

NOT DESIGNATED FOR PUBLICATION

No. 120,550

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ALONZO HILL,
Appellant.

MEMORANDUM OPINION

Appeal from Harvey District Court; MARILYN M. WILDER, judge. Opinion filed January 24, 2020. Affirmed.

David L. Miller, of Ney, Adams & Miller, of Wichita, for appellant.

Kaitlin M. Dixon, assistant county attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., HILL and GARDNER, JJ.

PER CURIAM: Alonzo Hill was convicted of various drug crimes and sentenced to prison, but the district court granted him a dispositional departure and placed him on probation. After violating his probation, the district court revoked Hill's probation and ordered him to serve the remainder of his underlying sentence without first imposing intermediate sanctions.

On appeal, Hill argues that the district court violated the Ex Post Facto Clause by relying on a statute that was not in effect when he committed his crimes to revoke his probation. But he did not raise this argument with the district court and does not argue

that an exception applies that allows him to raise it for the first time on appeal. As a result, he has not properly preserved the issue for appeal.

FACTUAL AND PROCEDURAL HISTORY

In 16CR311 (Case 1), the State charged Hill with possession with intent to distribute marijuana, a drug felony. In 16CR606 (Case 2), the State charged Hill with possession with intent to distribute methamphetamine or heroin, criminal possession of a firearm, and criminal use of a weapon. All offenses in both cases occurred in May 2016.

The State and Hill reached a plea agreement where Hill would enter a no-contest plea to the charge in Case 1 and to the possession with intent to distribute charge in Case 2. In return, the State would dismiss the remaining charges in Case 2 and would dismiss a third case which is not involved in this appeal. Additionally, the State would not oppose Hill's motion seeking a dispositional departure at sentencing.

At sentencing, in July 2018, the district court granted Hill's motion for a dispositional departure. The court sentenced him in Case 1 to an underlying prison sentence of 59 months but placed him on probation. The court imposed the same sentence in Case 2 and imposed the sentence consecutive to the sentence in Case 1.

The State moved to revoke Hill's probation in October 2018. According to Hill's intensive supervision officer, Hill failed to report as directed in August 2018 and October 2018 and did not follow recommendations after participating in a drug and alcohol evaluation.

After a hearing on the motion, the district court revoked Hill's probation and ordered him to serve a modified controlling sentence of 59 months imprisonment—in

effect reducing Hill's sentence by half. Hill timely appeals the revocation of his probation. His cases are consolidated on appeal.

ANALYSIS

When Hill violated his probation, district courts were generally required to impose intermediate sanctions on a probation violator. See K.S.A. 2018 Supp. 22-3716(c)(1). But the district court could bypass the imposition of intermediate sanctions and require a violator to serve the remainder of his or her underlying sentence, if "the probation . . . was originally granted as the result of a dispositional departure granted by the sentencing court." K.S.A. 2018 Supp. 22-3716(c)(9)(B). This change in the law became effective in July 2017. L. 2017, ch. 92, § 8. Hill committed his crimes in May 2016. He entered his pleas in April 2018. He was sentenced in July 2018, and the motion to revoke his probation was filed in October 2018. Hill was ordered to serve his underlying sentence, without first having served an intermediate sanction. Although it is not clear from the record why the district court bypassed intermediate sanctions, Hill contends it was because he received probation as part of a dispositional departure, implicating K.S.A. 2018 Supp. 22-3716(c)(9)(B). At the hearing, the State argued that "there's no need for the dip or dunk since the order had a dispositional departure." And defense counsel agreed.

On appeal, Hill argues the district court violated his constitutional rights when it applied a statutory amendment that was not in effect when he committed his crimes. See *State v. Kurtz*, 51 Kan. App. 2d 50, 55, 340 P.3d 509 (2014) (holding that defendant's sentence is generally governed by criminal statute in effect on date defendant committed crime). Hill asserts that revocation of his probation without imposing the intermediate sanctions required when he committed his crimes violates his rights under the Ex Post Facto Clause of the United States Constitution. U.S. Const. Art. I, § 10 ("No State shall . . . pass any . . . ex post facto Law."). The retroactive application of K.S.A. 2018 Supp.

22-3716(c)(9)(B) is an issue pending before our Supreme Court. See *State v. Coleman*, No. 118,673, 2018 WL 6580094, at *4 (Kan. App. 2018) (unpublished opinion), *rev. granted* 310 Kan. __ (September 3, 2019), and *State v. Liby*, No. 118,834, 2018 WL 6423998, at *2 (Kan. App. 2018) (unpublished opinion), *rev. granted* 310 Kan. __ (September 5, 2019). The Supreme Court heard oral argument on the cases in December 2019.

Although Hill's claims would fail if we were to apply the reasoning in this court's decisions in *Coleman* and *Liby*, we are prohibited from examining the merits of Hill's argument here because he has failed to preserve this issue for appeal.

Issues not raised before the district court, including constitutional issues, cannot be raised for the first time on appeal. See *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018). But there are several exceptions to the general rule. *State v. Phillips*, 299 Kan. 479, 493, 325 P.3d 1095 (2014) ("There are three exceptions to the rule: (1) The newly asserted theory involves only a question of law arising on proved or admitted facts and is determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) the district court is right for the wrong reason.").

An appellant may be allowed to present the issue for the first time on appeal if he or she asserts one of the exceptions and explains why it applies. Supreme Court Rule 6.02(a)(5) (2019 Kan. S. Ct. R. 34). In *State v. Williams*, 298 Kan. 1075, 1085, 319 P.3d 528 (2014), the Supreme Court held that litigants who ignore this rule risk a ruling that they have improperly briefed the issue, and the issue will be deemed waived or abandoned. The Supreme Court has made it clear that it will strictly enforce Rule 6.02(a)(5). *State v. Godfrey*, 301 Kan. 1041, 1044, 350 P.3d 1068 (2015).

Hill did not posit to the district court the effect of retroactive application of K.S.A. 2018 Supp. 22-3716(c)(9)(B). In fact, his attorney agreed that the district court was not required to use intermediate sanctions because Hill was placed on probation because of a dispositional departure. Nor does Hill explain why we should consider his argument for the first time on appeal as required by Supreme Court Rule 6.02(a)(5). As our Supreme Court did in *Godfrey*, we decline to reach the merits of Hill's single issue on appeal as he failed to preserve his claim by raising it before the district court. As a result, he has abandoned the possible application of an exception to the rule by failing to brief it. See 301 Kan. at 1044.

Affirmed.