IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 114,050

STATE OF KANSAS,
Appellee,

v.

LLOYDE DUBRY,
Appellant.

SYLLABUS BY THE COURT

1.

The Kansas Sentencing Guidelines Act, K.S.A. 21-4701 et seq., uses prior out-of-state convictions when calculating a person's criminal history. Under the Act, the State classifies an out-of-state conviction as a person or nonperson offense by referring to comparable offenses under the Kansas criminal code. If the code does not have a comparable offense, the out-of-state conviction is classified as a nonperson crime.

2.

The legality of a sentence under K.S.A. 2018 Supp. 22-3504 is controlled by the law in effect at the time the sentence was pronounced. Therefore, a sentence that was legal when pronounced does not become illegal if the law subsequently changes.

Review of the judgment of the Court of Appeals in an unpublished opinion filed August 26, 2016. Appeal from Shawnee District Court; CHERYL A. RIOS, judge. Opinion filed June 28, 2019. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Clayton J. Perkins, of Capital Appellate Defender Office, and *Joanna Labastida*, of Kansas Appellate Defender Office, were on the briefs for appellant.

Jodi Litfin, assistant solicitor general, and *Elizabeth A. Billinger*, assistant district attorney, *Chadwick J. Taylor*, district attorney, and *Derek Schmidt*, attorney general, were on the briefs for appellee.

The opinion of the court was delivered by

BILES, J.: Lloyde Dubry moved to correct his sentence several years after it was imposed, arguing the sentencing court improperly scored a prior Wyoming conviction as a person crime. The sole issue is whether the Court of Appeals erred in affirming the district court's denial of the motion on the basis that the Wyoming offense's classification was correct. We affirm based on *State v. Murdock*, 309 Kan. 585, Syl., 439 P.3d 307 (2019) (*Murdock II*) (holding sentence that was legal when pronounced does not become illegal if the law subsequently changes).

FACTUAL AND PROCEDURAL BACKGROUND

Dubry pleaded guilty to kidnapping, a severity level 3 felony. The State alleged the crime occurred on December 6, 2010. The district court accepted the plea and adjudged him guilty. He was sentenced on March 30, 2011.

Dubry's presentence investigation report reflected three prior convictions and recommended that each be scored as a person felony. These were: a pre-1993 Kansas aggravated criminal sodomy conviction; a pre-1993 Kansas aggravated kidnapping conviction; and a 1981 Wyoming conviction for immodest, immoral, or indecent liberties with a child. Based on this, the PSI report recommended an A criminal history score. Defense counsel did not object. Applying the A criminal history score, the district court sentenced Dubry to 233 months' imprisonment.

In 2015, Dubry filed a motion to correct his sentence arguing the prior convictions should have been scored as nonperson offenses since they predated the KSGA, relying on *State v. Murdock*, 299 Kan. 312, 319, 323 P.3d 846 (2014) (*Murdock I*) (prior out-of-state conviction to be compared to Kansas law in effect at time of prior conviction to determine whether prior conviction scored as person or nonperson offense, resulting "in the classification of all out-of-state pre-1993 crimes as nonperson felonies"), *overruled by State v. Keel*, 302 Kan. 560, 357 P.3d 251 (2015). The district court denied the motion and Dubry timely appealed.

On appeal, Dubry shifted his illegal sentence argument and claimed only that the Wyoming conviction should not have been scored as a person crime because the Wyoming statute is broader than the counterpart Kansas offense. He contended the Wyoming and Kansas offenses could not be deemed comparable without judicial fact-finding that violated his Sixth and Fourteenth Amendment rights under the United States Constitution. See *Descamps v. United States*, 570 U.S. 254, 260-61, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013) (holding prior conviction can qualify as predicate offense for sentencing enhancement under federal Armed Career Criminal Act only if offense's elements are identical to or narrower than elements of generic offense); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 348, 147 L. Ed. 2d 435 (2000) (holding facts that increase maximum penalty for crime, other than prior convictions, must be submitted to jury and proved beyond a reasonable doubt).

A Court of Appeals panel affirmed, holding the Wyoming conviction was appropriately classified as a person crime. *State v. Dubry*, No. 114,050, 2016 WL 4498520, at *5 (Kan. App. 2016) (unpublished opinion). In the panel's view, the "core conduct outlawed" in the Wyoming statute was the same as that declared to be a person offense in Kansas' indecent liberties with a child statute. 2016 WL 4498520, at *3. It reasoned that in making the person-crime designation, a sentencing court must

"compar[e] the prior-conviction statute to the 'comparable offense' in effect in Kansas on the date the current crime was committed. K.S.A. 2015 Supp. 21-6811(e)(3). 'To be comparable, the crimes need only be comparable, not identical.'" 2016 WL 4498520, at *2. Moreover, it reasoned,

> "under [*State v. Vandervort*, 276 Kan. 164, 72 P.3d 925 (2003)] and [*State v. Williams*, 299 Kan. 870, 326 P.3d 1070 (2014)], which remain good law, when a Kansas court determines whether a prior out-of-state conviction is for a person offense, no factfinding is required—the court simply examines the relevant statutes and determines whether the crime is comparable to a Kansas offense or not." 2016 WL 4498520, at *5.

We granted Dubry's timely petition for review and ordered the parties to explain whether we should summarily vacate the panel's decision and remand to the district court in light of *State v. Wetrich*, 307 Kan. 552, 561, 412 P.3d 984 (2018) (holding that to be "comparable" under 21-6811, "the out-of-state crime cannot have broader elements than the Kansas reference offense"). Dubry argues *Wetrich* should apply.

Jurisdiction is proper. See K.S.A. 20-3018(b) (providing for petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review).

DISCUSSION

A criminal sentence's legality is judged by the law at the time it was pronounced. *Murdock II*, 309 Kan. at 591. When Dubry was sentenced, prior out-of-state crimes did not need to be identical to their Kansas counterparts to be classified as person crimes. See *State v. Vandervort*, 276 Kan. 164, 179, 72 P.3d 925 (2013).

At the time of Dubry's offense, the KSGA provided:

"Out-of-state convictions and juvenile adjudications will be used in classifying the offender's criminal history. An out-of-state crime will be classified as either a felony or a misdemeanor according to the convicting jurisdiction. If a crime is a felony in another state, it will be counted as a felony in Kansas. *The state of Kansas shall classify the crime as person or nonperson. In designating a crime as person or nonperson comparable offenses shall be referred to.* If the state of Kansas does not have a comparable offense, the out-of-state conviction shall be classified as a nonperson crime. Convictions or adjudications occurring within the federal system, other state systems, the District of Columbia, foreign, tribal or military courts are considered out-of-state convictions or adjudications. The facts required to classify out-of-state adult convictions and juvenile adjudications must be established by the state by a preponderance of the evidence." (Emphasis added.) K.S.A. 21-4711(e).

Under the Wyoming statute forming the basis of Dubry's 1981 conviction, Wyo. Stat. Ann. § 14-3-105 (1978):

"Any person knowingly taking immodest, immoral or indecent liberties with any child or knowingly causing or encouraging any child to cause or encourage another child to commit with him any immoral or indecent act is guilty of a felony, and upon conviction shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) or imprisoned in the penitentiary not more than ten (10) years, or both."

At the time of Dubry's current crime, Kansas' indecent liberties statute provided:

"(a) Indecent liberties with a child is engaging in any of the following acts with a child who is 14 or more years of age but less than 16 years of age:

(1) Any 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; or

(2) soliciting the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another.

"(b) It shall be a defense to a prosecution of indecent liberties with a child as described in subsection (a)(1) that the child was married to the accused at the time of the offense.

"(c) Indecent liberties with a child is a severity level 5, person felony." K.S.A. 21-3503.

Dubry's argument is that the person-crime classification based on the Wyoming statute's similarities to the Kansas statute was improper because the Wyoming statute "criminalizes a broader (and nearly undefined) range of conduct than any Kansas offense, including acts that would be legal in Kansas." But under *Vandervort*, this argument would be unavailing. See *Vandervort*, 276 Kan. at 179 (rejecting argument that Virginia crime that lacked nonconsent element required to be guilty of Kansas person offense rendered crimes incomparable). Any viability to Dubry's argument turns on whether the new rule announced in *Wetrich* applies to his sentence. But we have determined already that it does not apply. See *State v. Newton*, 309 Kan. __, 2019 WL 2399484, at *3 (No. 116,098, filed June 7, 2019) (holding defendant sentenced before *Wetrich* could not rely on *Wetrich* in motion to correct an illegal sentence); see also *State v. Weber*, 309 Kan. __, 2019 WL 2479316, at *4-5 (No. 113,472, filed June 14, 2019) (holding motion to correct a sentence that was imposed before *Wetrich* decision was governed by the law in effect at time of sentence).

"[F]or purposes of a motion to correct an illegal sentence, neither party can avail itself of subsequent changes in the law." *Murdock II*, 309 Kan. at 591. In *Weber*, we held:

> "*Wetrich* was a change in the law as contemplated by *Murdock II*. See *Murdock II*, 309 Kan. at 592 ('[T]rue changes in the law cannot transform a once legal sentence into an illegal sentence, but developments in the law may shine new light on the original question of whether the sentence was illegal when pronounced.'). Before *Wetrich,* no Kansas case construed the term 'comparable' as used in K.S.A. 2018 Supp. 21-6811(e)(3), formerly K.S.A. 21-4711(e), to incorporate the identical-or-narrower requirement. *Vandervort* rejected such a construction when it reviewed a defendant's claim that an out-of-state offense and a Kansas offense could not be comparable since the out-of-state offense was broader, i.e., did not contain a lack-of-consent element required to commit the Kansas crime. See 276 Kan. at 178-79 ('Vandervort confuses the term 'comparable' with the concept of identical elements of the crime.'). *Wetrich* substituted the statute's new interpretation for the old one. 307 Kan. at 562" *Weber*, 2019 WL 2479316, at *4.

The legality of a sentence under K.S.A. 2018 Supp. 22-3504 is controlled by the law in effect at the time the sentence was pronounced. Therefore, a sentence that was legal when pronounced does not become illegal if the law subsequently changes. Since *Wetrich* announced a change in the law and Dubry was sentenced before *Wetrich* was decided, *Murdock II* bars *Wetrich*'s application to Dubry's motion to correct his sentence.

Affirmed.

Appendix B

379 P.3d 1129 (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.
Lloyde DUBRY, Appellant.

No. 114,050
|
Opinion filed August 26, 2016
|
Review Granted, Decision Vacated June 4, 2018

Appeal from Shawnee District Court; CHERYL RIOS, Judge.

Attorneys and Law Firms

Joanna Labastida, of Kansas Appellate Defender Office, for appellant.

Chadwick J. Taylor, district attorney, Elizabeth A. Billinger, assistant district attorney, and Derek Schmidt, attorney general, for appellee.

Before Leben, P.J., Pierron and McAnany, JJ.

