s lawyer in the case then before the court. In ignoring the conflict issue, the district court ignored “the main issue to be addressed.” 290 Kan. at 515. The Supreme Court concluded that Aguilar satisfied the good cause showing necessary to set aside her plea and set aside the district court’s ruling on Aguilar’s motion. 290 Kan. at 515.

In the later decision in *State v. Schaefer*, 305 Kan. 581, 589, 385 P.3d 918 (2016), the court considered another presentencing motion to withdraw a plea; this time, under the “lackluster performance” standard announced in *Aguilar*. Schaefer raised issues regarding each of the *Edgar* factors: (1) the competency of his counsel; (2) whether he was coerced into entering his plea; and (3) whether his plea was fairly and understandingly made. With respect to the first *Edgar* factor, Schaefer claimed his lawyer’s performance was inadequate because he failed to advise Schaefer that by pleading nolo contendere to amended on-grid charges of rape and attempted rape he might be exposed to possible involuntary civil commitment under the Kansas Sexually Violent Predator Act (KSVPA). The district court denied relief, finding that Schaefer was represented by competent counsel.

Unlike in *Aguilar*, Schaefer’s appeal did not involve any claim of a conflict of interests. But he relied on *Aguilar* in arguing that “he does not have to prove that his attorney was unconstitutionally ineffective, but rather ‘[m]erely lackluster advocacy ... may be plenty to support the first *Edgar* factor and thus statutory good cause for presentence withdrawal of a plea.’ *Aguilar*, 290 Kan. at 513.” *Schaefer*, 305 Kan. at 589. The *Schaefer* court confirmed that “the test for competent counsel when determining good cause to withdraw a plea is something less than the test to determine constitutionally effective assistance of counsel.” 305 Kan. at 597.

Citing K.S.A. 2015 Supp. 22-3210(d), the Supreme Court noted that Schaefer’s burden was to show good cause for withdrawing his plea, rather than the more stringent burden of manifest injustice. 305 Kan. at 587-88. In considering the matter, the district court was not confined to the *Edgar* factors but could consider other factors that may come into play in a particular case. On appeal, Schaefer argued that the district court abused its discretion in ignoring factors other than the three *Edgar* factors.

In affirming the district court, the Supreme Court disposed of Schaefer’s claim that the district court abused its discretion by applying the wrong legal standard—i.e., only the *Edgar* factors and not the “lackluster performance” standard of *Aguilar*—by noting that the district court:

- issued a thorough decision detailing its reasons for denying the motion;
- considered the points raised in Schaefer’s testimony and his statements at his plea hearing; and
- considered the context in which Schaefer entered his plea. *Schaefer*, 305 Kan. at 589.

Returning to our case, Scott contends that the district court failed to apply the lackluster standard in deciding whether he had shown good cause to withdraw his pleas. He argues that rather than applying the “less stringent” good cause standard for measuring the performance of his counsel, the district court applied the “heightened” Sixth Amendment constitutional standard.

*7 We see no indication that the district court erroneously applied a heightened standard for Scott to meet. The district court explicitly applied the *Edgar* factors in resolving Scott’s motion. The *Edgar* factors remain “viable benchmarks for judicial discretion” in deciding a presentencing motion to withdraw a plea. *Aguilar*, 290 Kan. at 512. This includes the first *Edgar* factor regarding attorney competence. Under the holding in *Aguilar*, an attorney’s performance that is merely lackluster satisfies the movant’s burden of showing that the first *Edgar* factor has not been satisfied and that the presentencing motion should be granted.

In its analysis, the district court did not explicitly refer to the lackluster test for lawyer competence under the first *Edgar* factor. Nor did the court refer to the more demanding constitutional standard for ineffective assistance of counsel. But the court’s analysis was consistent with both *Aguilar* and *Schaefer*—in substance and in the comprehensiveness of its analysis—and demonstrated that Scott’s lawyers were not lackluster in their representation.

The *Aguilar* court did not explain what constitutes a lackluster performance. But Webster’s New World College Dictionary 812 (5th ed. 2014) defines lackluster as

“lacking energy or vitality; boring, unimaginative, etc.” On the other hand, that same dictionary defines “effective” as “producing a definite or desired result.” Webster’s New World College Dictionary 464 (5th ed. 2014).

In Scott’s closing argument on his motion, his counsel enumerated Scott’s complaints but essentially conceded that Scott’s lawyers were competent. The district court agreed and found that they were appropriate in how they advised Scott. But the court then went on to analyze Scott’s complaints about his lawyers, which centered on their failure to provide him with a transcript of the preliminary hearing and about their urging him to plead rather than go to trial. The thrust of Scott’s argument is that these complaints demonstrate the lackluster character of his lawyers’ performance.

Substantial evidence supports the district court’s finding that Scott’s counsel satisfied the competency requirement in *Edgar*. Scott’s first lawyer testified that the driving force behind the plea agreement was Scott’s desire to get out of jail as quickly as possible. He and Scott talked about a plea agreement between 5 and 10 times during the months he represented Scott. He attempted to carry out Scott’s wishes, but he was unable to get the prosecutor to engage in any plea negotiations. He did not order a transcript of the preliminary hearing because of Scott’s desire for a quick plea deal. But he explained that if plea negotiations were unsuccessful, he would have ordered the transcript and made sure it was available for trial.

Scott’s second lawyer discussed with Scott the conflicting statements Scott’s wife made but did not pursue the issue because of Scott’s concern for a speedy resolution of the case that would get him out of jail. Moreover, the rather trivial conflicts in the wife’s testimony, as outlined in Scott’s closing argument, were hardly sufficient to warrant abandoning Scott’s desire for a speedy resolution of the case.

Scott’s second lawyer was able to negotiate an agreement which the district court characterized as “a good deal.” He gave Scott a copy of the proposed agreement and reviewed it with him. Scott had no questions about it. As a result of the agreement and Scott’s agreed pleas, he was released on bond, which was his immediate objective. (Moreover, as an aside, Scott ultimately was placed on unsupervised probation which was what he said his lawyer predicted.) Consistent with the evidence, the district court found that Scott’s lawyers did not pressure him into entering his pleas.

*8 Finally, with regard to Scott’s claim that his second lawyer told him he could withdraw his plea at any time, the court simply rejected it as incredible. In our review we do not second-guess the district court on matters of credibility. *State v. Dunn*, 304 Kan. 773, 822, 375 P.3d 332 (2016).

