NOT DESIGNATED FOR PUBLICATION

No. 124,759

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

BECKY ANNE WILSON,
Appellant.

MEMORANDUM OPINION

Appeal from Norton District Court; PRESTON PRATT, judge. Opinion filed June 30, 2023. Reversed and remanded.

Kasper Schirer, of Kansas Appellate Defender Office, for appellant.

Steven J. Obermeier, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

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

ISHERWOOD, J.: Becky Anne Wilson pled guilty to three counts of theft and fraud after she systematically pocketed $65,865 from her employer, Valley Hope. The district court ordered 24-month terms of probation for each of the three counts, seemingly without regard to the lesser durations established by the legislature for each offense. Wilson was also ordered to pay restitution for the full amount she stole, plus interest, at the rate of a civil judgment. Around 23 months later, the district court revoked Wilson's probation and imposed all three of her underlying prison terms with directions that they be served consecutively.

For the first time on appeal, Wilson advances an illegal sentence claim which bears two components. First, she contends the district court imposed an illegal sentence when it ordered a unitary 24-month term of probation across her three convictions because the statutorily required terms for her second and third offenses are significantly less than 24 months. Thus, she had satisfied the appropriate terms for those two convictions when her probation was revoked, foreclosing any imposition of their corresponding prison terms. Wilson further alleges that the attachment of interest payments to her restitution figure likewise failed to conform to the relevant statutes because those provisions do not authorize an order for interest. Following a thorough review of the relevant statutory provision, we find that the district court imposed an illegal sentence when it ordered Wilson to serve 24 months' probation for counts two and three without making the findings required to exceed the duration provided for under the statute. Further, we agree with Wilson's contention that the court impermissibly ordered her to pay interest on her restitution obligation. Thus, we reverse the district court's imposition of Wilson's prison terms for counts two and three, as well as its restitution order.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2019, the State charged Wilson with multiple counts of theft and fraud for acts committed over a three-month period in 2018. Wilson agreed to plead guilty to three of the offenses: theft by deception in violation of K.S.A. 2018 Supp. 21-5801(a)(2), (b)(2) (a level 7 felony), making a false information in violation of K.S.A. 2018 Supp. 21-5824(a) (a level 8 felony), and attempted theft by deception in violation of K.S.A. 2018 Supp. 21-5801(a)(2), (b)(2) and K.S.A. 2018 Supp. 21-5301(a) (a level 9 felony) in exchange for the State's assurance it would dismiss the remaining counts. Wilson also agreed to pay $65,865 in restitution to the victim organization, Valley Hope Association (Valley Hope).

Wilson entered the guilty pleas as anticipated and at sentencing, the State requested the standard number in the grid box for each count, to be served consecutively, imposition of restitution for the total amount stolen plus the market interest rate, and an order that Wilson's probation would be extended until her restitution obligation was satisfied. Wilson's counsel advised the district court that Wilson was informed there was a possibility her probation could be extended given her sizable restitution obligation. Wilson assured the judge she could pay $500 per month towards the restitution debt.

The district court granted probation terms of 24 months for each of the three counts with 18-, 8- and 6-month underlying prison terms, respectively. It ordered the two lesser prison sentences to run concurrent with one another but consecutive to count 1 for a total underlying prison term of 32 months. It also directed Wilson to pay $65,865 to Valley Hope as restitution and imposed $500 monthly restitution payments as a condition of her probation. The court informed Wilson she was also required "to pay interest on that amount at the rate that would apply to a civil judgment" but did not elaborate further as to the specific rate contemplated. The judge inquired whether either party could offer any insight into its authority to order interest, but both provided negative responses.

Roughly 23 months later, the State moved to revoke Wilson's probation following her commission of new crimes in Texas. Wilson stipulated to committing a new crime, as well as to violations for moving without permission, and being dishonest with her probation officer. The court found Wilson in violation of her probation, revoked the same and imposed the underlying 32-month prison sentence.

Wilson timely brings her case before us for resolution of two claims related to the legality of her sentence.

LEGAL ANALYSIS

The district court illegally sentenced Wilson to 24-month terms of probation for her secondary convictions and thereby ultimately lacked jurisdiction to impose the underlying prison terms for those offenses following revocation of her probation.

Wilson's first general contention of error consists of the claim that the district court lacked jurisdiction at the revocation hearing to impose the 14-month prison sentence underlying her secondary convictions. According to Wilson, when the sentencing court imposed 24-month terms of probation for her second and third offenses, it did so in contravention of K.S.A. 2018 Supp. 21-6608(c)(3) and (4), which informs a sentencing court of the appropriate probation term to impose based on the severity level of the offense at issue. Wilson asserts that if the court had complied with the statute, the probation terms for her secondary offenses would have been satisfied by the date of her revocation hearing, thereby rendering their underlying prison terms unavailable.

