NOT DESIGNATED FOR PUBLICATION

No. 119,145

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellant,

v.

SHANE M. PLUIMER,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; DAVID J. KAUFMAN, judge. Opinion filed April 26, 2019. Affirmed.

Boyd K. Isherwood, assistant district attorney, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, for appellant.

Patrick H. Dunn, of Kansas Appellate Defender Office, for appellee.

Before ARNOLD-BURGER, C.J., PIERRON, J., and MCANANY, S.J.

PER CURIAM: On February 7, 2017, Shane M. Pluimer was yelling loudly in a store parking lot in Wichita. When a nearby individual told him to be quiet, Pluimer responded by yelling several times, "'I'm going to kill you.'" Pluimer followed this individual into a nearby pharmacy. The individual told a store employee to keep Pluimer out and to call 911 because he feared for his life. Pluimer began yelling at everyone in the store. When the store manager told Pluimer to leave, Pluimer told the manager he was going to kill him too. When Pluimer entered the store, he pulled out a pocket knife and advanced towards the store manager, but Pluimer then used the knife to stab a nearby poster and left the store. The police located Pluimer and arrested him.

On February 9, 2017, Pluimer was charged with aggravated assault and two counts of criminal threat. He was unable to post the $25,000 bond the court ordered. He remained in State custody until his sentence was imposed.

On March 8, 2017, the court held a hearing on defense counsel's request for a competency evaluation of Pluimer. The court ordered that Community Care of Sedgwick County (COMCARE) conduct a competency evaluation of Pluimer. COMCARE determined that Pluimer needed treatment before the case could continue, so on April 25, 2017, the district court found Pluimer incompetent to stand trial and sent him to Larned State Security Hospital (Larned) for treatment. See K.S.A. 2018 Supp. 22-3303.

In its November 20, 2017 report, Larned determined that Pluimer had progressed in his treatment. So on December 15, 2017, the district court found Pluimer competent to stand trial and returned him to the county jail. His preliminary hearing was scheduled for January 9, 2018.

Thereafter, the parties entered into a plea agreement in which Pluimer agreed to plead no contest to one count of criminal threat, and the State agreed to dismiss the remaining charges. The State also agreed to recommend presumptive probation with an underlying standard eight-month sentence.

On January 29, 2018, Pluimer entered his plea pursuant to the plea agreement, and the district court accepted Pluimer's plea, found him guilty, and scheduled his sentencing for March 7, 2018.

On March 7, 2018, the court held Pluimer's sentencing hearing. Both the State and Pluimer's counsel urged the court to follow the plea agreement and to sentence Pluimer to presumptive probation with the standard underlying eight-month sentence. Pluimer's

lawyer explained, "Mr. Pluimer spent a great deal of time off docket for competency, so there were some mental health problems going on, and we just ask that you follow the terms of the plea agreement."

At the time of Pluimer's sentencing hearing, he had been in state custody since the time he was arrested in February 2017, a period of 13 months. The court inquired about jail credit.

> "COURT: What's the—Do you have any idea what the jail credit is?
> "[PROSECUTOR]: Judge, I don't. I was kind of surprised that I don't.
> "COURT: Your client been in custody all this time, Ms. Kluzak?
> "[DEFENSE COUNSEL]: Yes, Your Honor.
> "COURT: You been in custody for more than seven months?
> "[DEFENSE COUNSEL]: That's my under—[t]hat very well may be, Your Honor. I don't know if there were other holds, but I know he spent quite a bit of time in Larned."

After an off-the-record conference with counsel, the court stated that under *State v. Kinder*, 307 Kan. 237, 408 P.3d 114 (2018), it could not place Pluimer on probation because the full sentence of confinement for his crime had already been served.

> "To me this is time served. It's an eight-month sentence, time served. There is no probation since I cannot place him on probation, but to place him on postrelease means that he has to go to the Department of Corrections . . . . And so for that to occur Mr. [Pluimer] would have to go to KDOC on my order. Based on what? It's time served. Mr. [Pluimer] gets released from jail, and I'm gonna give the deputy a release."

The State appeals, arguing that the district court imposed an illegal sentence on Pluimer. We tease out of the State's brief its supporting arguments that the illegality of Pluimer's sentence arises from the facts that (1) there is no statutory authority to impose a sentence of time served; (2) to impose a legal sentence the court would have had to make

a dispositional departure, which it did not; and (3) to impose a legal sentence the court would have had to order a term of postrelease supervision, which it did not do.