MEMORANDUM OPINION

Leben, J.:

**1 Lloyde DuBry pled guilty to kidnapping in 2011. At sentencing, the district court classified his 1981 Wyoming conviction for immodest, immoral, or indecent liberties with a child as a person offense, resulting in a higher criminal-history score and thus a longer sentence than if it had been classified as a nonperson offense. In 2015, DuBry filed a motion to correct an illegal sentence—contending the offense should have been scored as a nonperson crime and that he thus should have received a lesser sentence. The district court denied the motion.

DuBry has appealed, arguing that in classifying his Wyoming offense as a person offense, the district court violated DuBry's constitutional rights to a jury trial and due process because the court had to make factual findings to do so—and any fact other than the mere existence of a prior conviction must be submitted to a jury and proved beyond a reasonable doubt under the Sixth Amendment to the United States Constitution as interpreted in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

But our court recently considered and rejected a very similar argument in *State v. Moore*, 52 Kan. App. 2d 799, — P.3d —, 2016 WL 3548863 (2016), *petition for rev. filed* July 25, 2016; *State v. Buell*, 52 Kan. App. 2d 818, — P.3d —, 2016 WL 3548925 (2016), *petition for rev. filed* July 25, 2016; and *State v. Ohrt*, No. 114,516, 2016 WL 3856321, at *3–6 (Kan. App. 2016) (unpublished opinion), *petition for rev. filed* July 29, 2016. As set out in more detail in those opinions, the out-of-state offense need not be identical to the Kansas offense; it need only be comparable. We agree with the analysis set out in *Moore*, *Buell*, and *Ohrt*, and we find that the Wyoming crime of immodest, immoral, or indecent liberties with a child is comparable to the Kansas person crime of indecent liberties with a child, which is a person offense. We therefore reject the argument made here by DuBry that his Wyoming conviction should have been scored as a nonperson offense.

FACTUAL AND PROCEDURAL BACKGROUND

DuBry was charged in December 2010 with one count of aggravated sodomy. DuBry and the State worked out a plea agreement even though DuBry did not want to specifically admit that he had committed the offense. Under the agreement, DuBry entered what's known as an *Alford* plea, so named after a United States Supreme Court case, *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). Under an *Alford* plea, the defendant can plead guilty without specifically admitting the facts of the offense in order to obtain a favorable plea deal. See *State v. Case*, 289 Kan. 457, 460, 213 P.3d 429 (2009). In exchange for DuBry's guilty plea, the State agreed to amend the charge to a single count of kidnapping. The district court then found DuBry guilty of that offense.

Under our state's sentencing laws, a defendant's presumptive sentence is ordinarily determined based on

the level of the offense and the severity of the defendant's criminal history, which is reflected in a criminal-history score. Kidnapping is a severity-level-3 felony. See K.S.A. 2015 Supp. 21–5408(c)(1). The presentence-investigation report listed DuBry's criminal-history score as A, the most serious category, which applies when the defendant has had three or more prior person felony offenses. See K.S.A. 2015 Supp. 21–6804.

**2 DuBry's score was based in part on a 1981 Wyoming conviction that was scored as a person-felony offense. That conviction was for immodest, immoral, or indecent liberties with a child. DuBry didn't object to his criminal-history score at sentencing, and the district court gave him the standard guideline sentence: 233 months in prison with 36 months of postrelease supervision.

Later, DuBry filed a motion to correct an illegal sentence. That motion, based on a Kansas Supreme Court case that has since been overruled, argued that none of DuBry's pre-1993 convictions could be scored as person offenses. After the case upon which the argument was based was overruled, DuBry limited his claim to the 1981 Wyoming conviction, arguing that it could not be scored as a person offense without having the district court make factual findings prohibited under *Apprendi*.

The district court denied the motion, but it did so before the case DuBry had initially relied upon was overruled and before DuBry modified the argument in support of his motion. We need not concern ourselves with the basis for the district court's ruling since DuBry's argument on appeal is now different. And since the issues presented are purely legal issues, we review the matter independently anyway, without any required deference to the district court's decision. See *State v. Luarks*, 302 Kan. 972, 976, 360 P.3d 418 (2015).

The State does contend for two procedural reasons that we cannot address DuBry's new argument: (1) he failed to raise it before the district court, and (2) constitutional claims can't be raised in a motion to correct an illegal sentence. But we considered and rejected both arguments in *Moore*, 52 Kan. App. 2d at 802–03. Since a motion to correct an illegal sentence can be raised at any time, DuBry can raise the issue for the first time on appeal. See K.S.A. 22–3504(1) ("The court may correct an illegal sentence at any time."); *State v. Dickey*, 301 Kan. 1018, 1034, 350 P.3d 1054 (2015). And the Kansas Supreme Court held in *Dickey* that when a constitutional challenge impacts a defendant's criminal-history score, that challenge may be brought under a motion to correct an illegal sentence—if the criminal-history score is wrong for any reason, the sentence no longer complies with sentencing statutes and is illegal. 301 Kan. at 1034.

ANALYSIS

We turn now to the substantive question raised in DuBry's appeal—whether the district court properly scored his 1981 Wyoming conviction as a person offense.

For an out-of-state conviction, the court must make two classifications after the State proves that the conviction exists. First, the court must determine whether the prior conviction is a misdemeanor or a felony based on the law of the state where the defendant was convicted. K.S.A. 2015 Supp. 21–6811(e)(2). Both sides agree that the Wyoming conviction was categorized as a felony in Wyoming. Second, the court determines whether the prior conviction is a person or nonperson offense by comparing the prior-conviction statute to the "comparable offense" in effect in Kansas on the date the current crime was committed. K.S.A. 2015 Supp. 21–6811(e)(3). "To be comparable, the crimes need only be comparable, not identical." *Moore*, 52 Kan. App. 2d 799, Syl. ¶ 5.

DuBry and the State agree that DuBry was convicted in Wyoming of the violation of the Wyoming statute prohibiting immodest, immoral, or indecent liberties against a child, Wyo. Stat. § 14–3–105 (1978):

> **3 "Any person knowingly taking immodest, immoral or indecent liberties with any child or knowingly causing or encouraging any child to cause or encourage another child to commit with him any immoral or indecent act is guilty of a felony, and upon conviction shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00) or imprisoned in the penitentiary not more than ten (10) years, or both."

For a potentially comparable Kansas statute, both DuBry and the State cite the Kansas offense against indecent liberties with a child, K.S.A. 21–3503(a). (The State also cited other offenses that might be comparable; we focus on K.S.A. 21–3503(a) because it was the only offense DuBry talked about in his appellate brief.) It is somewhat more

specific than the Wyoming statute; the Kansas statute makes unlawful certain specific physical contacts between the offender and a child, as well as soliciting a child to engage in those acts:

> "(a) Indecent liberties with a child is engaging in any of the following acts with a child who is 14 or more years of age but less than 16 years of age:
>
> (1) Any 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; or
>
> (2) Soliciting the child to engage in any lewd fondling or touching the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another." K.S.A. 21–3503.

The Wyoming statute doesn't specify what physical contacts qualify as immodest, immoral, or indecent, while the Kansas statute specifies that it is only violated by "lewd fondling or touching" done to arouse sexual desires or solicit a child to participate in those acts.

So we must determine whether these offenses are comparable or not. If they are, then the Wyoming conviction should be classified as a person offense because the comparable Kansas crime, indecent liberties with a child, is a person offense. K.S.A. 21–3503(c). If they are not comparable, then the Wyoming conviction should be classified as a nonperson offense; when there is no comparable Kansas offense, the out-of-state conviction is classified as a nonperson offense. K.S.A. 2015 Supp. 21–6811(e)(3).

In our view, although these crimes aren't identical, they are quite comparable. Both statutes seek to outlaw indecent liberties with a child. Kansas defines the crime more specifically, while Wyoming (at least in 1981) did it in more general terms. But the core conduct outlawed in both statutes is essentially the same. See *State v. Riolo*, 50 Kan. App. 2d 351, 356–57, 330 P.3d 1120 (2014), *rev. denied* 302 Kan. 1019 (2015).

Moreover, we see nothing unfair or surprising in treating these two statutes as comparable for purposes of determining whether the Wyoming conviction should be treated as a person offense. The Wyoming statute outlaws "immodest, immoral or indecent liberties *with any child*." (Emphasis added.) Like the Kansas offense of "indecent liberties *with a child*" (emphasis added), it is obviously a person offense—one that causes emotional or physical harm (or both) *to a person*. See *State v. Keel*, 302 Kan. 560, 574–75, 357 P.3d 251 (2015), *cert. denied* 136 S. Ct. 865 (2016).

So far, the analysis we have presented seems straightforward. It's a judgment call whether the Wyoming and Kansas statutes set out comparable offenses—and we don't find that a tough call. So what argument does DuBry make for a different result?

**4 DuBry's argument would take us on a detour to a set of rules the United States Supreme Court applied when interpreting a federal sentencing statute. See *Descamps v. United States*, 570 U.S. ——, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013). And while the Kansas Supreme Court discussed those rules in its 2015 decision in *Dickey*, 301 Kan. at 1037–38, our Supreme Court has never applied the specific rule DuBry seeks to invoke (the "identical-or-narrower rule") in the circumstances of his case—the classification of an out-of-state offense as a person or nonperson crime. Under the identical-or-narrower rule, when it applies, an offense is not comparable unless its elements are identical to or narrower than those of the other crime.

But we would not expect such a rule to apply under K.S.A. 2015 Supp. 21–6811(e)(3) since it tells us to decide whether it's a person offense by looking to "comparable offenses under the Kansas criminal code." Thus, a rule that the out-of-state statute must be identical to or narrower than the Kansas statute would be a much stricter standard than set out in K.S.A. 2015 Supp. 21–6811(e)(3), which only requires that the offenses be "comparable." And the Kansas Supreme Court in *State v. Williams*, 299 Kan. 870, 873, 326 P.3d 1070 (2014), 1 year after *Descamps*, told us that "the crimes need not have identical elements to be comparable for making the person or nonperson [offense] designation." See K.S.A. 2015 Supp. 21–6811(e)(3) (formerly K.S.A. 21-4711[e]).

DuBry's argument must be considered in light of the *constitutional* violation that must be avoided—having the trial judge make a factual finding beyond those made by a jury. That consideration simply does not come into play in the analysis that takes place under K.S.A. 2015 Supp. 21–6811(e)(3). Here, we have looked solely at the two

statutes DuBry urged us to compare (one Wyoming, one Kansas); based on the statutes establishing those offenses as crimes, we have determined them to be comparable. That explicitly follows the command of K.S.A. 2015 Supp. 21–6811(e)(3) and violates neither the Sixth Amendment nor *Apprendi*. We have not made any factual findings regarding *how* DuBry violated each statute. See *Ohrt*, 2016 WL 3856321, at *3–6.

Our ruling is thus consistent with the Kansas Supreme Court's application of the prior version of K.S.A. 2015 Supp. 21–6811(e)(3) in *Williams* and *State v. Vandervort*, 276 Kan. 164, 72 P.3d 925 (2003), *overruled in part by Dickey*, 301 Kan. at 1032. In both *Williams* and *Vandervort*, the court considered the classification of an out-of-state conviction under K.S.A. 21–4711(e). In both *Williams* and *Vandervort*, the court made no factual findings to determine whether the out-of-state conviction was for a person offense. And in both *Williams* and *Vandervort*, the court emphasized that " 'the offenses need only be comparable, not identical.' " *Williams*, 299 Kan. at 873 (quoting *Vandervort*, 276 Kan. at 179). As the court emphasized in *Williams*: "In this legal review of criminal statutes, there is no review of the evidence surrounding the out-of-state conviction. Nor is there review of the identicalness of the elements of the crimes identified in the out-of-state and in-state statutes. Rather, the review is for crime comparability." 299 Kan. at 875.

