

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

SUPPLEMENTAL BRIEF OF APPELLANT

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

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Nature of the Case

Counterman v. Colorado, ___ U.S. ___, 143 S.Ct. 2106 (2023), does not, and cannot, make Jason Phipps’ illegal sentence legal. *Counterman* does not overrule *State v. Boettger*, 310 Kan. 800, 453 P.3d 805 (2019) or the precedent upon which it was founded. Even if *Counterman* did overrule *Boettger*, Mr. Phipps is still entitled to relief from his illegal sentence under longstanding precedent. Accordingly, Mr. Phipps respectfully reiterates his request that this Court vacate his sentence, and remand for resentencing.

Statement of Issue

Supplemental Issue: *Counterman v. Colorado*, ___ U.S. ___, 143 S.Ct. 2106 (2023) neither overrules *State v. Boettger*, 310 Kan. 800, 453 P.3d 805 (2019) nor applies to Mr. Phipps’ appeal.

Statement of Facts

The Statement of Facts has been laid out in the Appellant’s Brief. He incorporates them by reference. No new facts are necessary to answer the questions contained in this Court’s order.

Arguments and Authorities

Supplemental Issue: *Counterman v. Colorado*, ___ U.S. ___, 143 S.Ct. 2106 (2023) neither overrules *State v. Boettger*, 310 Kan. 800, 453 P.3d 805 (2019) nor applies to Mr. Phipps’ appeal.

Analysis

This Court’s order for supplemental briefing directed the parties to answer two questions: (1) whether *Counterman* effectively overrules *Boettger*; and (2) whether *Counterman* applies to Mr. Phipps’ appeal. The answer to both of these questions is “no.”

A. Kansas Law Requires Resentencing

In resolving this appeal, whether *Counterman* abrogated *Boettger* is an academic topic as the answer to that question has no impact to this appeal. *Counterman* cannot be applied to Mr. Phipps case.

Bedrock principles of sentencing and precedent require Mr. Phipps' sentence be corrected. “[I]t is a fundamental rule of sentencing that the penalty parameters for a crime are established at the time the crime was committed.” *State v. Keel*, 302 Kan. 560, Syl. ¶ 9, 357 P.3d 251 (2015). Our Supreme Court has long held to this rule because it is “fair, logical, and easy to apply”; it prevents both the State and the accused from manipulating a sentencing date to take advantage of changes in the law. *State v. Terrell*, 315 Kan. 68, 75, 504 P.3d 405 (2022); *Keel*, 302 Kan. at 586; *State v. Williams*, 291 Kan. 554, Syl. ¶ 3, 244 P.3d 667 (2010); *State v. Vandervort*, 276 Kan. 164, 180, 72 P.3d 925 (2003); *State v. Sylva*, 248 Kan. 118, 121, 804 P.2d 967 (1991).

Mr. Phipps allegedly committed his current crimes of conviction in January of 2022. (R. I, 78-91). He was sentenced on June 13, 2022. (R. V, 1). *Counterman* was not issued until June 27, 2023. Even if *Counterman* did overrule *Boettger*, reckless criminal threats were declared unconstitutional at the time he committed his current crime of conviction. Prior convictions declared unconstitutional by an appellate court cannot be used to increase criminal history score. K.S.A. 21-6810(d)(9). Because reckless criminal threat had been declared unconstitutional at the time Mr. Phipps committed his crime, *Keel* prevents the prosecution from scoring Mr. Phipps' prior conviction against him.

Keel remains controlling regardless of the outcome of *Boettger* versus *Counterman*.

Remand is required to correct Mr. Phipps' sentence.

B. This Court is Duty Bound to Follow Our Supreme Court

Whenever the battle of *Boettger* versus *Counterman* takes place, this Court is an improper forum it. The issue must be decided by our Supreme Court.

This Court is duty bound to follow controlling precedent from our Supreme Court absent an indication it is departing from its previous position. *American Warrior, Inc., v. Bd. of Cnty. Comm'rs of Finney Cnty.*, 63 Kan. App. 2d 123, 128, 525 P.3d 789 (2023). *Boettger* remains good law and precedent binding this Court unless our Supreme Court declares otherwise. But unless and until it does, this Court is duty bound to follow *Boettger*.

C. Counterman is Readily Distinguishable and Not Contrary to Boettger

Regardless of the above hurdles to even reaching the question of whether *Boettger* was abrogated by *Counterman*, should this Court confront the question, is not entirely clear that *Counterman* should or can overrule *Boettger*. The *Counterman* Court was not reviewing or addressing Kansas' criminal threat statute but instead struck down a Colorado stalking statute which lacked a subjective mental state requirement. *Counterman*, 143 S.Ct. at 2019.

