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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TONY L. FOSTER

Petitioner

VS.

STATE OF KANSAS

Respondent.

On Petition for a Writ of Certiorari
to the Kansas Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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ORIGINAL

QUESTIONS PRESENTED FOR REVIEW

Wheather a state high court can deny a review to a constitutional challenge of its own statute when procedural due process, Kansas Supreme Court precedent, Federal and U.S. Supreme Court precedent demands its hearing.

LIST OF PARTIES

X All parties appear in the caption of the case on the cover page.

RELATED CASES

- State of Kansas v. Tony L. Foster, Shawnee County, Kansas Case Number 18 CR1796
- State of Kansas v. Tony L. Foster Appellate Court Case Number 19-122048-A

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Tony Lee Foster (herein after Foster) respectfully prays that a Writ of Certiorari be issued to review the judgement of the Kansas Court of Appeals.

OPINION BELOW

The opinion of the Kansas Court of Appeals is published at *State v. Foster*, 60 Kan. App. 2d 243, 493 P.3d 283 (2021) A copy of the opinion is attached as Appendix A.

The petition for review was denied by the Kansas Supreme Court on September 27th, 2021. A copy of the denial is attached as Appendix B.

JURISDICTION

The Kansas Supreme Courts decision to deny Foster's review was entered on September 27th, 2021. This petition is timely filed under U.S. Supreme Court Rule 13.1. This courts certiorari jurisdiction is invoked under 28 USC § 1257 (a)

CONSTITUTIONAL PROVISIONS INVOLVED

This Court has recognized that the Fourteenth Amendment Section I, provides in part:...
"nor shall any State deprive any person of life, liberty, or property, without due process of
law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Federal Courts have held that on appeal a litigant can overcome various preservation rules by, in relevant part, when the "interests of justice" require review. *Wirsching v. Colorado*, 360 F.3d 1191, 1197 (10th Cir. 2004); *Talley v. Hesse*, 91 F.3d 1411, 1413 (10th Cir. 1996); see also *Thomas v. Arn*, 474 U.S. 140, 155, 88 L. Ed. 2d 435, 106 S. Ct. 466 (1985) ("because the rule is a nonjurisdictional waiver provision, the Court of Appeals may excuse the default in the interests of justice").

Kansas Supreme Court Rule 6.02(a)(5) (2021 Kan. S. Ct. R. 35) states:

The arguments and authorities relied on, separated by issue if there is more than one. Each issue must begin with citation to the appropriate standard of appellate review and a pinpoint reference to the location in the record on appeal where the issue was raised and ruled on. If the issue was not raised below, there must be an explanation why the issue is properly before the court.

Generally, Kansas courts do not consider constitutional issues raised for the first time on appeal. There are exceptions to this rule, which include in relevant part (1) the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case, (2) consideration of the theory is necessary to serve **the ends of justice or to prevent denial of fundamental rights.** *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019). (emphasis added)

Since Foster was making a constitutional challenge on appeal, the issue should have been taken up by the Kansas Court of Appeals (KCOA) and heard on appeal. Thus, this is a due process and equal protection claim.

FACTS RELEVANT TO THE CASE

On July 9, 2018, Shannon Allison was living in a garage at her mother's house in north Topeka. The house was unoccupied at the time. One of Allison's friends, David

Payne, stopped by several times that day, looking for her ex-boyfriend, Joshua Anno. A few days earlier, Anno and Payne had discussed meeting up at Allison's so Anno [**3] could purchase a moped motor from Payne. During one of Payne's visits that day, he spent several hours removing a window air conditioner unit from the house so Allison could use it in the garage. Payne felt the garage where Allison was staying was too hot. After he removed the unit, Payne placed it on a chair in the garage.

Around midafternoon, Anno came by the house to mow the grass and meet up with Payne. When Anno arrived, no one was home. Allison returned just as he finished mowing. They both went inside the garage, at which point Anno fell asleep in a chair by the air conditioner. When Anno awoke, Foster was there, talking with Allison. Foster and Allison were in a dating relationship at the time, and they share children.

Soon after, Anno called 911 to report a shooting at the property. He denied knowing who the shooter was. Payne was the victim, and he died later that evening.

The police spoke to both Allison and Anno at the scene. Foster was not present. They told police they were in Allison's garage when they heard a pop outside. When they came out, they saw Payne on the ground. Both Allison and Anno said they did not see who shot Payne.

The police took Allison and Anno to the law enforcement center for further questioning. During transport, Anno told police he thought Foster may have shot Payne. When interviewed at the law enforcement center, Anno said he, Allison, and Foster were sitting in the garage when Payne approached outside. Anno called out to ask who it was, and Payne identified himself as "David." Foster asked if he was the same person who took an air conditioner unit out of the house. Anno then described Foster pulling out a revolver and firing one shot at Payne. Anno clarified he did not see the shooting because he was

looking for his phone, but he saw Foster with a gun and heard him fire it. Anno ran outside and found Payne nonresponsive. Anno explained that he did not identify Foster as the shooter to the 911 operator because Foster was standing next to him when he called.

