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CLERK OF THE MONTGOMERY-INDEPENDENCE DISTRICT COURT
CASE NUMBER: 2017-CR-000325-I-FE

IN THE DISTRICT COURT OF MONTGOMERY COUNTY, KANSAS

STATE OF KANSAS	)	
	)	
Plaintiff,	)	
	)	**Case No. 2017- CR-325(I)**
vs.	)	
	)	
BO DANA RUPERT	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION TO CORRECT AN ILLEGAL SENTENCE AND ACCOMPANYING MEMORANDUM OF LAW.

COMES NOW Defendant Bo Dana Rupert, by and through his counsel of record, and submits this motion and memorandum of law to correct an illegal sentence entered on October 26, 2017 banishing Mr. Rupert from the State of Kansas.

I. STATEMENT OF THE FACTS

1. Mr. Bo Dana Rupert is permanently banned from returning to the State of Kansas as a part of his criminal sentence— a form of illegal punishment that harkens back to the draconian penalties of Ancient Greece or the vigilante justice of the Old American West. In Ancient Greece it was called exile, a harsh form of ritual cleansing assigned to people convicted of homicide or embarrassing military defeat.[1] In the American West, it was called "sundown probation," the practice of dropping convicted defendants at the state line under threat to their safety should they ever return.[2] In 2019, Mr. Rupert is now subject to this very same punishment.

[1] *See Exile*, OXFORD CLASSICAL DICTIONARY (4th ed. 2012) (describing exile, or φυγή, and noting "[i]n Greece it was from earliest times a standard consequence of homicide, and was as much a religious way of getting rid of a source of pollution as a punishment […in] Classical Greece exile was a punishment for various offenses, such as professional failure by a general or ambassador").

[2] TEXAS ADULT PROBATION STAFF ADVISORY REPORT (1986), at 65, *available at* https://www.sunset.texas.gov/public/uploads/files/reports/Adult%20Probation%20Commission%20%28TDCJ%29%20Staff%20Report%201986%2070th%20Leg_0.pdf (describing sundown probation, apparently a common practice prior to 1935, where "offenders were often released under the condition that they leave the state, never to return"); *see*

2. Mr. Rupert misses his home, has family members in Kansas whom he wants to see, and wishes to return to the State without the fear of violating his criminal sentence or otherwise risking exposure to additional charges for violation of his plea agreement with the State. *See* Plea Agreement, Ex. A, at 2 ("The defendant agrees to […] not return to Kansas").

3. On August 17, 2017, Mr. Rupert pled guilty to two counts of criminal threat under K.S.A. § 21-5415(a)(1) and three counts of filing a false report under K.S.A. § 21-5904(a)(3). Shortly before Mr. Rupert's sentencing for these offenses, he pled guilty to an additional, third count of criminal threat.

4. On October 26, 2017, the Court issued Mr. Rupert's sentence for each of these convictions. Because Mr. Rupert's sentencing involved multiple convictions, the Court selected one of Mr. Rupert's criminal threat convictions to serve as the touchstone for calculating his base sentence.[3] Criminal threat is a level 9 person felony and the most serious offense of which Mr. Rupert was convicted.

5. At the time of sentencing, Mr. Rupert's prior criminal history score was determined to be an "F." The presumptive sentence for Mr. Rupert's base offense was therefore correctly identified as 12 months of probation under the 2017 Kansas Sentencing Ranges Grid.[4] The Court did not order a departure from this presumptive sentence. The sentences for all non-base offenses were also properly calculated without regard to criminal history score, and the Court assigned

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also SOUTH CAROLE PAROLE & COMMUNITY CORRECTIONS BOARD ANNUAL REPORT (1981), at 24, *available at* https://www.ncjrs.gov/pdffiles1/Digitization/81871NCJRS.pdf (explaining the origin of the appellation "sundown probation," because it was "a procedure whereby a criminal sentence would be suspended if the offender left the state by sundown").

[3] "The sentencing judge shall establish a base sentence for the primary crime. The primary crime is the crime with the highest crime severity ranking." K.S.A. § 21-6819(b)(2).

[4] *See 2017 Sentencing Ranges,* KANSAS SENTENCING COMMISSION (2017), *available at* https://sentencing.ks.gov/docs/default-source/2017-forms/2017-nondrug-and-drug-grid-quick-reference-guide.pdf?sfvrsn=f7cffd3f_0.

the presumptive probation sentence for each.[5] Mr. Rupert was therefore sentenced to one 12-month period of probation.[6]

6. During Mr. Rupert's guilty plea colloquy on August 17, 2017, however, the Court also accepted the terms of a plea agreement Mr. Rupert had entered into with Montgomery County Attorney Larry Markle. *See* Plea Colloquy, Ex. B, at 7-8 ("Mr. Markle and Mr. Lampson, is there anything with regard to the plea agreement that's not set out in this joint sentence recommendation that […] I need to be aware of?") .

7. In negotiating Mr. Rupert's plea agreement, his attorney Mr. Heath Lampson made clear that the County Attorney was bent on having Mr. Rupert leave town for good. In fact, the County Attorney's plea agreement included a requirement that Mr. Rupert: (1) leave the State of Kansas; and (2) never return to Kansas upon penalty of further prosecution for additional offenses stemming from the same incidents that gave rise to Mr. Rupert's instant convictions. Ex. A at 2 ("The defendant agrees to transfer his corrections to another State and not return to Kansas. If the defendant does return to Kansas then […] the County Attorney may consider filing all other charges for additional offenses not filed now"). Mr. Rupert felt he had no choice but to accept this agreement.

8. At sentencing on October 26, 2017, Mr. Lampson and the County Attorney asked the Court to incorporate the terms of Mr. Rupert's plea agreement into his sentence. *See* Sentencing Minutes, Ex. C, at 7 ("No departure, Your Honor. And we have a joint sentence recommendation […] we would ask that the Court follow the plea agreement").

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[5] "Nonbase sentences shall not have criminal history scores applied […]." K.S.A. § 21-6819(b)(5).

[6] *See* KANSAS SENTENCING GUIDELINES REFERENCE MANUAL 2018, at 59, *available at* https://www.sentencing.ks.gov/docs/default-source/2018-drm/2018-drm-final-text.pdf?sfvrsn=5f0fd3f_0 ("In cases of multiple nonprison sentences, the nonprison (probation) terms shall not be aggregated or served consecutively") (emphasis in original).

9. On the same day Mr. Rupert was sentenced, Officer Mike Talbot of Montgomery County's Community Corrections Department called Mr. Rupert at his place of employment to set up his first probation check-in. Mr. Rupert visited with Officer Talbot the next day. He told Officer Talbot that he would not be able to attend additional probation meetings because the County Attorney had told him to leave Kansas immediately. Officer Talbot rejoined that the County Attorney could not require Mr. Rupert to leave the State, and that any interstate transfer would require formal approval per the Interstate Commission for Adult Offender Supervision.

10. After receiving conflicting messages from the County Attorney and his probation officer, Mr. Rupert called his attorney to ask what he should do. Mr. Lampson unequivocally stated that Mr. Rupert needed to get across state lines that day pursuant to the terms of his sentence and his agreement with the State of Kansas. When Mr. Rupert expressed concern about potentially missing his probation check-ins, Mr. Lampson told him not to worry about what Officer Talbot had to say. Instead, he said that any probation violations would be cleaned up by the County Attorney as long as Mr. Rupert stayed away from Kansas.

11. Mr. Lampson's final admonition: "Don't still be here tomorrow when the sun comes up." Failing to do so, he warned, would violate Mr. Rupert's plea agreement and expose him to a harsher sentence for breach of his agreement. This sentencing arrangement essentially amounted to a sundown probation, notwithstanding that this type of punishment had been all but eradicated by a compact between the States as early as 1935. *See* TEXAS ADULT PROBATION STAFF ADVISORY REPORT (1986), *supra* note 1, at 65.

12. Mr. Rupert took his attorney's advice seriously. The day after his sentencing, on October 27, 2017, he relied on the kindness of a local pastor to drive him across the border to Oklahoma. He has never returned to Kansas.

13. On November 14, 2017—just two weeks after Mr. Rupert's sentencing—Montgomery County issued a warrant stating that he had violated the terms of his probation because he did not attend his first probation meetings.[7] Thus began a vicious cycle: Mr. Rupert violated his probation by not attending his probation meetings, but he could not return to the State to attend those meetings without violating the portion of his sentence ordering him never to return. This outstanding warrant now effectively ensures that Mr. Rupert would risk incarceration if he ever did return to Kansas.

14. Mr. Rupert's 12-month period of probation should have concluded on October 26, 2018. Meanwhile— for almost two full years— Mr. Rupert has been unable to return home. He fears that because of his sentence he never will be able to do so.

II. ARGUMENTS AND AUTHORITIES

A. Jurisdiction and Standing.

Under K.S.A. § 22-3504, the district court may correct an illegal sentence at any time. An illegal sentence includes any sentence that "does not conform to the applicable statutory provision, either in character or punishment." *Id.* § 22-3504(3). A criminal defendant has standing to challenge an illegal sentence even where the defendant agreed to the illegal sentence as part of a plea agreement. *State v. Van Lehman*, 308 Kan. 1089, 1093, 427 P.3d 840 (Kan. 2018) ("An illegal sentence may be corrected regardless of whether one or more parties may have had a hand in arriving at the illegality […] Further, contractual agreements that conflict with statutory provisions are considered void"); *State v. Lankford*, Case No. 113,817, 2016 Kan. App. Unpub. LEXIS 724, at *12-*13 (Kan. App. Sept. 2, 2016) ("our Supreme

[7] Montgomery County Warrant # 17CR325IC18CR206I; Charge: Probation Violation.

Court has said that appellate courts have jurisdiction to correct an illegal sentence even if the defendant's sentence was the result of a plea agreement") (*citing State v. Quested*, 302 Kan. 262, Syl. ¶ 1, 352 P.3d 553 (Kan. 2015)); *State v. Rhoten*, Case No. 2016 Kan. App. Unpub. LEXIS 603, at *10-11 (Kan. App. July 22, 2016) (as these are unpublished cases, a copy of each case is attached to this brief in compliance with Kansas Supreme Court Rule 7.04).

B. Banishment from the State Is Not Authorized As A Form of Punishment Under Kansas Law and Therefore Mr. Rupert's Sentence was Illegal.

The Kansas Legislature has clearly defined the only punishments that district courts are authorized to issue against a criminal defendant. *See* K.S.A. § 21-6604(a) (listing the only fourteen "authorized dispositions" that district courts "may adjudge" whenever a person has been convicted of a crime); *id.* §§ 21-6604(b)-(d) (containing a limited list of alternative dispositions available to the sentencing court). Barring a defendant from living or being present in the State of Kansas is not one of the punishments authorized by the sentencing statute. As such, Mr. Rupert being ordered to leave Kansas and never return—even upon his own agreement— constituted an illegal sentence in violation of state law. *See State v. Hirst*, Case No. No. 80,041, 2000 Kan. App. Unpub. LEXIS 205, at *3 (Kan. App. Jan. 21, 2000) ("The court's original sentence was not authorized by statute. A sentence which does not conform to statutory provisions is an illegal sentence") (*citing State v. Reedy*, 25 Kan. App. 2d 536, 537-38, 967 P.2d 342 (Kan. App. 1998)) (as this is an unpublished case, a copy is attached to this brief in compliance with Kansas Supreme Court Rule 7.04).

The illegal form of punishment to which Mr. Rupert is subject belongs to the annals of history. Being directed to leave a State is an ancient form of punishment commonly known as banishment. *See United States v. Ju Toy*, 198 U.S. 253, 269-70 (1905) ("In Black's Law

Dictionary banishment is defined as a punishment inflicted upon criminals, by compelling them to quit a city, place, or country, for a specific period of time, or for life") (Brewer, J., dissenting) (internal quotations and citations omitted); *see also Rutherford v. Blankenship*, 468 F. Supp. 1357, 1360 (W.D. Va. 1979) ("Banishment as a punishment has existed throughout the world since ancient times"). This type of punishment is now decidedly a relic of the past. *See People v. Green*, 114 Misc. 2d 339, 342 (N.Y. Sup. Ct. 1982) ("whatever the previous historical validity, banishment from one State to another […] has consistently been condemned in this century as illegal"); Michael F. Armstrong, *Banishment: Cruel and Unusual Punishment*, 111 U. PA. L. R. 758, 761 (1963) ("Lower courts, virtually without exception, have been denied the right to impose banishment in connection with a criminal sentence").[8] Indeed, Kansas appellate courts have never once considered banishment to be a recognized form of punishment under the Kansas sentencing statute. *See State v. Horselooking*, 54 Kan. App. 2d 343, 362 (Kan. App. 2017) (Atcheson, J., dissenting) (interpreting a tribal criminal code and noting that "[b]anishment has no direct analog in the Kansas sentencing scheme").

For almost a century, meanwhile, other states that have considered the question have unambiguously found that banishing a criminal defendant from an entire state is a form of illegal sentence that violates state public policy—particularly in the absence of direct statutory authorization for this outdated form of punishment:

> To permit one State to dump its convict criminals into another would entitle the State believing itself injured thereby to exercise its police and military power in the interest of its own peace, safety, and welfare, to repel such an invasion. It would tend to incite dissension, provoke retaliation, and disturb that fundamental

[8] Judicial declarations of invalidity aside, the governments of all 50 states actively sought to eliminate banishment as a form of punishment with the creation of the Interstate Probation and Parole Compact of 1935. *See* TEXAS ADULT PROBATION STAFF ADVISORY REPORT (1986), *supra* note 1, at 65. Kansas is bound to the current iteration of this interstate agreement by state statute. *See* K.S.A. § 22-4110(a) ("The compacting states to this Interstate Compact recognize that each state is responsible for the supervision of adult offenders in the community").

> equality of political rights among the several States which is the basis of the Union itself. Such a method of punishment is not authorized by statute, and is impliedly prohibited by public policy.

People v. Baum, 251 Mich. 187, 190 (Mi. 1930).

Consensus on this point has been unanimous. *See*, *e.g.*, *Alhusainy v. Superior Court*, 143 Cal. App. 4th 385, 393 (Cal. App. 2006) ("The requirement petitioner leave the state was invalid […] because public policy precludes banishment of felons from the state"); *Crabtree v. State*, 112 P.3d 618, 621-22 (Wy. 2005) (finding that banishment from just one county also violates state public policy); *State v. J. F.*, 262 N.J. Super. 539, 543 (N.J. App. 1993) ("Our Legislature has not included banishment among the range of penalties that may be imposed for the commission of a crime"); *State v. Charlton*, 115 N.M. 35, 37. (N.M. App. 1992) ("The legislature's refusal to authorize banishment as a sentencing option is evidence that banishment is contrary to the public policy of this state"); *Rojas v. State*, 52 Md. App. 440, 446 (Md. App. 1982) (acknowledging that banishment is an "unenforceable sentence term"); *Green*, 114 Misc. 2d at 343 ("Such a method of punishment is not authorized by statute, and is impliedly prohibited by public policy") (internal quotations and citations omitted); *Rutherford*, 468 F. Supp. at 1360 ("the power to banish, if it exists at all, is a power vested in the Legislature and certainly where such methods of punishment are not authorized by statute, it is impliedly prohibited by public policy"); *see also State v. Baker*, 58 S.C. 111, 114 (S.C. 1900) ("We do not recognize the Circuit Judge as possessing any right to impose such a sentence as is involved in the perpetual banishment of the defendant from the State").

