

APPENDIX

APPENDIX A

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Case 121485 CLERK OF THE APPELLATE COURTS Filed 2021 Oct 20 AM 8:59



Court: Supreme Court

Case Number: 121485

Case Title: IN THE MATTER OF
J.S.

Type: Petition for Review (re: Opinion) by Appellant
J.S.

Considered by the Court and denied.

SO ORDERED.

A handwritten signature in black ink, appearing to read "Marla J. Luckert".

/s/ Marla J. Luckert, Chief Justice

APPENDIX B

NOT DESIGNATED FOR PUBLICATION

No. 121,485

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of J.S.

MEMORANDUM OPINION

Appeal from Geary District Court; CHARLES A. ZIMMERMAN, magistrate judge. Opinion filed June 12, 2020. Appeal dismissed.

Angela M. Davidson, of Wyatt & Davidson, LLC, of Salina, for appellant.

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

Before POWELL, P.J., GARDNER, J., and WALKER, S.J.

PER CURIAM: J.S. appeals from his 1991 admission to the complaint as charged to felony theft of a motor vehicle, resulting in his adjudication as a juvenile offender, and from the juvenile sentence imposed upon him. Twenty-six years after his adjudication and sentence, J.S. filed an untimely notice of appeal from his conviction and sentence, claiming defense counsel failed to perfect his appeal and that the district court failed to inform him of his right to appeal. The district court denied this motion. After review, we dismiss this appeal for lack of jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

On March 22, 1991, the State charged J.S., a juvenile, in a single count complaint with theft of an automobile valued at more than \$500. On June 12, 1991, pursuant to a negotiated plea agreement, J.S. entered an admission to the charge, and the Geary County

District Court adjudicated him to be a juvenile offender. The district court placed him on one year of probation. The journal entry stated J.S. "knowingly, voluntarily and intelligently waived all applicable Fifth and Sixth Amendment rights under federal and state constitutions" and that the district court accepted J.S.'s plea. On September 16, 1992, he was discharged from probation.

On November 8, 2017, J.S. filed a pro se notice of appeal out of time. This filing stated that his attorney failed to perfect or complete an appeal of his sentence and conviction. He argued his attorney had an obligation to file his appeal and that his attorney and the district court failed to inform him of his right to appeal his sentence and conviction.

On May 29, 2018, J.S. filed an "Affidavit in Support of Notice of Appeal Out of Time," in which he stated he did not "recall" the district court or his attorney advising him of his right to appeal his sentence. J.S. also stated he learned from another inmate that the district court failed to advise him of his rights under K.S.A. 38-1633 (now K.S.A. 2019 Supp. 38-2344) and that, as such, his rights to a jury trial were violated.

On March 4, 2019, J.S. appeared in the district court for a hearing on his untimely notice of appeal, and he advised the district court judge that to "the best of [his] recollection" he was not advised of his rights to a jury trial or his rights to appeal. The district court ultimately ruled that J.S. submitted his notice of appeal and corresponding motions out of time and dismissed the matter.

J.S. now timely appeals the dismissal of his untimely notice of appeal.

ANALYSIS

J.S. makes two arguments on appeal. First, he argues he should be allowed to appeal out of time because the district court failed to advise him of his right to appeal. Second, J.S. argues the district court failed to notify him of his rights under K.S.A. 38-1633 (Ensley 1986) and, therefore, his adjudication cannot stand. We can only reach J.S.'s second argument if we have jurisdiction over his appeal.

An appellate court exercises "unlimited review over the issue of appellate jurisdiction." *State v. Smith*, 304 Kan. 916, 919, 377 P.3d 414 (2016). To the extent resolution of this case requires interpretation of a statute, such an issue is reviewed *de novo*. *State v. Eddy*, 299 Kan. 29, 32, 321 P.3d 12 (2014).

In 1991, J.S. had 10 days to file his notice of appeal. K.S.A. 38-1681(b) (Ensley 1986). As J.S. concedes: "Kansas appellate courts have jurisdiction only as provided by law, see K.S.A. 22-3608, and an untimely notice of appeal usually leads to dismissal of an action." *State v. Patton*, 287 Kan. 200, 206, 195 P.3d 753 (2008). However, the Kansas Supreme Court has carved out limited exceptions to this general rule in three situations when the defendant was: (1) not informed of his or her rights to appeal, (2) not provided an attorney to exercise those rights, or (3) provided an attorney for that purpose who then failed to perfect and complete an appeal. *State v. Ortiz*, 230 Kan. 733, 735-36, 640 P.2d 1255 (1982).