Wilson acknowledges that she never presented this issue to the district court for its consideration. The general rule is that a new legal theory may not be asserted for the first time on appeal. *State v. Hilyard*, 316 Kan. 326, 343, 515 P.3d 267 (2022). Even so, our Supreme Court has recognized three exceptions to that rule:

> "'(1) [T]he newly asserted claim involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) the claim's consideration is necessary to serve the ends of justice or to prevent the denial of fundamental rights; or (3) the district court's judgment may be upheld on appeal despite its reliance on the wrong ground or reason for its decision.'" *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021) (quoting *State v. Harris*, 311 Kan. 371, 375, 461 P.3d 48 [2020]).

Following a dissection of Wilson's claim, its various components reveal the first two exceptions apply. That is, a determination of whether the district court imposed the appropriate terms of probation for her secondary convictions and, relatedly, whether it

had jurisdiction to revoke Wilson's probation and order her to serve her underlying prison sentence for those offenses requires an examination of K.S.A. 2018 Supp. 21-6608. Issues of statutory interpretation present a question of law over which appellate courts have unlimited review. *State v. Collins*, 303 Kan. 472, 473-74, 362 P.3d 1098 (2015).

Further, to the extent probation terms were imposed that do not properly correspond with Wilson's crimes of conviction, a question arises concerning the legality of her sentence and whether justice has truly been served. An illegal sentence is one (1) imposed by a court without jurisdiction, (2) that does not conform to the statutory provision, either in the character or the term of the punishment authorized, or (3) that is ambiguous with respect to the time and manner in which it is to be served. *State v. Lee*, 304 Kan. 416, 417, 372 P.3d 415 (2016). K.S.A. 2022 Supp. 22-3504(a) authorizes a court to correct an illegal sentence at any time. That authority extends to appellate courts and grants us the latitude to correct such sentences for the first time on direct appeal. *State v. Boswell*, 314 Kan. 408, 417-18, 499 P.3d 1122 (2021). The nature of Wilson's claim triggers concerns that her sentence runs contrary to the term of punishment authorized.

Finally, an issue concerning subject matter jurisdiction rounds out Wilson's claims. Jurisdictional questions may be raised at any time, including for the first time on appeal. *State v. Sales*, 290 Kan. 130, 135, 224 P.3d 546 (2010). And whether jurisdiction exists is a question of law over which our scope of review is unlimited. *State v. Dull*, 302 Kan. 32, 61, 351 P.3d 641 (2015), *cert. denied* 577 U.S. 1193 (2016).

A court's decision about whether to consider issues for the first time on appeal is a prudential one. See *State v. Gray*, 311 Kan. 164, 170, 459 P.3d 165 (2020) (decision to review unpreserved claim is prudential, not mandatory). We find that Wilson has successfully established the purely legal nature of her claim, and the question it raises

concerning the notion of justice warrants review of this issue despite being raised for the first time on appeal.

The record before us reflects the district court imposed Wilson's sentence as follows:

> "Ms. Wilson, on Count No. 1, theft by deception, which is a severity level 7, nonperson felony on which you have a criminal history score of F, you are sentenced to the standard range of 18 months in prison. As I mentioned, it is presumptive probation, so from that underlying sentence, you are granted probation for a period of 24 months to be supervised by Court Services.
>
> "The conditions of your probation will be those set forth on the Presentence Investigation Report.
>
> "I'm also ordering as a condition of probation, that you pay at least $500 per month toward your costs and restitution. I will do an order that says the first series of payments, half will go towards restitution, half will go towards costs. I think there is a Supreme Court rule that says all the costs are supposed to be paid before restitution gets paid, but it seems like some of that restitution ought to be paid as soon as possible. So I'll do an order that says half of the payments are to go towards the costs, half towards the restitution, until all of your costs and fees are paid. Then all of it will go towards restitution.
>
> "Now that's a minimum amount you have to pay each month. If you don't pay that, then that can be a violation of your probation.
>
> "Also, you should be aware, and Mr. Peterson has probably told you, but an order of restitution, the victims can file a civil case and collect that the same as they would as a civil judgment. So the victims would have the authority to garnish your wages, garnish bank accounts, do other things to collect on that amount of restitution.