Because the punishment of banishment is not authorized by statute in Kansas and is presumptively against public policy and the principles of interstate comity, Mr. Rupert was patently issued an illegal sentence meriting correction under K.S.A. § 22-3504. *See id.* § 22-

3504(3) (a sentence must be corrected where it "does not conform to the applicable statutory provision, either in character or punishment").

C. Combining Banishment With Any Form of Legitimate Punishment Automatically Constitutes an Illegal Sentence and the Banishment Condition Should Be Stricken.

Mr. Rupert received two different kinds of sentences. He received both a presumptive sentence of probation and an unlawful additional punishment of banishment from the State of Kansas. Regardless of whether or not banishment is a lawful sentence under Kansas law— which it patently is not— Kansas law also refuses to allow two categorically different types of punishment to be imposed for the same crime. *See State v. Bowen*, 299 Kan. 339, 359 (Kan. 2014) (finding that implementing both a no-contact order, which is ostensibly a probation condition, and a term of imprisonment at the same time was an "inappropriate combination of dispositions that exceeds a sentencing court's authority"); *State v. Plotner*, 290 Kan. 774, 781, (Kan. 2010) (same). As described above, banishment is unequestionably its own independent form of punishment much in the same way that a prison sentence or probation are fundamentally different forms of punishment from one another. *See Shaw v. Patton,* 823 F.3d 556, 566-68 (10th Cir. 2016) (cataloguing the history of banishment from a large geographic area as an independent and distinct form of punishment, as opposed to an incidental sentencing condition); *Ju Toy*, 198 U.S. at 273 ("banishment is a punishment and of the severest sort"). Therefore to the extent that Mr. Rupert was subject both to an ordinary sentence of probation and also to the highly unusual punishment of banishment at the same time for the same offenses, his sentencing was illegal under Kansas law because it impermissibly combined punishments in a way that does not conform to the statutory provisions. *See* K.S.A. § 22-3504(3).

D. Even if Banishment Were Deemed A Specific Condition of Mr. Rupert's Probation, That Probation Condition Is Clearly Unlawful.

It is true that Kansas courts are given much broader authority in the context of probation to craft punishments in the form of conditions of release that are suited to a particular defendant's rehabilitation. *See* K.S.A. § 21-6607(b). But Kansas courts are not empowered to issue probation conditions that are plainly violative of the constitution or other principles of law. *See State v. Bennett*, 288 Kan. 86, 99, 200 P.3d 455 (Kan. 2009) (invalidating a probation condition as violating the Fourth Amendment); *State v. Mosburg,* 13 Kan. App. 2d 257, 258, 768 P.2d 313 (Kan. App. 1989) (invalidating a probation condition as violating substantive due process).

Although no Kansas state or federal courts have addressed the question, courts across the country have established that probation conditions requiring banishment are an abuse of statutory authority or plainly unconstitutional. *See*, *e.g.*, *State v. Muhammad*, 43 P.3d 318, 323 (Mont. 2002) ("A majority of the jurisdictions examining the issue have held that a probation condition banishing a defendant from a geographic area, such as a state or a county […] is in violation of statutory provisions regarding probation") (citing cases); *Commonwealth v. Pike*, 428 Mass. 393, 403-05 (Mass. 1998) (holding that a probation condition requiring banishment from the state implicated the fundamental constitutional right to travel, and was not narrowly tailored to meet constitutional requirements); *Charlton*, 115 N.M. at 37-39 ("When the trial court orders a defendant to leave a broad geographical region, often characterized as banishment, appellate courts have routinely invalidated this condition" on state law grounds); *People v. Harris*, 238 Ill. App. 3d 575, 582 (Ill. App. 1992) ("we find that the condition of defendant's probation that he leave the State of Illinois is unreasonable. A review of the record

does not reveal any justifiable basis for the imposition of such an overly broad condition"); *People v. Green*, 114 Misc. 2d 339, 344 (N.Y. Sup. Ct. 1982) (noting that banishment as a "condition of probation is illegal, void and unenforceable..."); *Henry v. State*, 276 S.C. 515, 516 (S.C. 1981) ("the trial judge was without authority to impose banishment from the State as a condition of probation, *even if appellant agreed to the sentence*") (emphasis added).

The suggestion that Mr. Rupert's banishment was merely a condition of probation therefore does not cure his illegal sentence. Nor does it address the *per se* invalidity of banishment as a punishment from a constitutional perspective. *See J. F.*, 262 N.J. Super. at 543 ("It also appears unlikely any such [banishment] provision, even if legislatively authorized, could successfully withstand an evaluation by the standards embodied in the due process, privileges and immunities, and commerce clauses of the United States Constitution"); *Rutherford*, 468 F. Supp. at 1360 ("Banishment has also been viewed as unconstitutional because it amounts to cruel and unusual punishment or is a denial of due process of law").

Finally, it is axiomatic that conditions of probation only last as long as the period of probation itself. For Mr. Rupert's level 9 felony offense, the maximum term of probation was 12 months. *See* K.S.A. § 21-6608(c)(3) ("in felony cases sentenced at severity levels 9 and 10 […] if a nonprison sanction is imposed, the court shall order the defendant to serve a period of probation of up to 12 months in length"). Mr. Rupert's banishment, however, is permanent. *See* Ex. A at 2. ("The defendant agrees to […] not return to Kansas"). It is therefore plainly not a probation condition either in technical form or in substance, or the probation period is over and Mr. Rupert should be declared able to return without penalty.[9]

[9] As Officer Talbot's comments suggested, *supra* ¶ 9, banishment is indeed antithetical to the concept of probation and community corrections. One requires consistent supervision and presence in a jurisdiction to support rehabilitation, while the other abdicates state supervisory responsibility altogether by removing individuals from the community permanently. *See State v. Schad*, 41 Kan. App. 2d at 805, Syl. ¶ 7 ("The primary purpose of probation is

E. The Court Must Strike the Banishment Condition from Mr. Rupert's Sentence and Must Otherwise Leave Mr. Rupert's Sentence Undisturbed.

Mr. Rupert was to receive a presumptive sentence of twelve months of probation for all of his convictions. Instead, he received a presumptive sentence plus an unlawful additional punishment of perpetual banishment from the State of Kansas. Under these circumstances, "courts have uniformly held that the conviction shall stand and only the banishment portion of the sentence is void." *Rutherford*, 468 F. Supp. at 1360; *Charlton*, 115 N.M. at 38 (merely striking the banishment condition from an otherwise valid sentence for a particular crime and not allowing resentencing); *see also Bowen*, 299 Kan. at 359 ("The appropriate remedy is to […] leave the remainder of the sentence intact").

Furthermore, because Mr. Rupert otherwise received the presumptive sentence, there can be no claim that the striking of his unlawful banishment should in any way impact the otherwise routine sentence he received. *See State v. Johnson*, 30 Kan. App. 2d 1133, 1134 (Kan. App. 2002) (noting that where a plea agreement includes a recommendation of an illegal sentence, and the illegal sentence increases the defendant's punishment, the sentence must be vacated and the presumptive sentence imposed unless the defendant requests a new trial); *see also Flaherty v. State*, 322 Md. 356, 366 (Md. App. 1991) (striking a banishment condition and noting that "[t]he condition was one that the trial judge fully appreciated should not have been applied in the first instance, and the remainder of the sentence appears adequate for the protection of the public"). Nor can Mr. Rupert's motion to correct his illegal sentence undermine the fact that he has already completed his 12-month term of probation in the form of two years of banishment from Kansas—a far more serious punishment.[10] *See* K.S.A. § 22-

the successful rehabilitation of the offender").

[10] *Ju Toy*, 198 U.S. at 273 ("banishment is a punishment and of the severest sort").

3504(1) ("The defendant shall receive full credit for time spent in custody under the sentence prior to correction"); *see also Van Lehman*, 308 Kan. at 1089 ("when [Defendant] completed his original sentence—even if illegal […] he was no longer subject to the jurisdiction of the criminal justice system"). The Court should therefore strike the banishment portion of Mr. Rupert's sentence and declare that Mr. Rupert's sentence has already been served in its entirety.

F. The Court Must Disavow Mr. Rupert's Plea Agreement with the State of Kansas and Cannot Enforce the Agreement Against Mr. Rupert Should He Return to the State.

Mr. Rupert's plea agreement with the State explicitly includes a threat that if Mr. Rupert violates his banishment sentence by returning to the state, he will be charged with additional offenses that the Distirct Attorney did not initially charge in his criminal complaint. *See* Ex. A at 2. Mr. Rupert wishes to return to Kansas but is afraid to do so in light of the County Attorney's threat of future prosecution.

This portion of Mr. Rupert's plea agreement is invalid and cannot be enforced by the Court for several reasons. First, plea agreements that include unlawful banishment conditions are inherently unenforceable contracts. *See*, *e.g.*, *State v. Cortner*, 893 So. 2d 1264, 1273 (Al. Crim. App. 2004) ("This Court has held that a plea agreement wherein the defendant agrees to leave the jurisdiction as part of his plea agreement is not a valid or enforceable agreement because the defendant could not consent to a sentence beyond the authority of the trial court"); *Rojas v. State*, 52 Md. App. 440 (Md. App. 1982) (finding banishment unenforceable and voiding the corresponding plea agreement); *see also Van Lehman*, 308 Kan. at 1093 (Kan. 2018) ("contractual agreements that conflict with statutory provisions are considered void").

Second, the County Attorney offered Mr. Rupert a false inducement to submit to banishment. Under Kansas law, double jeopardy already prevents prosecutors from pursuing

a successive prosecution for the same offense or for lesser included offenses arising out of the same transaction or occurrence. *See State v. Cady*, 254 Kan. 393, 397 (Kan. 1994) ("The Double Jeopardy Clause of the United States Constitution protects against […] a second prosecution for the same offense after conviction [… and] multiple punishments for the same offense"). To the extent the County Attorney promised not to bring charges he is already constitutionally barred from pursuing, the County Attorney has not supported Mr. Rupert's banishment condition with consideration and the condition is therefore unenforceable. *See State v. Bannon*, 2016 Kan. App. Unpub. LEXIS 331, at *10 (Kan. App. May 6, 2016) (noting that in the context of a plea agreement, a promise to carry out a pre-existing legal duty is not consideration sufficient to establish a binding agreement) (as this is an unpublished case, a copy is attached to this brief in compliance with Kansas Supreme Court Rule 7.04).

Finally, permitting the County Attorney to file even unrelated charges that predate Mr. Rupert's sentencing in this case as retaliation for challenging his banishment would reward the State for crafting an unlawful plea agreement. Indeed, allowing the County Attorney to charge such additional offenses would place the State in a better position than it had been before it entered the plea agreement with Mr. Rupert. Had all other previously investigated charges been included in the initial criminal complaint against Mr. Rupert and subsequently pled guilty to, they would have been brought before the sentencing court at the same time as Mr. Rupert's instant offenses. Assuming no higher offense was charged than a level 9 person felony, Mr. Rupert's presumptive sentence would still have been a maximum of 12 months of probation under his criminal history score of "F," with probation for all other non-base offenses to be served concurrently.[11] In other words, these additional charges would have had

[11] *See supra* notes 3-6.

no impact on Mr. Rupert's sentence.

By contrast, if upon Mr. Rupert's return to Kansas the County Attorney were permitted to file additional charges for crimes investigated prior to sentencing in this matter, Mr. Rupert would be subject to a criminal history score of "A" and would face a presumptive sentence of one year in prison for even the most minor felony charge. *See* K.S.A. § 21-6810(a) ("A prior conviction is any conviction […] which occurred prior to sentencing in the current case, *regardless of whether the offense that led to the prior conviction occurred before or after the current offense*") (emphasis added). Permitting this result would subject Mr. Rupert to a substantially harsher punishment than was initially available to the County Attorney before he secured an unlawful plea agreement. Being that the County Attorney has already successfully forced Mr. Rupert out of the State of Kansas for almost two years, it would be patently unlawful to allow this result.

CONCLUSION

For the foregoing reasons, Mr. Rupert requests that this Court strike the portion of his sentence banishing him from the State of Kansas, declare that Mr. Rupert's probation sentence has been served in full,[12] and order that the County Attorney may not attempt to enforce Mr. Rupert's condition of banishment through subsequent prosecution.

[12] "Probation […] may be terminated by the court at any time and upon such termination […] an order to this effect shall be entered by the court." K.S.A. § 21-6608(a)

Dated: July 10, 2019

Respectfully submitted,

/s/ Zal K. Shroff
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6701 W 64th Street, Suite 210
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CERTIFICATE OF SERVICE

I HEREBY certify that on this 10th day of July, 2019, the foregoing was filed with the Clerk of the Court using the Kansas Courts eFiling system which will send notice of electronic filing to all counsel of record.

/s/ Zal K. Shroff
Zal K. Shroff

EXHIBIT A

FILED

IN THE DISTRICT COURT OF MONTGOMERY COUNTY, KANSAS
SITTING AT INDEPENDENCE

2017 AUG 17 AM 11:08

CLERK OF DISTRICT COURT
MONTGOMERY CO. KS

STATE OF KANSAS, PLAINTIFF,

VS. BY_____ CASE NO: 17 CR 325 I (C)

BO DANA RUPERT, DEFENDANT.

PLEA AGREEMENT
AND JOINT SENTENCE RECOMMENDATIONS

NOW on this 17th day of August 2017, the above-captioned matter comes before the Court for entry of plea by the Defendant.

The State of Kansas appears by and through Larry Markle, County Attorney.

The Defendant appears in person, in custody and by and through his attorney, Heath Lampson of the Southeast Kansas Public Defenders' Office.

The Court having reviewed the file and heard arguments of counsel, FINDS that the parties have entered into a signed plea agreement with the following understanding and joint sentence recommendations as part of the agreement:

The defendant will plead guilty or no contest to 2 counts of criminal threat, a severity level 9 person felony and 3 counts of filing a false report, a Class A nonperson misdemeanor. It is the intent of the parties to elevate the defendant's criminal history score to A following his plea in this case. If his criminal history score is not elevated to an A following this plea then additional criminal threats will be filed and he will plead to as many as necessary to elevate his score to an A. No additional charges shall be filed at this time.

The defendant has provided the password to his cell phone and consented to search by law enforcement of the phone provided his attorney, Mr. Lampson is present when the phone is searched. The purpose of the search is to investigate pornography not gather additional evidence of threats. Provided the phone is clean of pornography, it will be returned to the defendant after sentencing.

