NOT DESIGNATED FOR PUBLICATION

No. 119,522

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

CODY W. COLLINS,
Appellant.

MEMORANDUM OPINION

Appeal from Reno District Court; JOSEPH L. MCCARVILLE III, judge. Opinion filed June 21, 2019. Vacated.

Kai Tate Mann, of Kansas Appellate Defender Office, for appellant.

Thomas R. Stanton, deputy district attorney, *Keith E. Schroeder*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before SCHROEDER, P.J., BUSER and ATCHESON, JJ.

PER CURIAM: During a family argument, Defendant Cody Collins brandished a pellet gun that looked like a semi-automatic handgun. He was criminally charged in Reno County District Court and ultimately pleaded guilty to two counts of aggravated assault. At sentencing, the district court found the pellet gun to be a deadly weapon for purposes of the Kansas Offender Registration Act, K.S.A. 2017 Supp. 22-4901 et seq. and ordered Collins to register. On appeal, Collins contends the record fails to support the district

court's registration order. We agree and vacate the order that Collins register and otherwise comply with KORA.

FACTUAL AND PROCEDURAL HISTORY

The details of the 2017 dispute principally between Collins' girlfriend and her mother and stepfather are mostly irrelevant. To quell the argument, Collins drew a pellet gun from his backpack and openly displayed it in what could be construed as an aggressive manner. The pellet gun discharges small metal projectiles by means of compressed air. Collins' pellet gun looked like a semi-automatic pistol, a firearm that discharges slugs using the explosive force of gunpowder in cartridges. As a result of the incident, the county attorney filed criminal charges against Collins.

In 2018, Collins pleaded guilty to two counts of aggravated assault, person felony violations of K.S.A. 2017 Supp. 21-5412(b)(1), based on his placing the victims in immediate apprehension of bodily harm while armed with "a deadly weapon." The Kansas Criminal Code does not define "deadly weapon." The district court accepted the pleas and found Collins guilty.[1]

[1]During the plea hearing, Collins described what he brandished as a pellet gun. The probable cause affidavit and some other documents in the record refer to it as a BB gun. For our purposes, any distinction between a pellet gun and a BB gun is without legal significance. Everybody agrees on the general operating characteristics of the gun.

At a hearing in January 2018, the district court sentenced Collins to 16 months in prison on one of the convictions to be served consecutively to a 12-month sentence on the other conviction and placed Collins on probation for 24 months. In addition, the district court found Collins to be a violent offender under KORA because he committed those crimes with "a deadly weapon," as provided in K.S.A. 2017 Supp. 22-4902(e)(2) (violent offender includes person convicted of person felony when district court makes finding

that "a deadly weapon was used in the commission" of crime of conviction). KORA, which is part of the Kansas Code of Criminal Procedure, contains no definition of "deadly weapon."

The district court relied on two rationales for finding the pellet gun to be a deadly weapon under KORA: (1) the gun was a firearm, as the State argued, and, therefore, a deadly weapon; and (2) if Collins brandished the gun, which looked like a firearm, someone with a firearm, such a law enforcement officer, would likely shoot in self-defense very possibly killing Collins—a scenario that effectively renders the pellet gun a deadly weapon. Based on that conclusion, the district court found Collins to be a violent offender under KORA and directed that he register and otherwise comply with the Act for 15 years. See K.S.A. 2017 Supp. 22-4906(a)(1)(N). Collins has appealed the district court's order that he register under KORA.[2]

[2]Collins also pleaded guilty to and was sentenced for one count of misdemeanor possession of marijuana. Although some drug convictions trigger KORA registration, Collins' marijuana conviction does not. Collins has not challenged any of the convictions or sentences on appeal.

ANALYSIS

For purposes of Collins' appeal, there are no disputed facts. The KORA registration issue turns on the meaning of the relevant statutes and whether the district court's announced reasons comport with the governing statutory language. As presented for our review, the point poses a question of law. We, therefore, owe no particular deference to the district court's answer to that question. See *State v. Baker*, 56 Kan. App. 2d 335, 337, 429 P.3d 240 (2018). We first look at the proper interpretation of the term "deadly weapon" as used in KORA and the criminal code and then turn to the flaws in the district court's specific reasoning in ordering Collins to register.

