NOT DESIGNATED FOR PUBLICATION

No. 124,490

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

FRANKLYN D. HARRISON,
Appellant.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; MICHAEL A. RUSSELL, judge. Opinion filed April 7, 2023. Affirmed.

Ryan J. Eddinger, of Kansas Appellate Defender Office, for appellant.

Milesha N. Segun, assistant district attorney, *Mark A. Dupree Sr.*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ISHERWOOD, P.J., ATCHESON, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: Defendant Franklyn D. Harrison contends the Wyandotte County District Court improperly included a municipal conviction for driving under the influence in his criminal history when it resentenced him for involuntary manslaughter arising from a later incident in which he was driving drunk. We find no error in the district court's determination and affirm the new sentence.

Basically, Harrison says the district court impermissibly relied on both the traffic citation and specific facts underlying the municipal court charge to include that

conviction in his criminal history. The record from the resentencing hearing in this case does not support those contentions, and Harrison's points are, therefore, without merit.

The legal and procedural background for Harrison's appellate issues is somewhat involved, so we necessarily delve into a fair amount of detail and assure our readers we have endeavored to avoid digressions, although it may not immediately seem so.

In this case, Harrison pleaded guilty in July 2018 to one count of involuntary manslaughter while driving under the influence, a severity level 4 person felony violation of K.S.A. 2016 Supp. 21-5405(a)(3). The underlying circumstances of the crime are irrelevant to the sentencing issue. The district court initially sentenced Harrison in late January 2019. Relying on the special rule in K.S.A. 2016 Supp. 21-6811(c)(2), the district court treated Harrison's two previous convictions in Kansas City, Kansas, municipal court for driving under the influence as person felonies in determining his criminal history. Harrison lodged no objection to that use of the DUI convictions. The district court found that Harrison had a criminal history score of A and imposed a standard guidelines sentence of 162 months in prison followed by postrelease supervision for 36 months.

Harrison appealed and disputed the district court's reliance on the municipal DUI convictions to increase his criminal history. The State conceded the district court made insufficient factual findings and requested the case be remanded for resentencing. In August 2019, this court entered an order vacating Harrison's sentence and remanding to the district court for further proceedings consistent with *State v. Obregon*, 309 Kan. 1267, 444 P.3d 331 (2019).

The district court resentenced Harrison in November 2019. The State again sought to rely on the municipal DUI charges against Harrison from April 2012 and May 2012 in

establishing his criminal history score. Harrison was convicted of both charges on January 9, 2013, in Kansas City, Kansas, municipal court.

At the new sentencing hearing, the State produced the traffic citation and related municipal court documents for the May 2012 charge and some documents, but not the citation, for the April 2012 charge. The citation and the other documents were admitted as evidence without objection at the sentencing hearing. They are not, however, included in the record on appeal.

As we mentioned, a special sentencing rule governs involuntary manslaughter convictions if the death results from the defendant having operated a motor vehicle while intoxicated. Pertinent here, K.S.A. 2022 Supp. 21-6811(c)(2)(B) provides that a conviction under a municipal ordinance criminalizing "any act" proscribed in K.S.A. 8-1567, the statute covering driving under the influence, should be treated as a person felony for criminal history purposes in sentencing a defendant for a DUI involuntary manslaughter.

We apply the sentencing statutes in effect on the date of sentencing. See *State v. Newton*, 309 Kan. 1070, 1073-74, 442 P.3d 489 (2019). In turn, when Harrison was resentenced, K.S.A. 8-1567(a) prohibited five forms of driving under the influence or "acts":

> "(1) The alcohol concentration in the person's blood or breath as shown by any competent evidence . . . is 0.08 or more;
> "(2) the alcohol concentration in the person's blood or breath, as measured within three hours of the time of operating or attempting to operate a vehicle, is 0.08 or more;
> "(3) under the influence of alcohol to a degree that renders the person incapable of safely driving a vehicle;
> "(4) under the influence of any drug or combination of drugs to a degree that renders the person incapable of safely driving a vehicle; or

> "(5) under the influence of a combination of alcohol and any drug or drugs to a degree that renders the person incapable of safely driving a vehicle."