The parties will make a joint recommendation at sentencing that the 2 criminal threat sentences run consecutive to one another to max his sentence. All other felony and/or misdemeanors will run concurrent. The parties will make a joint recommendation at sentencing to depart to probation with Community Corrections for a period of 12

months. The defendant agrees to transfer his corrections to another State and not return to Kansas. If the defendant does return to Kansas then the terms of this agreement have been violated and the County Attorney may consider filing all other charges for additional offenses not filed now.

READ AND APPROVED BY:

BO DANA RUPERT
DEFENDANT

PREPARED AND APPROVED BY:

DANIEL HEATH LAMPSON
ATTORNEY FOR DEFENDANT

READ AND APPROVED BY:

LARRY MARKLE
COUNTY ATTORNEY

EXHIBIT B

IN THE DISTRICT COURT OF MONTGOMERY COUNTY, KANSAS
14TH JUDICIAL DISTRICT
SITTING AT INDEPENDENCE

STATE OF KANSAS, Plaintiff,	)	
vs.	)	Case No. 17 CR 325
BO DANA RUPERT, Defendant.	)	

* * * * * * * *

TRANSCRIPT OF PLEA HEARING

PROCEEDINGS had in the above-entitled matter before the HONORABLE JEFFREY W. GETTLER, District Judge of the 14th Judicial District of the State of Kansas, on the 17th day of August, 2017, in Independence, Kansas.

A P P E A R A N C E S

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For the Defendant: DANIEL HEATH LAMPSON
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RECORD OF PROCEEDINGS

AUGUST 17, 2017

THE COURT: All right. This is State of Kansas vs. Bo Dana Rupert, Case No. 17 CR 325.

Mr. Rupert appears in person, in custody, and with his attorney, Mr. Lampson; State with Mr. Markle.

This case was originally scheduled for hearing next week, maybe, but counsel requested a hearing today for the purpose of entering a plea.

Was this set for preliminary hearing next week?

MR. MARKLE: Yes.

THE COURT: All right. Mr. Rupert, you understand you have the right to a preliminary hearing in this case?

THE DEFENDANT: I do.

THE COURT: And if you wanted to, you could require the State to present some evidence to support the felony charges against you?

THE DEFENDANT: I do.

THE COURT: And you desire to waive that hearing?

THE DEFENDANT: Yeah.

THE COURT: Okay. We'll show that Mr. Rupert has waived his right to a preliminary hearing.

The State has filed a First Amended Information that now contains five counts. Are you familiar with those amended --

THE DEFENDANT: I'm going to -- I'm going to look at it real quick --

THE COURT: All right.

THE DEFENDANT: -- just so I can be sure that I am --

MR. LAMPSON: It's the same one that I went over with you in -- the other day.

THE DEFENDANT: Yeah.

THE COURT: In this First Amended Information, you are charged with two counts of criminal threat, level 9 person felonies, and three counts of interference with law enforcement.

THE DEFENDANT: Yeah.

THE COURT: All Class A nonperson misdemeanors.

Any questions about those amended charges?

THE DEFENDANT: Yeah. Can I -- can I read the information on these real quick?

THE COURT: You're more than welcome to. Let me know when you're ready to proceed.

THE DEFENDANT: Yes, sir.

THE COURT: Any questions about that?

THE DEFENDANT: No.

THE COURT: All right. I've been handed a plea petition. I need to ask you a few questions about that. To do that, I need to place you under oath.

Would you raise your right hand for me.

(Defendant sworn.)

THE COURT: And do you -- hold it up a little bit longer.

And do you further swear and acknowledge that you have read and discussed each and every part of this document, and the answers which appear therein are true and correct, so help you God?

THE DEFENDANT: I do, Your Honor.

THE COURT: All right. I have in front of me what's called Defendant's Acknowledgement of Rights and Entry of Plea, a three-page document. Is this your signature on page 3? Right there. Did you sign that?

THE DEFENDANT: Yes.

THE COURT: All right. I've also been handed what's called a plea agreement and joint sentence recommendations, a two-page document. Is that your signature on page 2?

THE DEFENDANT: Yes, that is.

THE COURT: All right.

MR. LAMPSON: And, Your Honor, one thing I want to point out. On page 3 of the Defendant's Acknowledgment, it looks like I've signed it twice. The Defendant has approved this document, and we should have him sign this.

THE COURT: Okay. So that is your signature?

MR. LAMPSON: Or at least initial it. It is my signature twice.

THE COURT: All right.

MR. LAMPSON: And I don't know why.

THE COURT: But you've reviewed this plea petition with --

THE DEFENDANT: Yeah. I -- I approved the document, so --

THE COURT: All right. I'm going to have you sign --

THE DEFENDANT: Sorry about that.

THE COURT: That's all right.

MR. MARKLE: That's fine.

MR. LAMPSON: I don't know.

THE BAILIFF: Where do you need to sign it at?

THE DEFENDANT: Where it says

"defendant."

THE COURT: Right there.

THE BAILIFF: Oh. Right there. Okay.

THE COURT: You can just sign next to it, if you want.

(*Sotto voce* discussion between counsel.)

THE DEFENDANT: There you go. Sorry about that.

THE COURT: That would explain why you kind of looked at it funny.

MR. LAMPSON: And I did too. I thought, hm, that doesn't look like his signature, but...

Thank you, Your Honor. Sorry about that.

THE COURT: You're welcome.

All right. So you are 23 years of age?

THE DEFENDANT: I am.

THE COURT: And you've got your high school diploma?

THE DEFENDANT: I do.

THE COURT: All right. And you've had a sufficient opportunity to go over this plea petition with Mr. Lampson?

THE DEFENDANT: Yes, sir.

THE COURT: And you understand the charges for which you intend to enter a plea?

THE DEFENDANT: Yes.

THE COURT: And do you understand that by entering a plea, you'd be waiving a number of rights? Those include: The right to a jury trial, the right to cross-examine the State's witnesses, the right to take the stand on your own behalf or decline to do so, and the right to appeal everything except the sentence I impose.

THE DEFENDANT: Yes, sir.

THE COURT: And do you believe that Mr. Lampson has -- Mr. Lampson -- excuse me -- has done a good job explaining the rights you'll be giving up today?

THE DEFENDANT: Yes.

THE COURT: And do you believe he's handled your case in the appropriate manner?

THE DEFENDANT: Yes.

THE COURT: All right. Do you understand that by entering a plea, you'll be waiving the rights we've covered, as well as those contained in the plea petition, and that you'll give up any defenses you had; that there will be no trial, and you'll be found guilty of these five counts?

THE DEFENDANT: I do.

THE COURT: Mr. Markle and Mr. Lampson,

is there anything with regard to the plea agreement that's not set out in this joint sentence recommendation that --

MR. MARKLE: No.

THE COURT: -- I need to be aware of?

MR. LAMPSON: No, Your Honor.

THE COURT: And, Mr. Rupert, you're familiar with this document that contains your signature, correct?

THE DEFENDANT: Yes.

THE COURT: All right. And that is a plea agreement and joint sentencing recommendation. Do you understand I'm not bound to follow that agreement?

THE DEFENDANT: I do.

THE COURT: And at the time of sentencing, I can impose a maximum legal sentence I feel is appropriate?

THE DEFENDANT: Yes, sir.

THE COURT: And if there are any joint recommendations regarding concurrent sentencing or departures, that I'm not bound to follow those.

THE DEFENDANT: I do.

THE COURT: Do you understand that?

THE DEFENDANT: I do.

THE COURT: With the exception of what's

contained in the written plea agreement, have any promises been made to you to enter this plea?

THE DEFENDANT: No.

THE COURT: Have you been threatened to enter this plea?

THE DEFENDANT: No.

THE COURT: Do you have any disabilities that prevents you from understanding your rights and what's occurring today?

THE DEFENDANT: No.

THE COURT: And are you presently under the influence of any alcohol or drugs?

THE DEFENDANT: No. No, sir.

THE COURT: All right. With all that in mind, do you still desire to enter a plea in this case?

THE DEFENDANT: I do.

THE COURT: How, then, do you plead to Count 1 of the First Amended Information, criminal threat, a level 9 person felony?

THE DEFENDANT: No contest.

THE COURT: And how do you plead to Count 2, criminal threat, a level 9 person felony?

THE DEFENDANT: No contest.

THE COURT: And how do you plead to Count 3, interference with law enforcement, a Class A

nonperson misdemeanor?

THE DEFENDANT: No contest.

THE COURT: And how do you plead to Count 4, interference with law enforcement, a Class A nonperson misdemeanor?

THE DEFENDANT: No contest.

THE COURT: And how do you plead to Count 5, interference with law enforcement, a Class A nonperson misdemeanor?

THE DEFENDANT: No contest.

THE COURT: Mr. Markle, will you provide a factual basis.

MR. MARKLE: In regard to Count 1, this investigation was conducted by the Federal Bureau of Investigation and Coffeyville Police Department. Evidence shows that on or about March 30 of this year, Mr. Rupert using the Internet, made various threats against one Anthony Elkins, Jr., that caused Mr. Elkins and others to fear for Mr. Elkins' safety.

The same events also occurred in connection with Count 3, on or about the -- that same day, same possible dates of the 25th through the 30th -- oh. I'm sorry.

We changed that count, didn't we?

MR. LAMPSON: Yes.

MR. MARKLE: Okay. Let me strike that -- second part of that with regard to Count 3.

With regard to Count 2, these events occurred July 8th at the 4th of July celebration. I know it's on the 8th, but that's when it was in Coffeyville. Christopher Myers, a reserve deputy, was approached by Mr. Rupert. Mr. Rupert made a number of comments which caused Mr. Myers to fear for his safety. Those were reported to law enforcement.

In regard to Count 3, on or about July 25th, in Montgomery County, a report was made and signed by Mr. Rupert in that Kwin Bromley, the chief of police of the Coffeyville Police Department, had committed some type of misconduct. That report was investigated and determined to be false.

Same in regard to Count 4: There were two complaints made; the first one's Count 4, the second one's Count 5 -- on or about July 10th, 2017, where Mr. Rupert made complaints against Mike Bradley with the Coffeyville Police Department; that Officer Bradley had committed some type of misconduct in the performance of his official duties.

Those complaints were both investigated and found to be false.

All three of those counts, 3, 4, and 5,

constitute false reporting of misconduct by a law enforcement officer.

All of these events occurred in Montgomery County, Kansas, on the various dates and locations mentioned.

THE COURT: All right. Thank you, Mr. Markle.

Well, the Court will find there's a factual basis for the plea.

We'll find that, Mr. Rupert, your pleas were knowingly and voluntarily entered into. I'll accept your pleas of no contest and find you guilty of Counts 1, 2, 3, 4, and 5.

We need to order a presentence investigation and schedule this for sentencing.

MR. MARKLE: I think October 5th is the appropriate date; that's the Thursday docket.

THE COURT: We'll schedule this for sentencing on October the 5th, that's a Thursday, at 9:00 in Independence.

Anything further we need to do on Mr. Rupert this morning?

MR. MARKLE: Not today.

MR. LAMPSON: Not today, Your Honor.

THE COURT: All right. Thank you.

MR. MARKLE: Thank you.

MR. LAMPSON: Thank you, Your Honor.

(End of proceedings.)

STATE OF KANSAS)
)
MONTGOMERY COUNTY)

C E R T I F I C A T E

I, Michelle M. Stewart, a Certified Court Reporter for the Montgomery County District Court in the 14th Judicial District of the State of Kansas, do hereby certify that the foregoing is a full and correct transcript of my shorthand notes of the oral evidence and proceedings had in the above-entitled cause on the date indicated.

Dated at my home, this 2nd day of June, 2019.

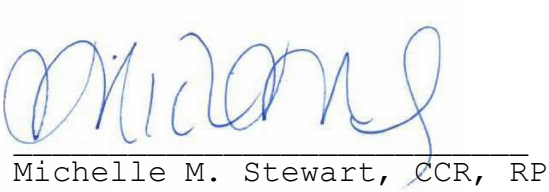

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EXHIBIT C

IN THE DISTRICT COURT OF MONTGOMERY COUNTY, KANSAS
14TH JUDICIAL DISTRICT
SITTING AT INDEPENDENCE

STATE OF KANSAS, Plaintiff,	)	
vs.	)	Case No. 17 CR 325
BO DANA RUPERT, Defendant.	)	

* * * * * * * *

TRANSCRIPT OF SENTENCING HEARING

PROCEEDINGS had in the above-entitled matter before the HONORABLE JEFFREY W. GETTLER, District Judge of the 14th Judicial District of the State of Kansas, on the 26th day of October, 2017, in Independence, Kansas.

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RECORD OF PROCEEDINGS

OCTOBER 26, 2017

THE COURT: This is State of Kansas vs. Bo Rupert, 17 CR 325.

Mr. Rupert appears in person, in custody, and with his attorney, Mr. Lampson; State by Mr. Markle.

MR. MARKLE: Judge, we had a plea agreement in this case that's already been filed, so we need to do an amended complaint, which we filed today. We also need to do an amended plea petition.

Has that been done, Heath?

MR. LAMPSON: I did not amend it, but in the original plea petition it contemplates a plea to a third criminal threat.

MR. MARKLE: That's fine with me if they're acknowledging that.

MR. LAMPSON: Your Honor, what we had was -- we had an additional criminal threat added to the plea, and that was contemplated by us prior to entering into the first agreement. We were uncertain about what Mr. Rupert's criminal history might be.

The deal between the State and myself was that whatever deal we made, the end result would be a criminal history score of "A"; Mr. Rupert knew that. So in order to effectuate that deal, we had to add a

criminal threat charge, and Mr. Rupert understands that.

That's your copy.

MR. MARKLE: So if you could arraign him on Count 6 on the Second Amended Complaint; the State will provide a factual basis for that as well.

THE COURT: All right. I'm just seeing that, so give me one second.

MR. MARKLE: Do you want my copy?

THE COURT: No. I've got it on the screen here. I didn't know that had been filed.

All right. Mr. Rupert, your attorney's handed you a copy of the Amended Complaint/Information. There is an added Count 6, which is criminal threat, a level 9 person felony, alleged to have occurred on March 30, 2017, in Montgomery County.

Do you have any questions about that charge?

THE DEFENDANT: No, sir.

THE COURT: And how do you desire to plea to that charge?

THE DEFENDANT: No contest.

THE COURT: All right. Mr. Markle, is it the same factual basis for the previous counts?

MR. MARKLE: With the slight variation in that we have an additional victim, Danielle Lee,

which was part of this same Internet-based/computer-based communication by Mr. Rupert with the various people listed in Count 1 and 2. In that those statements would have obviously communicated a threat to commit violence by placing them in fear; to wit, Danielle Lee.

THE COURT: All right. Now, Mr. Rupert, when you entered your pleas to Counts 1 through 5, you had reviewed and signed a plea petition. Do you recall that?

THE DEFENDANT: I do.

THE COURT: Do you need the Court to go over any aspect of that petition with regard to Count 6?

THE DEFENDANT: No, sir.

THE COURT: All right. Well, the Court will find a factual basis for Count 6, criminal threat. We'll find your plea was knowingly and voluntarily entered into, accept your plea of no contest, and find you guilty of Count 6.