How should "deadly weapon" be defined under KORA?

In the absence of statutory definitions of "deadly weapon," the appellate courts have arrived at common-law meanings under the criminal code and KORA. For purposes of the criminal code, a deadly weapon is an object "calculated or likely to produce death or serious injury." See *State v. Williams*, 308 Kan. 1439, 1455-56, 430 P.3d 448 (2018) (discussing appropriate language for jury instruction on deadly weapon). Aggravated assault criminalizes conduct placing a person "in reasonable apprehension of bodily harm" by use of "a deadly weapon." K.S.A. 2018 Supp. 21-5412(b)(1). In a prosecution for aggravated assault, the lethal character of the weapon is to be assessed from the victim's perspective. That is, would the victim reasonably believe he or she had been threatened with a deadly weapon? See *State v. Deutscher*, 225 Kan. 265, 271-72, 589 P.2d 620 (1979) (pointing unloaded revolver at victim sufficient to support conviction for aggravated assault, since crime rests on perpetrator's "apparent ability" to inflict harm); *State v. Bulk*, No. 114,462, 2016 WL 7494359, at *6 (Kan. App. 2016) (unpublished opinion) (citing *Deutscher* rule), *rev. denied* 306 Kan. 1321 (2017). A key objective of the aggravated assault statute lies in deterring conduct that would tend to frighten or terrorize the victim with what looks to be a deadly weapon. The Legislature advanced that deterrent purpose by making aggravated assault a person felony—a comparatively punitive sanction. So Collins' brandishing of a pellet gun that looked like a semi-automatic pistol factually supported the convictions for aggravated assault.

By contrast, KORA is not intended to deter or punish criminal conduct. The legislative purpose entails a public safety function by requiring certain classes of criminals to register with and otherwise disclose to law enforcement agencies information about where they live, work, or attend school. The information is readily available through a website the Kansas Bureau of Investigation maintains. See K.S.A. 2018 Supp. 22-4909. The Kansas Supreme Court has recognized KORA generally serves that public safety objective without being impermissibly punitive. See *State v. Huey*, 306 Kan. 1005,

1009-10, 399 P.3d 211 (2017) (defendant failed to show KORA punitive as to violent offenders); *State v. Petersen-Beard*, 304 Kan. 192, Syl. ¶ 1, 377 P.3d 1127 (2016) (KORA not punishment of designated sex offenders triggering constitutional protections against cruel and unusual punishment).

Pertinent here, KORA requires statutorily designated "violent offenders" to register. K.S.A. 2018 Supp. 22-4902(e). The Act principally identifies violent offenders as persons convicted of nine specified crimes. K.S.A. 2018 Supp. 22-4902(e)(1). Aggravated assault is not among them. Aggravated battery and aggravated robbery are also conspicuously missing from the list. But a catchall subsection requires a defendant to register if the district court makes a finding that he or she has committed a person felony using "a deadly weapon." K.S.A. 2018 Supp. 22-4902(e)(2). The district court applied that provision to Collins and his pellet gun.

Our court has taken divergent approaches in construing what constitutes a deadly weapon for purposes of the KORA catchall. In *State v. Franklin*, 44 Kan. App. 2d 156, 159-60, 234 P.3d 860 (2010), a panel held that the common-law definition used for the particular crime of conviction should govern for KORA registration, as well. Accordingly, the panel found Franklin was properly required to register as a violent offender under KORA because he used a BB gun that resembled a semi-automatic pistol in two aggravated robberies. The appellate courts have recognized that the victim's reasonable perception of a weapon used in an aggravated robbery as being lethal controls in proving the elements of the crime. See *State v. Colbert*, 244 Kan. 422, Syl. ¶¶ 2-3, 769 P.2d 1168 (1989); *State v. Childers*, 16 Kan. App. 2d 605, 612-13, 830 P.2d 50 (1991) (realistic looking black water pistol considered dangerous or deadly weapon sufficient to support conviction for aggravated robbery based on victim's perception when defendant displayed butt of gun stuck in waistband of his pants). That matches the victim oriented test used for proving aggravated assaults. But the appellate courts use an objective test for what constitutes a deadly weapon for aggravated battery convictions. That is, a defendant

must, in fact, use a deadly weapon. *State v. Whittington*, 260 Kan. 873, 878, 926 P.2d 237 (1996). The victim's perception, no matter how reasonable, is irrelevant. So, under *Franklin*, someone using a realistic looking toy gun in a robbery would be required to register as a violent offender under KORA. But that person would not if he or she struck another person with the toy gun—that probably wouldn't amount to an aggravated battery at all.

