

NOT DESIGNATED FOR PUBLICATION

No. 124,623

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellee,*

v.

LIBRADO ONTIBEROS JR.,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Ford District Court; LAURA H. LEWIS, judge. Opinion filed April 21, 2023.  
Affirmed.

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

*Kristafer R. Ailslieger*, deputy solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before GREEN, P.J., HURST, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: Librado Ontiberos Jr. appeals his registration requirements under the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 et seq., following his conviction for distribution of methamphetamine in two separate cases. He asserts KORA is unconstitutional because the compulsory registration requirement violates the compelled speech doctrine of the First Amendment to the United States Constitution. Ontiberos raises this issue for the first time on appeal. We decline to undertake prudential review of this unpreserved issue. In the alternative, Ontiberos appeals the district court's order requiring him to register for life under KORA. We find no error and affirm the district court's order requiring lifetime registration.

## FACTUAL AND PROCEDURAL BACKGROUND

On August 10, 2020, a confidential informant purchased 2.11 grams of methamphetamine from Ontiberos in a controlled buy. Later that evening, Ontiberos sold 3.5 grams of methamphetamine to a confidential informant in a second controlled buy. The State charged Ontiberos, in part, with distribution of methamphetamine in two separate cases. In each case, Ontiberos pled no contest to one count of distribution of methamphetamine, in violation of K.S.A. 2020 Supp. 21-5705(a)(1). The district court found Ontiberos guilty of both offenses and ordered that he register as an offender under KORA.

The district court sentenced Ontiberos to 54 months' imprisonment in each case with the sentences to run consecutive to one another. The district court granted Ontiberos' motion for dispositional departure to intensive supervision probation for a total term of 36 months for both cases.

The district court initially ordered Ontiberos to register as a drug offender under KORA for 15 years. The State asked for clarification as to whether Ontiberos was to register for 15 years or for life because of his second conviction. The State noted it was fine with the 15-year requirement. The district court amended Ontiberos' registration requirement, ordering him to register for life. Ontiberos did not object to the lifetime registration requirement but explained the sheriff's office told him the registration period was 15 years. The district court asked Ontiberos' counsel if he would like to take a break and look at the wording of the registration statute, but Ontiberos stated, "That's fine," and chose to proceed without taking a break.

Ontiberos timely appeals.

## ANALYSIS

*Ontiberos did not preserve his argument that KORA violates the compelled speech doctrine under the First Amendment.*

Ontiberos contends that KORA's compulsory registration requirement violates the First Amendment because KORA compels him to speak on behalf of the government by requiring him to provide information that the government will publish on the Kansas Bureau of Investigation's (KBI) public offender registry website. He also argues that since failure to comply with the registration requirement would result in a felony, it violates the compelled speech doctrine of the First Amendment. In making the argument, Ontiberos cites no authority from a single state or federal court holding that any offender registration law violates the First Amendment.

The State cites *United States v. Arnold*, 740 F.3d 1032 (5th Cir. 2014), and *United States v. Sindel*, 53 F.3d 874 (8th Cir. 1995), explaining that even though registration requirements may infringe on First Amendment rights and are subject to strict scrutiny, the government has a compelling interest in protecting the public and preserving an orderly society by requiring sex offender registration. The State also contends KORA has been upheld under the strict scrutiny test in Kansas and the federal courts, contrary to Ontiberos' argument.

Ontiberos admits he did not object to the district court's order requiring him to register under KORA but still asks this court to address the issue on appeal. Generally, a party cannot assert a new constitutional argument on appeal. There are three exceptions to the general rule:

“(1) The newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; or (3) the

district court is right for the wrong reason.' [Citations omitted.]" *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015).

Ontiberos asserts the first two exceptions apply: (1) His claim involves a question of law arising on proved or admitted facts and would be determinative of the case; and (2) consideration is necessary to prevent the denial of fundamental rights. Ontiberos recognizes that this court is not obligated to consider an unpreserved claim even if the claim falls within an exception to the general rule. See *State v. Gray*, 311 Kan. 164, 170, 459 P.3d 165 (2020) (decision to review unpreserved claim is prudential, not mandatory). We decline to exercise prudential review of Ontiberos' constitutional challenge for the reasons explained below.

First, Kansas Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36) requires an appellant to explain why an issue that was not raised below should be considered for the first time on appeal. *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019). Our Supreme Court has repeatedly warned that Rule 6.02(a)(5) would be strictly enforced, and litigants who disregarded this rule risked a ruling finding the issue improperly briefed and the issue would be deemed waived or abandoned. *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018); *Godfrey*, 301 Kan. at 1043-44. Ontiberos raised no constitutional challenge to KORA registration requirements at any time before the district court and has provided no explanation or excuse for his failure to do so.

