

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 124,064

STATE OF KANSAS,
Appellee,

v.

DARRYLN MICHAEL JOHNSON,
Appellant.

SYLLABUS BY THE COURT

1.

A claim challenging the constitutional validity of a waiver relinquishing the right to have a jury determine the existence of upward departure aggravating factors falls outside the definition of an illegal sentence, overruling *State v. Duncan*, 291 Kan. 467, 472-73, 243 P.3d 338 (2010).

2.

Absent a valid illegal sentence claim under K.S.A. 2022 Supp. 22-3504, an appellate court lacks jurisdiction to review a sentence resulting from an agreement between the State and the defendant that the sentencing court approves on the record.

Review of the judgment of the Court of Appeals in an unpublished opinion filed July 29, 2022. Appeal from Shawnee District Court; STEVEN R. EBBERTS, judge. Oral argument held March 29, 2023. Opinion filed June 30, 2023. Judgment of the Court of Appeals affirming the district court is reversed, and the appeal is dismissed.

Grace Tran, of Kansas Appellate Defender Office, argued the cause, and *Jennifer C. Bates*, of the same office, was on the briefs for appellant.

Natalie Chalmers, assistant solicitor general, argued the cause, and *Derek Schmidt*, attorney general, was with her on the briefs for appellee.

The opinion of the court was delivered by

STANDRIDGE, J.: Darryln Johnson pleaded guilty to two counts of sexual exploitation of a child. The district court advised Johnson of—and he exercised—his constitutional right to waive a jury trial on criminal liability for the crimes charged. As part of his plea, Johnson agreed to an upward departure from the guidelines sentence based on his stipulation to the existence of two aggravating factors. The court approved this agreement on the record but did not advise Johnson of his separate statutory right under K.S.A. 2019 Supp. 21-6817 to have the aggravating factors—which increased his sentence beyond the statutory maximum—proved to a jury beyond a reasonable doubt. The district court sentenced Johnson to 180 months in prison with lifetime postrelease supervision, as contemplated by the plea agreement.

Johnson appealed, arguing for the first time on appeal that his sentence was illegal under K.S.A. 2021 Supp. 22-3504 because he was not advised of and did not knowingly and voluntarily waive his right to a jury trial on the upward departure factors. The Court of Appeals panel interpreted Johnson's challenge as a constitutional one that generally cannot be raised in a motion to correct illegal sentence. Rather than dismissing the appeal for lack of jurisdiction, however, the panel relied on our opinion in *State v. Duncan*, 291 Kan. 467, 470-71, 243 P.3d 338 (2010), as an exception to the jurisdictional bar and rejected his challenge on the merits, holding (1) an aggravating factors jury needs to convene only when there is an issue of fact and there was no issue of fact because Johnson pleaded guilty; and (2) even if the district court violated Johnson's rights, any error was harmless. *State v. Johnson*, No. 124,064, 2022 WL 3017620, at *2-3 (Kan. App. 2022) (unpublished opinion).

While K.S.A. 2022 Supp. 22-3504 vests appellate courts with jurisdiction to hear the appeal of an illegal sentence, we hold that a district court's failure to advise—and obtain a waiver from—the defendant of the right to have a jury determine aggravating factors beyond a reasonable doubt falls outside the scope of an illegal sentence as defined by K.S.A. 2022 Supp. 22-3504. As no other statute provides a possible jurisdictional basis, we dismiss Johnson's appeal for lack of jurisdiction. In so holding, we expressly overrule our prior opinion in *Duncan*. Because the panel relied on *Duncan* to reach the merits of the appeal, we reverse the Court of Appeals' judgment and dismiss the appeal for lack of jurisdiction.

PROCEDURAL HISTORY

In April 2015, Johnson's parole officer reported to law enforcement a belief that Johnson possessed child pornography on his phone. The court issued a search warrant and, when executed, law enforcement discovered two videos depicting sexually explicit conduct of a child under 14 recorded by Johnson. In the videos, Johnson recorded a 6-year-old girl who was partially undressed in a changing room at a retail store. Johnson gave the child directions and told her how to pose. Law enforcement learned the child was the granddaughter of Johnson's long-time friend, and Johnson was helping the child shop for an Easter dress. The State charged Johnson with three counts of sexual exploitation of a child, two of which were off-grid crimes because Johnson recorded the two videos himself.