"I am ordering that interest be paid on that at the rate that would apply to a civil judgment. I don't know what that rate is. And the interest, of course, only applies to the amount of restitution. I think that rate may vary occasionally, but whatever the amount of interest is on a civil judgment, that's the interest on the amount of restitution that is being ordered.

"If your probation is revoked and you actually serve time in prison, you can earn up to 20 percent good time credit, and would be subject to 12 months post-release supervision.

"On Count 2, which is making a false information, a severity level 8, nonperson felony, you are sentenced to the standard range of 8 months in prison. Pursuant to the plea agreement, that is consecutive to Count No. 1. From that underlying sentence, then you are granted probation for a period of, it will be 24 months, which is the same period as Count No. 1, and the same terms and conditions as your probation on Count No. 1.

"And, again, if you violate your probation and actually serve time in prison, you can earn up to 20 percent good time credit and would be subject to 12 months of post-release supervision.

"On Count No. 5, which is attempted theft by deception, a severity level 9, nonperson felony, you are sentenced to the standard range of 6 months in prison. That is consecutive to Counts 1 and 2. Your probation on that will be for a period of 24 months, also the same terms and conditions as Count 1.

"Again, you can earn up to 20 percent good time credit and would be subject to 12 months post-release supervision.

"You are ordered to pay restitution in the amount of $65,865 to Valley Hope Association here in Norton. As I mentioned you're also ordered to pay interest on that amount at the rate that would apply to a civil judgment.

. . . .

"You will also need to meet with Mr. Marble before you leave the courthouse today so he can go over with you the details of your supervision.

"It probably goes without saying, but probation is part of the punishment. Instead of going to prison now, you've been given the opportunity to be on supervision instead of going to prison. But that means you can't do things that normally you could do, or you have to do things normally you wouldn't have to do, but that's part of the punishment. If you don't comply, then you're probably going to wind up in prison. So make sure you comply with everything you're supposed to do while on probation."

The subsections of K.S.A. 2018 Supp. 21-6608 which are relevant to a determination of the propriety of Wilson's probation terms include the following:

"(c) For all crimes committed on or after July 1, 1993, the duration of probation in felony cases sentenced for the following severity levels on the sentencing guidelines grid for nondrug crimes and the sentencing guidelines grid for drug crimes is as follows:

. . . .

"(3) except as provided further, in felony cases sentenced at severity levels 9 and 10 on the sentencing guidelines grid for nondrug crimes . . . if a nonprison sanction is imposed, the court shall order the defendant to serve a period of probation of up to 12 months in length;

"(4) in felony cases sentenced at severity level 8 on the sentencing guidelines grid for nondrug crimes. . . if a nonprison sanction is imposed, the court shall order the defendant to serve a period of probation, or assignment to a community correctional services program, as provided under K.S.A. 75-5291 et seq., and amendments thereto, of up to 18 months in length.

"(5) if the court finds and sets forth with particularity the reasons for finding that the safety of the members of the public will be jeopardized or that the welfare of the inmate will not be served by the length of the probation terms provided in subsections

(c)(3) and (c)(4), the court may impose a longer period of probation. Such an increase shall not be considered a departure and shall not be subject to appeal;

. . . .

"(7) . . . If the defendant is ordered to pay full or partial restitution, the period may be continued as long as the amount of restitution ordered has not been paid."

As a general matter, probation is tied to a conviction for a particular charge or crime. In a multiple conviction case, a district court must impose a specific term of probation for each conviction. *State v. Baker*, 56 Kan. App. 2d 335, Syl. ¶ 2, 429 P.3d 240 (2018). Here, the district court ordered Wilson to serve 24-month terms of probation for each of her offenses, including her secondary convictions for making a false information and attempted theft by deception, severity level 8 and 9 felonies, respectively. But K.S.A. 2018 Supp. 21-6608(c)(3) and (4) directs that those offenses should only receive up to 18 and 12 months, respectively, unless the terms are specifically extended in accordance with the dictates of subsections (c)(5) or (c)(7).

The district court has a "duty to apply the law in conformity with the legislative enactments in this State." *State v. Clapp*, 308 Kan. 976, 990, 425 P.3d 605 (2018). Neither the sentencing transcript nor its corresponding journal entry is particularly illuminating as to which subsection or what authority the court purportedly relied on to extend Wilson's probation for those two counts. In an effort to identify legislative intent, we make the statute's plain language our starting point and give common words their ordinary meaning. In the event the statute's language is ambiguous, courts may consult canons of construction to clarify the ambiguity. *Bruce v. Kelly*, 316 Kan. 218, 224, 514 P.3d 1007 (2022). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *State v. Strong*, 317 Kan. 197, 203, 527 P.3d 548 (Kan. 2023) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct.