MR. MARKLE: This will not affect the criminal history score of "F." No other presumptive probation or prison status, no other presumptive sentencing range. It'll be -- Count 6 will be sentenced as an "I" pursuant to statute.

THE COURT: And that'd be 7, 6, 5? It would be because that's what Count 2 is.

MR. MARKLE: Yes.

THE COURT: All right. Are you otherwise prepared to proceed to sentencing today?

MR. MARKLE: Yes.

MR. LAMPSON: Yes, Your Honor. We received a copy of the report, and we have no objection to a criminal history score of "F."

THE COURT: Do you agree with that statement, Mr. Rupert?

THE DEFENDANT: I do.

THE COURT: You've had a chance to review your criminal history?

THE DEFENDANT: I have, sir.

THE COURT: And you agree it's accurate?

THE DEFENDANT: I do.

THE COURT: All right. We will show that Mr. Rupert's criminal history score is set at "F."

The primary offense for which you're being sentenced today is criminal threat, a level 9 person felony, Count 1 of the Complaint, with a history score of "F," the sentencing range is ten months aggravated; nine months standard; and eight months mitigated.

This is a presumptive probation case. If

probation was imposed, it would be 12 months to community corrections.

If you're ordered to serve a sentence in this case, while incarcerated, you can earn up to 20 percent good-time credit and would be subject to 12 months' post-release supervision.

You're also being sentenced on Count 2, criminal threat, a level 9 person felony, sentenced as a history score of "I." And that range is seven months aggravated; six months standard; and five months mitigated; also eligible to earn up to 20 percent good-time credit.

Count 3 is interference with law enforcement, a Class A nonperson misdemeanor, and that carries a sentence up to 12 months in the county jail.

Count 4, interference with law enforcement, a Class A nonperson misdemeanor; that also carries a sentence up to 12 months in the county jail.

Count 5, interference with law enforcement, a Class A nonperson misdemeanor; carries a sentence up to 12 months in the county jail.

And lastly, Count 6 -- which you pled to this morning -- is a third count of criminal threat, a level 9 person felony, and that would also be sentenced as an "I" history, with a sentencing range of seven months

aggravated; six months standard; and five months mitigated; also eligible to earn up to 20 percent good-time credit towards that count.

Is either side seeking a departure?

MR. MARKLE: No.

MR. LAMPSON: No departure, Your Honor. And we have a joint sentence recommendation.

THE COURT: All right. And, Mr. Lampson, anything you wish to tell the Court in mitigation of punishment on behalf of your client?

MR. LAMPSON: No, Your Honor. Just that we would ask that the Court follow the plea agreement. We'll be asking the Court to run the first two counts consecutive with one another, then the third felony and all the misdemeanors concurrent. Um...

THE COURT: Concurrent with each other and to the first two counts?

MR. MARKLE: Yes.

MR. LAMPSON: Yes, Your Honor.

THE COURT: All right. And, Mr. Rupert, anything you wish to tell the Court in mitigation of punishment? You're not required to say anything, but you're welcome to if you'd like.

THE DEFENDANT: I don't have nothing to say.

THE COURT: Okay. Mr. Markle, are there any victims present that desire to speak?

MR. MARKLE: I've not been aware -- married -- I can't talk today. I've not been made aware of any, but I see Mr. Bailey's here, who is a victim in an uncharged case.

MR. BAILEY: No. I've -- I've never been a victim.

MR. MARKLE: Well, the library.

MR. BAILEY: Library employees.

MR. MARKLE: Right.

MR. BAILEY: I -- no, I don't have anything.

THE COURT: All right. Any comment from the State?

MR. MARKLE: Mr. Lampson claims he gave me the journal entry back, but I don't see it and I don't have it, so we'll try to hunt that down.

THE COURT: All right. And I would note -- and I think I provided a copy to counsel -- the Court did receive a letter on September 26th written from Jim Daily, a former teacher of Mr. Rupert, that is written on his behalf, in support of leniency, more or less.

MR. MARKLE: I did get a copy of that.

THE COURT: Does either party know of any legal reason why the sentence should not be pronounced this morning?

MR. MARKLE: No.

MR. LAMPSON: No, Your Honor.

THE COURT: All right, then, Mr. Rupert, it is the judgment of the Court your sentence should be as follows: The primary crime that controls the base sentence is Count 1, criminal threat, a level 9 person felony; sentenced with a history of "F." I'm going to sentence you to the standard term of nine months with the Kansas Department of Corrections. This is a presumptive probation case, so that sentence will be suspended, and you'll be placed on probation with community corrections for a period of 12 months.

If you ever have to serve your underlying sentence, while incarcerated, you could earn up to 20 percent good-time credit and would be subject to 12 months' post-release supervision.

The second offense for which you're being sentenced is Count 2, criminal threat, a level 9 person felony; sentenced with a history score of "I." I'm going to sentence you to the standard term of six months with the Kansas Department of Corrections; that, too, will be suspended, and you'll be placed on

probation for 12 months to community corrections, and you are eligible to earn up to 20 percent good-time credit towards that as well. Your sentencing for Count 2 will run consecutive to Count 1.

The third offense for which you're being sentenced is interference with law enforcement, a Class A nonperson misdemeanor. I'm going to sentence you to 12 months in the Montgomery County Department of Corrections; that, too, will be suspended, and you'll be placed on probation for 12 months to community corrections.

The fourth offense for which you're being sentenced is Count 4, interference with law enforcement, a Class A nonperson misdemeanor. Sentence you to 12 months with the Montgomery County Department of Corrections; that, too, will be suspended, placed on probation for 12 months to community corrections.

The fifth offense for which you're being sentenced is Count 5, interference with law enforcement, Class A nonperson misdemeanor. Sentencing you to 12 months with the Montgomery County Department of Corrections; that will be suspended, placed on probation for 12 months to community corrections.

And lastly, the sixth offense for which you're being sentenced is Count 6, criminal threat, a level 9

person felony. Sentenced with a history score of "I," sentence you to six months with the Kansas Department of Corrections; that'll be suspended, you'll be placed on probation for 12 months with community corrections, and you could earn up to 20 percent good-time credit towards that count as well.

Counts 3, 4, 5, and 6 will run concurrent to each other and to Counts 1 and 2.

(*Sotto voce* discussion between counsel.)

THE COURT: Mr. Lampson, what are your attorney's fees?

MR. LAMPSON: Your Honor, the attorney's fees in this case were $500.

(*Sotto voce* discussion between Mr. Lampson and defendant.)

MR. LAMPSON: Your Honor, my client is requesting that I ask the Court to consider waiving a portion of those attorney's fees. He's going to have some other things to pay in his case as part of a condition of his probation. And at the present time, he's unemployed.

THE COURT: All right. Mr. Rupert, the fees associated with Mr. Lampson's representation include $100 BIDS application fee and then the attorney's fees that he quoted of $500; that's $600.

You don't feel that you have the financial means in which to reimburse the State for those expenses?

THE DEFENDANT: I do not, sir.

THE COURT: You were -- when you're not incarcerated, are you employable?

THE DEFENDANT: Yeah.

THE COURT: You're capable of working?

THE DEFENDANT: Yes, sir.

THE COURT: With sufficient time, do you believe you would be able to reimburse the State for those expenses?

THE DEFENDANT: I believe I could.

THE COURT: And do you believe imposing those fees would be -- I guess, would that be an undue hardship upon you?

THE DEFENDANT: It would.

THE COURT: In what way?

THE DEFENDANT: I absolutely am 100 percent destitute at this time. So...

THE COURT: All right. The Court's going to assess the following: Court costs in the amount of $193, a probation fee in the amount of $120, a fingerprinting fee in the amount of $45, a DNA collection fee in the amount of $200.

The Court has considered Mr. Rupert's statements

regarding his current financial situation and his belief he'd be unable to pay. While the -- imposing these attorney's fees expenses would impose a hardship upon him. Considering that, the Court is going to waive the BIDS application fee of $100. I am going to assess a portion of the attorney's fees requested, in the amount of $250.

I do not believe that imposing that would be an undue hardship. You did say you are capable of working and with time would be able to reimburse the State for those expenses, so I will assess attorney's fees of $250, but will otherwise waive the other expenses related to Mr. Lampson's representation.

We will give you credit for time served.

Do we know that figure, Counsel?

MR. LAMPSON: Your Honor, I believe it's 91 days.

MR. MARKLE: It's 93. July 25th through today is 93.

THE COURT: We'll set that at 93 days.

Mr. Rupert, there are collateral consequences as a result of your felony conviction: You've lost temporarily the right to vote and the right to possess a firearm.

You may in the future have the right to have

these convictions expunged from your record. Mr. Lampson can explain that process to you and whether or not you'll qualify and when.

And you have 14 days to appeal the sentence I've just imposed. If you could not afford an attorney for that appeal, one will be appointed.

Do you have any questions, Mr. Rupert?

THE DEFENDANT: Um, just for my attorney.

THE COURT: All right. You're welcome to consult with him.

(*Sotto voce* discussion between Mr. Lampson and defendant.)

MR. MARKLE: We've prepared a journal entry reflecting the Court's rulings today. There's a couple of handwritten notations making corrections.

THE COURT: No questions for the Court, Mr. Rupert?

THE DEFENDANT: No, sir.

THE COURT: All right. Have I overlooked anything, Counsel?

MR. MARKLE: No.

(*Sotto voce* discussion between Mr. Lampson and defendant.)

THE COURT: All right. Good luck to

you, Mr. Rupert.

THE DEFENDANT: Thank you.

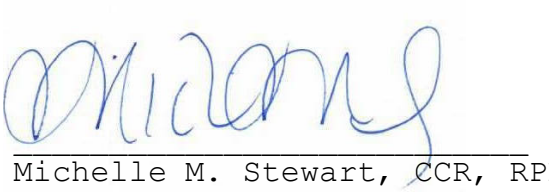
(End of proceedings.)

STATE OF KANSAS)
)
MONTGOMERY COUNTY)

C E R T I F I C A T E

I, Michelle M. Stewart, a Certified Court Reporter for the Montgomery County District Court in the 14th Judicial District of the State of Kansas, do hereby certify that the foregoing is a full and correct transcript of my shorthand notes of the oral evidence and proceedings had in the above-entitled cause on the date indicated.

Dated at my home, this 2nd day of June, 2019.



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CITED UNPUBLISHED DECISIONS

State v. Bannon

Court of Appeals of Kansas

May 6, 2016, Opinion Filed

Nos. 113,497, 114,081

Reporter
2016 Kan. App. Unpub. LEXIS 331 *; 369 P.3d 343; 2016 WL 2610159

STATE OF KANSAS, Appellee, v. JOHN W. BANNON, Appellant.

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

Subsequent History: Review denied by *State v. Bannon, 2017 Kan. LEXIS 759 (Kan., Sept. 28, 2017)*

Prior History: **[*1]** Appeal from Sedgwick District Court; CHRISTOPHER MAGANA, judge.

State v. Bannon, 362 P.3d 1123, 2015 Kan. App. Unpub. LEXIS 1055 (Kan. Ct. App., Dec. 11, 2015)

Disposition: Affirmed.

Counsel: Richard Ney, of Ney & Adams, of Wichita, for appellant.

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

Judges: Before STANDRIDGE, P.J, PIERRON, J., and JOHNSON, S.J.

Opinion

MEMORANDUM OPINION

Per Curiam: In this consolidated appeal, John W. Bannon appeals from the district court's decision to revoke his probation in Sedgwick County case number 13-CR-1445 and the court's decision to deny his motion to withdraw his plea in case number 14-CR-2494. For the reasons stated below, we affirm both of the district court's decisions.

FACTS

In case number 13-CR-1445, Bannon was convicted of criminal carrying of a weapon. On June 2, 2014, he was sentenced to 12 months' probation with an underlying jail term of 12 months.

On June 18, 2014, the State charged Bannon with two counts of criminal threat and one count of fleeing or attempting to elude an officer in case number 14-CR-1494. These offenses were alleged to have been committed on June 15, 2014. After a preliminary hearing, Bannon was bound over on one count of criminal threat and one count of fleeing or attempting **[*2]** to elude an officer.

On July 24, 2014, Bannon signed a written plea agreement affecting both 13-CR-1445 and 14-CR-1494. In it, Bannon agreed to enter a plea of no contest to one count of criminal threat in 14-CR-1494. In return, the State would dismiss the remaining charge of fleeing or attempting to elude an officer. The parties further agreed to the following in return for Bannon's plea:

> "a. Both parties agree to recommend the following sentences: the low number in the appropriate sentencing guidelines grid box;
> "b. Both parties agree to recommend the sentence imposed in this case run consecutively to Case No. 13 CR 1445;
> "c. Both parties agree to recommend that the statutory presumption be followed in this case and that Defendant's probation in 13 CR 1445 be reinstated;
> "d. The State agrees to recommend that the Court order an LSIR in addition to the PSI prior to sentencing.
> "e. Both parties are free to argue for any conditions of probation they wish the Court to impose and the level of supervision of Defendant's probation.
>
> "f. The City of Wichita is not a party to this agreement. With that being said, the attorney representing the City in Wichita Municipal Court Case No. 14CM001677 has indicated **[*3]** that upon Defendant's entry of no contest plea and being sentenced in this case, the City will dismiss Case No. 14CM001677 without prejudice and will consider refiling the same if Defendant has any

other police contact relating to firearms."

Below this list of recommendations, the plea agreement also contained the following provision: "The State will not be bound by this recommendation and may make any other sentencing recommendation it deems appropriate, including incarceration, in the event the defendant is arrested, commits a new offense, violates bond conditions or fails to appear for a court appearance at any time prior to sentencing."

The district court held a plea hearing on July 24, 2014, the same day Bannon signed the plea agreement. In accordance with the plea agreement, Bannon pled no contest to one count of criminal threat and was convicted. After the hearing, Bannon was released on bond. Among the bond conditions imposed on Bannon was a prohibition against consuming alcohol and a prohibition against possessing a firearm.

On August 6, 2014, Bannon was stopped by Officer Ronald Sanders of the Wichita Police Department. During the stop, Sanders smelled the odor of alcohol. Bannon **[*4]** had an open bottle of wine and a handgun in his car. Sanders ultimately arrested Bannon for driving under the influence (DUI). Bannon later submitted to an evidentiary breath test that showed his blood-alcohol content was .076.

On August 7, 2014, the district court issued an arrest warrant for Bannon based on his violation of the bond conditions in 14-CR-1494. The next day, the State filed a motion to revoke Bannon's bond.

On August 13, 2014, the State filed a motion for a dispositional departure sentence in 14-CR-1494. It noted that Bannon faced a presumptive sentence of probation but argued that a prison sentence was merited because Bannon's violation of bond conditions demonstrated that Bannon was not amenable to probation and was a risk to public safety. After the State filed its departure motion, Bannon filed a motion to withdraw his no contest plea. In it, Bannon argued the State's actions in filing the departure motion was a breach of the plea agreement. Bannon claimed he was entitled to withdraw his plea based on the State's alleged breach of the plea agreement. Bannon further claimed that the provision in the plea agreement allowing the State to deviate from its agreed upon **[*5]** sentencing recommendations was unenforceable because the provision lacked consideration and was unconscionable.