At this point, the careful reader is wondering about the phrase "*overruled in part by Dickey*" that we inserted after the legal citation to *Vandervort* in the last paragraph. On this point, we must explain something about legal customs. Even when judges try to write decisions that can readily be understood by both lay readers and lawyers, we still provide citations that tell lawyers where they can look up the opinions we've cited. We assume that lay readers can skip over the citations, but they could easily get tripped up trying to make sense of things like "276 Kan. 164." (It means to look in the Kansas Reports—books of Kansas Supreme Court opinions—in volume 276 at page 164.) Another legal custom requires that we include in the citation a notice if the case has been overruled, either totally or partially. In this case, following that legal custom was more trouble than it was worth because the point on which *Dickey* overruled *Vandervort* has nothing to do with the issues we've been discussing. Aside from overruling *Vandervort* on one limited issue, *Dickey* did not purport to overrule either *Vandervort* or *Williams*, and *Dickey* dealt with the classification of a prior *Kansas* conviction under K.S.A. 2014 Supp. 21–6811(d), not the classification of an *out-of-state* conviction under K.S.A. 2014 Supp. 21–6811(e)(3).

**5 Accordingly, under *Vandervort* and *Williams*, which remain good law, when a Kansas court determines whether a prior out-of-state conviction is for a person offense, no factfinding is required—the court simply examines the relevant statutes and determines whether the crime is comparable to a Kansas offense or not. If so, and if the Kansas offense is a person crime, then the out-of-state conviction is for a person crime too. We therefore find no error in the district court's determination here that DuBry's Wyoming conviction for immodest, immoral, or indecent liberties with a child was a person offense for the purpose of determining DuBry's Kansas criminal-history score.

We affirm the district court's judgment.

All Citations

379 P.3d 1129 (Table), 2016 WL 4498520

End of Document

426 P.3d 540 (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.
Jesse A. JONES, Appellant.

Nos. 117,808
|
117,809
|
117,810
|
Opinion filed September 28, 2018.

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

Attorneys and Law Firms

Clayton J. Perkins, 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 Gardner, P.J., Green and Hill, JJ.

Opinion

Per Curiam:

*1 This appeal by Jesse A. Jones argues that the district court imposed an illegal sentence by misclassifying his 2009 Missouri conviction for attempted first-degree robbery as a person crime. To decide that issue, we must apply not only a recent Kansas Supreme Court case, but also a recent amendment to the statute defining "illegal sentence." We agree with Jones that his Missouri conviction must be classified as a nonperson crime in Kansas, so he must be resentenced. Jones also argues, unsuccessfully, that the district court abused its discretion in revoking his probation.

Factual and Procedural Background

In March 2016, Jones entered guilty pleas in Kansas in three cases. Jones pleaded guilty in 15 CR 685 to one count of possession of methamphetamine; in 16 CR 584 to one count of possession of methamphetamine and one count of being a felon in possession of a firearm; and in 16 CR 806 to one count of methamphetamine, one count of being a felon in possession of a firearm, and one count of possession of marijuana.

At sentencing, the district court determined Jones had a criminal history score of C based in part on his prior person felony conviction in 2009 for attempted first-degree robbery in Missouri in violation of Mo. Rev. Stat. § 569.020 (2000) and Mo. Rev. Stat. § 564.011 (2000). Jones acknowledged that his criminal history was correct. Consistent with the plea agreement, the district court granted a dispositional departure to 12 months' probation with underlying sentences of 30 months' imprisonment in 16 CR 685, 38 months' imprisonment in 16 CR 584, and 38 months' imprisonment in 16 CR 806, to run consecutively.

Three months later, Jones was arrested for possession of methamphetamine and felony possession of a firearm. Jones pleaded guilty to both counts. The district court again assigned Jones a criminal history score of C. Although both parties recommended a dispositional departure to probation for the new charges and recommended Jones continue his probation in the previous cases, the district court revoked Jones' probation and imposed his underlying sentences. Jones appeals, challenging the legality of his sentences and the revocation of his probation.

Did the District Court Err in Classifying Jones' Missouri Attempted First-degree Robbery as a Person Crime?

Jones first claims that his sentence is illegal because the district court misclassified his 2009 Missouri conviction for attempted first-degree robbery as a person crime. He argues that the district court should have categorized this as a nonperson crime for three reasons: (1) K.S.A. 2017 Supp. 21-6811 does not provide for the classification of out-of-state inchoate crimes, requiring they be classified as nonperson; (2) Missouri's crime of attempt is not comparable to Kansas' crime of attempt under K.S.A. 2017 Supp. 21-5301; and (3) Missouri's crime of robbery is comparable to Kansas' theft by threat, a nonperson crime.

A court may correct an illegal sentence at any time. K.S.A. 2017 Supp. 22-3504(1). So Jones can challenge the classification of his prior conviction for purposes of lowering his criminal history score even though he raises this issue for the first time on appeal. See *State v. Dickey*, 301 Kan. 1018, 1034, 350 P.3d 1054 (2015); K.S.A. 2017 Supp. 21-6820(e)(3).

*2 Our resolution of this claim involves the interpretation of the revised Kansas Sentencing Guidelines Act (KSGA), K.S.A. 2017 Supp. 21-6801 et seq., a matter of law over which we have unlimited review. *State v. Collins*, 303 Kan. 472, 473-74, 362 P.3d 1098 (2015). So whether the district court properly classified Jones' prior conviction as a person or nonperson crime for criminal history purposes is a question of law subject to our unlimited review. See *Dickey*, 301 Kan. 1018, Syl. ¶ 5.

We generally analyze out-of-state convictions by using two steps.

To classify an out-of-state conviction for criminal history purposes, we generally follow two steps. First, we categorize the prior conviction as a misdemeanor or a felony. To do that, we defer to the convicting jurisdiction's classification of the crime. K.S.A. 2017 Supp. 21-6811(e). The parties do not dispute that Jones' Missouri conviction was for a felony. See Mo. Rev. Stat. § 569.020.

Second, we must determine whether the prior conviction is a person or nonperson crime. To do that, we look at the comparable crime in Kansas when the defendant committed the current crime of conviction. K.S.A. 2017 Supp. 21-6811(e)(3). If Kansas has no comparable crime, we classify the out-of-state crime as a nonperson crime. K.S.A. 2017 Supp. 21-6811(e)(3). If Kansas has a comparable crime, we see whether that crime is a person or nonperson crime and then classify the out-of-state crime that same way. Jones claims that his Missouri conviction for attempted first-degree robbery was not comparable to a person crime in Kansas, so his prior Missouri conviction was improperly classified as a person crime.

A. *Do we apply the same analysis to out-of-state anticipatory crimes?*

Jones claims that all out-of-state anticipatory crimes, namely, attempt, conspiracy, and solicitation, must be classified as nonperson crimes. He reasons that the KSGA does not explicitly provide a rubric for treating out-of-state convictions of these crimes, so the court should apply the rule of lenity to this "statutory silence" and score all out-of-state anticipatory crime convictions as nonperson crimes.

Jones relies on K.S.A. 2017 Supp. 21-6811(g). This subsection provides that for purposes of criminal history, a prior felony conviction of an attempt to commit a crime shall be treated as a person or nonperson crime in accordance with the designation assigned to the underlying crime. It states:

> "A prior felony conviction of an attempt, a conspiracy or a solicitation as provided in K.S.A. 21-3301, 21-3302 or 21-3303, prior to their repeal, or K.S.A. 21-5301, 21-5302 or 21-5303, and amendments thereto, to commit a crime shall be treated as a person or nonperson crime in accordance with the designation assigned to the underlying crime." K.S.A. 2017 Supp. 21-6811(g).

That language was meant to clarify that an attempt, conspiracy, or solicitation to commit a person crime is also a person crime for criminal history purposes. *State v. Dawson*, No, 113,233, 2016 WL 2772864, at *4 (Kan. App. 2016) (unpublished opinion), *rev. denied* 306 Kan. 1322 (2017); see *State v. Williams*, No. 114,778, 2017 WL 4558234, at *6 (Kan. App. 2017) (unpublished opinion), *petition for rev. filed* November 13, 2017.

Jones contends, however, that K.S.A. 2017 Supp. 21-6811(g) does not apply to any out-of-state crimes, as a careful reading of its plain language shows. He argues that the statutory language italicized below expressly limits its application only to anticipatory crimes committed in Kansas: "[a] prior felony conviction of an attempt ... *as provided in ... K.S.A. 2017 Supp. 21-5301* ... to commit a crime shall be treated as a person or nonperson crime in accordance with the designation assigned to the underlying crime." (Emphasis added.) K.S.A. 2017 Supp. 21-6811(g). Jones then contends that the statute covers only attempts *pursuant to or under* K.S.A. 2017 Supp. 21-5301 (attempt) and the other statutes related to anticipatory crimes listed in subsection (g). He argues that only Kansas convictions of attempt can meet that language.

*3 But Jones' argument distorts the relevant statutory language. It may well be that Jones' Missouri conviction is not a conviction *under* K.S.A. 2017 Supp. 21-5301. But we

do not read subsection (g) so narrowly. Its plain language states, instead, that a prior felony conviction of an attempt "*as provided in* ... K.S.A. 2017 Supp. 21-5301 ... to commit a crime shall be treated as a person or nonperson crime in accordance with the designation assigned to the underlying crime." K.S.A. 2017 Supp. 21-6811(g). Jones' prior felony conviction of an attempt in Missouri may be a conviction *as provided in* the Kansas attempt statute if the elements of that crime are the same in both states. We thus reject Jones' interpretation of subsection (g).

We do not apply the rule of lenity

But even had we agreed with Jones' interpretation of 21-6811 (g), we would not agree with his ensuing argument that the language creates a gap which requires us to treat all anticipatory crimes as nonperson crimes. Here, Jones relies on *State v. Horselooking*, 54 Kan. App. 2d 343, 400 P.3d 189 (2017), *rev. granted* 307 Kan. 990 (2017), a case in which we examined a tribal conviction which the tribe had not classified as a misdemeanor or as a felony. We applied the rule of lenity, 54 Kan. App. 2d at 354, which requires the courts to apply a reasonable reading favoring the defendant when the language of a criminal statute fosters a genuine ambiguity. See *State v. Coman*, 294 Kan. 84, Syl. ¶ 5, 273 P.3d 701 (2012) ("Under the rule of lenity, criminal statutes must be strictly construed in favor of the defendant."); cf. *State v. Barlow*, 303 Kan. 804, 813, 368 P.3d 331 (2016). We classified defendant's prior tribal conviction as a misdemeanor, rather than as a felony, because our sentencing statute does not explain how we should classify an out-of-state conviction as a felony or a misdemeanor when the convicting jurisdiction itself does not do so. 54 Kan. App. 2d at 354.