843, 136 L. Ed. 2d 808 [1997]). An analysis of the plain language here makes clear that the district court's power to rely on subsection (c)(5) for an extension of probation is directly tied to its ability to make particularized findings about public safety and offender welfare. *State v. Jones*, 30 Kan. App. 2d 210, 214, 41 P.3d 293 (2001). See also *State v. Huskey*, 17 Kan. App. 2d 237, Syl. ¶ 2, 834 P.2d 1371 (1992) ("When something is to be set forth with particularity, it must be distinct rather than general, with exactitude of detail, especially in description or stated with attention to or concern with details."). Regardless of what the sentencing court *could* have done, it did not do so here. Thus, subsection (c)(5) does not provide a safety net for the district court's decision to impose the extended terms of probation here.

The State also seeks to persuade us that subsection (c)(7) offers a sound avenue for upholding the court's decision. As reflected in the quoted language above, that subsection operates to allow an offender's term of probation to be extended for as long as restitution remains due. In the State's eyes, Wilson's 24-month term "was consistent" with this subsection and asserts that she was advised her probation would remain active until her restitution obligation was satisfied.

First, the record is not clear that Wilson was ever so affirmatively advised. While the State requested such an order at sentencing and Wilson's counsel informed the sentencing court that he explained to Wilson that such an extension was possible, the district court never made an oral pronouncement from the bench that her probation came with the directive that it would continue as long as her restitution remained unpaid. As support for its contention that Wilson was so informed, the State simply cites to the judge's handwritten comments concerning the conditions of probation that were attached to Wilson's presentence investigation report and stated that "term of probation shall automatically continue without further court order as long as the amount of restitution ordered remains unpaid."

The Kansas Supreme Court has held that a district court may extend probation under K.S.A. 2022 Supp. 21-6608(c)(7), without a hearing and with no statutory right to counsel. See *State v. Gordon*, 275 Kan. 393, 406-07, 66 P.3d 903 (2003); *State v. McDonald*, 272 Kan. 222, 227, 32 P.3d 1167 (2001). In *Gordon* and *McDonald*, however, the district court issued an ex parte order extending the defendant's probation. See 275 Kan. at 395-96; 272 Kan. at 223. Thus, both cases favor the interpretation that under K.S.A. 2022 Supp. 21-6608(c)(7) a district court may extend probation ex parte, but it must actively order a probation extension to do so. Here, the district court arguably never ordered Wilson's probation to continue until she fully paid the restitution amount given that such a declaration was limited to its handwritten note concerning her conditions of probation. The State seeks to overcome the deficiencies surrounding this issue by directing our attention to Rule 717 of the Local Court Rules for the 17th Judicial District, which states that "[t]he term of probation *shall automatically continue* without further court order as long as the amount of restitution ordered remains unpaid. . ." (Emphasis added). But the hurdle the State faces is that the rule conflicts with K.S.A. 2022 Supp. 21-6608(c)(7), which only makes such extensions permissible, not mandatory. A local rule may not conflict with statutes or Supreme Court Rules. See *In re Estate of Lessley*, 62 Kan. App. 2d 75, 83, 506 P.3d 942 (2022); see also Supreme Court Rule 105 (2022 Kan. S. Ct. R. at 174-75) ("[A] judicial district . . . may adopt rules that are: (1) clear and concise; (2) necessary for the judicial district's administration; (3) *consistent with applicable statutes*; and (4) consistent with—but not duplicative of—Supreme Court Rules."). (Emphasis added.)

In any event, the district court's conduct further reflects a lack of intent to truly adhere to what is contemplated by subsection (7). That is, it never merely left Wilson's probation open until her restitution was satisfied as it assigned three definitive 24-month terms at her initial sentencing, two of which were impermissible. And we are unaware of any authority for the State's apparent proposition that issuing an extension of probation under K.S.A. 2022 Supp. 21-6608(c)(7) alongside an initial order for probation absolves

a sentencing court of its obligation to grant the statutorily mandated base terms set forth under subsections (c)(3) and (4). Such an approach would seemingly render those terms obsolete and is unlikely what was intended by the legislature when drafting the provision. Any insight into the court's objective is further clouded by its decision to revoke Wilson's probation after 23 months, a decision that is clearly inconsistent with the theory of holding probation open until the restitution order is fulfilled.