The parties reached a plea agreement. Johnson agreed to plead to an amended complaint charging two severity level 5 counts of sexual exploitation of a child. The parties agreed to jointly recommend Johnson serve an upward departure sentence of 180 months in prison. In the agreement, the parties acknowledged that

"[the] agreement is expressly conditioned on the defendant stipulating to, and agreeing to, an upward durational departure in order to receive a sentence of 180 months in prison. The Defendant agrees to stipulate to the following aggravating factors pursuant to K.S.A. 21-6815:

- The victim was particularly vulnerable due to age which was known or should have been known to the offender. K.S.A. 21-6815(c)(2)(A); and/or
- The offense involved a fiduciary relationship which existed between the defendant and the victim. K.S.A. 21-6815(c)(2)(D)."

At sentencing, the State summarized the factual basis for its original charges. The detective who investigated Johnson's phone testified at the sentencing hearing as to the phone's contents. The State also presented the two videos. The videos zoom in on the child's nude top and crotch area.

Johnson also testified at the hearing. He admitted to both aggravating factors by acknowledging the child victim was of a vulnerable age and that he violated a fiduciary trust relationship with the child victim. Consistent with the plea agreement and the amended complaint, the district court sentenced Johnson to 180 months in prison with lifetime post-release supervision. Also consistent with the agreement, the court found the offense involved a fiduciary relationship, and the victim was particularly vulnerable due to age.

Johnson appealed, arguing his sentence is illegal because he was not advised of and did not knowingly and voluntarily waive his right to a jury trial on the upward departure aggravating factors. The Court of Appeals held the sentence was not illegal and affirmed the district court. *Johnson*, 2022 WL 3017620, at *1, 4-5. Johnson petitioned this court for review, again arguing his sentence was illegal because he was never advised

of, nor did he waive, his right to have a jury determine the facts to support the upward departure. The State cross-petitioned, asking us to clarify or overrule *Duncan* because it conflicts with our well-established caselaw over the past decade holding that a motion to correct an illegal sentence is not the proper vehicle to raise a constitutional challenge to the sentence imposed.

ANALYSIS

Johnson argues his sentence is illegal because the district court relied on aggravating factors to impose a sentence above the statutory maximum authorized by statute without advising him and obtaining a knowing and voluntary waiver of the right to have a jury determine those aggravating factors beyond a reasonable doubt. Whether a sentence is illegal is a question of law subject to de novo review. *State v. Juliano*, 315 Kan. 76, 78, 504 P.3d 399 (2022). Statutory interpretation is also a legal question subject to unlimited review. *State v. Clark*, 313 Kan. 556, 572, 486 P.3d 591 (2021).

An illegal sentence is defined as: (1) a sentence imposed by a court without jurisdiction; (2) a sentence that does not conform to the applicable statutory provision, either in character or punishment; or (3) a sentence that is ambiguous with respect to the time and manner in which it is to be served. K.S.A. 2022 Supp. 22-3504(c)(1). Johnson's argument does not allege that the court lacked jurisdiction to impose the sentence or that the sentence imposed was ambiguous, so we construe his illegal sentence claim as grounded in the second definition of the statute: that his sentence does not conform to the applicable statutory provision, either in character or punishment.

We have held the "applicable statutory provision" in K.S.A. 2022 Supp. 22-3504(c)(1) is limited to those statutory provisions that define the crime, assign the

category of punishment, or involve the criminal history classification axis. See *State v. Alford*, 308 Kan. 1336, 1340, 429 P.3d 197 (2018). This includes whether a person's previous conviction was properly classified under the Kansas Sentencing Guidelines Act (KSGA) when determining criminal history. See *State v. Dickey*, 305 Kan. 217, 221-22, 380 P.3d 230 (2016).