But that is not the case here. Missouri designated Jones' crime of attempted first-degree robbery as a felony, and the sole issue is whether we should consider that felony to be a person or nonperson crime. The KSGA is not silent on that issue, unlike the misdemeanor v. felony issue in *Horselooking*. Instead, K.S.A. 2017 Supp. 21-6811 explains in all-inclusive language how to classify out-of-state crimes:

> "(e)(1) Out-of-state convictions and juvenile adjudications shall be used in classifying the offender's criminal history.
>
> (2) An out-of-state crime will be classified as either a felony or a misdemeanor according to the convicting jurisdiction.
>
> ....
>
> (3) The state of Kansas shall classify the crime as person or nonperson. In designating a crime as person or nonperson, comparable crimes 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 crime in effect on the date the current crime of conviction was committed, the out-of-state crime shall be classified as a nonperson crime." K.S.A. 2017 Supp. 21-6811(e).

We are unpersuaded by Jones' claim that the KSGA does not state how to classify out-of-state anticipatory crimes. K.S.A. 2017 Supp. 21-6811(e)(3) applies to all out-of-state convictions, including convictions for anticipatory crimes.

B. *Does K.S.A. 2017 Supp. 22-3504(3) act as a jurisdictional bar?*

Jones next claims that the district court improperly classified his prior Missouri conviction as a person crime because Missouri's crime of attempt is not comparable to Kansas' crime of attempt. See *State v. Wetrich*, 307 Kan. 552, 412 P.3d 984 (2018). In response, the State claims that this court lacks jurisdiction to hear this claim based on K.S.A. 2017 Supp. 2-3504(3).

***4** The Kansas Legislature amended K.S.A. 22-3504 by adding subsection (3). "The plain purpose of the amendment is to define and limit the scope of a statutorily created procedure by which a person convicted of a crime can seek correction of a sentence." *State v. Dawson*, 55 Kan. App. 2d 109, 117, 408 P.3d 995 (2017), *rev. granted* 308 Kan. —— (June 26, 2018). This new subsection, effective May 18, 2017, states:

> " '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. A sentence is not an 'illegal sentence' because of a change in the law that occurs after the sentence is pronounced." K.S.A. 2017 Supp. 22-3504(3).

Jones' claim of an illegal sentence was first raised after May 2017, when this subsection took effect. The State claims that Jones' sentence is not illegal because his claim of illegality is based on *Wetrich*—a change in the law that occurred in 2018 after Jones' sentence was pronounced in 2016.

We do not agree that the amendment poses a jurisdictional bar. The State cites no legal authority supporting its position that the amendment is jurisdictional. Failure to support a point with pertinent authority or show why it is sound despite a lack of supporting authority or in the face of contrary authority is akin to failing to brief an issue. *State v. Tappendick*, 306 Kan. 1054, Syl. ¶ 2, 400 P.3d 180 (2017). In *Dawson*, we stated that the amendment "does not affect a court's subject matter jurisdiction." 55 Kan. App. 2d at 116. But even if the State is correct, we cannot rule on this jurisdictional issue without first determining the merits of the issue being appealed—whether Jones' sentence fits the definition of an illegal sentence.

C. *Is Jones' prior Missouri conviction comparable to a Kansas crime?*

As noted above, we determine whether the prior Missouri conviction was properly classified as a person crime by looking to a comparable crime in Kansas at the time the defendant committed the current crime of conviction. K.S.A. 2017 Supp. 21-6811(e)(3); *State v. Keel*, 302 Kan. 560, 590, 357 P.3d 251 (2015). If we find no comparable Kansas crime, we must classify the prior conviction as a nonperson crime. K.S.A. 2017 Supp. 21-6811(e)(3). But if Kansas has a comparable crime and Kansas classifies that crime as a person crime, we also classify the out-of-state conviction as a person crime. K.S.A. 2017 Supp. 21-6811(e)(3).

We review Wetrich's test for comparability

In March 2018, the Kansas Supreme Court construed the term "comparable" and adopted an identical-or-narrower test. *Wetrich*, 307 Kan. at 559-60. The court resorted to various dictionary definitions and thesaurus entries of the term "comparable" to find that term to be ambiguous. That ambiguity made it appropriate to consider legislative history. The court then found that using an identical-or-narrower rule to determine comparability would further one goal of the KSGA—"an even-handed, predictable, and consistent application of the law across jurisdictional lines." 307 Kan. at 561-62. To achieve that goal, our Supreme Court established the following test:

> "For an out-of-state conviction to be comparable to an crime under the Kansas criminal code, within the meaning of K.S.A. 2017 Supp. 21-6811(e)(3) ... the elements of the out-of-state crime cannot be broader than the elements of the Kansas crime. In other words, 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." 307 Kan. 552, Syl. ¶ 3.

***5** *Wetrich* based its decision solely on statutory interpretation and not on constitutional grounds. 307 Kan. at 558.

We apply Wetrich's *test for comparability*

We first review the elements of the out-of-state crime. Missouri's attempt statute underlying Jones' prior conviction of attempted first-degree robbery provided:

> "1. A person is guilty of attempt to commit a crime when, with the purpose of committing the crime, he does any act which is a substantial step towards the commission of the crime. A '**substantial step**' is conduct which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the crime." Mo. Rev. Stat. § 564.011.1 (2000).

Missouri courts construe this statute as having two elements: (1) The defendant has the purpose to commit the underlying crime, and (2) the defendant does an act which is a substantial step toward the commission of that crime. *State v. Withrow*, 8 S.W.3d 75, 78 (Mo. 1999).

We then compare the elements of the Missouri crime to the elements of Kansas' attempt statute for Jones' current crimes of conviction. Kansas defines attempt as:

> "[A]ny overt act toward the perpetration of a crime done by a person who intends to commit such crime but fails in the perpetration thereof or is prevented or intercepted in executing such crime." K.S.A. 2017 Supp. 21-5301(a).

This crime, as detailed in the Kansas pattern instructions, has three elements:

"1. The defendant performed an overt act toward the commission of [the underlying crime].

"2. The defendant did so with the intent to commit [the underlying crime].

"3. The defendant failed to complete commission of [the underlying crime]." PIK Crim. 4th 53.010.

The primary, if not sole, difference between these attempt statutes is that Missouri requires a "substantial step" while Kansas requires an "overt act" toward commission of the underlying crime—here, robbery.

Is this a distinction without a difference?

The State agrees that Missouri's definition of an attempt is technically broader than Kansas' definition, as theoretically one could take a substantial step that is not also an overt act. But the State contends that this is a mere distinction without a practical difference—any acts sufficient to constitute a substantial step under Missouri's law would also constitute an overt act under Kansas law. See *State v. Brown*, 306 Kan. 1145, 1163, 401 P.3d 611 (2017) (defining overt act as "the first or subsequent step" toward the commission of the crime). It thus argues that the crimes of attempt are comparable as defined in *Wetrich*, despite their different terminology. To do so, the State relies on decisional law interpreting and applying the "substantial step" and "overt acts" requirements under Missouri and Kansas law.

Missouri's substantial step requirement is broader than Kansas' overt act requirement

Missouri courts have determined that one may complete a substantial step without completing an overt act—an act beyond mere preparation is not required for an attempt. "Missouri has abandoned the requirement of some act beyond mere preparation or the requirement of an overt act in attempt law." *State v. Young*, 139 S.W.3rd 194, 198 (Mo. App. 2004.) Under Missouri's substantial step requirement, "mere preparation *may qualify* as a substantial step under certain circumstances. ... *Any* conduct clearly showing a firmness of intent to complete the crime is sufficient." *State v. Kusgen*, 178 S.W.3d 595, 599 (Mo. App. 2005).

*6 The Missouri Supreme Court, en banc, has found that its prior attempt statute, which required an overt act, was a tougher, or narrower, test than its current attempt statute, which requires only a substantial step. *State v. Molasky*, 765 S.W.2d 597, 600 (Mo. 1989) (finding the statutory change to "substantial step" "lowered the threshold needed to find the offense of attempt by shifting the emphasis away from what an actor still had to accomplish and refocusing instead upon what the actor had already done."). *Molasky* found an inmate's solicitation of a fellow inmate to commit murder through conversations which were unaccompanied by any other corroborative action was not a "substantial step" towards the commission of the offense sufficient to sustain a second-degree attempted murder conviction. 765 S.W.2d at 602-03.

Ten years later, the Missouri Supreme Court, again sitting en banc, explained that some of its cases had incorrectly merged the common-law elements of attempt, which include an overt act, into its "substantial step" standard. It found substantial step attempt was a lesser included offense of common-law attempt, which requires an overt act:

> "Under *Reyes*, common law attempt was the more difficult offense to prove in that it required an overt act showing that the defendant's conduct nearly approached consummation of the offense, not just a substantial step toward the completed offense. [862 S.W.2d] at 384. Substantial step attempt was, in effect, a lesser included offense of common law attempt." *Withrow*, 8 S.W.3d at 78, *holding modified on other grounds by State v. Claycomb*, 470 S.W.3d 358 (Mo. 2015).

Withrow found the evidence failed to show the defendant's participation in a substantial step of the attempted manufacture of a drug where it showed neither defendant's constructive possession of the closet in which drugs were found, nor defendant's involvement in drug-making, nor defendant's possession of materials used to commence the drug-making process—merely defendant's repeated presence in the house. 8 S.W.3d at 80-81.

In contrast, Kansas law requires that a defendant's acts " 'extend beyond mere preparations ... and must approach sufficiently near to the consummation of the crime to stand either as "the first or subsequent step" toward the commission of the crime.' " *Brown*, 306 Kan. at 1163

(quoting *State v. Peterman*, 280 Kan. 56, 61, 118 P.3d 1267 [2005]). Kansas courts distinguish mere preparation, which is insufficient for attempt, from post-preparation movement, which is sufficient:

> "[P]reparation consists of devising or arranging the means or measures necessary for the commission of the offense and ... attempt is the direct movement toward the commission after the preparations are made." *State v. Garner*, 237 Kan. 227, 239, 699 P.2d 468 (1985).

A person may thus be convicted in Missouri of attempt based on mere preparation, without taking an overt act, but not so in Kansas. Missouri's attempt statute is facially broader than Kansas' attempt statute.

Jones cites *State v. Lammers*, 479 S.W.3d 624, 632-35 (Mo. 2016) to illustrate the difference between the two standards. Jones contends that the Missouri Supreme Court found sufficient evidence for Lammers' conviction of attempted first-degree assault based on mere preparation which would not constitute an overt act in Kansas. The defendant bought two assault rifles from Walmart, took them to a friend who explained how to use them, then practiced shooting them. Defendant's mother learned about the guns and called law enforcement, who interrogated the defendant. Defendant admitted that before buying the guns he had thought about committing a mass shooting at a Walmart but changed his mind after target practice. *Lammers* found that by purchasing assault rifles and engaging in target practice, defendant had taken substantial steps sufficient to constitute an attempt. 479 S.W.3d at 633-34. We agree with Jones that those acts would not be considered overt acts toward the crime of assault in Kansas.