Wilson pleaded guilty to crimes that are classified as severity level 7, 8 and 9 felony offenses and the legislature established a precise duration of probation for each. Those are the terms the sentencing court should have ordered to comply with K.S.A. 2018 Supp. 21-6608. A proper calculation of Wilson's probation reveals that the lawful terms of her probation for the secondary offenses drew to a close in February 2021.

K.S.A. 2018 Supp. 22-3716(e) graces the district court with a 30-day window following the conclusion of an offender's probation to notify him or her of any violations they are alleged to have committed against the terms and conditions of their probation. Thus, if the court intended to extend Wilson's probation because restitution was outstanding, it was required to do so by March 2021. From our analysis of the record, we see no evidence that occurred. Accordingly, when Wilson's probation was revoked in July 2021, the only prison sentence remaining and subject to imposition was the 18 months associated with her primary crime of conviction, theft by deception.

Because Wilson was sentenced as part of a multi-conviction case, K.S.A. 2018 Supp. 21-6819 is also triggered. That provision states:

> "If the sentence for the primary crime is a nonprison sentence, a nonprison term will be imposed for each crime conviction, but the nonprison terms shall not be aggregated or served consecutively even though the underlying prison sentences have been ordered to be served consecutively. Upon revocation of the nonprison sentence, the

offender shall serve the prison sentences consecutively as provided in this section." K.S.A. 2018 Supp. 21-6819(b)(8).

The operation of this provision was previously scrutinized in *State v. Baker*, 56 Kan. App. 2d 335, 429 P.3d 240 (2018), a case which bears a strong resemblance to Wilson's. In that case, Baker pleaded guilty to two counts of forgery and a single count of theft. She was sentenced in 2012 at which time the district court simply placed her on probation for 24 months without assigning that term to a particular crime of conviction. But the journal entry of judgment clarified the duration was to be served for Baker's primary crime of theft, whereas 18 months' probation was ordered for each of her two forgery convictions in accordance with K.S.A. 2011 Supp. 21-6608(c)(4).

In 2017, the State moved to revoke Baker's probation following her commission of new crimes and Baker argued the only underlying sentence that remained was for her theft conviction as she already completed the probation terms assigned for her forgery convictions. *Baker*, 56 Kan. App. 2d at 337. The district court disagreed and found Baker had a unitary probation term of 24 months that encompassed each of her three convictions, and therefore, her entire underlying prison term of 37 months remained subject to imposition. Baker's probation was revoked and she was ordered to serve all three of the initial prison terms imposed at sentencing. 56 Kan. App. 2d at 337.

Baker appealed and argued the district court erred when it ordered her to serve the prison sentences for her forgery convictions because she completed those particular probation terms before her revocation hearing. *Baker*, 56 Kan. App. 2d at 337. As part of its analysis, the panel first observed that while the sentencing proceeding itself lacked clarity with respect to the precise probation terms assigned to each offense, the journal entry plainly identified the appropriate period for each offense. The court then dissected the language of K.S.A. 2017 Supp. 22-3716(e) and determined that the provision contained internally inconsistent language which allowed for two interpretations. 56 Kan.

App. 2d at 339. That is, it either required the offender to serve each of their underlying prison sentences or only demanded imposition of those for which the probation period was still in effect at the time of revocation.

In resolving the matter, the *Baker* court derived guidance from the rule of lenity. When language in a criminal statute is ambiguous, a court may apply the rule of lenity by strictly construing the provision and resolving any reasonable doubt as to the meaning in the defendant's favor. *State v. Griffin*, 312 Kan. 716, 720, 479 P.3d 937 (2021). The *Baker* court concluded that the rule "inures to Baker's benefit and confirms the argument that she had completed the probation and sentences on the forgeries before the district attorney's office ever sought to revoke her probation and long before the district court ordered her to prison." 56 Kan. App. 2d at 341. The court further reasoned that the Kansas Legislature did not intend for K.S.A. 2017 Supp. 21-6819(b)(8) to negate entirely the fixed upper limits on probation periods set out in K.S.A. 2017 Supp. 21-6608(c)(3) and (c)(4). Otherwise, the legislature would have included a specific exception to those probation caps among the other exceptions in K.S.A. 2017 Supp. 21-6608(c)(5). The panel reversed the district court's revocation of Baker's probations on the secondary convictions and vacated the resulting prison sentence. 56 Kan. App. 2d at 341-42.