A hearing on Bannon's motion to withdraw his plea was held on October 10, 2014. The parties did not call any witnesses and provided only argument to the district court. On October 27, 2014, the district court issued a written decision denying Bannon's motion to withdraw his plea based on its finding that the State did not breach the plea agreement.

The sentencing hearing in 14-CR-1494 and probation revocation hearing in 13-CR-1445 both took place on January 2, 2015. First, the State called Officer Sanders as a witness to testify about the circumstances surrounding the August 6, 2014, arrest of Bannon. The purpose of this testimony was to show that the State was no longer bound by the plea agreement's recommendations affecting both cases on appeal. The district court eventually granted the State's dispositional departure motion and sentenced Bannon in 14-CR-1494 to 6 months in prison. The court then revoked Bannon's probation in 13-CR-1445 based on Bannon's violations of the conditions of probation and ordered Bannon to serve a modified jail sentence of 8 months in prison.

ANALYSIS **[*6]**

The sole issue presented on appeal is whether the district court erred in denying Bannon's motion to withdraw plea. Under *K.S.A. 2015 Supp. 22-3210(d)(1)*, a guilty or no contest plea may be withdrawn "for good cause shown and within the discretion of the court" at any time before the sentence is adjudged. This court will not disturb a district court's denial of a defendant's presentence motion to withdraw a plea unless the defendant establishes that the district court abused its discretion. *State v. Macias-Medina, 293 Kan. 833, 836, 268 P.3d 1201 (2012)*. A judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. *Northern Natural Gas Co. v. ONEOK Field Services Co., 296 Kan. 906, 935, 296 P.3d 1106*, *cert. denied 134 S. Ct. 162, 187 L. Ed. 2d 40 (2013)*. A decision is arbitrary, fanciful, or unreasonable when no reasonable person would have taken the view of the district court. *State v. Wilson, 301 Kan. 403, 405, 343 P.3d 102 (2015)*.

Bannon claims the district court abused its discretion in denying his motion to withdraw plea because the following facts constitute good cause as a matter of law under the facts presented in this case: (1) the State breached the plea agreement; (2) the plea agreement was not supported by adequate consideration; and (3) the plea agreement was unconscionable.

1. *Breach of plea agreement*

Generally, a plea agreement **[*7]** is subject to contract principles. *State v. Urista, 296 Kan. 576, 583, 293 P.3d 738 (2013)*. "The primary rule for interpreting written contracts is to ascertain the parties' intent. If the terms of the contract are clear, the intent of the parties is to be determined from the language of the contract without applying rules of construction." *Anderson v. Dillard's, Inc., 283 Kan. 432, 436, 153 P.3d 550 (2007)*. In ascertaining the intent of the parties,

a court must construe all provisions together and in harmony with one another and should not engage in critical analysis of a single or isolated provision. *Iron Mound v. Nueterra Healthcare Management, 298 Kan. 412, 418, 313 P.3d 808 (2013)*. "A contract is not ambiguous unless two or more meanings can be construed from the contract provisions. [Citation omitted.]" *298 Kan. at 418*. "'Courts should not strain to create an ambiguity where, in common sense, there is not one. [Citations omitted.]'" *American Family Mut. Ins. Co. v. Wilkins, 285 Kan. 1054, 1059, 179 P.3d 1104 (2008)*. But if an ambiguity is found in a plea agreement, the agreement should be strictly construed in favor of the accused. *State v. Wills, 244 Kan. 62, 69, 765 P.2d 1114 (1988)*.

Bannon argues the State breached the plea agreement and that this alleged breach constitutes the good cause required to allow him to withdraw his plea as a matter of law. Bannon's argument is based on language in the plea agreement permitting the State to make any sentencing recommendation, including a term of prison, if Bannon violated the conditions **[*8]** of his bond. Notably, Bannon does not dispute he violated his bond conditions and that these violations released the State from its obligation to make the recommendations set forth in the plea agreement. Bannon also does not dispute that these violations permitted the State to make any other sentencing recommendation it deemed appropriate, including incarceration. Instead, Bannon identifies the State's decision to affirmatively file a motion seeking an upward dispositional departure in the 2014 case and its decision to oppose reinstatement of probation in the 2013 case as the basis for his claim that the State breached the plea agreement. Specifically, Bannon asserts a motion for upward dispositional departure is not a "sentencing recommendation" as that phrase is used in the plea agreement. Bannon claims that a recommendation is merely a suggestion to the court about what should be done, while a departure motion is "the affirmative legal trigger that allows the court to determine whether there are 'substantial and compelling' reasons for the court to impose a sentence other than the presumptive sentence." With regard to the 2013 case, Bannon asserts that a decision to oppose reinstatement **[*9]** of probation does not qualify as a sentencing "recommendation" under the facts presented because Bannon already had been sentenced in that case.

To begin with, we are not persuaded by Bannon's assertion that filing a motion to depart and opposing reinstatement of probation do not constitute sentencing recommendations. In direct contradiction to Bannon's assertions—which Bannon concedes are unsupported by any relevant authority—the Kansas Sentencing Guidelines use the term "recommend" when discussing departure sentences. *K.S.A. 2015 Supp. 21-6812(c)* allows a prosecutor negotiating a plea bargain to "*recommend* a particular sentence *outside of the sentencing range* only when departure factors exist and such factors are stated on the record." (Emphasis added.) But more importantly, the plain language of the plea agreement in this case was remarkably broad. In this written document, the parties agreed that if Bannon violated the conditions of his bond, the State could "make any other sentencing recommendation it deems appropriate, *including incarceration*." (Emphasis added.) By filing a dispositional departure motion, the State was doing precisely what the plea agreement authorized it to do: ask the district court to **[*10]** incarcerate Bannon. The State did not breach the plea agreement in doing so.

Based on our finding that the State did not breach the plea agreement, we conclude the district court did not abuse its discretion in finding that Bannon had failed to show the good cause required to allow him to withdraw his plea.

2. *Consideration*

Next, Bannon argues that the provision relieving the State of its obligation to make the agreed upon sentencing recommendations was not supported by consideration. "It is an elementary principle of law that to be enforceable a contract must be based upon valuable consideration." *Apperson v. Security State Bank, 215 Kan. 724, 734, 528 P.2d 1211 (1974)*. Consideration is "any benefit, profit or advantage flowing to the promisor which he [or she] would not have received but for the contract, or any loss or detriment to the promisee." *Temmen v. Kent-Brown Chevrolet Co., 217 Kan. 223, 231, 535 P.2d 873 (1975)*. But, "an agreement to do or the doing of that which a person is already bound to do does not constitute a sufficient consideration for a new promise." *Apperson, 215 Kan. at 734*. The interpretation and legal effect of written instruments present questions of law subject to unlimited review by this court. *Traster v. Traster, 301 Kan. 88, 104, 339 P.3d 778 (2014)*.

In support of his argument that the plea agreement lacked consideration, Bannon notes he had a preexisting legal duty to obey the **[*11]** law, appear at sentencing, and abide by his bond conditions. As a result, he argues that his promises to do those things prior to sentencing could not have served as consideration for the State's promises regarding sentencing. To accept Bannon's argument, however, we would be required to improperly isolate one provision within the plea agreement. The provision that released the State from its obligation to make certain sentencing recommendations was merely one of many terms found in the binding plea agreement. The provision clearly described what would happen if Bannon failed to obey the law, show up for court, or abide by his bond conditions. And notably, this provision would have had no effect on the parties' agreement had

Bannon not violated his bond conditions.

When viewed in its entirety, the parties agreed that Bannon would plead no contest to one count of criminal threat and that, in return, the State would dismiss one count of fleeing or attempting to elude an officer. The dismissal of this count was unquestionably a benefit to Bannon. Because this exchange of promises alone is sufficient consideration to form a binding contract, we find the plea agreement as a whole was supported **[*12]** by consideration.

To the extent Bannon is arguing that some amount of consideration was needed above and beyond the dismissal of one of the counts against him in order for the State to be relieved of its obligation to make the agreed upon sentencing recommendations, this argument fails. In *Moler v. Melzer, 24 Kan. App. 2d 76, 77, 942 P.2d 643 (1997)*, the parties entered into a real estate contract that included the following clause: "'In the case that the client should become dissatisfied with the inspection, it's [*sic*] findings, or future occurrences, the client will hold the inspector or the company represented liable for the cost of the inspection only.'" Moler argued the clause was a release of liability that must be supported by separate consideration. But this court found the clause was not a release of liability and noted that "Kansas has never imposed a requirement that a contract clause limiting liability be supported by separate consideration." *24 Kan. App. 2d at 78*.

The plea agreement provision at issue here is comparable to the clause in *Moler*. When Bannon violated his bond conditions, the State was released from its promise to make certain recommendations at sentencing. But the State was *not* released from its promise to dismiss the second count against **[*13]** Bannon. In the same way one party sought to limit its liability under the contract in *Moler*, the State here only sought to limit its obligations in the event Bannon failed to cooperate with the court or act in a lawful manner. These are legitimate concerns for the State when agreeing to recommend probation to a criminal defendant. Accordingly, no additional consideration was needed to support the provision in the contract challenged by Bannon.

3. *Unconscionability*

Finally, Bannon argues that the plea agreement provision relieving the State of its responsibility to make the agreed upon sentencing recommendation was unconscionable and therefore unenforceable. A contract may be deemed unconscionable if it is unfairly surprising, one-sided, or oppressive. But unequal bargaining power alone is insufficient to render a contract unconscionable. *Wille v. Southwestern Bell Tel. Co., 219 Kan. 755, 757-60, 549 P.2d 903 (1976)*.

In his brief, Bannon acknowledges the holding of *State v. Bell, 344 P.3d 397, 2015 WL 1123022 (Kan. App.)* (unpublished opinion), *rev. denied 302 Kan. , 2015 Kan. LEXIS 817 (September 23, 2015)*. There, a panel of this court found that the precise plea agreement clause at issue here was not unconscionable. *344 P.3d 397, 2015 WL 1123022, at *1, 5*. In *Bell*, the State agreed to recommend the lowest guideline sentences for all of the criminal offenses charged against Bell. The State entered into a **[*14]** written plea agreement with Bell containing the same clause that Bannon challenges in this case. Bell failed to appear at his sentencing hearing. Relieved of its obligation to recommend the lowest guideline sentences, the State instead recommended the maximum guidelines sentences. 344 P.3d 397, 2015 WL 1123022, at *1. Bell did not file a motion to withdraw his plea but directly appealed his sentence by arguing that his plea agreement was unconscionable. *344 P.3d 397, 2015 WL 1123022, at *2*. This court disagreed and affirmed his sentence. *344 P.3d 397, 2015 WL 1123022, at *5-6*.

Bannon argues that his case is distinguishable from *Bell*. First, he points out that the State sought a dispositional departure in this case but only sought higher guidelines sentences in *Bell*. Bannon also points out that Bell did not seek to withdraw his plea. But in both cases the provision authorizing the State to disregard the agreed upon sentencing recommendation was identical. Bannon fails to explain why Bannon's motion to withdraw his plea, which occurred after the plea agreement was signed, should affect our analysis of whether the written contract provision was unconscionable. Generally, courts must look to the circumstances that existed when the agreement was entered into to judge whether it is conscionable. **[*15]** *Estate of Link v. Wirtz, 7 Kan. App. 2d 186, 189, 638 P.2d 985*, *rev. denied 231 Kan. 800 (1982)*.

Bannon does, however, cite the State's dispositional departure motion as evidence that the plea agreement was unfairly surprising. He again argues that the term "sentencing recommendation" as it was used in the plea agreement did not include the filing of a dispositional departure motion. In addition to the reasons discussed above in denying Bannon relief on this claim, we find it difficult to see how Bannon could have been surprised by the State's departure motion. The plea agreement specifically stated that the State could recommend incarceration if Bannon violated his bond conditions. Since Bannon did violate his bond conditions, he cannot now credibly claim that he was unfairly surprised by the State's motion seeking to have him incarcerated.

In *Wille*, the Kansas Supreme Court noted 10 factors that courts could use to determine if a given contract is unconscionable:

> "(1) The use of printed form or boilerplate contracts drawn skillfully by the party in the strongest economic position, which establish industry wide standards offered on a take it or leave it basis to the party in a weaker economic position [citations omitted]; (2) a significant cost-price disparity or **[*16]** excessive price; (3) a denial of basic rights and remedies to a buyer of consumer goods [citation omitted]; (4) the inclusion of penalty clauses; (5) the circumstances surrounding the execution of the contract, including its commercial setting, its purpose and actual effect [citation omitted]; (6) the hiding of clauses which are disadvantageous to one party in a mass of fine print trivia or in places which are inconspicuous to the party signing the contract [citation omitted]; (7) phrasing clauses in language that is incomprehensible to a lay[person] or that divert his [or her] attention from the problems raised by them or the rights given up through them; (8) an overall imbalance in the obligations and rights imposed by the bargain; (9) exploitation of the underprivileged, unsophisticated, uneducated and the illiterate [citation omitted]; and (10) inequality of bargaining or economic power. [Citations omitted.]" *219 Kan. at 758-59*.

Bannon argues that his plea agreement was unconscionable because of the boilerplate nature of the provision relieving the State of its obligation to recommend a certain sentence and because of the unequal bargaining power between the parties. Even if true, the fact that the language **[*17]** was boilerplate is merely one factor in many to consider when determining if a provision is unconscionable. As the panel in *Bell* pointed out, under the challenged provision, it is the defendant who ultimately controls whether he or she will receive the bargained-for sentencing recommendation. See *Bell, 344 P.3d 397, 2015 WL 1123022, at *3*. If Bannon had abided by his bond conditions, the State presumably would not have filed a dispositional departure motion.

Bannon also asserts that he and the State had unequal bargaining power. He cites *Wills*, in which the Kansas Supreme Court noted that a defendant has only one bargaining chip: the ability to insist on a trial. *244 Kan. at 68*. Bannon argues that this unequal bargaining power combined with the boilerplate provision challenged on appeal render the plea agreement unconscionable. He notes, as an example, that the plea agreement allowed the State to make any sentencing recommendation it deemed appropriate in the event Bannon was merely arrested for a crime, whether he was innocent of the charges or not. While this hypothetical situation may be troubling, it is irrelevant to this case. The State argued at sentencing that it was the violations of Bannon's bond conditions and not his arrest that **[*18]** allowed it to recommend a dispositional departure sentence.

To that end, Bannon argues that he was entitled to a presumption of innocence in the face of charges stemming from his August 6, 2014, traffic stop. As a preliminary matter, we note that Bannon has never argued the district court erred in finding that he violated his bond conditions. An issue not briefed is deemed waived and abandoned. *State v. Jones, 300 Kan. 630, 639, 333 P.3d 886 (2014)*. But even if he had not abandoned his argument, it has no merit because the State presented sufficient evidence to support the district court's finding that Bannon violated his bond conditions. Officer Sanders testified that Bannon had a gun and an open bottle of wine in his car. Sanders also testified that an evidentiary breath test showed that Bannon had consumed alcohol.