*7 The State counters that the substantial steps in *Lammers* and other Missouri cases would necessarily be overt acts in Kansas. First, the State suggests that Missouri's substantial step requirement sets a higher bar than its language would suggest. See *Molasky*, 765 S.W.2d at 602 (finding no substantial step); *Withrow*, 8 S.W.3d at 78 (same). And *Molasky*'s concluding comment supports the State's conclusion: "Missouri cases indicate a substantial step is evidenced by actions, indicative of purpose, not mere conversation standing alone." 765 S.W.2d at 602. The cases the Missouri Supreme Court cited in support of that conclusion show substantial steps that Kansas would consider to be overt acts: "See e.g., *State v. Molkenbur*, 723 S.W.2d 894 (Mo. App. 1987) (defendant grabbed victim, trying to pull her back into an apartment), *State v. Thomas*, 670 S.W.2d 138 (Mo. App. 1984) (defendant entered victim's apartment, threatening her with knife), *State v. Walker*, 743 S.W.2d 99 (Mo. App. 1988) (defendant carried victim to back of van, restraining her while her clothing was being removed)." *Molasky*, 765 S.W.2d at 602, n.9. But those acts go beyond mere preparation, unlike the acts in *Lammers*.

Second, the State argues that Kansas has set a low threshold for overt acts in attempt law. The State relies on *State v. Sheikh*, 30 Kan. App. 2d 188, 190-91, 41 P.3d 290 (2001) (finding defendant's acts of removing 672 pseudoephedrine pills from their bubble packs, putting the pills and a firearm in his vehicle, then driving to another location amounted to overt acts in furtherance of the attempt crime). Specifically, the State focuses on *Sheikh*'s suggestion that merely reconnoitering a place and collecting items in preparation for a crime can be overt acts sufficient to support an attempt in Kansas. *Sheikh* relied on Tenth Circuit Court of Appeals cases which found sufficient evidence of an attempt based on mere reconnoitering and collecting items, stating:

> " 'The realistic emphasis on what had been done, rather than dwelling on what remained to be done is consistent with our decision in *United States v. Prichard*, 781 F.2d 179, 181-82 (10th Cir. 1986), in which we held that reconnoitering the object of a crime together with collecting the instruments to be used in that crime, constituted an attempt.' [*Saviano*,] 843 F.2d at 1297-98." *Sheikh*, 30 Kan. App. 2d at 191.

We find the State's reliance on *Sheik* to be misplaced for two reasons. First, *Sheikh* failed to recognize that the Tenth Circuit in *United States v. Prichard*, 781 F.2d 179, 181 (10th Cir. 1986), and in *United States v. Saviano*, 843 F.2d 1280, 1296-97 (10th Cir. 1988), required only a "substantial step," rather than an overt act, toward the commission of the crime. See; *Saviano*, 843 F.2d at 1296-97. Thus neither *Prichard* nor *Saviano* holds that mere reconnoitering and collecting, i.e., acts of mere preparation, are sufficient to constitute overt acts as required under Kansas law for attempt. In contrast, Missouri's current attempt statute is patterned after Model Penal Code § 5.01 (1985), which recognizes that "reconnoitering the place contemplated for the commission of the crime" is not insufficient as a matter of law to constitute a substantial step for purposes of an attempt. See *Molasky*, 765 S.W.2d at 600-01.

Second, *Sheikh*'s procedural posture distinguishes it from this case. There, we were asked whether certain acts could amount to overt acts sufficient to withstand a motion to dismiss the charge of attempted manufacture of a drug. Our standard of review was, accordingly, quite favorable to the State, as we drew inferences favorable to the prosecution in determining whether the evidence was sufficient to cause a person of ordinary prudence and caution to entertain a reasonable belief, or probable cause, of the accused's guilt. 30 Kan. App. 2d at 189-90. We were not asked in *Sheikh*, as we are here, to determine, as a matter of law, whether certain acts could constitute a substantial step without also being an overt act for purposes of conviction of an attempt.

*8 Determining whether certain events constitute an overt act rather than mere preparation for purposes of attempt is a fact-based inquiry not governed by definite rules:

> "[N]o definite rule as to what constitutes an overt act for the purposes of attempt can or should be laid down. Each case must depend largely on its particular facts and the inferences which the jury may reasonably draw therefrom. The problem should be approached with a desire to accomplish substantial justice. It has been said that mere preparation is not sufficient. The accused must have taken steps beyond mere preparation by doing something directly moving toward and bringing nearer the crime he intends to commit. It has been said that there must be some appreciable fragment of the crime committed." *Garner*, 237 Kan. at 238.

Nonetheless, caselaw demonstrates the definite rule in Kansas that for an attempt conviction, the accused must have taken steps beyond mere preparation. See *State v. Hargrove*, 48 Kan. App. 2d 522, 563-64, 293 P.3d 787 (2013) (finding sufficient evidence of overt acts that "exceeded mere preparation" and justified attempt conviction); *State v. Capps*, 33 Kan. App. 2d 37, 40, 99 P.3d 138 (2004) (finding jury instruction error; noting the jury especially needed to hear that an overt act is something more than mere preparation). See also *State v. Cherry*, 279 Kan. 535, 543, 112 P.3d 224 (2005) (citing *Capps* with approval). Not so in Missouri, where mere preparation will support an attempt conviction.

Based on the statutory elements of the relevant statutes, as well as on the decisional law interpreting them, we find the elements of attempt in Missouri to be broader than the elements of attempt in Kansas.

We find it unnecessary to reach Jones' claim that Missouri's crime of first-degree robbery is comparable to the Kansas crime of theft by threat, a nonperson crime. Even assuming the elements of the two underlying crimes are identical, the difference in the elements of the two States' crimes of attempt is sufficient to render the two crimes not comparable, as that term is defined in *Wetrich*. The district court thus incorrectly scored Jones' prior Missouri conviction as a person felony. This resulted in an incorrect criminal history score and an illegal sentence.

Was Wetrich *a "change in the law" within the meaning of K.S.A. 2017 Supp. 22-3504(3)?*

We now reach the State's contention that even if Jones' sentence is otherwise illegal, as we have found it to be, the 2017 amendment to K.S.A. 22-3504 means that his sentence, legal at the time it was pronounced, is not rendered illegal by later changes in the law. That amendment provides: "A sentence is not an 'illegal sentence' because of a change in the law that occurs after the sentence is pronounced." K.S.A. 2017 Supp. 22-3504(3). The State contends that the illegality of Jones' sentence is based solely on *Wetrich*, a 2018 case which changed the law after Jones' sentence was pronounced in 2016. This requires us to determine whether subsection (3) is retroactive and whether its terms apply here. We address this latter question first.

Was Wetrich *a change in the law?*

Jones next argues that *Wetrich*'s holding requiring application of the identical-or-narrower rule was a change in the law within the meaning of that phrase in K.S.A. 2017 Supp. 22-3504(3). The State's sole analysis of this issue follows: (1) Kansas has historically applied a common-sense definition of "comparable" that did not require prior crimes to arise under identical or narrower elements; (2) the Supreme Court issued a new rule in *Wetrich* by adopting an "identical or narrower" test for comparability; and (3) *Wetrich*'s new rule is a change in the law that occurred after Jones' sentence was pronounced.

***9** Facially, this simple argument has logical appeal. As the State argues, the Kansas Supreme Court, as recently as in *State v. Williams*, 299 Kan. 870, 873, 326 P.3d 1070 (2014) echoed and applied its prior holding in *State v. Vandervort*, 276 Kan. 164, 179, 72 P.3d 925 (2003), that crimes need not have identical elements to be comparable for purposes of making criminal history person or nonperson designations:

> "When designating a prior out-of-state crime of conviction as a person or nonperson crime in Kansas, 'the offenses need only be comparable, not identical.' *State v. Vandervort*, 276 Kan. 164, 179, 72 P.3d 925 (2003). There, we held the Kansas crime that was 'the closest approximation' of the out-of-state crime was a comparable crime, and we explicitly ruled the crimes need not have identical elements to be comparable for making the person or nonperson designation. 276 Kan. at 179." *Williams*, 299 Kan. at 873.

Wetrich, in common parlance, changed the law by requiring that the out-of-state crime have identical or narrower elements than the Kansas crime to which it is compared.

We applied the change in the law provision of K.S.A. 2017 Supp. 22-3504(3) only once, in *Dawson*. There we found that "[t]he analysis and holdings of our Supreme Court in *Dickey I* and *II* were not merely restatements of that court's prior decisions or applications of earlier holdings to different facts, they were a change in the law." *Dawson*, 55 Kan. App. 2d at 118. *Dawson* found a sentence is not an illegal sentence based on *Dickey*, if that sentence was final prior to the decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed. 2d 435 (2000).

Nonetheless, we do not believe the change in the law provision applies here. In the same way that a legislative amendment may be " 'deemed to clarify relevant law rather than effect a substantive change in the law,' " we are convinced that the Supreme Court would deem *Wetrich* to have clarified rather than changed decisional law. Cf. *White v. State*, 308 Kan. 491, 503, 421 P.3d 718 (2018). We reach this conclusion based on three reasons explained below: (1) The Supreme Court's treatment in *Wetrich* of its precedent; (2) the Supreme Court's subsequent characterizations of *Wetrich*; and (3) the timing of the matter.

First, as our court more fully explained in *State v. Smith*, No. 118,042, 56 Kan. App. 2d ——, 2018 WL 43742273, at *7 (Kan. App. 2018), a judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision. See *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13, 114 S. Ct. 1510, 128 L.Ed. 2d 274 (1994). We agree with the analysis of the *Smith* panel and adopt its rationale here. *Wetrich*'s treatment of its prior cases illustrates that principle of law. It did not squarely address its prior, explicit rulings in *Williams* and *Vandervort* that "the crimes need not have identical elements to be comparable for making the person or nonperson designation." *Wetrich*'s only mention of those cases was in illustrating the conflict among Court of Appeals' panels on this topic, largely by quoting from *State v. Moore*, 52 Kan. App. 2d 799, 813-14, 377 P.3d 1162 (2016):

> "Further, *Moore* declared that 'there's no [Kansas] statutory requirement that an out-of-state crime be identical or narrower than the comparable Kansas offense' and observed that *Dickey* had not overruled 'past Kansas caselaw holding that the comparable Kansas crime doesn't have to be identical to the prior-conviction statute and that the question is whether the statutes prohibit similar conduct. See, *e.g.*, *Williams*, 299 Kan. at 873 (quoting *Vandervort*, 276 Kan. at 179); *State v. Riolo*, 50 Kan. App. 2d at 353 (quoting *Barajas*, 43 Kan. App. 2d at 643).' 52 Kan. App. 2d at 813-14. The *Vandervort* court suggested that the Kansas crime with 'the closest approximation' to the out-of-state crime was a comparable offense. *State v. Vandervort*, 276 Kan. 164, 179, 72 P.3d 925 (2003)." *Wetrich*, 307 Kan. at 558.