The district court correctly found that the performance of

Scott’s lawyers met the *Edgar* competency standard. While the district court did not use any “magic words” to characterize their performance, the court did not burden Scott with the Sixth Amendment constitutional standard for measuring counsel’s performance. Moreover, our review of the evidence leads us to conclude that the performance of Scott’s lawyers was competent and effective—and far from lackluster. The district court did not abuse its discretion in denying Scott’s motion to withdraw his plea.

Scott’s Claimed Illegal Sentences

Scott contends that his sentences are illegal because they violate K.S.A. 2018 Supp. 21-6819. A sentence is illegal if it does not conform to applicable statutory provisions. K.S.A. 2018 Supp. 22-3504(3). A court may correct an illegal sentence at any time. K.S.A. 2018 Supp. 22-3504(1); *State v. Fisher*, 304 Kan. 263, 264, 373 P.3d 781 (2016). Because this raises issues of statutory construction, our review is unlimited. See *State v. Collins*, 303 Kan. 472, 473-74, 362 P.3d 1098 (2015).

In considering these claims we must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. *State v. Barlow*, 303 Kan. 804, 813, 368 P.3d 331 (2016). When a statute is plain and unambiguous, we do not speculate about the legislative intent behind that clear language, and we do not read something into the statute that is not readily found in its words. If the statute is not ambiguous, we need to resort to the tools of statutory construction. Only if the statute’s language is unclear or ambiguous do we turn to the canons of construction or to the statute’s legislative history to determine the Legislature’s intent. 303 Kan. at 813.

Finally, if our Supreme Court has already considered and decided the issue, we are duty bound to follow its holding on the issue unless we have some indication the Supreme Court is departing from its previous position. *State v. Meyer*, 51 Kan. App. 2d 1066, 1072, 360 P.3d 467 (2015).

Multiple Sentences Under K.S.A. 2018 Supp. 21-6819

The district court sentenced Scott to consecutive sentences of six months in prison for the criminal threat conviction, six months in the county jail for the criminal restraint conviction, and six months in the county jail for the domestic battery conviction. The court then suspended Scott’s sentences and placed him on 12 months of unsupervised probation.

Scott cites K.S.A. 2018 Supp. 21-6819(b)(1) for the

proposition that “[w]hen the sentencing judge imposes multiple sentences consecutively, the consecutive sentences shall consist of *an* imprisonment term which may not exceed the sum of the consecutive imprisonment terms, and a supervision term.” (Emphasis added.) Moreover, under K.S.A. 2018 Supp. 21-6819(b)(6), “[i]f the sentence for the primary crime is a prison term, the entire imprisonment term of the consecutive sentences will be served in prison.” Under K.S.A. 2018 Supp. 21-6803(r), “[P]rison’ means a facility operated by the Kansas department of corrections”; and under K.S.A. 2018 Supp. 21-6803(m), “[I]mprisonment’ means imprisonment in a facility operated by the Kansas department of corrections.” Based on these statutory definitions and mandates, Scott contends that the district court imposed illegal sentences when it ordered him to be incarcerated at different facilities—in the county jail for two consecutive six-month sentences and in KDOC custody for a six-month prison term.

*9 Our Supreme Court previously addressed this issue in *State v. Huff*, 277 Kan. 195, 83 P.3d 206 (2004). Huff pled guilty to attempted robbery, felony possession of marijuana, misdemeanor theft, and two counts of misdemeanor child endangerment. The district court imposed concurrent sentences on her two felony convictions, resulting in a controlling prison term of 16 months. The court also imposed consecutive 12-month jail sentences for each of her three misdemeanor offenses, to run consecutive to her primary offense of attempted robbery.

Huff claimed her sentence was illegal because the district court had no statutory authority to impose consecutive sentences for her misdemeanor convictions. Her argument hinged on whether incarceration in the county jail constitutes imprisonment. Kansas law provides that the court can impose concurrent or consecutive sentences when imposing sentences of imprisonment for different crimes. She argued that “the term imprisonment is reserved for felony crimes involving incarceration in a facility operated by the Kansas Department of Corrections. Misdemeanor convictions call for *confinement* instead of imprisonment with incarceration in a jail instead of the Kansas Department of Corrections.” 277 Kan. at 199. Thus she contended that in sending her to the county jail for her misdemeanor offenses, the district court did not have the option of imposing consecutive periods of confinement.

The Kansas Supreme Court cited the Kansas Court of Appeals decision in *State v. Reed*, 23 Kan. App. 2d 661, 934 P.2d 157 (1997). The Supreme Court also compared various sections of the Kansas Criminal Code and determined the terms “imprisonment” and “confinement”

were used interchangeably. *Huff*, 277 Kan. at 200. Ultimately, the Supreme Court concluded the district court had authority to impose consecutive sentences for misdemeanors. 277 Kan. at 207. In doing so, the court declared that “K.S.A. 2002 Supp. 21-4720(b) does not apply to misdemeanor cases.” 277 Kan. at 197-98.

In 2011, K.S.A. 21-4720(b) was renumbered to K.S.A. 21-6819(b), but the language of the statute remained largely the same. L. 2010, ch. 136, § 300. K.S.A. 2018 Supp. 21-6819(b)(6), on which Scott’s case relies, remained untouched. The changes made to K.S.A. 2018 Supp. 21-6819(b)(1) are unrelated to Scott’s argument. Likewise, the definitions of “imprisonment” and “prison” are unchanged from when *Huff* was decided. *Huff* remains controlling law and we are bound to follow it. *Meyer*, 51 Kan. App. 2d at 1072.

The Double Rule

Finally, Scott contends that the sentence imposed by the district court violated the “double rule.” The double rule states: “The total *prison* sentence imposed in a case involving multiple convictions arising from multiple counts within an information, complaint or indictment cannot exceed twice the base sentence.” (Emphasis added.) K.S.A. 2018 Supp. 21-6819(b)(4).

Scott argues that because he was sentenced on multiple convictions charged in the same information, his term of incarceration cannot be more than twice the six-month prison base sentence for the felony criminal threat charge. But Scott’s two other six-month sentences for domestic battery and criminal restraint were to be served in the county jail, not in prison. K.S.A. 2018 Supp. 21-6819(b)(4) specifically refers to the “prison” sentence, and prison specifically means a facility operated by KDOC. See K.S.A. 2018 Supp. 21-6803(r). Although “imprisonment” applies to misdemeanors, prison and county jail are not interchangeable terms, and we may not read something into the statute that is not readily found in its words. See *Barlow*, 303 Kan. at 813. Accordingly, Scott’s sentence does not violate the double rule.