Bannon's final argument is that the plea agreement was unconscionably one-sided because the State retained the benefit of its bargain while he lost his. But as noted above, part of the benefit Bannon received from the plea agreement was the dismissal of one count of fleeing or attempting to elude an officer. Bannon acknowledges the dismissal of this count in his brief but downplays its significance by stating that he "did **[*19]** not receive any other benefit under the plea agreement." The fleeing or attempting to elude charge against Bannon was a severity level 9 person felony. Dismissal of a person felony charge is a significant benefit. As a result, we find that the plea agreement was not unconscionably one-sided.

Affirmed.

State v. Hirst

Court of Appeals of Kansas

January 21, 2000, Opinion Filed

No. 80,041

Reporter
2000 Kan. App. Unpub. LEXIS 205 *

STATE OF KANSAS, Appellee/Cross-appellant, v. MICHAEL LYNN HIRST, Appellant/Cross-appellee.

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

Subsequent History: Reported at *State v. Hirst, 996 P.2d 848, 2000 Kan. App. LEXIS 164 (Kan. Ct. App., 2000)*

Prior History: **[*1]** Appeal from McPherson District Court, CARL B. ANDERSON, JR., judge.

Disposition: Appeal dismissed; cross-appeal denied.

Counsel: Rick Kittel, assistant appellate defender, and Jessica R. Kunen, chief appellate defender, for appellant/cross-appellee.

Ty Kaufman, county attorney, and Carla J. Stovall, attorney general, for appellee / cross-appellant.

Judges: Before JUSTICE DAVIS, presiding., DAVID J. KING, District Judge, assigned, and PHILIP C. VIEUX, District Judge, assigned.

Opinion

MEMORANDUM OPINION

Per Curiam: Mike Lynn Hirst appeals his convictions of felony possession of marijuana and misdemeanor possession of drug paraphernalia. He raises several claims of error in pretrial and trial rulings. The State has cross-appealed on a question reserved, claiming the court erred in resentencing Hirst approximately 6 months after his original sentencing hearing.

We dismiss Hirst's appeal and deny the State's cross-appeal.

The parties are familiar with the facts of the case. Only those facts which are relevant to explain the court's decision will be recited in this opinion.

Following Hirst's conviction, the court sentenced him to 24 months' imprisonment. The court incorrectly stated the potential good time credit was 6 months, rather **[*2]** than 3.6 months. Hirst did not appeal. About 6 months later, Hirst filed a *K.S.A. 60-1507* motion requesting that the court shorten his term of imprisonment by the 6 months good time credit imposed at sentencing. The court concluded its original sentence was illegal and resentenced Hirst pursuant to *K.S.A. 22-3504*. The court imposed the same sentence but informed Hirst the potential good time credit was 3.6 months. Hirst appealed. The State filed a cross-appeal challenging whether the court had jurisdiction to do anything but correct the original sentence.

Hirst claims error by the court in (1) denying his motions to suppress evidence, (2) the response it gave to a question from the jury during deliberations and, (3) the jury instruction regarding the drug paraphernalia offense.

Our jurisdiction to consider these issues is contingent on adopting the trial court's conclusion that it resentenced Hirst pursuant to *K.S.A. 22-3504*. If the court merely corrected Hirst's original sentence, his appeal is not timely.

The trial court based its authority to change the computation of good time by interpreting and applying *K.S.A. 22-3504*. Interpretation of statutes is a question of law. The appellate **[*3]** court standard of review on questions of law is unlimited. *State v. Lewis, 263 Kan. 843, 847, 953 P.2d 1016 (1998)*. *K.S.A. 22-3504(1)* allows a court to correct an illegal sentence at any time.

Hirst was entitled to a potential good time credit of 15% of his sentence or 3.6 months. *K.S.A. 1998 Supp. 21-4722(a)(2)*. The court erroneously calculated Hirst's potential good time credit as 25% of his sentence or 6 months. The court's original sentence was not authorized by statute. A sentence which does not conform to statutory provisions is an illegal sentence. *State v. Reedy, 25 Kan. App. 2d 536, 537-38, 967 P.2d 342 (1998)*. If the sentencing court correctly determines the defendant's crime severity level and criminal history but imposes an incorrect guidelines sentence, the court may correct the sentence to reflect the correct term. *25 Kan. App.*

2d 536, 967 P.2d 342, Syl.

Under *Reedy* and *K.S.A. 22-3504*, the district court's jurisdiction when it considered the error in the original sentence was only to correct the good time computation. While the court erred in conducting an entire sentencing hearing, it corrected only the computation for good time credit to comply with the sentencing guidelines. It did **[*4]** not modify the sentence, which it was without authority to do. See *K.S.A. 1998 Supp. 21-4603d*; *State v. Bost, 21 Kan. App. 2d 560, 564-65, 903 P.2d 160 (1995)*.

Regarding Hirst's appeal, the district court did not have jurisdiction over the substantive claims. Where the district court lacks jurisdiction, an appellate court does not acquire jurisdiction over the subject matter on appeal. *Bost, 21 Kan. App. 2d at 564*. In addition, Hirst did not raise pretrial and trial issues at the resentencing hearing. When an issue is not presented to the trial court, it will not be considered for the first time on appeal. *State v. Ninci, 262 Kan. 21, Syl. ¶ 8, 936 P.2d 1364 (1997)*.

Regarding the State's cross-appeal, the district court, in effect, did not exceed its jurisdiction. While the court stated that it was resentencing Hirst, it was only correcting the sentence. When a trial court reaches the right result, the judgment will be upheld, even though it may have relied upon the wrong ground or assigned erroneous reasons for its decision. *State v. Wilburn, 249 Kan. 678, 686, 822 P.2d 609 (1991)*.

Appeal dismissed; cross-appeal denied.

End of Document

State v. Lankford

Court of Appeals of Kansas

September 2, 2016, Opinion Filed

No. 113,817

Reporter
2016 Kan. App. Unpub. LEXIS 724 *; 379 P.3d 1146; 2016 WL 4586162

STATE OF KANSAS, Appellee, v. DANIEL L. LANKFORD, Appellant.

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

Subsequent History: Review denied by *State v. Lankford, 2017 Kan. LEXIS 39 (Kan., Feb. 7, 2017)*

Prior History: **[*1]** Appeal from Sedgwick District Court; DAVID J. KAUFMAN, judge.

Disposition: Vacated and remanded with directions.

Counsel: Adam D. Stolte, of Stolte Law, LLC, for appellant.

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

Judges: Before LEBEN, P.J., STANDRIDGE and ARNOLD-BURGER, JJ.

Opinion by: LEBEN

Opinion

MEMORANDUM OPINION

LEBEN, J.: Daniel Lankford appeals the district court's summary denial of his motion to correct an illegal sentence. He argues that the district court's classification of his 1983 Kansas burglary adjudication as a person felony was unconstitutional under *Descamps v. United States, 570 U.S. , 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013)*, and *Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)*, as those cases were applied by the Kansas Supreme Court in *State v. Dickey, 301 Kan. 1018, 1036-40, 350 P.3d 1054 (2015)*. Lankford asserts that this misclassification increased his criminal-history score and made his sentences illegal, a mistake he says the court can correct under *K.S.A. 22-3504*.

The State argues that we shouldn't reach the merits of Lankford's claim for procedural reasons but agrees that if we reach the issue on its merits, Lankford's point is correct based on *Dickey*. We have reviewed each of the procedural hurdles that Lankford must overcome and have concluded that none of them bar consideration of his claim on the merits. Based on ***[*2]*** *Dickey*, we conclude that the criminal-history score used in Lankford's sentencing was incorrect, and we remand for resentencing with a corrected criminal-history score.

FACTS AND PROCEDURAL BACKGROUND

In December 2011, Lankford pled guilty to burglary of a residence and theft. Before a defendant convicted of a felony in Kansas is sentenced, a presentence report is prepared summarizing the defendant's criminal history. That's because most felony sentences are determined by a sentencing grid that considers the severity level of the crime (set by statute) and the defendant's criminal history. A defendant's criminal-history score increases based on how many of his or her past convictions, including out-of-state convictions and juvenile adjudications, were felonies and person offenses. See *K.S.A. 2015 Supp. 21-6809* (three or more person felonies results in a criminal-history score of "A," two results in a criminal-history score of "B," and one results in a "C" or "D"); *K.S.A. 2015 Supp. 21-6804* (non-drug-offense sentencing grid); *K.S.A. 2015 Supp. 21-6805* (drug-offense sentencing grid).

Person offenses are usually crimes that may inflict physical or emotional harm to another person, whereas crimes that damage property are generally designated as nonperson offenses. **[*3]** *State v. Keel, 302 Kan. 560, 574-75, 357 P.3d 251 (2015)*, *cert. denied 136 S. Ct. 865, 193 L. Ed. 2d 761 (2016)*. Before 1993, Kansas criminal statutes and sentencing laws did not distinguish between person and nonperson offenses, but since then, most statutes specify whether the crime is a person or nonperson offense. To classify pre-1993 Kansas convictions or adjudications as person or nonperson

offenses for criminal-history purposes, the sentencing court compares the prior-conviction statute with the comparable statute in effect at the time the current crime of conviction was committed. 302 Kan. at 573-76, 580-81. For burglary, in particular, past convictions are treated as person felonies if they involved a dwelling but are treated as nonperson felonies if they were committed somewhere other than a dwelling. *K.S.A. 2015 Supp. 21-6811(d)*; see also K.S.A. 2015 Supp. 21-5807. A dwelling is defined as "a building or portion thereof, a tent, a vehicle or other enclosed space which is used or intended for use as a human habitation, home or residence." K.S.A. 2015 Supp. 21-5111(k).

In Lankford's case, the district court found that Lankford had a criminal-history score of "B," based in part on a 1983 Kansas juvenile adjudication for burglary. The presentence investigation report labeled the adjudication as "Burglary (Residence)" and classified it as a person felony. Lankford did not challenge **[*4]** his criminal-history score before the district court.

Based on that criminal history and the severity level of the crime, Lankford's 2011 burglary conviction would warrant a sentence of 27, 29, or 31 months under the Kansas Sentencing Guidelines. The district court sentenced him to 31 months for the burglary conviction and 7 months for the theft conviction—with the sentences running one after another for a total sentence of 38 months—but granted Lankford's request to be placed on probation. Not long after sentencing, Lankford violated the terms of his probation and was ordered to serve a modified sentence of 28 months in prison. The record does not indicate that Lankford filed a direct appeal.

In June 2013, the State charged Lankford with aggravated escape after he left the Wichita Work Release Facility, where he was serving his prison sentence. As part of a plea agreement with the State, Lankford pled guilty to the charge. The district court again found that he had a criminal-history score of "B," and Lankford did not object. Lankford's guideline sentencing range for the aggravated-escape conviction was 114, 120, or 128 months. See K.S.A. 2015 Supp. 21-6804; K.S.A. 2015 Supp. 21-5911(b)(1)(G); K.S.A 2015 Supp. 21-5911(c)(2)(B). But the district court chose to grant Lankford's **[*5]** request for a shorter sentence and sentenced him to 60 months in prison to run after he had served his time in the other case.

In February 2015, Lankford filed a motion to correct an illegal sentence for both cases, arguing that his criminal-history score had been incorrectly calculated under *State v. Murdock, 299 Kan. 312, 323 P.3d 846 (2014)*, *overruled by State v. Keel, 302 Kan. 560, 357 P.3d 251 (2015)*, *cert. denied 136 S. Ct. 865, 193 L. Ed. 2d 761 (2016)*. He also filed another motion to correct an illegal sentence, this time arguing that his criminal-history score had been incorrectly calculated under *State v. Dickey, 50 Kan. App. 2d 468, 329 P.3d 1230 (2014)*, *aff'd 301 Kan. 1018, 350 P.3d 1054 (2015)*. The State responded that *Murdock, Dickey*, and *Descamps* did not apply to Lankford's case and urged the district court to deny the motions. Ultimately, the district court concluded that the matter was properly before it but denied the motions without a hearing.

Lankford has appealed to this court. On appeal, since the opinion favorable to Lankford in *Murdock* has since been overruled, Lankford proceeds only on his arguments under *Dickey*, *Apprendi*, and *Descamps*.

ANALYSIS

Lankford argues that the district court wrongly calculated his criminal-history score, resulting in an illegal sentence, because it classified his 1983 burglary adjudication as a person felony rather than a nonperson felony.

Before we discuss the State's **[*6]** procedural objections to considering Lankford's motion on its merits, we must set out some background about motions seeking to correct an "illegal sentence," a term that has specific meaning in Kansas law. Under K.S.A. 22-3504, a court may correct an illegal sentence at any time. The Kansas Supreme Court has strictly defined "illegal sentence," and a sentence is illegal only if it fits within one of three categories: (1) it is imposed by a court without jurisdiction; (2) it doesn't conform to the applicable statutory provision, either in the character or term of the authorized punishment; or (3) it is ambiguous about the time or manner in which it is to be served. *State v. Lee, 304 Kan. 416, 417, 372 P.3d 415 (2016)*; *State v. Donaldson, 302 Kan. 731, 733-34, 355 P.3d 689 (2015)*; *Makthepharak v. State, 298 Kan. 573, 578, 314 P.3d 876 (2013)*. Whether a sentence is illegal is a question of law, which we review independently, with no required deference to the district court. *State v. Hankins, 304 Kan. 226, 230, 372 P.3d 1124 (2016)*.

Because "illegal sentence" is strictly defined, as a general rule, defendants may not file a motion to correct an illegal sentence based on constitutional challenges. See, *e.g.*, *State v. Warrior, 303 Kan. 1008, 1010, 368 P.3d 1111 (2016)* (holding constitutional challenge to sentencing procedures could not be raised in a motion to correct an illegal sentence); *State v. Mitchell, 284 Kan. 374, 376-77, 162 P.3d 18 (2007)* (determining district court did not have jurisdiction to consider defendant's constitutional claims **[*7]** brought in motion to correct an illegal sentence). But the Kansas Supreme Court has allowed defendants to use K.S.A. 22-3504

to challenge their criminal-history scores based on constitutional claims because these challenges satisfy the second definition of an illegal sentence: if the criminal-history score is incorrect, the resulting sentence wouldn't comply with the sentencing statutes. See *State v. Luarks, 302 Kan. 972, 975-77, 360 P.3d 418 (2015)*; *Dickey, 301 Kan. at 1034* (citing *State v. Neal, 292 Kan. 625, 631, 258 P.3d 365 [2011])*.