In her interview at the law enforcement center, Allison said she and Anno were in her garage when they heard a bang outside. She first said she did not know who shot Payne. After the detective said he knew Foster was in the garage, Allison admitted Foster was there and had arrived shortly before the shooting. At some point, Detective Jesse Sherer, who also interviewed Anno, entered Allison's interview. Detective Sherer asked Allison why Foster shot Payne. Allison said it was an accident, claiming, "He did not mean to." She said before the shooting, Foster asked whether Payne was the person who had caused problems over the air conditioner. Allison also admitted she grabbed the gun from Foster's hands before setting it on a bed.

Later that day, the police found Foster and arrested him. Detective Sherer interviewed Foster. At first, Foster denied knowing Payne or being present. When Detective Sherer told Foster witnesses placed him at the scene, Foster admitted he was with Allison in her garage when they heard a gunshot outside. He denied shooting Payne or possessing a gun.

The State charged Foster with intentional murder in the second degree or, in the alternative, reckless murder in the second degree. The State also charged Foster with one count of criminal possession of a firearm.

Both Allison and Anno testified at trial that Foster shot Payne. Jeffrey Parsons, an inmate at the Shawnee County Jail, also testified for the State. Parsons testified that, the day after the shooting, Foster approached him and told Parsons that he "caught a bad motherfucker." Parsons explained that in jail this phrase means he "caught a bad case."

Parsons testified Foster also told him that he shot someone and threw the gun by the house.

The jury found Foster guilty of reckless murder in the second degree and criminal possession of a weapon. (Appendix A Pg 2-5)

FACTS RELEVANT TO THE APPEAL

In its opinion the KCOA ruled Fosters constitutional challenge was waived by only offering only conclusory analysis and provides no legal support for the assertion. (Appendix A Pg 14) However, the Chief Judge of the KCOA, analyzed the issues differently:

I believe Foster has properly preserved his claim by invoking two exceptions to our general rule that merit consideration. Foster has done everything we have asked of an appellant who raises an issue for the first time on appeal. He argues that the fundamental right at issue is the right to bear arms and correctly states that the issue only involves a question of law that would be dispositive of his criminal possession of a weapon charge—thus relying on exceptions 1 and 2 from Johnson. And he has done so in more than a conclusory manner. Foster makes a cognizant argument for the statute's unconstitutionality over the course of several pages of his brief, citing supporting authority. The State responded in kind. The majority fails to note what additional information it believes is necessary to decide Foster's claim. I am at a loss. It is not a difficult constitutional issue to grasp, and it is one that has been raised numerous times in both federal and state courts.

Moreover, I agree that Foster's newly asserted claim meets the two recognized exceptions he relies upon—it involves only a question of law—one that would be dispositive of his conviction for criminal possession of a weapon—and it involves a fundamental right—the right to bear arms. And because the claim has been asserted at least two times already before this court, we should decide it rather than allowing the issue to continue to fester in our district courts for no good reason except that we can. And again, another panel of this court took a similar approach as I do here, by electing to consider a first-time challenge to constitutionality of K.S.A. 2020 Supp. 21-6301(a)(13). *McKinney*, 59 Kan. App. 2d at 355. So, unlike the majority, I will do what I think it should and examine the merits of Foster's claim.

Id at 18-19

REASONS FOR GRANTING CERTIORARI

I. The Kansas Court of Appeals Denied Fosters Procedural Due Process Rights when they denied hearing his constitutional claim

The Kansas Court of Appeals denied Foster his procedural due process rights, when he challenged the constitutionality of his criminal possession of a firearm charge under K.S.A. 2020 Supp. 21-6304 (a)(2). This court has held that procedural due process is "due process unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 81 S. Ct. 1743, 6 L.Ed.2d 1230 (1961). Furthermore, "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972)

In this particular decision, Foster according to the KCOA Chief Justice, met all the required preservation issues to hear his constitutional challenge. (Appendix A Pg 18-19)

Both state and federal courts have created procedural rules for defendants to hear their constitutional challenges to both state and federal statutes. Although "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) To succeed in a typical facial attack, "the challenger must establish that no set of circumstances exists under which the statute would be valid." *Id.*

The KCOA should have heard Fosters arguments on his claim of a unconstitutional statute. This would be a case where procedural due process protections should apply.

CONCLUSION

For the foregoing reasons, Petitioner, Tony L. Foster, respectfully prays that a writ of certiorari be issued to review the judgement of the Kansas Court of Appeals.

Respectfully Submitted,

Tony Foster

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