*10 Affirmed.

All Citations

442 P.3d 1067 (Table), 2019 WL 2559515

426 P.3d 539 (Table)
Unpublished Disposition

This decision without published opinion is
referenced in the Pacific Reporter. See Kan. Sup. Ct.
Rules, Rule 7.04.

NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Timothy Allen LOWE Jr., Appellant.

No. 117,943

Opinion filed September 28, 2018.

Appeal from Leavenworth District Court; GUNNAR A.
SUNDBY, judge.

Attorneys and Law Firms

Rick Kittel, of Kansas Appellate Defender Office,
Lawrence, for appellant.

Joan Lowdon, deputy county attorney, Todd Thompson,
county attorney, and Derek Schmidt, attorney general, for
appellee.

Before Atcheson, P.J., Hill, J., and Stutzman, S.J.

MEMORANDUM OPINION

Per Curiam:

*1 In this direct appeal, Timothy Lowe Jr. asks this court to order remand of his case to the district court for consideration of a pro se motion he filed after his sentencing and after he had filed his notice of appeal. He also claims his sentence violated the provisions of the revised Kansas Sentencing Guidelines Act (KSGA). We reject both the requested remand and the claim of sentencing error and affirm.

FACTS AND PROCEDURAL BACKGROUND

On March 23, 2017, a Leavenworth County District Court jury convicted Lowe of interference with law

enforcement—obstruction of legal process, a severity level 9 nonperson felony, and two counts of battery against a law enforcement officer, class A person misdemeanors. On April 19, 2017, the district court sentenced Lowe to 7 months in prison for the obstruction and 12 months in jail for each of the misdemeanors. One misdemeanor sentence was ordered to be served concurrent with his prison sentence and the other to be consecutive to that sentence.

Lowe filed his notice of appeal 12 days later, on May 1, appealing “the conviction and sentence and any other adverse rulings decided against [Lowe] in the District Court, as pronounced on the 19th day of April, 2017.” Sixteen days later, on May 17, Lowe filed a pro se motion in the district court “Declining or Terminating Representation or Counsel.” Lowe listed five Leavenworth County cases in the caption of his motion. The five cases included case number 16CR315, which is the sole case number on his notice of appeal, thus the only one relevant to our review.

Specific to the case before us, Lowe claimed his counsel was ineffective for providing incorrect information that he took into consideration when deciding on a plea agreement. In particular, Lowe alleged he was told “that if he was convicted of 2016 CR 315 then he would be scored in the G-Box for any convictions that may or may not follow said case.” Lowe further claimed his counsel told him it was “illegal for him to receive copies of his discovery.” Finally, Lowe alleged “[t]here were paperwork errors when sentenced for 2016 CR 315, which were brought to [counsel’s] attention on April 19, 2017. These errors still have not been fixed.”

The record shows neither a hearing nor a ruling on Lowe’s pro se postsentencing motion.

ANALYSIS

Lowe’s first issue does not claim error in any decision made by the district court. Rather, he asks that we order remand with directions to the district court to consider and rule on his pro se motion claiming ineffective assistance of counsel. He also wants the remand to include resentencing, based on his claim that the total term of his sentence violated the requirement of K.S.A. 2017 Supp. 21-6819(b)(4) that “[t]he total prison sentence imposed in a case involving multiple convictions arising from multiple counts within an information, complaint or indictment cannot exceed twice the base sentence.”

Consideration of pro se motion.

Lowe argues that, notwithstanding the title “Motion Declining or Terminating Representation of Counsel,” this court should view his pro se motion as a motion for new trial that makes a claim of ineffective assistance of trial counsel. He points out the motion included claims that trial counsel was ineffective in this case and others not addressed here. Lowe then directs us to authority to consider a mislabeled pro se motion for new trial as a motion for postconviction relief under K.S.A. 2017 Supp. 60-1507.

*2 Although not stated as such, and not requested specifically, Lowe asks us to order, sua sponte, a remand to the district court for a hearing under the procedure described in *State v. Van Cleave*, 239 Kan. 117, 716 P.2d 580 (1986). A look to the description of that procedure, as presented in *Van Cleave*, is instructive for this case:

“We believe that the procedure we recommended in *State v. Shepherd*, 232 Kan. 614, 657 P.2d 1112 (1983), when there is a claim of newly discovered evidence while the case is pending upon appeal, is equally applicable to a claim of ineffective assistance of counsel which arises after the district court has lost jurisdiction of the case pending appeal. In *Shepherd*, we stated:

“The statutes do not provide any specific procedure for the handling and determination of a motion to remand a case from the appellate courts. The granting of a motion to remand a case from the appellate courts for the purpose of the trial court hearing a motion for new trial based upon alleged newly discovered evidence or for other trial court proceedings lies within the sound discretion of the appellate court. *The granting of such a motion is not a matter of right which accrues in every case merely by filing a motion seeking remand.* While the statutes are silent on procedural standards, better practice suggests that a defendant seeking to have a case remanded from the appellate courts should set forth with some specificity sufficient details of the evidence to be presented to the trial court in support of the motion for new trial so the appellate court may determine in the first instance whether there are valid grounds to expect that a new trial might be granted by the trial court. The appellate courts cannot be expected to operate in a vacuum and grant every motion to remand a case already on appeal absent a showing that the motion for new trial has merit and is not frivolous or an attempt to delay the appellate process.” [232 Kan. at] 620. (Emphasis added.)” 239 Kan. at 120.

In *Rowland v. State*, 289 Kan. 1076, 219 P.3d 1212 (2009), our Supreme Court commented again that remand for a *Van Cleave* hearing in the district court is not a required procedure. The court reviewed Rowland’s ineffective assistance claim, made in a K.S.A. 60-1507 motion. The district court had appointed counsel and held a preliminary

hearing on the legal issues in the motion, then rejected the ineffective assistance issue on the basis that an ineffectiveness claim had been heard as part of Rowland’s direct appeal. The Supreme Court found no error in this court’s denial of Rowland’s claim that his trial counsel had made an unauthorized admission of his guilt, because the panel found: “ ‘[e]very allegation concerning trial counsel’s admissions of the defendant’s guilt is unsubstantiated by the record on appeal.’ [*State v. Rowland*, No. 90,128, 2014 WL 1683106, at *2 (Kan. App. 2004) (unpublished opinion)].” 289 Kan. at 1079. Concerning a second ineffectiveness claim, that trial counsel should have requested a voluntary intoxication instruction, however, the court ruled:

“On this portion of Rowland’s direct appeal ineffective assistance claim, the Court of Appeals *should have remanded on its own motion for a Van Cleave hearing or declined to decide the merits*, until it had been brought first to the district court on a K.S.A. 60-1507 motion. *Either procedure* could have insured that this and any other questions regarding trial counsel’s performance were fully explored and disposed of by the district court first, where any necessary evidentiary hearing could be held and trial counsel and Rowland permitted to testify.” (Emphases added.) *Rowland*, 289 Kan. at 1085.