The State first argues that we lack jurisdiction under *K.S.A. 22-3504* because Lankford is challenging his sentences on constitutional grounds and a motion to correct an illegal sentence cannot be used to raise constitutional claims. But as the State concedes, *Dickey* held that a constitutional challenge that impacts a defendant's criminal-history score can be raised under *K.S.A. 22-3504(1)* because "such a challenge essentially raises a claim that the sentence imposed does not conform with the applicable statutory provision regarding the term of punishment authorized for the current conviction." *301 Kan. at 1034* (citing *Neal, 292 Kan. at 631*); see also *State v. Vasquez, 52 Kan. App. 2d 708, 714-17, 371 P.3d 946 (2016)* (distinguishing claim that a sentencing statute is unconstitutional from a claim that a constitutional error caused an inaccurate criminal-history score and illegal sentence). The State contends that *Dickey* and *Neal* ***[*8]*** were wrongly decided, but we are duty bound to follow Kansas Supreme Court precedent without some indication that the Supreme Court is departing from its previous position. *State v. Gauger, 52 Kan. App. 2d 245, 255, 366 P.3d 238 (2016)*; see also *Luarks, 302 Kan. at 975* (citing *Dickey* as grounds to consider defendant's challenge to classification of past convictions). We have jurisdiction to consider Lankford's claim.

The State raises two other procedural objections to Lankford's appeal. First, the State argues that because Lankford failed to raise this issue in his direct appeal, the legal doctrine called res judicata prevents him from raising it now. Second, the State argues that *Dickey* cannot be applied to cases in which a defendant's sentence has become final (either because the defendant didn't appeal it or lost an initial, direct appeal).

We begin with the State's res judicata argument, which presents a purely legal question that we review independently, without any required deference to the district court's conclusion. *State v. Robertson, 298 Kan. 342, 344, 312 P.3d 361 (2013)*; *State v. Martin, 52 Kan. App. 2d 474, 479, 369 P.3d 959 (2016)*, *petition for rev. filed* May 5, 2016. "Res judicata" is a Latin phrase that means "a thing adjudicated." Black's Law Dictionary 1504 (10th ed. 2014). As a legal doctrine, it prevents a person from raising a particular claim again after the court **[*9]** has already ruled on it or from raising a claim that could have been raised in a previous case but wasn't. *Robertson, 298 Kan. at 344*; *State v. Martin, 294 Kan. 638, 640-41, 279 P.3d 704 (2012)*.

But the plain language of *K.S.A. 22-3504* creates an exception to res judicata because it authorizes a court to "correct an illegal sentence *at any time*." (Emphasis added.) Our Supreme Court recognized this exception in *Neal*. In that case, the defendant brought a motion to correct an illegal sentence 7 years after his direct appeal, arguing his criminal-history score was incorrect because the district court had improperly counted his past misdemeanor convictions as a single person felony. The court held that because a motion to correct an illegal sentence could be filed at any time, the motion was not barred by res judicata. *292 Kan. at 631* ("[A] motion to correct illegal sentence is not subject to our general rule that a defendant must raise all available issues on direct appeal."). See also *Vasquez, 52 Kan. App. 2d at 713* (applying *Neal* to find defendant's motion to correct an illegal sentence not barred by res judicata); *State v. Blake, No. 113,427, 376 P.3d 93, 2016 Kan. App. Unpub. LEXIS 366, 2016 WL 2772899, at *4 (Kan. App. 2016)* (unpublished opinion) ("[I]f defendants' claims fit within the definition of an illegal sentence under *K.S.A. 22-3504[1]*, then those defendants may raise their claims at any time regardless of their ability to raise such arguments in **[*10]** a prior appeal."). As our court said in *Martin*, "Applying the doctrine of res judicata to bar challenges of an illegal sentence merely because they could have been brought in a direct appeal would undermine the clear statutory directive in *K.S.A. 22-3504(1)* that courts may correct an illegal sentence at any time." *52 Kan. App. 2d 474, 2016 WL 852130, Syl. ¶ 5*.

In its brief, the State relies on general language from *State v. Johnson, 269 Kan. 594, 602, 7 P.3d 294 (2000)*, where our Supreme Court said that a motion to correct an illegal sentence "may not be used as a vehicle to breathe new life into appellate issues previously abandoned or adversely determined." In that case, however, the basis for the motion to correct illegal sentence was much different than the argument Lankford makes. In *Johnson*, the defendant argued that his sentence was illegal based on the State's alleged violation of the plea agreement. The *Johnson* court held that the claim did not fit within the definition of an illegal sentence and recognized that the defendant had raised the issue in prior appeals, thus barring it from further litigation under res judicata principles. *269 Kan. at 601*. The cases in which Kansas appellate courts have applied res judicata to motions to correct an illegal sentence involve claims that were previously **[*11]** resolved by the court or claims that would not fall within the definition of an illegal sentence. See *Martin, 52 Kan. App. 2d at 480* (listing cases). Here, because Lankford's challenge to his criminal-history score fits within the parameters of an illegal-sentence challenge under *K.S.A.*

22-3504(1), his claim is not barred by res judicata.

The State next argues that Lankford can't bring his claim because *Dickey* doesn't apply retroactively to cases that became final before the Supreme Court issued the *Dickey* opinion. In other words, the State contends that *Dickey* doesn't apply to collateral actions, which are legal actions (like a motion to correct an illegal sentence) brought after the defendant's conviction and sentence have become final—which happens when a defendant either chooses not to appeal his conviction and sentence or when the defendant's initial, direct appeal is concluded. As a general rule, when an appellate court decision changes the law, that change applies going forward and applies only to cases that are pending on direct review or not yet final when the decision is issued. *State v. Mitchell, 297 Kan. 118, Syl. ¶ 3, 298 P.3d 349 (2013)*. But the court's holding in *Dickey* isn't a change in the law; it's an application of a constitutional rule announced many years earlier in *Apprendi*. *Vasquez, 52 Kan. App. 2d at 713* (citing **[*12]** *Dickey, 301 Kan. at 1021*). Therefore, the relevant date for retroactivity purposes is the date *Apprendi* was decided—June 26, 2000. *State v. Gould, 271 Kan. 394, 414, 23 P.3d 801 (2001)*; *Vasquez, 52 Kan. App. 2d at 713-14*; *Martin, 52 Kan. App. 2d at 484*. Lankford's cases arose in 2011 and 2013, long after *Apprendi* had been decided. Thus, applying *Dickey* in Lankford's cases is not an improper retroactive application of that law. See, *e.g.*, *State v. Hadley, 369 P.3d 341, 2016 Kan. App. Unpub. LEXIS 283, *10, 2016 WL 1546020, at *4-5 (Kan. App. 2016)* (unpublished opinion).

Although not clearly set out as a separate argument, the State also suggests that because Lankford originally bargained for and received lower sentences than are standard for his crimes, we should not consider his illegal-sentence claim or apply *Dickey* to his case. The State cites no direct, clear support for its arguments. If Lankford's burglary adjudication is reclassified as a nonperson felony, his criminal-history score will be a "C." With that criminal-history score, the standard sentencing range for his 2011 burglary conviction would be 25, 27, or 29 months; likewise, the standard sentencing range for the aggravated escape would be 53, 57, or 60 months. Thus, the State is correct that Lankford could conceivably receive longer sentences than he received before, but that does not prohibit Lankford from raising his claim of an illegal sentence. In fact, our Supreme **[*13]** Court has said that appellate courts have jurisdiction to correct an illegal sentence even if the defendant's sentence was the result of a plea agreement. *State v. Quested, 302 Kan. 262, Syl. ¶ 1, 352 P.3d 553 (2015)*. And a court can correct an illegal sentence at any time, even if it results (or could result) in a higher sentence for the defendant. See *State v. McCarley, 287 Kan. 167, 175, 195 P.3d 230 (2008)* (holding that the State can challenge a sentence as illegal even if it results in a more severe sentence for the defendant). The fact that Lankford's original bargained-for sentences are similar to or lower than the presumptive ranges that will apply on resentencing simply isn't relevant to whether his sentences are illegal.

In sum, Lankford is not procedurally barred from bringing his claim.

We turn then to the merits—whether the district court properly classified Lankford's 1983 conviction as a person felony. The question is one of law, which we review independently, without any required deference to the district court. *State v. Cordell, 302 Kan. 531, 533, 354 P.3d 1202 (2015)*.

While the State has essentially conceded the merits issue, we will briefly explain why Lankford's point is well taken. Lankford asserts that his 1983 Kansas burglary adjudication should have been scored as a nonperson felony based on *Dickey*. In *Dickey*, the defendant pled guilty **[*14]** to felony theft, and in determining his criminal-history score, the district court scored his 1992 Kansas juvenile adjudication for burglary as a person felony. *301 Kan. at 1021-22*. On appeal, Dickey challenged the classification, arguing that it violated his *Sixth Amendment* rights under *Descamps* and *Apprendi*.

In *Apprendi*, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *530 U.S. at 490*. *Descamps* applied consistent principles to a federal sentencing scheme when it described how sentencing courts should compare prior-conviction statutes to generic offenses when determining whether the prior conviction was a violent felony that would increase a defendant's sentence under the *federal Armed Career Criminal Act*. *133 S. Ct. at 2281, 2288*. Under *Descamps*, when determining sentence enhancements under the *Armed Career Criminal Act*, a federal sentencing court compares the elements of the relevant statutes and should not generally consider the actual facts of the prior conviction because doing so may result in the sentencing court finding facts that increase the sentence but were not proven by a jury beyond **[*15]** a reasonable doubt. *133 S. Ct. at 2281-82*.

In *Dickey*, the burglary statute in effect when Dickey committed his prior burglary didn't require evidence that the burglarized structure was a dwelling. Our Supreme Court explained that when the district court determined that Dickey's prior burglary adjudication had involved a dwelling, the court necessarily "ma[de] or adopt[ed] a factual finding [*i.e.*, that the burglary involved a dwelling] that went beyond

simply identifying the statutory elements that constituted the prior burglary adjudication." *301 Kan. at 1039*. The court concluded that classifying Dickey's burglary adjudication as a person felony violated his constitutional rights to have a jury determine all facts other than the mere existence of a past conviction. Thus, the *Dickey* court held that his burglary adjudication should have been classified as a nonperson felony for criminal-history purposes. *301 Kan. at 1039-40*.

Here, just like in *Dickey*, the burglary statute in effect in 1983 didn't include a "dwelling" element. It defined burglary as "knowingly and without authority entering into or remaining within any building, mobile home, tent or other structure, or any motor vehicle, aircraft, watercraft, railroad car or other means of conveyance of persons **[*16]** or property, with intent to commit a felony or theft therein." *K.S.A. 21-3715* (Ensley 1981). In order to classify Lankford's 1983 adjudication as a person felony, the district court necessarily found that the adjudication involved a "dwelling," which was not proven by a jury beyond a reasonable doubt; in doing so, the court violated Lankford's constitutional rights under *Apprendi*. See *Dickey, 301 Kan. at 1039-40*. Thus, under *Dickey*, Lankford's 1983 burglary adjudication should have been classified as a nonperson felony; his criminal-history score is therefore incorrect, and his sentences are illegal.

Because we find that Lankford's sentences are illegal under *Dickey*, we vacate his sentences and remand to the district court with directions to reclassify the 1983 burglary adjudication as a nonperson offense and resentence him accordingly.

End of Document

State v. Rhoten

Court of Appeals of Kansas

July 22, 2016, Opinion Filed

No. 113,896

Reporter
2016 Kan. App. Unpub. LEXIS 603 *; 376 P.3d 97; 2016 WL 3960192

STATE OF KANSAS, Appellee, v. EZEKIEL RHOTEN, Appellant.

Notice: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

Subsequent History: PUBLISHED IN TABLE FORMAT IN THE PACIFIC REPORTER.

Review denied by *State v. Rhoten, 2017 Kan. LEXIS 29 (Kan., Feb. 7, 2017)*

Prior History: **[*1]** Appeal from Sedgwick District Court; DOUGLAS R. ROTH, judge.

Disposition: Vacated and remanded with directions.

Counsel: Carl F.A. Maughan and Sean M.A. Hatfield, of Maughan Law Group LC, of Wichita, for appellant.

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

Judges: Before MALONE, C.J., LEBEN, J., and JOHNSON, S.J.

Opinion by: LEBEN

Opinion

MEMORANDUM OPINION

LEBEN, J.: Ezekiel Rhoten is serving a 100-month prison sentence on convictions for aggravated burglary and robbery. He filed a motion in the district court to correct his sentence, arguing that some of his past convictions had been improperly classified as person crimes, which made his presumptive prison sentence longer under our state's sentencing guidelines. The district court denied the motion, and Rhoten appealed to our court.

On appeal, the State concedes that if we reach the merits of Rhoten's claim, he's "likely" right—two of his past convictions wouldn't be classified as person offenses if we apply the ruling of our Supreme Court in *State v. Dickey, 301 Kan. 1018, 1036-40, 350 P.3d 1054 (2015)*. But the State argues that we should: (1) conclude that we have no jurisdiction to consider Rhoten's claim; (2) conclude that Rhoten waived his claim by failing **[*2]** to make it on direct appeal; or (3) find that *Dickey* created a new rule that applies only to future cases. (Rhoten's conviction and sentencing took place in 2012, 3 years before *Dickey*, so the State argues that we cannot apply it to Rhoten's sentencing.)

We disagree with the State on each of these points. First, we have jurisdiction over Rhoten's claim because a Kansas statute, *K.S.A. 22-3504*, specifically allows a motion to correct an illegal sentence to be made "at any time." And the *Dickey* court held that a motion under *K.S.A. 22-3504* is an appropriate way to challenge whether a defendant's criminal-history score was incorrectly determined. Second, since *K.S.A. 22-3504* motions may be brought at any time, Rhoten's failure to raise the claim on direct appeal doesn't matter. Third, *Dickey* was just an application of the United States Supreme Court's decision in *Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)*, and a later decision applying *Apprendi*, *Descamps v. United States, 570 U.S. , 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013)*. Thus, because *Dickey* did not announce a new rule, it can be applied in motions involving convictions that took place before *Dickey* and that were already final when the motion was filed.

We therefore reach the substance of Rhoten's claim. We find that it has merit, so we vacate his sentence and remand the case for resentencing. In the remainder **[*3]** of the opinion, we will provide more detailed support for our conclusions.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2012, Rhoten pled no contest to one count of aggravated burglary and one count of robbery. At sentencing, the district court found that Rhoten had a criminal-history score of A, the most serious of nine potential scores, based in

part on two 1985 Kansas burglary convictions that were classified as person felonies. Given the primary offense (aggravated burglary) and Rhoten's criminal-history score, his presumptive guidelines sentencing range for the aggravated burglary was 122 to 136 months in prison.

In exchange for Rhoten's plea, the State agreed to recommend that the district court impose a decreased prison sentence of 100 months—what's known as a downward-durational-departure sentence, since the sentence departs downward from the guideline range. At sentencing, the State made that recommendation, while Rhoten argued for the sentence to be reduced further (to 75 months) or for probation. The district court denied Rhoten's requests and followed the State's recommendation, imposing a 100-month sentence with 24 months of postrelease supervision.

Rhoten appealed his sentence **[*4]** but voluntarily dismissed that appeal in August 2013.