More recently, in *State v. Carter*, 55 Kan. App. 2d 511, Syl. ¶ 4, 419 P.3d 55 (2018), *rev. granted*, 309 Kan. ___ (January 11, 2019), another panel held that something should be treated as a "deadly weapon" requiring KORA registration if it "is calculated or likely to produce death or serious bodily injury" when used as intended or in a predictable way. In other words, the instrumentality would actually have to be a deadly weapon. The crime victim's perception wouldn't matter. Under the *Carter* construction of KORA, a defendant using a realistic toy gun could be convicted of aggravated robbery but would not be required to register as a violent offender. In that case, Carter brandished a Taser while robbing a department store. The panel upheld the conviction for aggravated robbery because a clerk reasonably thought Carter might have a deadly weapon. But the panel vacated the district court's order that Carter register under KORA because a Taser is not, objectively, a deadly weapon. As the panel acknowledged, its application of KORA conflicts with the *Franklin* decision. 55 Kan. App. 2d at 520-21.[3]

[3]Because the Kansas Supreme Court granted review in *Carter*, the panel opinion "has no force or effect." Supreme Court Rule 8.03(k)(2) (2019 Kan. S. Ct. R. 60). We may, however, consider the reasoning expressed in *Carter* as persuasive authority akin to a secondary source. See *Estate of Belden v. Brown County*, 46 Kan. App. 2d 247, 270, 261 P.3d 943 (2011). By the same token, however, we are not obligated to follow *Franklin*, since one panel of this court is not bound by a published opinion of another panel. See *State v. Urban*, 291 Kan. 214, 223, 239 P.3d 837 (2010); *Osterhaus v. Toth*, 39 Kan. App. 2d 999, 1008, 187 P.3d 126 (2008), *aff'd* 291 Kan. 759, 249 P.3d 888 (2011).

We effectively must choose up sides in the debate created by *Franklin* and *Carter* to determine whether the district court reached the right result in ordering Collins to

register under KORA. If *Franklin* provides the better statutory interpretation, then Collins' admissions in pleading guilty to aggravated assault and its constituent element that he used a deadly weapon as determined from the victims' perspective supports a legal conclusion he is a violent offender under the KORA catchall in K.S.A. 2018 Supp. 22-4902(e)(2). In turn, the district court's precise reasoning in ordering Collins to register becomes superfluous. See *State v. Smith*, 309 Kan. ___, ___ P.3d ___, 2019 WL 2306653, at *6 (No. 113,828, filed May 31, 2019) (district court may be affirmed if it reaches right result for wrong reason). But if the *Carter* approach reflects the sounder approach, we must then analyze the district court's reasons to see whether they warrant the conclusion that the pellet gun, considered objectively, amounted to a deadly weapon.

In construing an integrated statutory scheme such as KORA, an appellate court must, as a first priority, strive to honor the legislative intent and purpose. *In re Marriage of Traster*, 301 Kan. 88, 98, 339 P.3d 778 (2014). The court should look initially to the words of the statutes to discern legislative intent. *Bussman v. Safeco Ins. Co. of America*, 298 Kan. 700, 725-26, 317 P.3d 70 (2014). Absent an express statutory definition, words of a statute should be given their ordinary and common meaning. *Walters v. Metropolitan Ed. Enterprises, Inc.*, 519 U.S. 202, 207, 117 S. Ct. 660, 136 L. Ed. 2d 644 (1997); *Midwest Crane & Rigging, LLC v. Kansas Corporation Comm'n*, 306 Kan. 845, 851, 397 P.3d 1205 (2017). As we have said, KORA does not define "deadly weapon," nor is the phrase in any way qualified in K.S.A. 2018 Supp. 22-4902(e)(2). That unembellished language points toward a legislative intent consistent with the usual meaning of the words, as *Carter* suggests. 55 Kan. App. 2d at 517-18.