*3 Here, Lowe filed his motion well after his notice of appeal and suggests we treat it as a mislabeled pro se motion for new trial, functionally recategorized as a K.S.A. 60-1507 motion. He alleges ineffectiveness in vague terms, alleging his counsel gave him “incorrect information” that he “[took] into consideration” in evaluating plea agreements offered in this case, either including or consisting of information about his criminal history. He further asserts his trial counsel told him “it was illegal for him to [receive] copies of his discovery” and “[t]here were paperwork errors when sentenced” for this case that had not been corrected at the time the motion was filed. We are unable to tell from Lowe’s motion whether the conflict of interest Lowe alleges related to this case or others to which the motion related.

To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish (1) the performance of defense counsel was deficient under the totality of the circumstances, and (2) there is a reasonable probability the jury would have reached a different result absent the deficient performance. *Sola-Morales v. State*, 300 Kan. 875, 882, 335 P.3d 1162 (2014) (relying on *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674, *reh. denied* 467 U.S. 1267 [1984]). Because Lowe fails to specify any role these alleged failures by his counsel played in his convictions and sentences, an argument could be made that we should deny his claims without a hearing in the district court. There may, however, be more to Lowe’s claims than he articulated in his pro se motion.

Although Lowe made no request for a *Van Cleave* hearing on his ineffectiveness claims and provided no specificity in support of them, we draw no conclusions about their merits. From that, however, we may make a reasonable inference there are no exigencies weighing heavily in favor of remand rather than consideration of the issues after the direct appeal process is completed. We therefore decline Lowe's request for a remand to the district court. If Lowe's ineffectiveness claims are to be decided, they may first be taken up fully by the district court in a K.S.A. 60-1507 hearing, with no prejudice to his right to be heard. As the court observed in *Rowland*, either a sua sponte remand or a deferral until after the direct appeal allows "any ... questions regarding trial counsel's performance [to be] fully explored and disposed of by the district court first," with an evidentiary hearing and opportunity for trial counsel and Lowe to testify, if that is deemed appropriate. See 289 Kan. at 1085.

Lowe's sentence did not violate K.S.A. 2017 Supp. 21-6819(b)(4).

Lowe next claims the sentence imposed by the district court violated the sentencing limitation in K.S.A. 2017 Supp. 21-6819(b)(4) that directs: "The total prison sentence imposed in a case involving multiple convictions arising from multiple counts within an information, complaint or indictment cannot exceed twice the base sentence." Lowe reasons that because he was sentenced on multiple convictions charged in the same information, his term of incarceration could not be more than twice the seven-month prison base sentence for the felony obstruction charge.

If Lowe is correct, the district court's sentence would constitute an illegal sentence as defined in K.S.A. 2017 Supp. 22-3504(3):

" 'Illegal sentence' means a sentence: Imposed by a court without jurisdiction; that does not conform to the applicable statutory provision, either in character or punishment; or that is ambiguous with respect to the time and manner in which it is to be served at the time it is pronounced."

An illegal sentence may be corrected at any time. K.S.A. 2017 Supp. 22-3504(1).

Whether the "total prison sentence" referenced in K.S.A. 2017 Supp. 21-6819(b)(4) applies to misdemeanors is key to Lowe's argument. The concept of a base sentence arises from the KSGA. K.S.A. 2017 Supp. 21-6819(b)(2) directs a district court to "establish a base sentence for the primary crime," which is then defined as "the crime with the highest crime severity ranking." That subsection continues,

detailing the basis for a district court to determine the primary crime when multiple sentences are imposed, including sentencings with both off-grid and on-grid sentences, sentencings with more than one crime in the same crime category, and sentencings that include crimes on both the drug and nondrug grids, with or without conflicting presumptions for probation and imprisonment. K.S.A. 2017 Supp. 21-6819 is part of the revised KSGA within the Kansas Criminal Code, K.S.A. 21-5101 et seq.

*4 The revised KSGA applies to felony crimes committed on or after July 1, 1993. K.S.A. 2017 Supp. 21-6802(c). Misdemeanors are classified under K.S.A. 2017 Supp. 21-6602. Lowe's misdemeanor convictions were class A misdemeanors, "the sentence for which shall be a definite term of confinement *in the county jail* which shall be fixed by the court and shall not exceed one year." (Emphasis added.) K.S.A. 2017 Supp. 21-6602(a)(1). As distinct from a county jail, a "prison" is defined as "a facility operated by the Kansas department of corrections." K.S.A. 2017 Supp. 21-6803(r).

In *State v. Huff*, 277 Kan. 195, 83 P.3d 206 (2004), the district court sentenced Huff for two felonies, ordering them to be served concurrently, resulting in a controlling prison term of 16 months. The district court also imposed 12-month jail sentences for each of three misdemeanor offenses, to run consecutive to each other and to the felony sentences. Huff claimed her sentences were illegal because the district court lacked authority to order consecutive sentences for her misdemeanor cases.

On Huff's appeal, this court held the district court did have authority to impose the consecutive misdemeanor sentences and did not abuse its discretion by doing so. *State v. Huff*, 31 Kan. App. 2d 717, 71 P.3d 1185 (2003). The court held that K.S.A. 2002 Supp. 21-4720(b) (predecessor to K.S.A. 2017 Supp. 21-6819[b]), which granted discretion to impose concurrent or consecutive sentences in a multiple conviction case, applied only to felony sentences falling under the KSGA. On review, our Supreme Court observed that reasoning "appears to be correct" under the holding in *State v. Reed*, 23 Kan. App. 2d 661, 934 P.2d 157 (1997), and the KSGA. *Huff*, 277 Kan. at 197.