A claim that a sentence fails to conform to the applicable *statutory* provision is not the same as a claim that a sentence fails to conform to *constitutional* requirements. *State v. Edwards*, 281 Kan. 1334, 1337, 135 P.3d 1251 (2006). "Because this narrow, statutory definition does not include a claim that a sentence violates a constitutional provision, a motion to correct an illegal sentence under [K.S.A. 22-3504] is not a proper vehicle to raise such a constitutional challenge." *State v. R. H.*, 313 Kan. 699, 702, 490 P.3d 1157 (2021) (citing *State v. Bryant*, 310 Kan. 920, 922, 453 P.3d 279 [2019]); see *State v. Mitchell*, 284 Kan. 374, 377, 162 P.3d 18 (2007) (definition of illegal sentence does not encompass violations of constitutional provisions).

Johnson claims his sentence is illegal because it does not conform to K.S.A. 2022 Supp. 21-6817(b)(2), which gives a defendant the right to have a jury—instead of the court—determine whether aggravating factors have been proved beyond a reasonable doubt. Johnson acknowledges this right can be waived. See K.S.A. 2022 Supp. 21-6817(b)(4). But he argues his sentence is illegal because the court imposed an upward departure sentence without advising him and obtaining a knowing and voluntary waiver of the statutory right. In response, the State argues Johnson's claim alleging the lack of a knowing and voluntary waiver is a constitutional claim that does not meet the statutory definition of an illegal sentence.

Given this dispute between the parties, we must decide the nature of Johnson's claim before addressing the merits. The question presented is (1) whether Johnson's

claim alleges his sentence does not conform to the applicable statutory provision, either in character or punishment, or (2) whether Johnson's claim alleges his sentence violates a constitutional provision. To resolve this question, we begin with the statutes cited by Johnson to argue his sentence does not conform to the applicable statutory provision.

- K.S.A. 2022 Supp. 21-6815(b), which provides that, subject to K.S.A. 2022 Supp. 21-6817(b), aggravating factors that increase the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.
- K.S.A. 2022 Supp. 21-6817(b)(2), which requires the court to decide whether the aggravating factors should be submitted to a jury during trial or to a jury in a separate departure sentencing hearing after determination of the defendant's innocence or guilt.
- K.S.A. 2022 Supp. 21-6817(b)(4), which applies if the court decides the aggravating factors should be presented at a separate departure sentencing hearing and provides that the defendant can waive the right to have a jury decide aggravating factors in the manner provided by K.S.A. 22-3403. If a jury determination on aggravating factors is waived, the court will conduct the upward durational departure sentence proceeding.
- K.S.A. 22-3403(1), which permits the parties—with the court's consent—to submit the trial of any felony to the court.

In short, these statutes give a defendant (1) the right to have a jury determine whether aggravating factors exist and (2) the ability to waive that right upon agreement by defendant with the consent of the court. Johnson argues his sentence is illegal because it does not conform to the "applicable statutory provision" in K.S.A. 2022 Supp. 21-

6817(b), which gives a defendant the right to have a jury determine aggravating factors unless waived by the defendant. But Johnson's illegal sentence argument is based on a faulty premise—that K.S.A. 2022 Supp. 21-6817(b) is the "applicable statutory provision" under the facts of his case. As we have held, the "applicable statutory provision" language in K.S.A. 2022 Supp. 22-3504(c)(1) is limited to those statutory provisions that define the crime, assign the category of punishment, or involve the criminal history classification axis. See *Alford*, 308 Kan. at 1340. Notably, none of the K.S.A. 2022 Supp. 21-6817(b) provisions define the crime of sexual exploitation of a child, assign a category of punishment to be imposed on conviction of that crime, or involve the criminal history classification axis. Instead, K.S.A. 2022 Supp. 21-6817(b) is part of a procedural framework for determining the existence of aggravating factors for upward departure sentences. The upward departure sentence imposed here was authorized because Johnson committed the crime of sexual exploitation of a child under circumstances where the victim was particularly vulnerable and involved a fiduciary relationship. For this reason, we conclude that a claim challenging the constitutional validity of a waiver relinquishing the right to have a jury determine the existence of upward departure aggravating factors under K.S.A. 2022 Supp. 21-6817(b) does not qualify as an "applicable statutory provision, either in character or punishment" under the illegal sentence statute, K.S.A. 2022 Supp. 22-3504(c)(1).