Second, though Ontiberos contends he is making a facial challenge to KORA's constitutionality, his argument more closely resembles an as applied challenge. See *State v. Jones*, No. 124,174, 2023 WL 119911 (Kan. App. 2023) (unpublished opinion), *petition for rev. filed* February 6, 2023. In making his argument, Ontiberos advances at least two factual propositions not supported in the record. First, he argues that KORA "compels offenders to give the government information it already possesses." But Ontiberos does not identify in the record, or otherwise, the information the government

already possesses which he objects to providing. Second, Ontiberos directly contends here that "KORA's requirement for Mr. Ontiberos to [provide] information about his convictions compels a statement of fact that *he would rather avoid. He does not want this information broadcast on the internet, along with a current photo and the exact location of his residence.*" (Emphasis added.) But the record before the district court contains no information about Ontiberos' viewpoint about disclosure of information. He did not object to disclosing any of the information required by KORA, and he certainly did not inform the court he wanted to avoid providing information because it would be broadcast on the internet. The record before the district court is silent on these matters as the record reflects Ontiberos was aware of the registration requirements but made no argument against it. The insertion of these fact-based arguments by Ontiberos undercuts his assertion that his claim is simply a facial challenge. Because we find Ontiberos' arguments to be based on his particular factual circumstances, we decline to address his unpreserved claim as simply a question of law based on proved or admitted facts.

Finally, while we can agree that First Amendment protections are fundamental rights, we do not view our decision to decline prudential review of the issue as a denial of Ontiberos' rights. The issues raised by Ontiberos have been addressed by other courts, which have uniformly upheld offender registration laws. See *Arnold*, 740 F.3d at 1035 (Federal Sex Offender and Notification Act [SORNA] serves a compelling government interest and does not violate First Amendment); *United States v. Fox*, 286 F. Supp. 3d 1219, 1224 (D. Kan. 2018) (SORNA compels speech but does not offend the First Amendment); *Davis v. Thompson*, No. 19-3051-SAC, 2019 WL 6327420, at \*3 (D. Kan. 2019) (unpublished opinion) (KORA does not violate First Amendment prohibition against compelled speech). Though Ontiberos contends these decisions upholding offender registration have been wrongly decided or are distinguishable, he does not identify any state or federal court authority which has invalidated an offender registration law on First Amendment grounds.

The precise argument advanced by Ontiberos was recently addressed by another panel of our court in *Jones*. As is the case here, the defendant in *Jones* did not challenge KORA registration in the district court or offer any explanation or excuse for the failure to raise the issue in the district court. As here, the defendant in *Jones* maintained that his claim on appeal fell within the first two exceptions to the preservation requirement. *Jones* argued he was making a facial challenge to KORA that did not involve factual disputes and contended it would be a "tragic error" for the court to find the issue to be unpreserved. 2023 WL 119911, at \*5. Our court in *Jones* declined to reach *Jones*' unpreserved constitutional claim, but it also determined that even if it evaluated the claim on the merits, the claim was flawed. 2023 WL 119911, at \*5 (citing *State v. Masterson*, No. 124,257, 2022 WL 3692859, at \*2 [Kan. App.] [unpublished opinion], *rev. denied* 316 Kan. 762 [2022]).

*Masterson*, like *Jones*, involved the same First Amendment claim and arguments advanced by Ontiberos. The *Masterson* court also declined to reach the defendant's unpreserved constitutional claim, but along the way it thoroughly analyzed the compelled speech claim and concluded: "[I]f we were to address this issue, it is legally and fatally flawed." 2022 WL 3692859, at \*2. Relying on *Arnold, Fox, and Davis*, the court in *Masterson* observed: "KORA does not violate the First Amendment to the United States Constitution." 2022 WL 3692859, at \*4. We agree with the analysis in both *Masterson* and *Jones*. Ontiberos does not present any new or different argument here and provides no contrary authority to persuade us that his fundamental rights are in jeopardy because of the registration requirements in KORA. And even if we were to assume fundamental rights were in issue, we decline to address this issue because of the unexplained failure to raise the issue in district court.

*The district court did not err in ordering Ontiberos to register for life under KORA.*

Ontiberos contends, even if KORA is constitutional, the district court erred in

ordering him to register for life for a second or subsequent conviction of a crime requiring registration. Ontiberos asserts that the plain language of the registration statute requires that his two convictions be treated as a single conviction. The State argues the plain language of the statute supports the district court's decision to impose lifetime registration. Ontiberos did not object to the registration requirements before the district court. Citing *Marinelli*, Ontiberos suggests that an objection before the district court was not required for this court to reach the merits on appeal because "[a]ppellate courts . . . have jurisdiction to consider a direct appeal by a defendant who pleaded guilty or nolo contendere and challenges a district court's order that the defendant comply with [KORA]." *State v. Marinelli*, 307 Kan. 768, Syl. ¶ 2, 415 P.3d 405 (2018). The State does not advance a contrary argument, and we thus consider Ontiberos' claim that his registration period should be for 15 years rather than for life.