The Colorado stalking statute is significantly different from our criminal threat statute. The Colorado statute in *Counterman* criminalizes repeated communications with another "that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress." *Counterman*, 143 S.Ct.

at 2112, quoting Colo. Rev. Stat. §18-3-602(1)(c). This is far different from our criminal threat statute which penalizes single statements and does not require any harm or distress. *Compare* Colo. Rev. State §18-3-602(1)(c) *with* K.S.A. 21-5415(a)(1). The concurrence in *Counterman* counsels against application of *Counterman*'s 'recklessness-is-sufficient' rule to true threat statutes designed like ours. *Counterman*, 143 S.Ct. at 2119-32 ("There are far fewer First Amendment concerns with stalking laws that punish repeated, targeted, unwanted conduct and accompanying speech . . . [T]rue threats encompass a narrow band of intentional acts.") (Sotomayor, J. concurring).

Boettger relied heavily upon *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003) to conclude that the Kansas threat statute requires specific intent to pass constitutional muster. *Boettger*, 310 Kan. at 804-19. *Counterman* did not overrule *Black*. *Counterman*, 143 S.Ct. at 2114. The differences in the stalking statute at issue in *Counterman* and our criminal threat statute demonstrate that *Boettger* and *Counterman* can occupy the same First Amendment universe without conflict.

D. The Kansas Constitution Ought to Protects Kansans' Pre-existing Right to Speak

Even if this Court determines that *Boettger* and *Counterman* are diametrically opposed such they cannot occupy the same First Amendment universe, the good news is that they do not have to. The Kansas Constitution provides free speech protections to Kansans, and Section 11 of the Kansas Constitution Bill of Rights should be found to encompass the *Boettger* true threat standard, providing consistent protection to Kansans.

A finding that *Counterman* effectively overruled *Boettger* upon its release would mark regression of the protections afforded Kansans' by the United States Constitution.

This is not the first time this has recently occurred. See *Dobbs v. Jackson Women's Health Org.*, ___ U.S. ___, 142 S.Ct. 2228, 142 L.Ed.2d 545 (2022) (eliminating federal right to pre-viability abortion).

Thankfully for Kansans, the United States Constitution is not the only source of protection safeguarding our fundamental rights. We may also seek refuge in the Kansas Constitution. See *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, Syl. ¶ 3, 440 P.3d 461 (2019) (Kansas Constitution may provide rights greater than those found in United States Constitution).

The Kansas Constitution Bill of Rights protects Kansans' right to speech thusly:

“The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such rights; and in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted.” Kansas Const. Bill of Rights § 11.

Section 11 provides Kansans a right to speak freely *on any matter*. While our Supreme Court has stated that the First Amendment and Section 11 of the Kansas Bill of Rights are “generally considered coextensive” the statements should be considered dicta because the parties did not claim a difference between the two provisions and the Court did not analyze any differences. See *State v. Russell*, 227 Kan. 897, 899-900, 610 P.2d 1122 (1980) citing *State v. Motion Picture Entitled “The Bet”*, 219 Kan. 64, 72, 547 P.2d 760 (1976). Counsel's research has not uncovered any Kansas case in which any consideration is given to whether Section 11 offers greater protection than the First Amendment.

Reinforcing the notion the Kansas Constitution offers greater protection than the First Amendment if *Counterman* overruled *Boettger* can also be found in Section 20 of the Kansas Constitution Bill of Rights. That provision states in relevant part that the “enumeration of rights shall not be construed to impair or deny others retained by the people[.]” Kansas Const. Bill of Rights, § 20.

Kansans have retained the protection that their speech would not be criminal unless they *intended* to threaten another person, i.e., made a true threat since 2019. We should continue to possess this right. Furthermore, Kansans ought not live in a state of uncertainty regarding their most fundamental rights. A finding that Section 11 requires a *Boettger* standard of true threats maintains the continuity of Kansans’ speech rights.

If Section 11 was presupposed to be co-extensive with the First Amendment, and found that the First Amendment required true threats be intentional, Section 11 can, and should, continue to protect Kansans when the First Amendment rug is pulled from their feet. It is within this Court’s ability to continue protecting Kansans as they have been protected since 2019, and Mr. Phipps urges this Court to do so.

Conclusion

This Court is duty bound to follow *Boettger* unless and until our Supreme Court overrules it. Even if *Counterman* undermines *Boettger*, this Court should interpret Section 11 of the Kansas Constitution Bill of Rights to continue to protect continue to provide the same fundamental rights to speech Kansans’ have enjoyed since 2019. Regardless of the final outcome in the interplay of *Counterman* and *Boettger*, *Keel* requires correction of Mr. Phipps’ sentence. For these reasons, and those in his prior

briefing, Mr. Phipps respectfully requests this Court vacate his sentence, and remand for resentencing with a proper criminal history score of “D.”

Respectfully submitted,

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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 26th day of September, 2023.

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