And the arguments presented by Johnson in both his brief to the Court of Appeals and in his petition for review lead us to conclude that his claim depends solely on constitutional principles:

"Mr. Johnson did not waive his right to have a jury determine the facts supporting any upward departure. To effect a knowing and voluntary waiver of the right to jury trial, a criminal defendant must be informed by the district court of that right and must then clearly and unequivocally give up that right. See *State v. Rizo*, 304 Kan. 974, Syl. ¶ 2, 377 P.3d 419 (2016); *State v. Beaman*, 295 Kan. 853, 858-59, 286 P.3d 876

(2012). A generic waiver of the jury trial right regarding guilt or innocence does not encompass the right to have a jury determine the facts supporting an upward durational departure—a defendant must be explicitly informed of that right to effectively waive it. *State v. Duncan*, 291 Kan. 467, 472-73, 243 P.3d 338 (2010)."

Johnson challenges the constitutional validity of the jury waiver and not a statutorily unauthorized sentence. Consistent with longstanding precedent, Johnson is precluded from using K.S.A. 22-3504 to challenge the constitutional validity of a waiver relinquishing the right to have a jury determine the existence of upward durational departure factors. See *State v. Gayden*, 281 Kan. 290, 292-93, 130 P.3d 108 (2006) (holding claim that cumulative punishments for six convictions violated Double Jeopardy Clause of Fifth Amendment to United States Constitution cannot be properly raised in motion to correct illegal sentence); see also *Mitchell*, 284 Kan. at 377 (holding district court properly concluded it lacked jurisdiction under K.S.A. 22-3504 to address constitutional challenges to sentence on grounds it violated double jeopardy, equal protection, and Eighth Amendment).

With no valid illegal sentence claim under K.S.A. 2022 Supp. 22-3504, we lack jurisdiction to review Johnson's sentence because he agreed to the sentence and the district court approved the agreement on the record. See K.S.A. 2022 Supp. 21-6820(c)(2) ("On appeal from a judgment of conviction entered for a felony committed on or after July 1, 1993, the appellate court shall not review . . . any sentence resulting from an agreement between the state and the defendant which the sentencing court approves on the record.").

We acknowledge that our holding today appears to conflict with the holding we announced under a similar challenge in *Duncan*, 291 Kan. at 470-71. As here, *Duncan* pleaded guilty to a reduced charge but agreed to a specific upward durational departure

sentence. After a colloquy with the district court, he waived all rights associated with the guilt phase of a jury trial and pleaded guilty. The district court, however, did not ask him to and he did not waive his right to have a jury determine the existence of aggravating factors. The district court imposed the agreed-upon upward departure sentence and granted him probation.

The court ultimately revoked probation and Duncan appealed, claiming his sentence was illegal. To support his illegal sentence claim, Duncan argued the district court violated his constitutional rights by imposing an upward departure sentence without a valid waiver of the right to have a jury determine the aggravating factors. The State argued the court did not have jurisdiction to consider Duncan's claim because K.S.A. 21-4721 (the predecessor to K.S.A. 21-6820) prohibits the appellate court from reviewing "any sentence resulting from an agreement between the state and the defendant which the sentencing court approves on the record." 291 Kan. at 470.

We rejected the State's jurisdictional argument, holding that "an appellate court's jurisdiction to consider a challenge to a sentence is limited to those grounds authorized by [K.S.A. 21-4721] *or a claim that the sentence is otherwise illegal.*" 291 Kan. at 470. Since *Duncan*, we have consistently reaffirmed the rule that an appellate court has jurisdiction to correct an illegal sentence even if it were agreed to in a plea and approved by the court on the record. See *State v. Quested*, 302 Kan. 262, 264, 352 P.3d 553 (2015); see also K.S.A. 2022 Supp. 21-6820(a) (adding language authorizing appeal of a ruling on a motion to correct illegal sentence under K.S.A. 22-3504).

After finding Duncan cleared the jurisdictional hurdle by claiming his sentence was illegal, we moved to the merits of his waiver challenge. 291 Kan. at 471. After reviewing the plea agreement and the transcript of the plea hearing, we held Duncan did not make a constitutionally valid waiver of his right to a jury determination of the

aggravating sentencing factors. 291 Kan. at 473. In discussing the appropriate remedy for this constitutional deficiency, we noted K.S.A. 21-4718 did not permit the district court to empanel a jury solely to conduct an upward durational departure proceeding when the defendant has pleaded guilty. Thus, we vacated Duncan's sentence and remanded for resentencing without an upward departure.