In *Reed*, this court found that the provisions of K.S.A. 21-4720(b)(4), limiting the total sentence in multiple conviction cases to no more than twice the base sentence, did not apply to misdemeanor convictions. 23 Kan. App. 2d at 663. The Supreme Court recounted the analysis developed in *Reed*:

"The *Reed* court reasoned that 'prison' is defined in K.S.A. 21-4703(r) as a facility operated by the Kansas Department of Corrections and '[s]ince sentences for misdemeanor convictions are served in county jails, those type of sentences cannot meet the definition of

prison sentences under the KSGA.’ 23 Kan. App. 2d at 663. Consequently, *Reed* concluded that *a defendant may be sentenced to consecutive misdemeanor convictions in addition to the sentence imposed under K.S.A. 21-4720(b)(4) for any multiple felony convictions.* 23 Kan. App. 2d at 663.” (Emphasis added.) *Huff*, 277 Kan. at 197.

The court then stated: “As such, the Court of Appeals correctly concluded that K.S.A. 2002 Supp. 21-4720(b) does not apply to misdemeanor cases.” 277 Kan. at 197-98.

Lowe acknowledges this authority from *Reed* and *Huff*, but argues that, although *Huff* said K.S.A. 21-4720 [now 21-6819] does not apply to misdemeanor cases, “[i]t does not appear, however, that *Huff* specifically holds that such consecutive misdemeanor sentences may be imposed without regard to the ‘double rule.’ ” Instead, Lowe contends *Huff* may be read to support the opposite conclusion, since the court found “the term imprisonment refers to felony as well as misdemeanor convictions.” 277 Kan. at 201.

We disagree with Lowe’s attempt to parlay that comment

by the court into an extension of a provision in the KSGA—which applies solely to felonies—into a sentencing limitation applicable to misdemeanors. We need not belabor this further than to simply read what the Legislature has done: K.S.A. 2017 Supp. 21-6819(b)(4) specifically applies the “double the base” limitation to “[t]he total prison sentence.” The Legislature defined the term prison and that definition does not include county jails, where misdemeanor sentences are to be served. As the court in *Huff* succinctly observed: “[T]he emphasis is not on the term imprisonment as the defendant would have us believe but, rather, the emphasis is upon the place of confinement.” 277 Kan. at 201. We find no merit in Lowe’s contention that the manner for service of his misdemeanor sentences violated a sentencing limitation in the felony-specific KSGA.

*5 Affirmed.

All Citations

426 P.3d 539 (Table), 2018 WL 4655619

412 P.3d 1041 (Table)
Unpublished Disposition

This decision without published opinion is
referenced in the Pacific Reporter. See Kan. Sup. Ct.
Rules, Rule 7.04.

NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Oscar FLORES, Appellant.

No. 116,853

Opinion filed February 23, 2018

Appeal from Sedgwick District Court; WARREN M.
WILBERT, judge.

Attorneys and Law Firms

Carl Maughan, of Maughan Law Group LC, of Wichita, for
appellant.

Lesley A. Isherwood, assistant district attorney, Marc
Bennett, district attorney, and Derek Schmidt, attorney
general, for appellee.

Before Malone, P.J., Schroeder, J., and Burgess, S.J.

MEMORANDUM OPINION

Per Curiam:

*1 Oscar Flores was found guilty by a jury of assault, domestic battery, and eight counts of violating a protective order. Flores appeals, arguing that the district court erred by running some of his misdemeanor sentences consecutively and by allowing the State to amend the complaint, adding new charges, a few days before his trial. Finding no abuse of discretion, we affirm the district court's judgment.

We will briefly review the facts. On August 9, 2015, while driving, Flores allegedly backhanded his then-girlfriend K.S. in the face; grabbed her leg to prevent her from leaving the car, causing bruising; and threatened her life with a knife. K.S. eventually escaped from the situation when Flores stopped at a gas station. The following day,

K.S. made a police report and she was interviewed by an officer with the Wichita Police Department. Following the interview, Flores was arrested and placed in jail.

On August 18, 2015, the State charged Flores with one count of aggravated assault with a deadly weapon and one count of domestic battery. On the same day, the district court granted a protective order forbidding contact between Flores and K.S.

While the case was pending, Flores contacted K.S. numerous times using the jailhouse telephone and video-visit system. K.S. estimated that Flores contacted her over 70 times, while the State estimated that Flores contacted K.S. over 100 times. Throughout these calls, Flores continued to threaten and harass K.S. Flores even tried to prevent K.S. from testifying by instructing her not to show up for any court dates.

At a pretrial hearing on April 22, 2016, as a result of the jailhouse contacts, the State sought to amend the original complaint, adding eight new charges of violating a protective order. After hearing arguments of counsel, the district court granted the State's request to amend the complaint. Because the trial was scheduled to start April 25, 2016, Flores' trial counsel requested a continuance. The State had no objection to the trial continuance, yet, Flores himself objected. Against his counsel's recommendation, Flores insisted that he go to trial on April 25. When the district court informed Flores of the risk of going to trial if he was not ready, he responded: "I will take my chances."

Flores' trial began April 25, 2016. K.S. testified for the State, as well as several law enforcement officers who had investigated the case. Throughout the trial, Flores expressed dissatisfaction with his counsel for refusing to call certain witnesses and refusing to ask certain questions during cross-examination. Flores' counsel explained that he tried to contact the witnesses, but he was having difficulties contacting them. The district court recessed trial for a day, in part, so Flores could bring in his witnesses. The next day, Flores' witnesses were present. Following yet another discussion with the court, Flores and his counsel decided not to call his witnesses for strategic purposes. Flores also decided that he would not testify. Flores' defense was based on attacking the credibility of K.S. After hearing the evidence, the jury found Flores guilty as charged, with the exception of finding him guilty of the lesser charge of simple assault, rather than aggravated assault. Each conviction was for a misdemeanor crime.

*2 On June 7, 2016, the district court sentenced Flores to 30 days in jail for assault, six months for domestic battery, and one year for each protective order conviction. The

district court then ordered that the assault, domestic battery, and four of the protective order sentences run consecutively, resulting in a controlling term of 55 months in jail. Flores timely filed a notice of appeal.

CONSECUTIVE SENTENCES

Flores first claims the district court erred by ordering some of his sentences to run consecutive to one another. The State, in turn, argues that the district court's decision to order consecutive sentences for Flores' misdemeanor convictions was not arbitrary or unreasonable in light of the facts and circumstances of his case.