The State requests that this panel revisit *Baker*, arguing that there is no ambiguity in K.S.A. 2022 Supp. 21-6819(b)(8) because the clause "as provided in this section" creates no reasonable doubt that the Kansas Legislature intended an offender to serve all prison sentences consecutively when probation is revoked in a multiple conviction case. The State's interpretation, however, is erroneous. The statute's inclusion of "as provided in this section" merely conveys that the sentences should be served consecutively only if the statute applies based on the current disposition of the offender's convictions. We are not persuaded that *Baker* requires any adjustments or modifications.

We see no reason to depart from *Baker* in this strikingly similar case. Wilson had completed her probation and satisfied the sentences for her second and third offenses when the district court revoked her probation and imposed her underlying prison term. Thus, she could only be required to serve the sentence for her conviction of theft by deception, which remained outstanding at the time of revocation. Once the lawful term of probation has expired, the district court no longer has jurisdiction over the defendant to revoke the probation. See *State v. Cisneros*, 36 Kan. App. 2d 901, 905-06, 147 P.3d 880 (2006); *State v. Farmer*, 16 Kan. App. 2d 419, 422, 824 P.2d 998 (1992). Accordingly, the district court's revocation of Wilson's probation for her secondary convictions and imposition of the corresponding prison terms is reversed.

The district court's order for Wilson to pay interest on her restitution obligation constitutes an illegal sentence.

The second prong of Wilson's illegal sentence claim stems from the district court's restitution order. She asserts that the court's directive for her to pay interest on the $65,865 restitution award at the rate of a civil judgment cannot stand because payment of interest is not authorized under K.S.A. 2018 Supp. 21-6604. Thus, that portion of the order constitutes an illegal sentence. The State counters that imposition of interest falls within the vast discretion afforded a sentencing court when calculating the extent and manner of payment for restitution and that such a demand was reasonable given the facts of Wilson's case.

Again, Wilson raises this challenge for the first time on appeal but claims that because it falls under the umbrella of an illegal sentence, we may properly review the issue. As earlier stated, a "court may correct an illegal sentence at any time while the defendant is serving such sentence" including when the issue is raised for the first time on appeal. K.S.A. 2022 Supp. 22-3504(a); *State v. Boswell*, 314 Kan. at 417-18. Restitution is properly considered a component of a defendant's sentence. See *State v. Hall*, 298 Kan.

978, 986, 319 P.3d 506 (2014). We find a legitimate question exists as to whether the district court's attachment of interest to Wilson's restitution order runs contrary to the provisions governing restitution and therefore will review it under that theory. See *State v. Lee*, 304 Kan. at 417 (an illegal sentence includes that which does not conform to the statutory provision, either in the character or the term of the punishment authorized.). But we believe the manner in which the parties have framed and argued the issue reflects a misinterpretation of the district court's true intent at sentencing. As a result, they fall a bit shy of the mark with respect to the actual misstep committed by the district court that renders the restitution portion of Wilson's sentence illegal.

At sentencing, the court stated the following with respect to Wilson's restitution obligation:

> "I am ordering that interest be paid on that at the rate that would apply to a civil judgment. I don't know what that rate is. And the interest of course, only applies to the amount of restitution. I think that rate may vary occasionally, but whatever the amount of interest is on a civil judgment, that's the interest on the amount of restitution that is being ordered . . . You are ordered to pay restitution in the amount of $65,865 to Valley Hope Association here in Norton. As I mentioned, you're also ordered to pay interest on that amount at the rate that would apply to a civil judgment."

A careful analysis of the court's ruling reveals that the assessment of interest was not intended to be incorporated into Wilson's restitution obligation so as to become part of that base economic award. Rather, the district court ordered $65,865 in restitution, accompanied by the directive that interest be paid *on* that restitution, not *as part of* the restitution. Our interpretation of its pronouncement is buttressed by its corresponding journal entry which states that the "Total Restitution" amount for which Wilson is responsible is $65,865. In contrast, the attachment of interest is memorialized in the "Additional Comments" section of that document where the judge noted "Defendant is ordered to pay interest on the restitution at the rate for a civil judgment."

This means that the issue we must resolve is not whether a sentencing court similarly situated to Wilson's could properly impose interest on the principal restitution amount until it is fully paid to compensate a victim for any lost time-value of the stolen money. Instead, we must determine whether the district court exceeded the bounds established by the legislature when it attached a supplemental cost to Wilson's restitution obligation.

When a defendant has been found guilty of a crime, the court must order the offender to pay full or partial restitution in an amount that reimburses the victim for the actual loss suffered unless the court finds a plan of restitution unworkable. K.S.A. 2022 Supp. 21-6604(a)(4) and (b)(1); *State v. Alcala*, 301 Kan. 832, 840, 348 P.3d 570 (2015). Restitution is the rule and a finding of unworkability the exception. 301 Kan. at 840.