K.S.A. 2022 Supp. 22-4906(c) states: "Upon a second or subsequent conviction of an offense requiring registration, an offender's duration of registration shall be for such offender's life." K.S.A. 2022 Supp. 22-4902(g) explains, in relevant part: "Convictions or adjudications that result from or are connected with the same act, or result from crimes committed at the same time, shall be counted for the purpose of this section as one conviction or adjudication."

Although Ontiberos admits he was convicted of distributing methamphetamine in two separate cases involving controlled buys that occurred at different times of the same day, he contends the crimes should have been treated as one conviction for registration purposes. He contends that "two distributions to the same victim in the same day are inherently connected per K.S.A. 22-4902(g)" and should be understood to be the same act with the same victim. Ontiberos contends the decision to charge separate crimes is an "unreasonable" and "whimsical" charging decision with an "absurd" result. He suggests that because these were controlled buys, law enforcement could have conducted a single buy. Ontiberos asks this court to remand to the district court with instructions to change

his registration term to 15 years. The State responds that Ontiberos' offenses were separate acts, committed at separate times and locations, involving differing amounts of methamphetamine, and fall within the plain language of the registration statute requiring lifetime registration. The issue is one of statutory interpretation over which this court has unlimited review. *State v. Williams*, 299 Kan. 911, 930, 329 P.3d 400 (2014).

K.S.A. 2022 Supp. 22-4902(g) provides that convictions resulting from or connected with the same act, or resulting from crimes committed at the same time, shall be counted as one conviction. Here, we find the State had discretion to charge Ontiberos for the crimes he committed—two separate counts of distribution of methamphetamine. Ontiberos cites *State v. Barnes*, 278 Kan. 121, 92 P.3d 578 (2004), in support of his attack on the prosecutor's decision to charge two separate offenses, but it is wholly unpersuasive. *Barnes'* reference to prosecutorial whimsy arose in the context of an offense that fits within the scope of two criminal statutes with identical elements but with different penalties. Nothing of the sort is at issue here.

The fact Ontiberos committed the same criminal offense twice on the same day and both offenses were controlled buys under the watchful eye of law enforcement does not itself make law enforcement the "victim," and Ontiberos fails to show how this creates a sufficient connection to require the two crimes to be treated as one. There is no suggestion that law enforcement somehow entrapped or caused Ontiberos to commit multiple offenses instead of one, and we see no support in the record to conclude, as Ontiberos now suggests, that the two sales were somehow part of a single act.

Ontiberos sold methamphetamine twice on the same day at different times and locations and in different amounts to a confidential informant working with law enforcement. The record does not indicate whether the same confidential informant made the two buys. Because there was no objection to registration before the district court, there is no developed record of the details of the two separate sales of methamphetamine



by Ontiberos. Perhaps our analysis would be different if the sales were to the same confidential informant, or other facts existed showing a connection, but the record does not indicate that was the case here. We do not agree that the nature of the transactions as controlled buys through law enforcement alone connects the clearly separate sales into a single act for registration purposes. In other words, the limited details surrounding the sales do not persuade us that the two drug transactions should be counted as a single conviction. It is "the well-established rule that an appellant has the burden to designate a record sufficient to establish the claimed error. Without an adequate record, an appellant's claim of alleged error fails.' [Citations omitted.]" *State v. Vonachen*, 312 Kan. 451, 460-61, 476 P.3d 774 (2020). Here, the record is insufficient to show that the two distribution charges are the result of or connected with the same act.

As the State points out, Ontiberos failed to show that his offenses resulted from the same act—there were two separate acts, i.e., two sales at different times and locations. Ontiberos first sold 2.11 grams of methamphetamine to a confidential informant on August 10, 2020, as charged in 20-CR-681. Hours later that same day, Ontiberos sold 3.5 grams of methamphetamine to a confidential informant. Ontiberos concedes the second methamphetamine sale was hours after the first. Ontiberos fails to demonstrate that his two convictions must be counted as a single separate conviction for offender registration purposes, and the district court did not err in ordering lifetime registration.

Affirmed.

\* \* \*

HURST, J., concurring: I concur with the judgment of the court declining to address Ontiberos' unpreserved First Amendment argument and finding that he failed to demonstrate that the State was required to consider his two convictions as a single act for

KORA registration purposes. I write separately on the single issue of declining to address any part of Ontiberos' First Amendment argument, its similarity to arguments made in any other cases decided by panels of this court, or the applicability of those cases to his argument. Because this court declines to address Ontiberos' First Amendment claims, I cannot say they are analogous to other cases that have been decided by panels of this court or that those cases would directly bear on his claims. While it is true that this court has heard many First Amendment challenges to KORA registration requirements, it is also true that the unique facts of each case require a thorough, thoughtful evaluation to determine the application of the law to those facts.

As such, I decline to join the court's analysis and opinion regarding Ontiberos' First Amendment claims but agree in judgment that this court's prudential review of those unpreserved constitutional claims is not guaranteed.