As Flores acknowledges, it is generally within the district court's discretion to determine whether a sentence should run concurrent with or consecutive to another sentence. K.S.A. 2017 Supp. 21-6606(a); *State v. Mosher*, 299 Kan. 1, 2, 319 P.3d 1253 (2014). A judicial action constitutes an abuse of discretion if (1) no reasonable person would take the view adopted by the district court; (2) it is based on an error of law; or (3) it is based on an error of fact. *State v. Marshall*, 303 Kan. 438, 445, 362 P.3d 587 (2015). The party asserting that the district court abused its discretion bears the burden of showing such an abuse. *State v. Robinson*, 303 Kan. 11, 90, 363 P.3d 875 (2015), *cert. denied* 137 S. Ct. 164 (2016).

Flores does not assert that the district court's action constituted an error of law or an error of fact, so his claim is that no reasonable person would have taken the view adopted by the district court to run the sentences consecutively. To show that the district court acted unreasonably, Flores points to an extensive discussion between himself and the district court during the trial, outside the presence of the jury. This discussion concerned witnesses that Flores wanted to call against his trial counsel's recommendation and Flores' assertion that his counsel was ineffective. On appeal, Flores asserts that this discussion was "heated" and "argumentative." While conceding that this discussion does not conclusively reveal bias, Flores claims that the discussion indicates an animosity, or an appearance of animosity, between the district court and himself, leading the court to abuse its discretion by imposing consecutive sentences.

Based upon our review of the trial transcript, we disagree with Flores' interpretation that the discussion between himself and the district court was "heated." In fact, the district court appeared to be very willing to listen to Flores. If any party became argumentative during the discussion, it was Flores who was arguing with the court, not the other way around. On multiple occasions, the district court patiently tried to explain the law to Flores in order to resolve the issues he was raising at trial. We fail to find any animosity, or even the appearance of animosity, between

the district court and Flores which led to the district court running the sentences consecutively.

Flores' brief also mentions the "double rule" which prohibits a district court from imposing a maximum sentence that is twice the base sentence for felony convictions. See K.S.A. 2017 Supp. 21-6819(b)(2), (4); *State v. Eisenhour*, 305 Kan. 409, 410, 384 P.3d 426 (2016) ("Under the double base-sentence rule, a maximum sentence of imprisonment cannot exceed twice the base sentence imposed on a primary crime."). Flores correctly concedes that the "double rule" does not apply to misdemeanor sentences. See *State v. Huff*, 277 Kan. 195, 197-98, 83 P.3d 206 (2004). Nonetheless, Flores asks us to apply the reasoning of the "double rule" to his case and asks us to find that imposing a sentence greater than double the maximum sentence of the primary crime is "presumptively unreasonable." However, Flores fails to provide any legal authority to support his request, and we refuse to apply the "double rule" reasoning to Flores' misdemeanor sentences.

*3 In making its sentencing determination, the district court considered that Flores had 23 entries on his criminal history worksheet, including two prior convictions for domestic violence and one for battery. The district court also considered the evidence surrounding the jailhouse phone calls between Flores and K.S. Finally, the district court considered that although Flores violated his protective order concerning K.S. over 100 times, the State only charged Flores with eight counts of violating a protective order. Based on the record, we are unable to say that no reasonable person would have taken the view adopted by the district court in ordering consecutive sentences. Accordingly, we conclude that Flores has failed to meet his burden of demonstrating that the district court abused its discretion in running his sentences consecutively.

AMENDED COMPLAINT

Next, Flores claims the district court erred in allowing the State to amend the complaint just a few days before trial. Because the State amended the complaint by adding new charges, Flores claims he did not have time to prepare a solid defense. The State asserts that the district court did not abuse its discretion when it allowed the State to amend the complaint because doing so did not subject Flores to substantial prejudice.

Although Flores asserts that this issue involves statutory interpretation subject to unlimited review, we disagree. Instead, as asserted by the State, the district court's decision to allow an amendment to a complaint is reviewed for an abuse of discretion. *State v. Bischoff*, 281 Kan. 195, 205, 131 P.3d 531 (2006). The party asserting an abuse of

discretion bears the burden of showing such abuse. *Robinson*, 303 Kan. at 90.

K.S.A. 22-3201(e) governs the amending of complaints: “The court may permit a complaint or information to be amended at any time before verdict or finding if no additional or different crime is charged and if substantial rights of the defendant are not prejudiced.” Our Supreme Court has interpreted this statute to mean that a district court has considerable discretion to allow an amended complaint prior to trial, even if it adds new charges, as long as the amendment does not prejudice the substantial rights of the defendant. *Bischoff*, 281 Kan. at 205; *State v. Woods*, 250 Kan. 109, Syl. ¶ 1, 825 P.2d 514 (1992).

Here, at the pretrial hearing, the State explained to the district court that Flores’ trial counsel was aware “for weeks” that additional charges would be added to the original complaint. On appeal, Flores fails to show how the amendment prejudiced his substantial rights. Granted, the amendment allowed additional charges to be filed a few

days before trial. However, the State and the district court were willing to continue Flores’ trial, but he insisted on going to trial without a continuance. Flores asserts that the district court had an obligation to protect his rights to a fair trial by continuing his case over his objection. However, Flores supplies us with no legal authority to support this claim. More importantly, the record reflects that Flores was able to bring his witnesses to trial, but he decided not to call them for strategic purposes. Under these circumstances, we conclude that Flores has failed to establish that the district court abused its discretion in allowing the State to amend the complaint.

Affirmed.

All Citations

412 P.3d 1041 (Table), 2018 WL 1022843

427 P.3d 1017 (Table)
Unpublished Disposition

This decision without published opinion is
referenced in the Pacific Reporter. See Kan. Sup. Ct.
Rules, Rule 7.04.

NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Demetrius C. MAGGETT, Appellant.

No. 118,057

Opinion filed October 5, 2018.

Appeal from Sedgwick District Court; STEPHEN J.
TERNES, judge.

Attorneys and Law Firms

Carol Longenecker Schmidt, of Kansas Appellate
Defender Office, for appellant.

Lance J. Gillett, assistant district attorney, Marc Bennett,
district attorney, and Derek Schmidt, attorney general, for
appellee.

Before Leben, P.J., Green and Malone, JJ.

MEMORANDUM OPINION

Per Curiam:

*1 Demetrius C. Maggett appeals the district court's denial of his request for a lesser sentence following the revocation of his probation, claiming an abuse of discretion. The State replies that we lack jurisdiction to consider this appeal because Maggett is appealing an agreed upon sentence as well as a presumptive sentence. In the alternative, the State submits that the district court did not abuse its discretion.