Several motivating principles underly the theory of restitution. It is intended to have both deterrent and retributive effects on the offender and will also, ideally, serve a rehabilitative function for that individual. See *State v. Robison*, 314 Kan. 245, 253-54, 496 P.3d 892 (2021). The legislature has made clear the importance it places upon the need for offenders to compensate their victims for losses suffered at the offender's hands by ordering that sentencing courts "shall" impose restitution to the aggrieved party as a condition of probation. See *State v. Hunziker*, 274 Kan. 655, 659-60, 56 P.3d 202 (2002) and K.S.A. 2022 Supp. 21-6607(c)(2). Thus, equally important is the role restitution plays in returning the victim to the position they enjoyed prior to the offense. See *State v. Meeks*, 307 Kan. 813, 820, 415 P.3d 400 (2018). The significance of the principle that a victim should be made whole is not lost on us.

A district court has considerable discretion in determining the appropriate amount of restitution to order in a given case. *State v. Hunziker*, 274 Kan. at 659-60. K.S.A. 2022 Supp. 21-6604 (b) offers a bit of guidance for how the legislature envisioned a restitution

remedy might be implemented to cure the ills borne of the victim's loss and subsection (b)(1) of that provision is particularly relevant to the issue before us. It states as follows:

> "(b)(1) In addition to or in lieu of any of the above, the court shall order the defendant to pay restitution, which shall include, but not be limited to, damage or loss caused by the defendant's crime. Restitution shall be due immediately unless: (A) The court orders that the defendant be given a specified time to pay or be allowed to pay in specified installments; or (B) the court finds compelling circumstances that would render restitution unworkable, either in whole or in part. In regard to a violation of K.S.A. 2022 Supp. 21-6107, and amendments thereto, such damage or loss shall include, but not be limited to, attorney fees and costs incurred to repair the credit history or rating of the person whose personal identification documents were obtained and used in violation of such section, and to satisfy a debt, lien or other obligation incurred by the person whose personal identification documents were obtained and used in violation of such section. In regard to a violation of K.S.A. 2022 Supp. 21-5801, 21-5807, 21-5813 or 21-5818, and amendments thereto, such damage or loss shall include the cost of repair or replacement of the property that was damaged, the reasonable cost of any loss of production, crops and livestock, reasonable labor costs of any kind, reasonable material costs of any kind and any reasonable costs that are attributed to equipment that is used to abate or repair the damage to the property. If the court finds restitution unworkable, either in whole or in part, the court shall state on the record in detail the reasons therefor." K.S.A. 2022 Supp. 21-6604 (b)(1).

There is no aspect of this provision which lends itself to an interpretation that imposition of supplemental fees such as what the court endeavored to order here was contemplated or is permissible. We acknowledge that this subsection is not comprehensive and there are instances when restitution has been authorized for costs not specifically addressed or otherwise identified in the statute. See *Alcala*, 301 Kan. at 840 (Court did not abuse its discretion in making the costs of a grandparent's attorney fees for CINC proceedings and a corresponding adoption case part of a restitution obligation); *Hall*, 298 Kan. at 991 (Hall properly ordered to pay restitution to compensate victim for moving expenses); and *State v. Hand*, 297 Kan. 734, 740, 304 P.3d 1234 (2013) (An

increase in insurance premiums properly included within restitution order). But again, our focus is on what, if any, derivative fees are allowed, not what may properly be included within the restitution order, so this line of cases does not serve to inform our decision.

The conclusion yielded by our additional research is that no statutory mechanism exists for the imposition of such extraneous fees and that void is conceivably by design. In essence, the legislature has made allowances for interest in particular contexts but when given the opportunity to extend it into the realm of criminal restitution generally, it arguably declined to do so. For example, in 2018, a panel of this court issued its opinion in *State v. Roberts*, 57 Kan. App. 2d 836, 845, 461 P.3d 77, *vacated and remanded* 2020 WL 8269363, at *1 (2020), and stated that the version of K.S.A. 21-6604 in effect at that time imposed an obligation upon the district court to formulate "a plan for the payment of restitution." In the wake of the *Roberts* opinion, the legislature specifically amended K.S.A. 21-6604(b)(1) in 2020 to eliminate any references to a payment "plan" and to create the opportunity for an offender to make restitution payments in installments. See L. 2020, ch. 9, §1. It also added subsection (b)(3) to address those offenders subject to restitution orders that were silent about whether the obligation was due immediately or potentially remittable through installments. The new subsection enabled those individuals to file a motion by December 31, 2020, requesting the opportunity to fulfill their obligation in "specified installments." K.S.A. 2022 Supp. 21-6604(b)(3). K.S.A. 21-6607(c)(2) was similarly amended at that time to remove any allusion to court established restitution payment plans and likewise eliminated language that an offender is responsible for restitution to the aggrieved party "in an amount and manner determined by the court." L. 2020, ch.9, §1.