Another panel of this court recently addressed the exact issue that J.S. now raises in *In re I.A.*, 57 Kan. App. 2d 145, 450 P.3d 347 (2019), *rev. granted* 311 Kan. ___ (February 25, 2020). In that case, the district court denied the respondent's untimely notice of appeal in his juvenile offender case, and I.A. argued before a panel of our court that such an action was in error because at his initial adjudication the district court never informed him of his right to appeal. 57 Kan. App. 2d at 146-47. The *In re I.A.* panel

dismissed the appeal for lack of jurisdiction, holding that the first *Ortiz* exception only applies when a statute affirmatively requires the district court inform a defendant of his or her right to appeal and that the Kansas Juvenile Justice Code lacks such a provision. 57 Kan. App. 2d at 152-53. Although not binding, we find the reasoning in that case sound, and elect to follow it here.

In Kansas, the right to appeal is purely statutory and is not a right contained in the United States or Kansas Constitutions. *State v. Ehrlich*, 286 Kan. 923, Syl. ¶ 2, 189 P.3d 491 (2008). In *Patton*, 287 Kan. at 219-20, the Kansas Supreme Court made clear that the first *Ortiz* exception applies where a defendant's failure to timely appeal was caused by the deprivation of a right to which that defendant was entitled by law. See *In re I.A.*, 57 Kan. App. 2d at 150 (discussing *Patton*).

On appeal, J.S. claims he was deprived of his right to be advised by the district court that he had a right to appeal. However, unlike the statutes in the Kansas Code of Criminal Procedure, which are applicable in adult proceedings, there is no statutory requirement in the revised Kansas Juvenile Justice Code that a court must advise a juvenile that he or she had the right to appeal from an order of adjudication or sentencing. Likewise, there is nothing directing the court to inform a juvenile of his or her right to the assistance of counsel to pursue an appeal. See K.S.A. 2019 Supp. 38-2344(b)(1)-(6) (before entering plea district court must inform juvenile of nature of charges, presumption of innocence, right to jury trial without unnecessary delay, right to confront and cross-examine witnesses, right to subpoena witnesses, right not to testify, and sentencing alternatives).

Additionally, we note that the procedure for an appeal from an order of adjudication or sentencing in juvenile offender proceedings is governed by the Kansas Code of Civil Procedure. K.S.A. 2019 Supp. 38-2380(b); see K.S.A. 2019 Supp. 38-2382(c). The only exception to the 30-day limitation to bring an appeal under the Code of

Civil Procedure is "upon a showing of excusable neglect" by the party. K.S.A. 2019 Supp. 60-2103(a).

The panel in *In re I.A.*, 57 Kan. App. 2d at 151-53, relied on two Kansas Supreme Court cases to support its conclusion that exceptions to the requirement of a timely filed notice of appeal apply only if a defendant's failure to timely appeal was caused by the deprivation of a right which is provided by law.

First, in *Guillory v. State*, 285 Kan. 223, 170 P.3d 403 (2007), the defendant pled nolo contendere to first-degree premeditated murder. Guillory filed a pro se motion for relief under K.S.A. 60-1507 after the time for a direct appeal had run. The district court summarily denied the relief Guillory requested in his motion. He later filed an untimely pro se notice of appeal from the summary denial of his K.S.A. 60-1507 motion.

On appeal, a panel of our court issued a show cause order asking the parties to explain why the appeal should not be dismissed for lack of jurisdiction given that the appeal was not filed within the time required by K.S.A. 60-2103(a). Guillory responded that his untimely notice of appeal was permitted under the first *Ortiz* exception because the district court did not inform him of his right to appeal the decision denying his 60-1507 motion. The Court of Appeals panel held that none of the *Ortiz* exceptions applied to appeals in 60-1507 cases and dismissed the appeal for lack of jurisdiction. *Guillory*, 285 Kan. at 224. The Kansas Supreme Court granted Guillory's petition for review and, like the Court of Appeals, determined it was without jurisdiction to consider the appeal. See *In re I.A.*, 57 Kan. App. 2d at 151.