Standard of Review

Whether a sentence is illegal within the meaning of K.S.A. 2018 Supp. 22-3504 is a question of law over which we have unlimited review. *State v. Lee*, 304 Kan. 416, 417, 372 P.3d 415 (2016). Similarly, to the extent that this case involves statutory interpretation, our review is unlimited. *State v. Collins*, 303 Kan. 472, 473-74, 362 P.3d 1098 (2015).

Pluimer's Sentence is not Illegal

An illegal sentence is a sentence imposed by a court without jurisdiction, a sentence that does not conform to the statutory provisions either in the character or the term of the punishment authorized, or a sentence that is ambiguous with respect to the time and manner in which it is to be served. K.S.A. 2018 Supp. 22-3504(3).

The State's Three Arguments

First, the State argues that under K.S.A. 2018 Supp. 21-6615(a) the court must apply jail time credit to the defendant's sentence if the defendant is sentenced to a period of confinement. But here, the court did not sentence Pluimer to a period of confinement. Thus, the notion of jail credit does not come into play. Consequently, the State argues Pluimer's sentence is illegal because time served is not an authorized disposition under K.S.A. 2018 Supp. 21-6604(a).

Second, Pluimer's criminal history called for presumptive probation for his crime. The State argues that in order to impose a prison sentence so as to bring Pluimer's jail

time credit into play, the court would have had to depart from presumptive probation and impose a prison sentence. But the court failed to make the necessary departure from presumptive probation.

Third, the State argues that in order to satisfy the requirement of pronouncing a complete sentence under K.S.A. 2018 Supp. 21-6804(e)(2), the court had to order a period of postrelease supervision, which the court failed to do.

■ *The State's First Argument*

The driving force behind Pluimer's sentence was our Supreme Court's ruling in *State v. Kinder*, 307 Kan. 237. In *Kinder*, the district court sentenced the defendant to 9 months' imprisonment but granted him presumptive probation for a period of 18 months. But the rub was Kinder's nearly 12 months of pretrial confinement for which the district court gave him credit. This jail time credit exceeded Kinder's nine-month prison sentence. Accordingly, Kinder argued that he had already served his required period of confinement and probation was improper. Our Supreme Court agreed, noting that probation is a substitute for time incarcerated. But if there is no underlying prison term to be served, there is nothing for which probation provides a substitute. 307 Kan. at 242-43. Thus, the district court erred in imposing probation when the underlying sentence of confinement already had been served.

The State's first argument is premised on the notion that the court could not apply jail time credit for Pluimer's period of confinement because there was no prison sentence imposed to which the jail credit could apply. But this ignores the fact that the court specifically stated, "It's an eight-month sentence, time served." This is confirmed by the Journal Entry of Judgment which memorializes that the sentence imposed was eight months, which was the mid-sentence in the presumptive sentencing range.

As to the State's contention that Pluimer's sentence was not an authorized disposition, the district court imposed an eight-month sentence. This is an authorized disposition under K.S.A. 2018 Supp. 21-6604(a). But Pluimer had accumulated approximately 13 months of jail time credit for his time in custody since his arrest. Jail time credit is not only authorized by statute but is mandated by K.S.A. 2018 Supp. 21-6615. See *State v. Calderon*, 233 Kan. 87, 97, 661 P.2d 781 (1983). The duration of Pluimer's pretrial detention completely (and then some) vitiated his underlying eight-month prison sentence. Pluimer's period of pretrial detention properly includes his time at Larned. See *State v. Mackey*, 220 Kan. 518, Syl., 552 P.2d 628 (1976) (defendant entitled to credit against sentence for time spent in state mental hospital undergoing pretrial mental examinations).

Applying Pluimer's jail time credit and the holding in *Kinder*, the court determined that Pluimer had already served his period of confinement while in pretrial detention. Both these actions—imposing an eight-month sentence and giving credit for Pluimer's period of pretrial detention—were consistent with our sentencing statutes. The State's first argument fails to convince us that the court imposed on Pluimer an illegal sentence.

- *The State's Second Argument*

The State's second argument is that because Pluimer's criminal history called for presumptive probation for his crime, in order to impose a prison sentence so as to bring Pluimer's jail time credit into play, the court would have had to depart from presumptive probation, which the court did not do.