To begin with, we find that we have jurisdiction to review Maggett's claim. In doing so, we align ourselves with this court's previous decision of *State v. Reeves*, 54 Kan. App. 2d 644, 403 P.3d 655 (2017), *rev. denied* 307 Kan. 992 (2018). Next, finding that the district court did not abuse its discretion, we affirm the district court's decision.

FACTS

Although Maggett brings this appeal from the revocation of his probation, we will briefly set forth the underlying facts supporting his convictions. On November 5, 2016, Maggett was involved in a domestic dispute with his girlfriend, T.M.T., over Maggett using a belt to discipline T.M.T.'s daughter. During the ensuing argument, Maggett punched T.M.T. in the shoulder, and when she fought back the two struggled and T.M.T. ended up with redness on the left side of her jaw.

T.M.T.'s two daughters observed the fighting and went next door to I.J.M.'s house for help. When I.J.M. came to the aid of T.M.T., Maggett pulled a gun and told I.J.M. that he would kill him. I.J.M. backed away, and Maggett then fled with T.M.T.'s cell phone. The police found both the gun used to assault I.J.M. and T.M.T.'s cell phone on Maggett's person when they arrested him a short time later.

On November 8, 2016, the State charged Maggett with aggravated assault of I.J.M., domestic battery of T.M.T., and theft of T.M.T.'s cell phone. Maggett pled guilty as charged, under a plea agreement. The parties agreed to recommend that Maggett be sentenced to the aggravated number of 13 months' imprisonment for aggravated assault, 6 months in jail for domestic battery, and 12 months in jail for theft, with all counts running consecutive. The parties also agreed to request that the district court not apply the special rule requiring imprisonment for the aggravated assault conviction. Instead, the parties agreed to recommend that Maggett be placed on probation with several conditions, including having no contact with T.M.T.

At the sentencing hearing on February 8, 2017, the district court followed the plea agreement and sentenced Maggett to 13 months' imprisonment for the aggravated assault conviction and to consecutive terms totaling 18 months in jail for the two misdemeanor convictions, but placed Maggett on probation for 24 months. The district court also ordered Maggett to have no contact with T.M.T. until he completed all recommended domestic violence classes and T.M.T. authorized the contact.

Forty-seven days later, on March 27, 2017, the State filed a warrant alleging that Maggett had violated the conditions of his probation by having contact with T.M.T. and by committing the new offense of aggravated battery/domestic violence on March 17, 2017. The warrant also alleged that Maggett had contact with T.M.T. on March 22, 2017, and committed the new offense of intimidation of a witness/domestic violence.

*2 At a hearing on June 22, 2017, Maggett stipulated to the probation violations. Despite Maggett's request to be placed back on probation, the district court revoked Maggett's probation and ordered him to serve his underlying sentence, finding that Maggett had committed a new felony while on probation and that reinstating probation would jeopardize public safety. Before the hearing concluded, Maggett moved to modify his sentence by reducing the jail portion of the sentence from 18 months to 12 months. The State opposed the motion. The district court denied Maggett's request for modification stating,

"I wanted very much for Mr. Maggett to succeed on probation. I never wanted to come back here under the circumstances of a probation violation, much less new charges. Unfortunately, Mr. Maggett has chosen a path that I would not have chosen for him. So I don't believe that any modification is justified so I will deny that oral motion."

Maggett filed a notice of appeal on June 23, 2017.

ANALYSIS

On appeal, Maggett does not argue that the district court erred in revoking his probation. Instead, Maggett claims that the district abused its discretion when it denied his request for a reduced sentence at the probation revocation hearing. The State argues that this court lacks jurisdiction to review the district court's denial of Maggett's request for a lesser sentence at the probation revocation hearing. Alternatively, the State argues that the district court did not abuse its discretion in denying Maggett's request for a reduced sentence.

We will first address the State's jurisdictional claim. Whether jurisdiction exists is a question of law over which an appellate court has unlimited review. *State v. Smith*, 304 Kan. 916, 919, 377 P.3d 414 (2016). Also, resolution of the State's jurisdictional claim requires statutory interpretation. Interpretation of a statute is a question of law subject to unlimited review. *State v. Collins*, 303 Kan. 472, 473-74, 362 P.3d 1098 (2015).

Under K.S.A. 2017 Supp. 21-6820(c)(1), an appellate court shall not review any sentence that is within the presumptive sentence for the crime. Likewise, under K.S.A. 2017 Supp. 21-6820(c)(2), an appellate court shall not review any sentence resulting from an agreement between the State and the defendant which the sentencing court approves on the record. Here, Maggett received a presumptive sentence for his felony conviction and the sentence resulted from an agreement between the parties that the district court approved on the record. Maggett made no attempt to appeal his original sentence.

The district court later found that Maggett violated the terms of his probation. Under K.S.A. 2017 Supp. 22-3716(c)(1)(E), upon a finding that a defendant has violated the terms of probation, the district court may impose a graduated list of intermediate sanctions, including ordering the defendant to serve the sentence imposed "or any lesser sentence." Generally, the district court must impose intermediate sanctions before revoking probation. See K.S.A. 2017 Supp. 22-3716(c). Statutory exceptions allow a district court to bypass intermediate sanctions, which the district court applied here, and the application of those exceptions are not an issue in this appeal. See K.S.A. 2017 Supp. 22-3716(c)(8)(A) and K.S.A. 2017 Supp. 22-3716(c)(9)(A).

The State argues that this court lacks jurisdiction over Maggett's appeal under K.S.A. 2017 Supp. 21-6820(c)(1) because he originally received a presumptive sentence for his crimes. But in *Reeves*, this court found that it has jurisdiction to review the district court's denial of a defendant's request for a lesser sentence upon the revocation of probation, even if the sentence originally imposed was a presumptive sentence under the guidelines. 54 Kan. App. 2d 644, Syl. ¶ 2. The *Reeves* court began by distinguishing a defendant's appeal of an original sentence with an appeal of the district court's denial of a lesser sentence at a probation revocation hearing. By distinguishing the two, the *Reeves* court found that a defendant's appeal of the district court's refusal to reduce a presumptive sentence at a probation revocation hearing is not barred by K.S.A. 2017 Supp. 21-6820(c)(1) because the original presumptive sentence is not what is being appealed. 54 Kan. App. 2d at 647. The *Reeves* court concluded that the district court's denial of a request for a lesser sentence is appealable as a final order, for the same reason that an order to revoke probation is appealable as a final order. 54 Kan. App. 2d at 647.