"A fatal flaw in Guillory's argument is that the first *Ortiz* exception, excusing an untimely notice of appeal where the defendant was not informed of the right to appeal, was based on the fact that a criminal defendant has a statutory right to be advised of his or her right to a direct appeal. K.S.A. 22-3424(f) requires the sentencing court to inform

The *In re I.A.* panel expounded on the Kansas Supreme Court's logic in *Hempfill*, and we find the following logic especially compelling:

"Unlike the Kansas Code of Criminal Procedure, nothing within the revised Kansas Juvenile Justice Code requires the court presiding over a juvenile matter to affirmatively advise the juvenile of the statutory right to appeal an adjudication or sentence. The juvenile justice code outlines the juvenile process in detail and contains several cross-references to other statutory provisions, including some in the code of criminal procedure. See K.S.A. 2018 Supp. 38-2330(f) (providing that, in certain circumstances, code of criminal procedure relating to appearance bonds and review of conditions and release shall be applicable to appearance bonds in juvenile proceedings); K.S.A. 2018 Supp. 38-2303(c) (setting time limits to commence juvenile proceedings for any act committed by juvenile which, if committed by adult, would constitute sexually violent crime as defined in K.S.A. 2018 Supp. 22-3717); K.S.A. 2018 Supp. 38-2389(c)(5) (providing that juvenile is not required to register as offender under Kansas Offender Registration Act, K.S.A. 22-4901, as result of adjudication under this section); K.S.A. 2018 Supp. 38-2356(c) (upon finding by court that juvenile committed offense charged but is not responsible because of mental disease or defect, juvenile shall be committed to state hospital and subject to annual review and potential discharge as provided by K.S.A. 2018 Supp. 22-3428a). Had the Legislature intended to incorporate the provisions of K.S.A. 2018 Supp. 22-3424(f) requiring the court to advise a criminal defendant of his or her right to appeal, it would have specifically identified the statute for that purpose. See *State v. Phinney*, 280 Kan. 394, 402, 122 P.3d 356 (2005) (requirement that defendant be fully advised of his or her right to appeal under K.S.A. 22-3424[f] is not limited to defendants who are convicted after trial; same rule applies to defendants who plead guilty and forego trial)." *In re I.A.*, 57 Kan. App. 2d at 152-53.

We find no authority to the contrary. See *In re Schaffer*, No. 120,630, 2019 WL 4123491, at *5 (Kan. App. 2019) (unpublished opinion) (applying *In re I.A.* and finding the first *Ortiz* exception does not apply in juvenile offender appeals). We similarly hold that the district court was not required by law to advise J.S. of his statutory right to appeal, and the first *Ortiz* exception, which J.S. argues was applicable to him before this

court, does not apply in a juvenile adjudication. Consequently, we do not have the necessary jurisdiction to consider the underlying merits of J.S.'s appeal. We dismiss this case for lack of jurisdiction.

Appeal dismissed.

COPY**IN THE DISTRICT COURT OF GEARY COUNTY, KANSAS****IN THE MATTER OF:**

Jason W. Schaffer, Respondent
 DOB: 1976

Case No. 91 JV 104

JOURNAL ENTRY OF MOTIONS HEARING

NOW, on this 4th day of March, 2019, the above captioned matter comes before the Honorable Charles A. Zimmerman, Judge of the District Court for hearing on the Motion for Appointment of Appellant Counsel, Motion to Quash State's Respondent to Notice of Appeal Out of Time, Motion for Judgment on the Pleadings and the Motion to Order Transcripts all filed by the Respondent, pro se. The State of Kansas appears by Lloyd R. Graham, Assistant Geary County Attorney. The respondent appears by phone, pro se.

WHEREAS, the Court entertains statements of the parties.

THEREUPON, the Court denies all of the motions filed by the respondent in this matter due to the fact that they were untimely submitted and filed. The Court advises the respondent that this decision is appealable to the Kansas Court of Appeals and any appeal must be filed within 14 days of the filing of the journal entry for this hearing.