Imparting meaning to the term "deadly weapon" doesn't really provide much of a linguistic challenge. The phrase refers to instrumentalities, i.e., weapons, designed to inflict lethal injuries, i.e. deadly harm, or reasonably capable of doing so. Thus, Black's Law Dictionary defines "deadly weapon" this way: "Any firearm or other device, instrument, material, or substance that, from the manner in which it is used or is intended

to be used, is calculated or likely to produce death." Black's Law Dictionary 1827 (10th ed. 2014). So some objects not primarily intended as weapons likely qualify—a pickax or a long pair of scissors come to mind. Nothing in KORA itself indicates a legislative design to expand the scope of deadly weapons beyond that regular or objective meaning. To suggest a person should be required to register as a violent offender under KORA because a victim of his or her crime mistakenly, if reasonably, perceived an instrumentality or device to be a deadly weapon materially augments the plain language of K.S.A. 2018 Supp. 22-4902(e)(2), contrary to the accepted rules of statutory construction. *State v. Fleming*, 308 Kan. 689, 698, 423 P.3d 506 (2018).

Had the Legislature wanted KORA registration to apply to a defendant convicted of aggravated assault or aggravated robbery based on a victim's reasonable perception that the defendant used a deadly weapon, it presumably would have specified aggravated assault, as codified in K.S.A. 2018 Supp. 21-5412(b)(1), and aggravated robbery, as codified in K.S.A. 2018 Supp. 21-5420(b)(1), as covered convictions. The specific designation of those crimes would have extended KORA registration to anyone convicted of them for using what the victim perceived to be a deadly weapon.

As presently written, the catchall provision in K.S.A. 2018 Supp. 22-4902(e)(2) unquestionably requires defendants committing aggravated assaults or aggravated robberies with what are objectively deadly weapons to register. But it does not obviously extend beyond those classes of defendants. To unnaturally expand the meaning of deadly weapon in the catchall to include instrumentalities victims reasonably but incorrectly perceive to be deadly weapons would judicially do what the Legislature left undone.

Moreover, as we have suggested, that expansion would create anomalous outcomes for some criminal defendants facing potential KORA registration. For example, if a person has a plastic replica of a semi-automatic pistol and angrily hits another person across the face with it causing a minor injury, the crime amounts to a misdemeanor

battery without KORA implications even if the victim believed the replica to be a real firearm. Conversely, if the person with the replica firearm demands and receives $5 from the victim, the crime is aggravated robbery and applying a victim-perception definition of deadly weapon would require the defendant to register under KORA.

Each scenario would likely cause the victim some (and perhaps significant) emotional upset. But neither entails conduct that threatens the physical safety of the victim or the public at large, especially in the same way that convicted sex offenders, drug dealers, or defendants who actually use deadly weapons to commit crimes are perceived as potentially dangerous recidivists when released into the community. See *Petersen-Beard*, 304 Kan. at 207 (KORA registration requirements upheld given danger of recidivism among sex offenders as group); cf. *State v. Mossman*, 294 Kan. 901, 909-10, 281 P.3d 153 (2012) (high recidivist rate among classes of sex offenders and the heavy toll those crimes take on victims warrant lifetime postrelease supervision). The anomaly in mandating KORA registration for some crimes but not others based on a victim's mistaken, though reasonable, perception of the instrumentality a defendant has used as a deadly weapon approaches the arbitrary and lacks an obvious rational justification in public safety considerations. That, too, tilts in favor of the objective interpretation of the deadly weapon catchall advanced in *Carter* and against the victim-perception approach used in *Franklin*.

For those reasons, we conclude, consistent with *Carter*, that violent offender registration under KORA for use of a deadly weapon in the commission of a person felony should be applied only to those instrumentalities that are, in fact, deadly weapons. In turn, Collins' guilty plea to aggravated assault with a deadly weapon does not in and of itself furnish a sufficient legal basis to require him to register, since the conviction could have been based on what the victims perceived to be a deadly weapon. We, therefore, must evaluate the district court's rationale for ordering KORA registration to determine if that reasoning supports a conclusion that the pellet gun is, in fact, a deadly weapon.