Nine months later, in May 2014, Rhoten filed a motion to correct an illegal sentence, arguing that his criminal-history score had been incorrectly calculated under *State v. Murdock, 299 Kan. 312, 323 P.3d 846 (2014)*, *overruled by State v. Keel, 302 Kan. 560, 357 P.3d 251 (2015)*, *cert. denied 136 S. Ct. 865, 193 L. Ed. 2d 761 (2016)*. In October 2014, he filed another motion to correct an illegal sentence, that time arguing that his criminal-history score had been incorrectly calculated under *Dickey*. In January 2015, the district court denied Rhoten's motions without a hearing.

Rhoten then appealed to this court.

Analysis

Rhoten argues that the district court wrongly calculated his criminal-history score (making his sentence illegal) because it classified his two 1985 burglary convictions as person felonies rather than nonperson felonies as *Dickey* required. If those convictions are reclassified as nonperson offenses, Rhoten's criminal-history score would drop from A to B, and his presumptive guidelines sentence range for the aggravated robbery would be 114 to 128 months rather than 122 to 136 months. (Rhoten has abandoned his *Murdock* argument on appeal, presumably because *Murdock* has been overruled and is no longer good law. See *Keel, 302 Kan. at 589-90*.)

In our review, whether on the State's procedural **[*5]** arguments or on the merits of Rhoten's motion, the questions presented are legal ones that we must review independently, without any required deference to the district court. See *State v. Looney, 299 Kan. 903, 906, 327 P.3d 425 (2014)* (jurisdiction); *State v. Robertson, 298 Kan. 342, 344, 312 P.3d 361 (2013)* (res judicata); *State v. Luarks, 302 Kan. 972, 975-76, 360 P.3d 418 (2015)* (motion to correct illegal sentence).

The State's Procedural Arguments

Before we get to the merits of Rhoten's claim, we must first determine whether we can hear his appeal at all. The State argues that we lack jurisdiction under *K.S.A. 22-3504* because Rhoten is challenging his sentence on constitutional grounds, and our Supreme Court has said, as a general matter, that defendants can't use *K.S.A. 22-3504* to challenge their sentences on constitutional grounds. *State v. Lee, 304 Kan. 416, 417, 372 P.3d 415 (2016)*; *State v. Warrior, 303 Kan. 1008, 1009-10, 368 P.3d 1111 (2016)*. But, as the State also recognizes, our Supreme Court allowed a claim just like Rhoten's to be heard on its merits in *Dickey*.

Any analysis of *K.S.A. 22-3504* must begin with the statute's terms: "The court may correct an illegal sentence at any time." The Kansas Supreme Court has confined "illegal sentence" as used in this statute to three situations: "'(1) a sentence imposed by a court without jurisdiction; (2) a sentence that does not conform to the applicable statutory provision, either in the character or the term of authorized punishment; or (3) a sentence **[*6]** that is ambiguous with respect to the time and manner in which it is to be served.'" *Makthepharak v. State, 298 Kan. 573, 578, 314 P.3d 876 (2013)*; *State v. Trotter, 296 Kan. 898, 902, 295 P.3d 1039 (2013)*. And in *Dickey*, the court said defendants can use *K.S.A. 22-3504* to challenge their criminal-history scores because such a challenge meets the second definition of an illegal sentence: it's a claim that a sentence doesn't conform to the applicable statutory provision. *Dickey, 301 Kan. at 1034* (citing *State v. Neal, 292 Kan. 625, 631, 258 P.3d 365 [2011]*). The State argues that *Dickey* and *Neal* should be overruled; our court, of course, does not overrule Kansas Supreme Court rulings.

Dickey held that when a constitutional challenge impacts a defendant's criminal-history score, the challenge is within the strict definition of an illegal sentence because if the criminal-history score is wrong, the sentence no longer complies with the sentencing statutes. *Dickey, 301 Kan. at 1034* (citing *Neal, 292 Kan. at 631*); see also *State v. Vasquez, 52 Kan. App. 2d 708, 712-14, 371 P.3d 946 (2016)* (distinguishing claim that a sentencing statute is unconstitutional from a claim that a constitutional error caused an incorrect criminal-history score and illegal sentence); *Luarks, 302 Kan. at 975-76*. Accordingly, we have jurisdiction to consider Rhoten's claim.

The State also argues that Rhoten's claim is barred by the

legal doctrine called "res judicata." In Latin, the phrase means "a thing adjudicated," and in legal doctrine, it means that **[*7]** once a person has raised a particular issue before the court and the court has ruled on that issue, that person isn't allowed to raise the same issue again. Black's Law Dictionary 1504 (10th ed. 2014); see *Robertson, 298 Kan. at 344*. Most of the time, res judicata also bars a party from raising a claim that *could* have been raised in a previous case but wasn't. *State v. Martin, 294 Kan. 638, 640-41, 279 P.3d 704 (2012)*; *State v. Conley, 287 Kan. 696, 698, 197 P.3d 837 (2008)*. The State argues that since Rhoten didn't make this argument in his direct appeal, he has waived it.

But res judicata only applies to motions to correct an illegal sentence if the claims made in the motion were *actually raised* and ruled on in a previous case—it doesn't apply if the defendant hasn't brought the claims before. *State v. Martin, 52 Kan. App. 2d 474, 480-82, 369 P.3d 959 (2016)*, *petition for rev. filed* May 5, 2016; see *Neal, 292 Kan. at 631* ("[T]he motion to correct illegal sentence is not subject to our general rule that a defendant must raise all available issues on direct appeal."); *Angelo v. State, 320 P.3d 449, 2014 Kan. App. Unpub. LEXIS 160, *9, 2014 WL 1096834, at *3 (Kan. App. 2014)* (unpublished opinion), *rev. denied 301 Kan. , 2015 Kan. LEXIS 17 (January 8, 2015)*. The plain language of *K.S.A. 22-3504* carves out this exception to res judicata: "The court may correct an illegal sentence *at any time*." (Emphasis added.) Thus, while *K.S.A. 22-3504* "'may not be used as a vehicle to breathe new life into appellate issues previously abandoned or adversely determined,'" *Conley, 287 Kan. at 698* (quoting *State v. Johnson, 269 Kan. 594, 602, 7 P.3d 294 [2000]*, applying res judicata **[*8]** when the illegal-sentence claim hasn't been brought before would undermine the clear language and purpose of *K.S.A. 22-3504*. *Vasquez, 52 Kan. App. 2d 708, 371 P.3d 946, 2016 WL 1728688, at *4*; see *Cain v. Jacox, 302 Kan. 431, Syl. ¶ 3, 354 P.3d 1196 (2015)* (holding that courts applying res judicata "must be mindful of the equitable purposes animating the doctrine"). So Rhoten's claim is not barred by res judicata.

The State's third procedural argument is that the *Dickey* ruling, issued in 2015, can't be applied to Rhoten, who was convicted and sentenced in 2012. As the State correctly notes, Rhoten's motion to correct an illegal sentence is what's known as a "collateral" attack, which is a challenge to a conviction or sentence that is brought after the conviction and sentence have become final. They become final at the end of a defendant's initial direct appeal, if one is filed. Rhoten did file an appeal, but he voluntarily dismissed it in August 2013. So his conviction and sentence became final in August 2013, well before the 2015 *Dickey* ruling. The State argues that the *Dickey* ruling can't be applied to Rhoten's case.

Both the finality of criminal judgments and fairness to defendants are at issue here in this specific context—when court decisions have announced a new rule in the law. On one hand, we have a strong interest **[*9]** in the finality of criminal judgments. We don't lightly try cases over again, especially when many years may have passed and witnesses and other evidence may have become unavailable. On the other hand, we want to be fair to defendants and consider any valid legal arguments they might raise. The United States Supreme Court and the Kansas Supreme Court have balanced these interests in the context of judicial decisions that announce a new rule: That new rule is applied to all cases that are then on direct appeal—but *not* to cases that have already become final. Thus, a truly new rule won't benefit the defendant who is raising a collateral attack on a criminal conviction or sentence after having already concluded (or waived) the direct appeal. *Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987)*; *State v. Mitchell, 297 Kan. 118, Syl. ¶ 3, 298 P.3d 349 (2013)*.

To figure out whether the *Dickey* ruling applies to Rhoten's motion to correct an illegal sentence, which is a collateral attack, we must determine whether *Dickey* announced a new rule. "[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague v. Lane, 489 U.S. 288, 301, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)* (plurality opinion). *Dickey* didn't announce a new rule; it applied a constitutional rule announced by the United States Supreme **[*10]** Court in its 2000 decision in *Apprendi*. *Apprendi did* announce a new rule. Accordingly, its ruling has been applied only to cases pending and not yet final when it was announced or to future cases. *State v. Gould, 271 Kan. 394, 414, 23 P.3d 801 (2001)*; *Vasquez, 52 Kan. App. 2d at 714*; *Martin, 52 Kan. App. 2d at 484*. Rhoten's case arose many years after *Apprendi*, so we apply its rule to him. And while *Dickey* also discussed another United States Supreme Court case that arose *after* Rhoten's conviction had become final, the 2013 decision in *Descamps*, that case simply *applied Apprendi*; it did not announce a new rule. *Vasquez, 52 Kan. App. 2d at 713*; *Martin, 52 Kan. App. 2d at 484*. We therefore apply *Dickey* to Rhoten's case.

The State also briefly suggests that because Rhoten originally bargained for and received a downward-durational-departure sentence (100 months when the standard sentence was greater), we shouldn't consider his illegal-sentence claim or apply *Dickey*. The State cites no authority for this proposition. *Cf. State v. Quested, 302 Kan. 262, Syl. ¶ 1, 352 P.3d 553 (2015)* ("An appellate court has jurisdiction to correct an illegal sentence even if a defendant bargained for the sentence as part of a plea agreement."). The State is correct that the 100-month sentence he received is still lower than the guidelines sentencing range that would apply if his criminal-

history score were reduced from A to B. But courts **[*11]** can correct an illegal sentence at any time, even if it results (or could result) in a higher sentence for a defendant. See *State v. McCarley, 287 Kan. 167, 175, 195 P.3d 230 (2008)* (holding that the State can challenge a sentence as illegal even if it results in a more severe sentence for the defendant). So it's just not relevant to the illegal-sentence inquiry that Rhoten's original departure sentence is lower than the presumptive range that will apply at his resentencing. He is entitled to be sentenced with the correct criminal-history score and presumptive sentencing range to guide the sentencing judge.

With the State's procedural objections out of the way, we move now to the merits of Rhoten's claim.

The Merits of Rhoten's Claim

To consider the merits of Rhoten's claim, we will need to compare the *Dickey* case with Rhoten's, while keeping in mind the standards set out in *Apprendi*. Ultimately we must consider whether his sentence is illegal because his prior convictions were not properly classified as person crimes.

In *Dickey*, the defendant pled guilty to felony theft, and the district court scored his 1992 juvenile adjudication for burglary as a person felony. The defendant argued on appeal that this classification violated his *Sixth Amendment* rights under **[*12]** *Apprendi* and *Descamps*.

Apprendi held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *530 U.S. at 490*. *Descamps* was primarily about the interpretation of a specific federal sentencing statute, but it applied this principle from *Apprendi* when it explained how a federal sentencing court should compare prior-conviction statutes to generic offenses when determining whether the prior conviction is a violent felony that will increase a defendant's sentence. *133 S. Ct. at 2281, 2288*. Generally, a federal sentencing court can only compare the *elements* of the relevant statutes and cannot look at the *actual facts* underlying the prior conviction because doing so could result in the sentencing court finding sentence-enhancing facts (that a prior felony conviction was a "violent felony," for example) that weren't proved to a jury beyond a reasonable doubt (violating *Apprendi*). *133 S. Ct. at 2281-82*. The sentencing court can only consider the actual facts of the prior crime (using documents such as indictments or jury instructions) when the prior-conviction statute is divisible—that is, when it sets forth alternative **[*13]** elements of a given crime. In other words, when the prior crime could have been committed in more than one way, the sentencing court is allowed to find out how it was committed and therefore which elements of the prior-conviction statute were applied to the defendant. *133 S. Ct. at 2281*. The court can then compare the relevant elements of the prior-conviction statute to the generic offense and decide, based purely on these statutory elements, if the prior conviction was a violent felony that would increase the sentence. *133 S. Ct. at 2285*.

In *Dickey*, the Kansas Supreme Court determined that *Apprendi*, as explained in *Descamps*, applies to the Kansas Sentencing Guidelines Act because the Act requires the court to classify prior convictions as person or nonperson crimes, which puts the court at risk of finding a fact about a prior conviction—that it was a person crime—that will increase a defendant's sentence but wasn't proved to a jury beyond a reasonable doubt. See *Dickey, 301 Kan. at 1039*; *K.S.A. 2015 Supp. 21-6809* (three person felonies results in a criminal-history score of A, two results in a criminal-history score of B, and one results in a C or D); *K.S.A. 2015 Supp. 21-6811(d)* and *(e)* (the facts required to classify prior burglary convictions and prior out-of-state convictions shall be established **[*14]** by the State by a preponderance of the evidence). For burglary in particular, "dwelling" is the statutory element that determines the person or nonperson classification. *K.S.A. 2015 Supp. 21-6811(d)*; *K.S.A. 2015 Supp. 21-5807(a)*.

The burglary statute in effect when Dickey committed his prior burglary didn't require evidence that the burglarized structure was a dwelling. *Dickey, 301 Kan. at 1039*. Because the prior burglary statute didn't contain a dwelling element, determining whether the defendant's prior burglary actually involved a dwelling at the criminal-history stage "would necessarily involve judicial factfinding that goes beyond merely finding the existence of a prior conviction or the statutory elements constituting that prior conviction." *301 Kan. at 1021*. Therefore, the *Dickey* court concluded that "classifying [the defendant's] prior burglary adjudication as a person felony violates his constitutional rights as described under *Descamps* and *Apprendi*." *301 Kan. at 1021*.

Here, just like in *Dickey*, the burglary statute in effect in 1985 didn't include a "dwelling" element: burglary was "knowingly and without authority entering into or remaining within any building, mobile home, tent or other structure, or any motor vehicle, aircraft, watercraft, railroad car or other means of conveyance **[*15]** of persons or property, with intent to commit a felony or theft therein." *K.S.A. 21-3715* (Ensley 1981). So to classify Rhoten's 1985 burglary convictions as person crimes, the district court necessarily found that those prior convictions involved a "dwelling," which is a fact only a jury can find under *Apprendi* because it is the fact that makes burglary a person crime and increases a defendant's sentence.

Dickey, 301 Kan. at 1039-40; see *State v. Cordell, 302 Kan. 531, 531-32, 354 P.3d 1202 (2015)* (finding a 1986 burglary conviction should have been classified as a nonperson crime under *Dickey*). Under *Dickey*, Rhoten's 1985 convictions should have been classified as nonperson felonies.

We vacate Rhoten's sentence and remand to the district court with directions to reclassify the two 1985 burglary convictions as nonperson offenses and resentence Rhoten.

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