IT IS SO ORDERED.

**THE HONORABLE CHARLES A. ZIMMERMAN
 JUDGE OF THE DISTRICT COURT**

APPROVED:

/s/ Lloyd R. Graham, #10949 LRG
 Lloyd R. Graham, #10949
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Jason W. Schaffer, #59016
 Ellsworth Correctional Facility
 P.O. Box 107
 Ellsworth, KS 67439
 Respondent

APPENDIX D

IN THE DISTRICT COURT OF GEARY COUNTY, KANSAS

In the Matter of:
JASON W. SCHAFFER, respondent.
04-30-76

Case No. 91-JV-104

JOURNAL ENTRY OF ADJUDICATION
(Pursuant to K.S.A. 38-1655)

NOW, on this 12th day of June, 1991, the above-captioned matter comes before the Honorable William D. Clement, District Judge. The State of Kansas appears by Thomas P. Alongi, Assistant Geary County Attorney. The respondent appears in person and by Kelly S. Hodge.

WHEREAS the parties have reached a negotiated settlement, the Court inquires as to specific facts. The State informs the Court that, in return for the minor's admission to the complaint as charged, it will recommend a supervised probationary period notwithstanding the juvenile's recent release from the Atchison Youth Center. Satisfied that the respondent has knowingly, voluntarily and intelligently waived all applicable Fifth and Sixth Amendment rights under federal and state constitutions, and that a factual basis exists, the Court accepts the minor's admission.

WHEREUPON it adjudicates him as a Juvenile Offender for committing an act which, if perpetrated by an adult, would constitute a violation of:

K.S.A. 21-3701(a):
THEFT, a class E felony.

Thereafter, finding no reason to refrain from proceeding to immediate disposition, the Court entertains the recommendations

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of counsel. Hearing no objection, it remands the respondent to the custody of the secretary, and places him on a one-year, supervised probation (subject to transfer to Emporia, Kansas) during which he shall obey foster home rules, attend school when required, refrain from violating the law, and pay any restitution along with Forty-Five Dollars (\$45.00) in costs and attorney fees.

IT IS SO ORDERED.

Honorable William D. Clement
District Judge

APPROVED BY:

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Thomas P. Alongi #14150
Assistant Geary County Attorney
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FILED
IN DISTRICT COURT
SHAWNEE COUNTY
KANSAS
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IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

STATE OF KANSAS

TOPEKA KS

PLAINTIFF

v.

JASON WADE SCHAEFFER

93 CR 527

DEFENDANT

AFFIDAVIT OF PROSECUTION

I, Jod W. McIneece, First Assistant District Attorney, being first duly sworn upon my oath, depose and state:

I have received and reviewed written and oral reports prepared by law enforcement officers who, in the performance of their duties, inform me and lead me to believe that the occurrences and events which are recounted here occurred as described in Shawnee County, Kansas. The officers named here are known to me by experience and reputation to be truthful, reliable, and faithful reporters of facts.

The Officers who have provided me with the information which provides the factual framework for this affidavit are: Jerry Young, Tom Young, Dan Hay, Steve Harsha, Randy Mills, and Frank Davis, all Topeka Police Detectives. Additional information has been gathered from the Clerk of the Court in the Counties of Geary, Lyon, and Ford.

Jason Wade Schaeffer is 16 years of age having been born on April 30, 1976. On at least two separate and prior occasions, Jason Schaeffer has been adjudicated of having committed acts which would have been felonies had he been an adult at the time. Those prior adjudications as a juvenile offender arose as follows:

Lyon County, Kansas, case No. 92 JV 4, adjudication for Theft, class E Felony, January 13, 1992.

Geary County, Kansas, case No. 91 JV 104, adjudication for Theft, class E Felony, June 12, 1991.

Ford County, Kansas, case No. 89 JV 51, adjudication for Theft, class E Felony, August 11, 1989.

Under K.S.A. 38-1602 (B)(3), a person who has attained the age of 16 or 17 years and who has been previously adjudicated on two separate prior acts which would have been adult felonies no longer is subject to the jurisdiction of the juvenile code. Such persons are treated as adults by virtue of the prior adjudications without any further proceedings by way of waiver or otherwise.