***10** Curiously, *Wetrich* did not overrule, distinguish, disapprove, or even analyze *Vandervort* or *Williams*, despite the fact their holdings are irreconcilable with its own. Instead, *Wetrich* ignored them but for its passing reference above. Its analysis of comparable was independent of its prior interpretations of that word. 307 Kan. at 562. *Wetrich*'s approach to the issue thus appears to be tailored to reach the conclusion that it was not changing the law but was merely construing a long-standing term in a preexisting statute pursuant to its original legislative intent.

Second, we find additional guidance from the Supreme Court's characterizations of *Wetrich* in its subsequent cases. On the same day the Supreme Court decided

Wetrich, it decided two other cases involving the designation of person crimes: *State v. Moore*, 307 Kan. 599, 602, 412 P.3d 965 (2018), and *State v. Buell*, 307 Kan. 604, 607, 412 P.3d 1004 (2018). Both cases applied *Wetrich*, but they took care to use scant, yet identical, language in referring to it, stating only:

> "In *State v. Wetrich*, 307 Kan. 552, 561, 412 P.3d 984 (2018), we construed the meaning of 'comparable crime' in K.S.A. 2017 Supp. 21-6811(e)(3), and its ancestors, to require that the out-of-state crime have identical or narrower elements than the Kansas crime to which it is being compared." *Moore*, 307 Kan. at 602; *Buell*, 307 Kan. at 607.

Neither *Moore* nor *Buell* alluded to *Wetrich* as having changed the law or imposed a new test. Instead, both cases parrot language that appears to be carefully crafted to say that *Wetrich* merely "construed the meaning" of a term in a statute. And the Supreme Court's later mentions of *Wetrich* are consistently terse, referring to it only as "resolving scoring of out-of-state burglary conviction as matter of statutory interpretation." *State v. Gensler*, 308 Kan. 674, 678, 423 P.3d 488 (2018).

Third, we find it significant that *Wetrich* was decided in March 2018, nearly 10 months after K.S.A. 2017 Supp. 22-3504(3) took effect. Courts generally presume that the Legislature acts with full knowledge about the statutory subject matter, including prior and existing law, and judicial decisions interpreting them. *University of Kan. Hosp. Auth. v. Board of Comm'rs of Unified Gov't*, 301 Kan. 993, 1000, 348 P.3d 602 (2015). We apply that same presumption to the courts. The Supreme Court was therefore aware in 2018 when it decided *Wetrich*—a case involving an illegal sentence—of the Legislature's 2017 revisions that codified what an illegal sentence is. K.S.A. 2017 Supp. 22-3504(3).

For those reasons, we do not believe that the Supreme Court's unusual treatment of precedent in *Wetrich* and its cursory characterizations of *Wetrich* thereafter are mere happenstance. Instead, the Supreme Court's language in and about *Wetrich* appears to be designed to preclude success on the very argument that the State is now making —that *Wetrich* is a change in the law which cannot provide the basis for an illegal sentence. Accordingly, we find the change in the law provision in K.S.A. 2017 Supp. 22-3504(3) does not preclude Jones' sentence from being illegal. Accordingly, we need not determine whether this amendment applies retroactively. Even if it does apply retroactively, the amendment does not apply here. Jones must be resentenced with his attempted first-degree robbery conviction from Missouri scored as a nonperson crime.

We note that *Wetrich*'s test is clear and relatively simple to apply. We are duty bound to apply it. But what that test gains in ease of application it loses in fairness and common sense. As this case illustrates, crimes that inherently involve harm to a person will now often be deemed to be nonperson crimes for those who have committed them in another state. For example, had this been an attempted murder case, the result, although absurd, would have been the same—a Missouri conviction for an attempted murder of a person can never be scored as a person crime in Kansas, post-*Wetrich*. Application of the test also has the disparate effect of treating persons who commit attempted murder in Kansas as person felons, while treating those who attempt to murder persons in Missouri as nonperson felons. Those who have committed prior person crimes in Kansas will receive a greater penalty than those who committed crimes on persons in other states, thwarting, rather than achieving, the KSGA's goal that "[s]anctions should be uniform and not related to ... geographic location." *Wetrich*, 307 Kan. at 560.

Did the district court abuse its discretion in revoking Jones' probation and imposing his underlying sentence?

***11** Jones also argues that the district court abused its discretion by acting unreasonably—it revoked Jones' probation although both parties had recommended it. In Jones' plea agreement, the parties recommended a dispositional departure to probation for the new charges and recommended Jones continue his probation in the previous cases. Both parties mentioned this option might allow Jones access to appropriate treatment programs in the hopes of reducing his risk of recidivism. The district court instead revoked Jones' probation, imposing his underlying sentence.

A district court may revoke probation upon finding that the defendant violated the terms of probation. *State v. Walker*, 260 Kan. 803, 808, 926 P.2d 218 (1996). The decision to revoke probation is within the discretion of the district court. *State v. Graham*, 272 Kan. 2, 4, 30 P.3d 310 (2001). Judicial discretion is abused if the judicial decision (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. *State*

v. Moyer, 302 Kan. 892, 906, 360 P.3d 384 (2015). The party asserting the trial court abused its discretion bears the burden of showing the abuse of discretion. *State v. Rojas-Marceleno*, 295 Kan. 525, 531, 285 P.3d 361 (2012). So Jones bears that burden here.

The district court's ability to revoke probation is limited somewhat by statute. K.S.A. 2017 Supp. 22-3716(c)(1)(A)-(E) provides a system of intermediate sanctions the court must generally impose on an individual rather than revoking the probation. But the statute expressly allows the court to revoke probation instead of applying intermediate sanctions "[i]f the offender commits a new felony or misdemeanor while the offender is on probation." K.S.A. 2017 Supp. 22-3716(c)(8)(A). Jones stipulated to having committed two new felonies in violation of his probation. No intermediate sanctions were thus required.

Jones acknowledges that the district court had the authority to revoke his probation based on his commission of new felonies, but he argues that the district court's decision to revoke probation was unreasonable considering the parties' joint agreement and Jones' treatment options. Jones had completed inpatient drug treatment and was undergoing outpatient drug treatment when he committed his new crimes.

But the district court specifically found that Jones was not invested in his sobriety and posed a danger to society.

> "I'm sorry, Mr. Jones. I'm not taking another risk. You got three presumptions for prison today. I am not going to find a way to grant you probation today. Enough is enough. This is your fourth case, three of which you possessed a weapon. You are a danger. If you were just out using drug, I would say, well, okay, you got this addiction, but you choose to have a weapon.
>
> ....
>
> "I have an obligation to society. The legislature said when somebody has the third drug crime, they should go to prison. The legislature said when somebody who is on probation commits another crime, because they are obviously not working their probation, they should go to prison. And then when you score a 5C, border box, that is presumptive prison.
>
> "Now I can make findings that there are community-based programs that would promote your offender reformation, but I have already added that on May 11, 2016, and you obviously did not avail yourself of those programs. You were not invested in those programs. I cannot in good conscience make those findings, and I have an obligation to the public, quite frankly, to protect them from you, because when you got a weapon and you are high on meth, it only takes a bad set of circumstances before you use that weapon and kill somebody."

***12** The district court judge considered Jones' repeated possession of drugs and weapons and revoked his probation. A reasonable person could agree with that determination, so the district court's decision to revoke probation was not an abuse of discretion.

We affirm the district court's revocation of probation, vacate Jones' sentence, and remand for resentencing with the correct criminal history score.

All Citations

426 P.3d 540 (Table), 2018 WL 4656409

End of Document

2018 WL 4039484
Only the Westlaw citation is currently available.

Court of Appeals of Kansas.

STATE of Kansas, Appellee,

v.

Francisco MONTES, Jr., Appellant.

No. 117,916

Opinion filed August 24, 2018

Appeal from Sedgwick District Court; BRUCE C. BROWN, Judge.

Convictions affirmed and sentences vacated and remanded.

Attorneys and Law Firms

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

Matt J. Maloney, assistant district attorney, Marc Bennett, district attorney, and Derek Schmidt, attorney general, for appellee.

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

MEMORANDUM OPINION

Per Curiam:

*1 Francisco Montes, Jr. appeals his conviction for two counts of felony criminal threat and his sentences on those convictions.

He challenges the convictions based on a claim that the district court's limitation on his cross-examination of one witness prevented him from fully presenting his defense. But Montes has not shown that the additional areas he wanted to cover in cross-examination were relevant to the specific charges against him, and he didn't make a detailed enough explanation to the district court of the evidence he wanted to present. We therefore find no basis in the trial record to set aside his convictions.

We find merit, though, in one of Montes' claims of sentencing error. The district court treated a Florida burglary conviction as a prior person offense, which led to a more severe presumptive sentence than would have otherwise been the case. Under *State v. Wetrich*, 307 Kan. 552, Syl. 3, 412 P.3d 984 (2018), the district court erred on this point; the Florida statute defines burglary more broadly than the comparable Kansas statute does, so the Florida statute had to be considered a nonperson offense for sentencing purposes. We therefore vacate Montes' sentence and remand the case for resentencing.

Montes raises some additional claims of error in the trial court, but we have not found any of those of merit. We will discuss each of those issues later in the opinion.

FACTUAL AND PROCEDURAL BACKGROUND

One day in November 2015, Montes went to COMCARE, a community-mental-health center in Wichita, because he was having "homicidal tendencies." After arriving at COMCARE, Montes filled out an intake card saying that he wanted to see a psychiatrist, and waited in the lobby. The receptionist with whom Montes checked in noted that Montes was agitated, so Deidra Hall—a program manager for COMCARE's crisis center—went to talk with Montes about what was going on. That wasn't the first time Hall and Montes had interacted; he had received services at COMCARE before.

Hall then moved Montes from the lobby to a private meeting room so they could speak in private about what kind of help Montes needed that day. At trial, Hall said Montes identified his main issue as a need for food. Montes, on the other hand, said he went to COMCARE because he was homicidal and "needed to be refrained from the community." Although Montes and Hall disagree about the reason Montes gave Hall for being there, neither party disputes that Montes became agitated at some point during their discussion.

Hall described how she and Montes were sitting about ten feet apart from each other, but when Montes got upset

he moved towards Hall and stood up with his hands over her. She said he then yelled, "I'm going to fuck you up, I'm going to fucking kill you, bitch" at Hall. Since Montes' arms were in the air, Hall said she "went under his arms and left the room."

Montes denied saying anything like that to Hall, but he agreed that she left the room at some point during their interaction.

Hall explained that she was afraid Montes was going to hurt her, so she told the receptionist to call 911. Tisha Garland—another COMCARE program manager—went out front to watch Montes. Hall then took over the 911 call. Hall told the jury that while she was on the phone Montes "was continuing to yell, threatening that he was going to kill everybody in the building."

*2 Garland told the jury that Montes' "level of agitation was so intense that [she] immediately decided to go and get [the COMCARE] director, Jason Scheck, who was in his office." Scheck then came to the lobby. He said he observed Montes and then decided to try to speak with him. He and Garland both described how they tried to engage Montes to deescalate the situation to protect the staff and other clients. Their efforts failed, and Scheck said Montes became more agitated. Scheck said Montes then told him he was going to break Scheck's neck.