The municipal ordinance under which Harrison was charged in 2012 and convicted in 2013 criminalized those five acts or substantially comparable acts but also included a sixth when the driver "is a habitual user of any narcotic, hypnotic, somnifacient[,] or stimulating drug." Code of Ordinances of the Unified Government of Wyandotte County/ Kansas City, Kansas (W.C.O.) Sec. 35-250(a)(6) (2012). And Harrison rests his challenge on that difference.

On appeal, the parties agree the State had the burden to prove Harrison's criminal history at the resentencing by a preponderance of the evidence. We do not look behind that agreement, since it favors Harrison. Harrison concedes his municipal convictions should be treated as person felonies in his criminal history if they were for any of the five prohibited acts common to K.S.A. 8-1567(a) and the municipal ordinance. But Harrison argued in the district court that the State offered insufficient proof of the specific subsection of the municipal ordinance he violated, so those convictions should not have been included in his criminal history. In other words, the State had to establish the convictions were *not* based on the sixth prohibited act in the municipal ordinance that had no legal counterpart in K.S.A. 8-1567(a).

The district court agreed that the State had failed to present documents establishing the specific subsection of the ordinance applicable to the April 2012 municipal charge and resulting conviction. The district court discarded that conviction in determining Harrison's criminal history for resentencing in this case. The State has not cross-appealed the district court's ruling, so we do not consider the April 2012 charge further.

During the resentencing hearing, the district court read aloud from the traffic citation for the May 2012 charge and noted the language was comparable to one of the subsections defining the offense of DUI in K.S.A. 8-1567(a):

> "And looking at the ticket, it does indicate that there—and what the Court finds of merit is that the ticket says 'did operate or attempt to operate a vehicle while . . . the alcohol concentration in [a] person's blood or breath at the time or within two (2) hours is .08,' which is consistent with, I believe, at least our statute."

The documents for the May 2012 charge also show Harrison was later convicted under the ordinance. The district court concluded the materials were sufficient to satisfy the State's burden of proof and included that conviction in Harrison's criminal history as a person felony.[*]

[*]Strictly speaking, the municipal ordinance was narrower than the state statute because the window for operating a motor vehicle with an elevated blood alcohol level was two hours rather than three hours, as set out in K.S.A. 8-1567(a)(2). In that respect, the ordinance is comparable to—and really more restrictive than—K.S.A. 8-1567, so the prohibited act would also be a prohibited act under K.S.A. 8-1567(a), satisfying the special sentencing rule in K.S.A. 2022 Supp. 21-6811(c)(2)(B).

The district court's decision to discard one of the municipal DUI convictions reduced Harrison's criminal history score from A to B. Based on that reduction, the district court imposed a standard guidelines punishment on Harrison of 154 months in prison followed by postrelease supervision for 36 months. Harrison has now appealed the new sentence based on the inclusion of the May 2012 municipal DUI charge and conviction in his criminal history.

First, Harrison contends the district court's review of and reliance on the traffic citation was impermissible under *Obregon*. But he misconstrues the court's language. There, the court recognized that a district court may consult the "'trial record'" of the earlier case resulting in the conviction being considered for criminal history purposes,

"'including charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms.'" 309 Kan. at 1274 (quoting *Johnson v. United States*, 559 U.S. 133, 144, 130 S. Ct. 1265, 176 L. Ed. 2d 1 [2010]). Harrison's argument is doubly flawed.

The list of materials is illustrative, rather than exhaustive, as the word "including" suggests. See *State v. Jefferson*, 287 Kan. 28, 37-38, 194 P.3d 557 (2008); Scalia and Garner, Reading Law: The Interpretation of Legal Texts 132 (2012) ("[T]he word *include* does not ordinarily introduce an exhaustive list[.]"); but see *State v. Scheetz*, 63 Kan. App. 2d 1,___, 524 P.3d 424, 440 (Kan. App. 2023) (although introduced by word "includes," detailed list of 10 forms of "sexual misconduct" in K.S.A. 2021 Supp. 60-455[g] held exclusive rather than exemplary). A traffic citation would be the sort of document that could be considered even if it were not expressly identified in the quote from *Johnson*. But a traffic citation is properly considered a charging document—directly undercutting Harrison's argument. See K.S.A. 2022 Supp. 22-2202(i) (complaint defined as including citation issued under K.S.A. 8-2106); K.S.A. 8-2106(a)(1) (officer may issue citation for violation of uniform act regulating traffic on highways, including DUI as serious traffic offense).