In retrospect, we find our jurisdictional decision in *Duncan* is analytically flawed. We properly held an appellate court has jurisdiction to review an illegal sentence claim. We then concluded an upward departure sentence imposed in an unconstitutional proceeding results in an illegal sentence, which in turn gave us jurisdiction to consider Duncan's constitutional claim. Missing from this analysis is the essential inquiry into whether his constitutional claim of error met the definition of an illegal sentence by considering if (1) the sentence was imposed by a court without jurisdiction; (2) the sentence failed to conform to the applicable statutory provision, either in the character or punishment; or (3) the sentence was ambiguous with respect to the time and manner in which it is to be served.

Although *Duncan* was decided in 2010 and K.S.A. 22-3504 did not include this definition of an illegal sentence until the statute was amended in 2017, we have repeatedly used this specific definition in our caselaw dating back to at least 1986. See *State v. Thomas*, 239 Kan. 457, 460, 720 P.2d 1059 (1986) ("An 'illegal sentence' is either a sentence imposed by a court without jurisdiction; a sentence which does not conform to the statutory provisions, either in the character or the term of the punishment authorized; or a sentence which is ambiguous with respect to the time and manner in which it is to be served."). Had we properly evaluated Duncan's constitutional claim to determine whether it met the definition of an illegal sentence, we are confident our holdings would have been the same as the ones we reach today:

- A claim challenging the constitutional validity of a waiver relinquishing the right to have a jury determine the existence of upward departure aggravating factors under K.S.A. 2022 Supp. 21-6817(b) falls outside the definition of an illegal sentence.
- Absent a valid illegal sentence claim under K.S.A. 2022 Supp. 22-3504, an appellate court lacks jurisdiction to review a sentence resulting from an agreement between the State and the defendant which the sentencing court approves on the record.

To the extent *Duncan* conflicts with our holdings today, we overrule it. "We do not overrule precedent lightly and must give full consideration to the doctrine of stare decisis." *State v. Sherman*, 305 Kan. 88, 107, 378 P.3d 1060 (2016). "We recognize that '[t]he application of stare decisis ensures stability and continuity—demonstrating a continuing legitimacy of judicial review. Judicial adherence to constitutional precedent ensures that all branches of government, including the judicial branch, are bound by law.'" *Herington v. City of Wichita*, 314 Kan. 447, 456, 500 P.3d 1168 (2021) (quoting *Crist v. Hunan Palace, Inc.*, 277 Kan. 706, 715, 89 P.3d 573 [2004]).

But stare decisis "is not a rigid inevitability but a prudent governor on the pace of legal change." *Herington*, 314 Kan. at 456 (quoting *State v. Jordan*, 303 Kan. 1017, 1021, 370 P.3d 417 [2016]). "While this court is not inexorably bound by its own precedent, we generally will follow the law of earlier cases unless clearly convinced that the rule 'was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent.'" 314 Kan. at 457 (quoting *Sherman*, 305 Kan. at 108). In this case, we are clearly convinced that we erred in *Duncan*. Our holdings today correct this previous error.

CONCLUSION

We hold a claim challenging the constitutional validity of a waiver relinquishing the statutory right under K.S.A. 2022 Supp. 21-6817(b) to have a jury determine the existence of upward departure aggravating factors falls outside the definition of an illegal sentence. Absent a valid illegal sentence claim under K.S.A. 2022 Supp. 22-3504, an appellate court has no jurisdiction to review a sentence resulting from an agreement between the State and the defendant that the court approves on the record. Based on these holdings, we expressly overrule our prior opinion in *Duncan*, 291 Kan. 467. Because the panel relied on *Duncan* to reach the merits of the appeal, we reverse the Court of Appeals' decision and dismiss the appeal for lack of jurisdiction. We deny as moot the State's motion for supplemental briefing on the issue of harmless error and note Johnson's response to the State's motion.

Judgment of the Court of Appeals affirming the district court is reversed, and the appeal is dismissed.