Pluimer is in the same circumstances as the defendant in *Kinder*. Pluimer faced a standard prison sentence of eight months with presumptive probation. In Kinder's case, "'[s]ince Kinder had no prior convictions or adjudications, the presentence investigation report calculated his criminal history score as I, resulting in a presumptive sentence of 7

to 9 months' imprisonment with 18 months' probation.'" 307 Kan. at 238. In *Kinder*, the district court imposed the standard nine-month prison sentence. As shown above, Pluimer received the standard eight-month sentence. The only difference between the two cases is that the district court in *Kinder* then imposed 18 months' probation. That was the part of Kinder's sentence that the Supreme Court found to be improper: "We further conclude probation cannot be imposed after the full sentence of confinement has been served." 307 Kan. at 238.

Here, the district court recognized that it could not place Pluimer on probation because of the holding in *Kinder*. Moreover, the court declined to consider a departure that would increase Pluimer's prison sentence so that his prison sentence would exceed his jail time credit and the court could then order probation. The State had not moved for a departure and had provided no substantial and compelling reasons that would justify a departure. See K.S.A. 2018 Supp. 21-6604(a)(3). The district court stated: "So I know according to the Supreme Court of Kansas and the chief justice himself I cannot place Mr. Kinder [*sic*] on probation, and I decline to *sua sponte* or continue this sentencing to do a departure motion. Based on what?"

In our examination of the record we find no departure motion by either party and no substantial and compelling reasons that possibly could form the basis for such a motion. In fact, at the sentencing hearing both parties requested that the court follow the plea agreement.

Besides, it has long been the law of this state that the law does not require the court to engage in a futile act. See *Anderson v. Dugger*, 130 Kan. 153, 156, 285 P. 546 (1930). Here, the State would require the district court to go through the steps to depart from presumptive probation and impose a prison sentence before giving Pluimer credit for time served and then discharging him as required by *Kinder*. If we were to remand to the district court to go through that exercise, the ultimate outcome of the case would

remain unchanged. The ultimate outcome of the case is controlled by *Kinder*. That would not change if we were to remand. The State's second argument does not persuade us that we should vacate Pluimer's sentence and remand for resentencing.

- *The State's Third Argument*

The State's third and final argument is that the district court failed to pronounce a complete sentence under K.S.A. 2018 Supp. 21-6804(e)(2) because the court failed to order 12 months of postrelease supervision as required by K.S.A. 2018 Supp. 22-3717(d)(1)(C).

Pluimer persuasively argues that under K.S.A. 2018 Supp. 22-3717(d)(1), a defendant cannot serve postrelease supervision without having first served a prison sentence. Under our sentencing guidelines, K.S.A. 2018 Supp. 21-6803(r) in particular, "'prison'" is defined as "a facility operated by the Kansas department of corrections."

Plumier was at the Larned State Security Hospital for a time while he was examined and treated for his mental illness. He was not there as punishment for a crime but rather for a competency evaluation and treatment. During the rest of his time he was held in the county jail in pretrial detention.

The type of confinement that triggers the requirement of postrelease supervision is described in *State v. Gaudina*, 284 Kan. 354, 359, 160 P.3d 854 (2007), as "[being] removed from society and severely restricted in activities and conduct for the primary purpose of penalizing the defendant while protecting society." Pluimer was never in a KDOC prison serving a sentence for his crime. He was at Larned due to his deteriorating mental condition, and he was in the county jail because he did not have the resources to post bond. We do not punish people for being mentally ill or for being unable to post bond.

Moreover, even if the State is correct in its argument on this issue, our Supreme Court's opinion in *Kinder* provides practical guidance for dealing with the matter of postrelease supervision at this late date: "Kinder was sentenced to probation well over 12 months ago. So remand for imposing postrelease supervision of 12 months would be pointless." 307 Kan. at 244.

The same holds true here. Pluimer was sentenced on March 7, 2018. More than a year has passed since then. If a petition for review is filed with our Supreme Court, additional time will pass before any remand would be possible. We have no indication that in this interim Pluimer has not remained a law-abiding member of the community in need of close State supervision. To order postrelease supervision at this late date would be pointless.

Kinder controls, and we are bound to follow it absent some indication that our Supreme Court is departing from its holding in this decision. *State v. Meyer*, 51 Kan. App. 2d 1066, 1072, 360 P.3d 467 (2015). We see no such indication. Accordingly, we conclude that the State has failed to show that Pluimer's sentence is illegal. The district court had jurisdiction to impose it. The sentence the district court imposed conforms to the statutory provisions both as to its character and the term of the punishment authorized, and the sentence is unambiguous with respect to the time and manner in which it is to be served. K.S.A. 2018 Supp. 22-3504(3).

Affirmed.