For his second point, Harrison contends that even if the district court could consider the traffic citation, it improperly relied on the document to establish case-specific facts about that offense contrary to his constitutional rights. To properly frame the issue, we need to outline the constitutional considerations Harrison invokes.

In a series of cases, the United States Supreme Court has held that a fact, other than the existence of a previous conviction, used to increase a criminal defendant's sentence above a statutory maximum must be proved to a jury beyond a reasonable doubt or expressly admitted by the defendant, for example, in entering a guilty plea. *United States v. Booker*, 543 U.S. 220, 244, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005)

(defendant's admission); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (proved to jury). Impermissible judicial fact-finding in sentencing violates a defendant's rights to jury trial and to due process protected respectively in the Sixth and Fourteenth Amendments to the United States Constitution. 530 U.S. at 476. The Kansas Supreme Court has applied the rule of *Apprendi* to factors increasing a criminal defendant's presumptive term of incarceration under the sentencing guidelines, including his or her criminal history. *State v. Dickey*, 301 Kan. 1018, 1021, 350 P.3d 1054 (2015); see *State v. Gould*, 271 Kan. 394, 410-11, 23 P.3d 801 (2001). As explained in *Dickey*, a conviction considered for criminal history purposes in and of itself establishes the statutory elements of the crime and any factual circumstances inherent in those elements. 301 Kan. at 1036-38. So, for example, a conviction under K.S.A. 8-1567(a)(2) establishes the defendant had a blood-alcohol level of .08 or more, but it does not establish the precise level.

If a statute (or, here, the municipal DUI ordinance) defines multiple ways of committing a particular crime, the district court may review documents related to a defendant's conviction to determine which way governed the conviction. In turn, the district court may then consider the elements of that particular means of committing the crime. *Descamps v. United States*, 570 U.S. 254, 261-64, 269-70, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013); *Dickey*, 301 Kan. at 1037-38. Here, the district court, therefore, could review documents from the May 2012 charge to determine the subsection of the ordinance Harrison violated. If those elements were comparable to one of the subsections in K.S.A. 8-1567(a), then the district court properly treated the conviction as a person felony for criminal history purposes in this case. That conclusion would not step over the line first drawn in *Apprendi* marking impermissible judicial fact-finding. But the district court could not rely on any case-specific factual recitations in those documents to augment the statutory elements applicable to Harrison's municipal court conviction. That would cross the constitutional line. *Descamps*, 570 U.S. at 263-64; *Dickey*, 301 Kan. at 1038-39.

Harrison submits the district court relied on case-specific facts from the May 2012 traffic citation to determine that the charge was for having a blood-alcohol level of .08 or more within two hours of operating a vehicle. But the record indicates the district court read and considered a definitional statement of the elements of the particular ordinance subsection charged in the citation rather than specific facts pertaining to Harrison's violation. The district court would have impermissibly relied on case-specific facts if it considered a reference in the documents to Harrison's actual blood-alcohol level or to precisely how long after Harrison had been taken into custody the blood-alcohol test was administered.

The documents further established that Harrison was convicted of driving under the influence. We have no reason to assume or presume he pleaded guilty to a subsection of the ordinance other than the one identified in the traffic citation, since the punishment would have been the same for any violation.

The district court briefly alluded to the use of documents in determining how to score a conviction for criminal history purposes, although it did not recite the legal principles in detail. Neither side objected to the district court's characterization of the May 2012 conviction during the sentencing hearing. The citation itself is not in the record on appeal, so Harrison cannot show that the district court relied on case-specific factual circumstances rather than on generic language in the citation describing the elements of ordinance subsection he was charged with violating. See *State v. Bridges*, 297 Kan. 989, 1001, 306 P.3d 244 (2013) (defendant claiming error on appeal obligated to furnish record establishing basis for relief). As we have said, the district court did no more than quote elements of the offense applicable to any violation of that subsection of the ordinance.

In short, the record fails to show any error in the district court's use of the May 2012 municipal DUI in determining Harrison's criminal history in this case. In turn, the district court imposed a lawful sentence on Harrison.

Affirmed.