Did the district court correctly find the pellet gun to be a deadly weapon under KORA?

For purposes of KORA registration, the district court found the pellet gun to be a "firearm." The term "firearm" is defined in the criminal code as "any weapon designed or having the capacity to propel a projectile by force of an explosion or combustion." K.S.A. 2018 Supp. 21-5111(m). The statute essentially codifies a common-law definition adopted in *State v. Davis*, 227 Kan. 174, 177-78, 605 P.2d 572 (1980), for purposes of a sentencing provision that precluded probation for defendants using firearms to commit certain crimes. This court later held that a pellet gun is not a firearm as defined in *Davis* because it discharges a projectile using compressed air rather than combustion. *State v. Johnson*, 8 Kan. App. 2d 368, 370, 657 P.2d 1139 (1983). Based on that authority, the district court erred in finding Collins' pellet gun to be a firearm. So that reason for ordering Collins to register under KORA fails.

Even if the district court's finding that Collins used a firearm were factually accurate, we ponder, albeit briefly, whether it would be sufficient to impose KORA registration. The statutory language requires a judicial determination that the defendant used a deadly weapon. The terms are not synonymous—lots of deadly weapons aren't firearms. But "firearm" could be a proxy for "deadly weapon" in that a vast majority of firearms almost certainly are deadly weapons. Some miniature pinfire handguns meet the definition of a firearm in K.S.A. 2018 Supp. 21-5111(m) but arguably wouldn't be deadly weapons. We do not delve more deeply into this aspect of the district court's ruling except to suggest conforming findings to the applicable statutory language tends to make things tidy. See *State v. Davis*, No. 111,748, 2015 WL 2137195, at *3 (Kan. App. 2015) (unpublished opinion) (In outlining the grounds for revoking the defendant's probation, "the district court might have been better served by including an ultimate determination using words drawn directly from the statute."). The county attorney did not endeavor to

prove that Collins' pellet gun, though not a firearm, was a deadly weapon based on the size of the projectile and velocity with which it would be discharged.

The district court's alternative basis for finding the pellet gun to be a deadly weapon for KORA purposes is equally unavailing despite its creativity. As we mentioned, the district court hypothesized that if Collins indiscriminately brandished his pellet gun, someone carrying a firearm might be induced to shoot in self-defense, given the gun's striking resemblance to a semi-automatic pistol. In that circumstance, Collins foreseeably might suffer a fatal wound. The district court reasoned that the pellet gun would be something akin to the proximate cause of a fatal shooting, rendering it a deadly weapon.

The rationale falters in several material respects. First, of course, the character of an instrumentality as a deadly weapon under KORA must be determined from its own attributes. Second, the district court's hypothetical depends upon a second party's mistaken, if reasonable, impression of the pellet gun—prompting that party's use of deadly force in self-defense. That link in the chain derives from the same sort of considerations as the victim-directed assessment of a deadly weapon the *Franklin* panel deployed and we have found unpersuasive.

Finally, the facts of the hypothetical do not fit the statutory language of the catchall for violent offenders in K.S.A. 2018 Supp. 22-4902(e)(2). To reiterate, the catchall applies when the defendant is convicted of a person felony and what the district court finds to be a deadly weapon "was used in the commission of such person felony." In the district court's scenario, like the family argument, Collins presumably would be guilty of an aggravated assault for waving the pellet gun around in the immediate vicinity of other people. Assuming he were then shot in self-defense but survived, he could be charged and convicted of aggravated assault, as also happened here. But the deadly weapon would have been in the hands of the person who acted in self-defense, so it could

not have been used to commit the aggravated assault. And that act of self-defense wouldn't magically change the pellet gun (or a toy replica) into a deadly weapon.

The district court, therefore, erred in finding Collins used a deadly weapon and in ordering that he register under KORA as a violent offender. We vacate the registration order and relieve Collins of any obligation to comply with the requirements of KORA.