When it was clear that Montes wasn't going to calm down, someone at COMCARE finally activated the panic alarm system to alert law enforcement of the emergency. An employee also contacted security personnel at the Sedgwick County courthouse, right across the street from COMCARE, to ask for help.

Alan Bennett, a deputy with the Sedgwick County Sheriff's Department, was one of the law-enforcement officers who responded. He told the jury that there were already two officers from the Wichita Police Department at COMCARE by the time he arrived. Bennett personally observed Montes' behavior, which he described as "[e]xtremely agitated." Then he arrested Montes and transported him to the county jail.

The State charged Montes with two counts of criminal threat. At trial, Montes testified in his own defense. He told the jury that he didn't specifically threaten any of COMCARE's employees that day, but that he "made a homicidal threat to the community." On cross-examination, when the State asked Montes to clarify what he meant by a homicidal thought, he replied, "Where you tend to want to hurt or commit bodily harm." Montes said that he had wanted to kill someone that day.

The jury found Montes guilty of both counts of criminal threat and the district court sentenced him to 15 months in prison. Montes then appealed to our court.

ANALYSIS

I. *The District Court Didn't Deny Montes His Right to Present a Complete Defense When It Limited the Scope of Hall's Cross-Examination.*

Montes' first argument is that the district court improperly limited his cross-examination of Hall. Montes contends that this prevented him from presenting a complete defense to the charge because Hall's testimony would have been relevant to whether he had the required mental state to be guilty of criminal threat. Montes says this limitation resulted in a violation of his constitutional rights to present a full defense and have a fair trial.

This court reviews a trial court's decision to limit the scope of a witness' cross-examination for an abuse of discretion. *State v. Wells*, 296 Kan. 65, 86, 290 P.3d 590 (2012). A court abuses its discretion if its decision is based on an error of fact or law, or if no reasonable person could agree with the decision. *State v. Mosher*, 299 Kan. 1, 3, 319 P.3d 1253 (2014).

To understand Montes' argument, we must place it in the context of what the State had to prove at trial. The State charged Montes with making a criminal threat, which K.S.A. 2015 Supp. 21-5415(a)(1) defines as "any threat to ... [c]ommit violence communicated with intent to place another in fear ... or in reckless disregard of the risk of causing such fear." The State alleged that Montes made specific threats against Hall and Scheck in reckless disregard of the risk of causing them to be in fear.

Montes says that by sustaining the State's objection to Hall's cross-examination, the court prevented him from presenting a full defense because his "history of mental health treatment at COMCARE and his diagnoses were relevant to show that he did not have the reckless mental state" required for a criminal-threat conviction.

Essentially, he contends that proof of Hall's and Scheck's knowledge of his past interactions at COMCARE should have led them not to be fearful of him. As Montes put the point in his appellate brief: "If Mr. Montes had a history of receiving treatment at COMCARE for similar 'agitated' behavior, he would have believed the staff were familiar with his behavior and that there was not a risk of placing the employees in fear when he made his general threat to the public."

*3 The State first argues that we shouldn't reach the issues on its merits because Montes didn't make an adequate proffer of evidence as required by K.S.A. 60-405. Under that statute, a judgment won't be reversed because of erroneously excluded evidence unless the record shows "that the proponent of the evidence either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers." K.S.A. 60-405. Montes, on the other hand, suggests that "defense counsel proffered that he sought to cross-examine Hall about Mr. Montes mental health history at COMCARE and his 'mental health issues.' "

At trial, Montes' attorney asked the court: "So you're suggesting ... that his mental health issues in general [were] not relevant to this trial?" The court responded that the cross-examination wasn't relevant "unless I'm missing something." Then Montes' attorney explained that the evidence was relevant because people go to COMCARE "because [they're] having some kind of mental health issues." Since Montes had mental-health issues and he went to COMCARE "to try to get help, it would be relevant as to what his issues were."

As the district court pointed out, however, Montes' attorney didn't say how Montes' mental-health issues "tie[d] in to whether or not an offense [had] occurred." Nor did Montes's attorney say anything when the court pressed for more information about whether "there's some connection there that I'm missing [that] will relate to this element of the offense or this defense." Montes simply didn't explain what Montes' mental health had to do with the charged offenses or his defense. Using the language from K.S.A. 60-405, Montes didn't "indicate[ ] the substance of the expected evidence." At the outset, then, we agree with the State that because of Montes' inadequate proffer, he has not preserved this issue for appellate review.

Even if we considered Montes' limited proffer of evidence sufficient, the district court still was within its discretion to limit the inquiry on the details of his past interactions at COMCARE. To consider that, we must compare the rules for determining what's relevant evidence with the specific rationale Montes presents on appeal for the admission of this evidence.

In general, all relevant evidence is admissible unless it is otherwise excluded by another evidentiary rule, constitutional provision, or court decision. *State v. Williams,* 303 Kan. 585, 592-93, 363 P.3d 1101 (2016). Evidence is relevant if it tends to prove a significant fact —in legal terms, it must be both material and probative. K.S.A. 60-401(b); *State v. Huddleston,* 298 Kan. 941, 959, 318 P.3d 140 (2014). Evidence is material when it establishes a fact that is at issue; it is probative when it logically tends to prove the material fact. *State v. Coones,* 301 Kan. 64, 78, 339 P.3d 375 (2014).

Montes says Hall's cross-examination was relevant to his theory of defense that he didn't have the requisite mental state to commit these crimes. But he's arguing about the intent related to the general threat to the public that he admits he made—not the specific threats to Hall and Scheck. As we already noted, he contends on appeal that proof of his past interactions would have shown that "he would have believed the staff were familiar with his behavior and that there was not a risk of placing the employees in fear *when he made his general threat to the public.*" (Emphasis added.)

In context, then, Montes argues only that he didn't have the requisite mental state for criminal threat when he threatened the general public, but that's not what he was charged with. The State charged him with two counts of criminal threat because of his specific threats towards Hall and Scheck. And Montes doesn't explain how Hall's testimony would have proved that he didn't act in reckless disregard of the risk of placing Scheck and Hall in fear when he individually threatened them. The testimony Montes sought from Hall during the cross-examination would have been neither material nor probative, and the court properly limited the cross-examination because Hall's testimony wouldn't have been relevant.

*4 Finally, even if we were to find that the district court had improperly limited Hall's cross-examination, we agree

with the State's final argument that any error would be harmless. An error is harmless if we conclude beyond a reasonable doubt that the error didn't change the trial's outcome. See *State v. Andrew*, 301 Kan. 36, 46-47, 340 P.3d 476 (2014) (using the harmless-error standard for errors involving a defendant's theory of defense).

At trial, both Scheck and Hall testified that Montes' threats towards them made them afraid. And as we will make clear in our discussion of the next issue on appeal, there was no potential jury confusion about what Montes was charged with—the specific threats against Hall and Scheck, not some generic threat to the general public. Montes doesn't explain how evidence of his treatment history would have changed the jury's mind when it considered those specific threats. Thus, any error in limiting Hall's cross-examination would have been harmless.

II. *The District Court Didn't Err by Excluding a Unanimity Instruction.*

Montes' next argument is that the district court erred by failing to tell the jury that it had to agree unanimously on which act was the basis for a conviction—also known as giving a unanimity instruction. Montes says a unanimity instruction was required because, in addition to the evidence showing that he threatened Hall and Scheck, the State also presented evidence that he made a general threat against the public. He claims the jury could have based its guilty verdicts either on that additional threat against the public or on the alleged threats specifically against Hall and against Scheck.

When the State relies on multiple acts to support one charge, either the trial court must give a unanimity instruction to make sure all jurors agree on which of the possible criminal acts is the basis for its verdict or the State must convey to the jury the specific acts it relies on to support the charge. See *State v. Atkins*, 298 Kan. 592, 618, 315 P.3d 868 (2014).

There's no dispute that this case involved multiple acts. The State charged Montes with two counts of criminal threat—one toward Hall and the other toward Scheck. But in addition to those two threats, Montes says the State also presented evidence of a third threat that could have supported another conviction. He points to Hall's testimony, during which she described how, after threatening her, Montes went to the lobby and "threaten[ed] that he was going to kill everybody in the building." Under K.S.A. 2015 Supp. 21-5415(a)(1), a person is guilty of criminal threat if he threatened to "commit violence with intent to place *another* in fear ...." (Emphasis added.) So, Montes argues, the threat to kill everybody in the building also could have been a criminal threat.

Even if Montes' "general threat to kill the public" was another act in a multiple-acts scenario, the district court didn't err by excluding a unanimity instruction because the State told the jury which of Montes' acts served as the basis for each charge. During its opening statement, the State told the jury that Montes specifically threatened Hall because he was angry with her. It described how Montes told Hall: "I'm going to F you up [and] I'm gonna F'ing kill you, bitch." Then it explained how Montes threatened Scheck: "Mr. Montes continues to become agitated .... And while he's still angry and he's still aggressive, he says ... as he basically charges at [Scheck] and gets in his face, I'm gonna kill you and I'm gonna snap your neck." The State wrapped up its opening statement by telling the jury that the case was about Montes' threats toward Hall and Scheck.

***5** During its closing remarks, the State tied each of the counts charging criminal threats to specific statements made to Hall and Scheck. The prosecutor first explained how the evidence proved Montes threatened Hall. After reminding them that Montes' told Hall, "I'm gonna fuck you up, [and] I'm going to fucking kill you, bitch," the prosecutor then said, "I would submit he's guilty on count one of criminal threat." When discussing count two, the State talked only about Montes' interaction with Scheck, reminding the jury that the underlying acts for count two were Montes' threats toward Scheck that he was going to kill Scheck and break Scheck's neck.

The State appropriately designated which acts the jury needed to consider for each charge. Thus, the district court didn't err by failing to include a unanimity instruction.

III. *The District Court Erred by Classifying Montes' 1995 Florida Burglary Conviction as a Person Felony.*

Montes' third claim of error is that the district court made a mistake in determining his criminal-history score, which plays an important part in determining the presumptive sentence under our state's sentencing guidelines. The district court determined Montes' criminal-history score

was a B, based partly on the court's classification of Montes' 1995 burglary conviction from Florida as a person felony. But Montes contends that the court should have classified the Florida conviction as a nonperson felony. In that case, Montes' criminal-history score would have been a C, which would have made Montes' presumptive sentence probation, not prison. See K.S.A. 2015 Supp. 21-6804(a). Whether the district court properly classified Montes' prior conviction is a question of law over which we have unlimited review. *State v. O'Connor*, 299 Kan. 819, 822, 326 P.3d 1064 (2014).

Under the Kansas Sentencing Guidelines Act, a defendant's sentence is based on the severity of the current offense and the defendant's criminal-history score. See K.S.A. 2015 Supp. 21-6804(a), K.S.A. 2015 Supp. 21-6805(a). The severity level of the current offense is set by statute. The criminal-history score is based on the defendant's prior convictions, including those from other states. See K.S.A. 2015 Supp. 21-6809; K.S.A. 2015 Supp. 21-6811(e).