*3 We agree with the analysis in *Reeves*. Maggett is not trying to appeal his presumptive sentence that the district court imposed on February 8, 2017. In fact, his time for appealing his original sentence expired before he filed his notice of appeal following the probation revocation hearing. See K.S.A. 2017 Supp. 22-3608(c) (defendant shall have 14 days after the judgment of the district court to appeal). Instead, Maggett is appealing the district court's decision on June 22, 2017, denying his request to serve a lesser sentence following his probation revocation. K.S.A. 2017 Supp. 22-3716(c)(1)(E) grants jurisdiction to the district court to modify a sentence upon a probation revocation by allowing the court to impose the underlying sentence or any lesser sentence. See *State v. McGill*, 271 Kan. 150, 154, 22 P.3d 597 (2001). Maggett invoked that provision by seeking a lesser sentence upon his probation revocation. The district court's denial of Maggett's request for a lesser sentence at the probation revocation hearing was a final judgment subject to appeal. See K.S.A. 2017

Supp. 22-3601(a); K.S.A. 2017 Supp. 22-3602(a) (addressing appeals from a district court's final judgment in a criminal case).

The State also argues that this court lacks jurisdiction under K.S.A. 2017 Supp. 21-6820(c)(2) because Maggett's original sentence resulted from a plea agreement. Although *Reeves* does not address this exact argument, the analysis is the same. Maggett is not appealing his original plea-negotiated sentence; instead, he is appealing the district court's denial of his request for a lesser sentence upon the revocation of his probation. In this situation, K.S.A. 2017 Supp. 21-6820(c)(2) is not a jurisdictional bar to his appeal.

As a final point on jurisdiction, the procedure for revoking a defendant's probation is governed by K.S.A. 2017 Supp. 22-3716, and that statute is not a part of the revised Kansas Sentencing Guidelines Act (KSGA). See K.S.A. 2017 Supp. 21-6801 et seq. The KSGA governs the imposition of the defendant's original sentence, not the district court's decision at a probation revocation hearing. Thus, the limitations on a defendant's right to appeal a sentence under K.S.A. 2017 Supp. 21-6820(c) do not apply to probation revocation hearings governed by K.S.A. 2017 Supp. 22-3716, the statute at issue in Maggett's appeal. See *Reeves*, 54 Kan. App. 2d at 646. In accordance with *Reeves*, we find that this court has jurisdiction to review the issue Maggett has raised on appeal.

But just because we have jurisdiction to review the issue on appeal does not mean there is any merit to Maggett's claim. Maggett claims the district court abused its discretion by refusing his request for a lesser sentence at the probation revocation hearing. K.S.A. 2017 Supp. 22-3716(c)(1)(E) provides that the district court *may* order the defendant to serve the original sentence or any lesser sentence upon the revocation of the defendant's probation. The use of the permissive term "may" in the statute signals that the district court has discretion to either grant or deny a defendant's request for a lesser sentence upon the revocation of probation. See *Reeves*, 54 Kan. App. 2d at 648.

An appellate court reviews the district court's decision to deny a defendant's request for a lesser sentence upon the revocation of probation for an abuse of discretion. *Reeves*, 54 Kan. App. 2d 644, Syl. ¶ 3. A judicial action constitutes an abuse of discretion if (1) no reasonable person would take the view adopted by the district court; (2) the action is based on an error of law; or (3) the action is based on an error of fact. *State v. Marshall*, 303 Kan. 438, 445, 362 P.3d 587 (2015). The party asserting the district court abused its discretion bears the burden of showing such abuse of discretion. *State v. Smith-Parker*, 301 Kan. 132, 161, 340 P.3d 485 (2014).

Maggett claims no error of fact or law. Instead, Maggett claims that no reasonable person would have denied his

request for a lesser sentence based on the spirit of the "double rule." The "double rule" prohibits a district court from imposing a sentence under the guidelines that is greater than twice the base sentence for felony convictions. See K.S.A. 2017 Supp. 21-6819(b)(2), (4); *State v. Eisenhour*, 305 Kan. 409, 410, 384 P.3d 426 (2016) ("Under the double base-sentence rule, a maximum sentence of imprisonment cannot exceed twice the base sentence imposed on a primary crime.").

*4 Maggett's original sentence for his felony conviction of aggravated assault was 13 months' imprisonment. He also received consecutive misdemeanor sentences totaling 18 months in jail, for a controlling term of confinement of 31 months. This sentence is more than twice the base sentence for the felony conviction. By reducing the misdemeanor jail sentences from 18 months to 12 months, as Maggett requested at the probation revocation hearing, his controlling term of confinement would have been reduced to 25 months and would have fallen within the spirit of the "double rule."

Maggett correctly concedes that the "double rule" does not apply to misdemeanor sentences. See *State v. Huff*, 277 Kan. 195, 197-98, 83 P.3d 206 (2004). Even so, Maggett asks us to apply the reasoning of the "double rule" to his case and find that imposing a sentence greater than double the maximum sentence of the primary crime is unreasonable. Maggett fails to provide any pertinent legal authority to support his request other than some legal writings suggesting that lower sentences prevent recidivism by allowing a defendant to return to the community sooner.

Maggett's argument ignores the underlying facts of his case. Maggett was convicted of aggravated assault with a deadly weapon arising from a domestic violence incident. The district court showed leniency by placing Maggett on probation in the first place. Less than two months later, Maggett violated the no-contact order and committed a new crime of domestic battery with the same victim. Despite Maggett's blatant disregard of the court's orders, the judge thoughtfully considered his request for a lesser sentence, expressing regret that Maggett had squandered his chance at probation. We cannot say that no reasonable person would have taken the view adopted by the district court. Maggett has failed to show that the district court abused its discretion by denying his request for a lesser sentence at the probation revocation hearing.

Affirmed.

All Citations

427 P.3d 1017 (Table), 2018 WL 4840311

Certificate of Service

I hereby certify that the above and foregoing Appellant's brief was served on the Sumner County District Attorney, by notice of electronic filing pursuant to Kansas Supreme Court Rule 1.11(b); and by e-mailing a copy to the Attorney General, at ksagappealsoffice@ag.ks.gov on the 19TH day of January, 2023.

/s/ Kai Tate Mann
Kai Tate Mann #26234