The district court follows a two-step process when categorizing a defendant's prior conviction for calculating the defendant's criminal-history score. First, the court determines whether the prior conviction should be classified as a felony or a misdemeanor. K.S.A. 2015 Supp. 21-6811(e)(2). There's no dispute about whether Montes' 1995 Florida conviction was a felony under Fla. Stat. § 810.02 (1995), so the next step is to classify the defendant's out-of-state conviction as a person or nonperson offense. To do this, the district court compares the out-of-state offense to a comparable one in effect in Kansas on the date the defendant committed the current crime of conviction. K.S.A. 2015 Supp. 21-6811(e)(3). If there's no comparable offense in Kansas, the conviction must be classified as a nonperson crime. K.S.A. 2015 Supp. 21-6811(e)(3).

When it ruled, the district court had several decisions from our court to rely on that had interpreted "comparable" Kansas offenses as those prohibiting similar conduct as the out-of-state offense—the elements of both crimes didn't have to be identical. See, e.g., *State v. Moore*, 52 Kan. App. 2d 799, 813-14, 377 P.3d 1162 (2016); *State v. Riolo*, 50 Kan. App. 2d 351, 353, 330 P.3d 1120 (2014); *State v. Barajas*, 43 Kan. App. 2d 639, 643, 230 P.3d 784, 788 (2010). But in March 2018, our Supreme Court clarified that "for an out-of-state conviction to be comparable to an offense in Kansas, the elements of the out-of-state crime must be identical to or narrower than the elements of the comparable Kansas crime." *State v. Wetrich*, 307 Kan. 552, Syl. ¶ 3, 412 P.3d 984 (2018).

***6** If we apply *Wetrich* here, Montes is correct that the district court should have scored the Florida conviction as a nonperson offense. The Florida statute was broader than the Kansas burglary statute. In Florida, a burglary meant entering or remaining in a structure with the intent to commit *any* offense in that structure. Fla. Stat. § 810.02(1) (1995). In Kansas, the definition was more limited—the intent had to be to commit a felony, a theft, or a sexually motivated crime there. K.S.A. 2014 Supp. 21-5807.

The State argues that *Wetrich* doesn't control here because of a 2017 amendment to K.S.A. 22-3504 that added the sentence, "A sentence is not an 'illegal sentence' because of a change in the law that occurs after the sentence is pronounced." K.S.A. 2017 Supp. 22-3504(3). The State contends that the Supreme Court's ruling in *Wetrich* was a change in the law after Montes' sentencing, so the new identical-to-or-narrower-than rule doesn't apply to Montes' sentence. But the *Wetrich* court didn't change the law. Instead, it simply clarified the meaning of "comparable offense" in K.S.A. 21-6811: "We can resolve the issue presented here on the basis of statutory interpretation [of K.S.A. 21-6811]." *Wetrich*, 307 Kan. at 558. The statute didn't change, and the *Wetrich* court simply interpreted the statute. See *State v. Thomas*, 53 Kan. App. 2d 15, 24, 383 P.3d 152 (2016), *rev. denied* 306 Kan. 1330 (2017); *State v. Smith*, No. 117,237, 2018 WL 2271412, at *4 (Kan. App. 2018) (unpublished opinion). We therefore apply *Wetrich* and conclude that the trial court erred when it classified the Florida burglary conviction as a person offense.

The elements of the Montes' Florida crime are broader than the elements of the Kansas crime, so Kansas' and Florida's burglary offenses aren't comparable. See *Wetrich*, 307 Kan. 552, Syl. ¶ 3 ("[T]he elements of the out-of-state crime cannot be broader than the elements of the Kansas crime.") Given *Wetrich*, Montes' criminal-history score should have been C instead of B. We will therefore vacate Montes' sentence and remand the case for resentencing.

IV. *The District Court Didn't Err by Considering Montes' 1995 Florida Convictions When Calculating His Criminal-History Score.*

As Montes' final claim, he argues that the district court couldn't consider any of his Florida convictions at all since the State didn't present evidence of it to a jury. Montes says the failure to do so deprived him of his Sixth Amendment right to a jury and his Fourteenth Amendment right to due process, as explained in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000).

Montes' presentencing-investigation report shows that he has 18 prior convictions—the first six are out-of-state convictions. Before sentencing, Montes objected to the court using all six of those convictions to figure out his criminal-history score. The court granted Montes' motion for four of the six entries and only relied on two of Montes' out-of-state convictions for criminal-history scoring: his 1995 convictions for burglary and battery on a law-enforcement officer.

Our Supreme Court rejected the same argument Montes is making here in *State v. Ivory*, 273 Kan. 44, 46, 41 P.3d 781 (2002). The *Ivory* court explained that "[t]he [Kansas Sentencing Guidelines Act] builds criminal history into the calculation of a presumptive sentence, rather than using criminal history as an enhancement." And the *Apprendi* court explicitly carved out an exception for courts to use a defendant's prior conviction to increase that defendant's penalty. 273 Kan. at 46.

*7 We are of course duty bound to follow Kansas Supreme Court precedent unless the court somehow suggests that it is moving away from its earlier holding. *State v. Meyer*, 51 Kan. App. 2d 1066, 1072, 360 P.3d 467 (2015). No such indication exists here, see *State v. Sullivan*, 307 Kan. 697, 708, 414 P.3d 737 (2018), so the district court didn't err when it considered Montes' prior convictions without requiring the State to prove those convictions beyond a reasonable doubt.

We vacate Montes' sentence and remand the case for resentencing. In all other respects, the district court's judgment is affirmed.

All Citations

Not Reported in Pac. Rptr., 2018 WL 4039484

End of Document

FILED BY CLERK
KS. DISTRICT COURT
3RD JUDICIAL DIST.
TOPEKA, KS.

2015 MAR 24 A 9:40

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION ELEVEN

STATE OF KANSAS,	)	
	)	
Plaintiff,	)	
	)	Case No. 2010-CR-2318
vs.	)	
	)	
LLOYDE S. DUBRY,	)	
	)	
Defendant.	)	

MEMORANDUM DECISION AND ORDER

The above captioned matter comes before the Court upon Defendant's "Motion To Correct Illegal Sentence," filed February 26, 2015 and the State of Kansas's Response, filed March 16, 2015. After careful consideration, the Court finds and concludes as follows:

NATURE OF THE CASE

On February 15, 2011 Defendant pled to an amended charge of Kidnapping, a level 3 person felony. On March 30, 2011 Defendant was sentenced to serve a prison term of 233 months upon a finding by this Court that Defendant's criminal history classification was "A." Defendant now challenges that two prior *in state* person felony convictions and one *out of state* person felony conviction should have been scored by this court as non-person felonies when he was sentenced on March 30, 2011 pursuant to the Kansas Supreme Court's recent decision in *State v. Murdock*, 299 Kan. 312 P.3d 846 (2014) *modified* (Sept. 19, 2014).

The decision in Murdock states that *out of state* convictions prior to the Kansas Sentencing Guidelines Act, should be scored as non-person offenses in calculation of a defendant's criminal history score. Defendant believes that if this court finds that the *Murdock* decision applies retroactively; his criminal history classification should have been scored as "E."

In this case, Defendant pled guilty to the criminal charge (set forth above) and was sentenced to a prison term on March 30, 2011. Defendant filed this motion on February 26, 2015, long after his conviction was final. "A conviction is not considered final until the judgment of conviction has been rendered, the availability of an appeal has been exhausted, and the time for any rehearing of final review has passed" *State v Osby*, 238 Kan. 280, 283, 710 P.2d 676 (1985). Further, Defendant's conviction was final long before the *Murdock* decision was issued.

The Kansas Court of Appeals in *Singleton* held that "the law is well settled that state courts are under no constitutional duty to apply their criminal decisions retroactively," *State v Singleton*, 22 Kan. App. 2d 478, 481, 104 P.3d 424 (2005). Under *Teague v Lane* 489 U.S. 288, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989) the U.S. Supreme Court held that even a new rule of criminal procedure would not be applied retroactively on collateral review given that rule neither placed certain kinds of primary, private individual conduct beyond the power of criminal law-making authority to prosecute, no(r) was it (a) watershed rule requiring observance of procedures that were implicit in the concept of ordered liberty cited in *Whisler v. State*, 272 Kan. 864, 879, 36 P.3d 290 (2001).

More recently, the Kansas Court of Appeals held *Verge v. State*, 50 Kan. App. 2d __, 335 P.3d 679 (July 18, 2014) ruled that the new constitutional rule espoused by the United State Supreme Court in *Alleyne* (holding that any fact which increases the penalty for a crime beyond the prescribed statutory minimum sentence must be submitted to a jury) does not apply retroactively to cases on collateral review and could not serve as a basis for a motion to correct illegal sentence. The court's decision turned on the Kansas Supreme Court's treatment of the *Apprendi* decision —of which *Alleyne* is commonly regarded as an extension—in *Whisler v.*

State, 272 Kan. 864, 879, 36 P.3d 290 (2001).

In *State v Frazier*, 30 Kan.App.2d 398, 42 P.3d 188, *rev. denied* 274 Kan 1115 (2002), wherein the court held that possession of ephedrine (a severity level 1 drug felony) and possession of drug paraphernalia (a level 4 severity drug felony) were identical offenses; thus the defendant could be sentenced only under the lesser penalty (see *Frazier* at 30 Kan. App. 2d 405-406). Thereafter, the appellate court found that while facts in *Wilson* were analogous to *Frazier*, Wilson's level 1 sentence should not be reduced to a level 4 sentence and reasoned that to apply *Frazier* retroactively would give Wilson a double benefit; a favorable plea agreement and then the benefit of an issue that he had failed to raise on appeal, *Wilson v. State*, 31 Kan. App. 2d 28, 728-29, 71 P.3d 1180 (2003).

Finally, the Kansas Court of Appeals recently issued an unpublished (but persuasive) decision in *State v. Lewis*, No. 110,050, 2014 WL 5619132 (Kan. App. 2014) in which the court declined to apply *Murdock* retroactively to criminal cases that were final when the Murdock decision was issued.

In light of the decisions in Singleton, *Verge, Alleyne, Wilson, and Lewis (supra)*, the Court concludes while the *Murdock* decision did create a new rule of criminal procedure, but that this rule is *not* retroactively applicable to individuals whose direct appeals have been concluded. For these reasons, the Court denies the Petitioner's "Motion to Correct Illegal Sentence" and no hearing is required for the reasons set forth above.

CONCLUSION

For the reasons stated above, Defendant's motion is DENIED. This Memorandum Decision and Order shall constitute the Court's entry of judgment when filed with the Clerk of this Court. No further hearing or journal entry is required.

IT IS SO ORDERED

Dated this 23rd day of March, 2015.

Hon. Cheryl Rios Kingfisher
District Judge

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the about and foregoing Order was, on this 23rd day of March, mailed by United States Postal Service postage prepaid thereon, hand-delivered, or placed in a mail-bin dedicated to the following:

Jeff Dazey
700 SW Jackson, Suite 1001
Topeka, KS 66603
Attorney for Defendant

Matthew Patterson
Assistant District Attorney
3rd Judicial District
200 SE 7th Street, Suite 214
Topeka, KS 66603
Attorney for the State

Kathleen McGovern
Administrative Assistant, Division 11
Shawnee County District Court