Despite its immersion in these provisions, with an eye towards clarifying the parameters of restitution, the legislature did not see fit to provide for the payment of interest on restitution even when K.S.A. 16-204 arguably presented it with a blueprint to follow if that was its intention. The terms of that provision, since its codification in 1923, mandate

interest on any civil judgment with the rate driven by the date on which the order was entered. The legislature is presumed to know the law. See *In re Tax Appeal of American Restaurant Operations*, 264 Kan. 518, 524, 957 P.2d 473 (1998). It is also presumed that it does not intend to adopt useless or meaningless legislation. See *State v. Van Hoet*, 277 Kan. 815, 826, 89 P.3d 606 (2004). With those standing principles in mind, we believe it is safe to conclude that if it was an acceptable practice for sentencing courts to crown criminal restitution orders with supplemental interest payments the legislature would have provided for the same under K.S.A. 2022 Supp. 21-6604(b)(1). It clearly did not and therefore, the district court was prohibited from crafting such an order from whole cloth in Wilson's case.

We briefly return to the criminal context to address K.S.A. 2022 Supp. 21-5933 and the offense of Medicaid fraud as the final example undergirding our conclusion. In drafting that provision, the legislature took measures to specifically include an independent subsection which holds offenders responsible for "(2) *payment of interest on the amount of any excess payments at the maximum legal rate in effect on the date the payment was made to the person for the period from the date upon which payment was made, to the date upon which repayment is made.*" (Emphasis added.) K.S.A. 2022 Supp. 21-5933. Minor amendments were made to the provision in 2014 but the interest provision remained intact. Notably, the statutory penalties for Wilson's crimes do not include any similar provision for the payment of interest on the purloined funds.

Our legislature has demonstrated on more than one occasion that it is clearly aware how to provide for interest payments when that is its intention. Thus, we conclude the absence of such an option from the provisions Wilson violated, K.S.A. 2018 Supp. 21-5801(a)(2), (b)(2), K.S.A. 2018 Supp. 21-5301, and K.S.A. 2018 Supp. 21-5824(a), as well as those statutes which directly address restitution, K.S.A. 2018 Supp. 21-6604(b)(1) and K.S.A. 2018 Supp. 21-6607, carries a significance that cannot be ignored. Accordingly, the district court's assessment of interest must be vacated.

The sentence imposed by the district court is plagued with infirmities that subjected Wilson to an illegal sentence. Its failure to adhere to the governing statutory provisions resulted in the erroneous imposition of prison terms following the revocation of her probation and a fatally flawed restitution order. Neither of those components can be permitted to stand without resulting in prejudice to Wilson.

Reversed and remanded.

* * * *

ATCHESON, J., concurring: Defendant Becky Anne Wilson pleaded guilty to theft and two other felonies for embezzling $65,865 from Valley Hope Association. After she messed up near the end of her probation, the Norton County District Court ordered her to serve the underlying sentences. On appeal, Wilson asserts she had already completed what would have been the legally proper periods of probation on two of the felonies when the State sought revocation and, therefore, cannot now be ordered to serve the prison terms on them. She also asserts the district court erred in adding interest onto any unpaid restitution. I agree with my colleagues that both points are well-taken and, therefore, concur in the outcome we reach. But I want to explain what I understand we are saying about interest on restitution and, thus, what I am agreeing with.

Before turning to the restitution issue, I pause to say I join in the majority's handling of the first issue and the conclusion that Wilson completed her probation on two of the convictions. The circumstances here legally fall into place with *State v. Baker*, 56 Kan. App. 2d 335, Syl. ¶ 1, 429 P.3d 240 (2018), and call for the same result—Wilson cannot be required to serve the prison terms imposed on the convictions for making a false information and for attempted theft by deception because she had completed the statutorily mandated probation periods for them before the State sought to revoke her

probation. The majority relies heavily on *Baker*. As the author of *Baker*, I agree with both the approach and the result.

As to restitution, the question before us is this: May a district court order interest on the otherwise agreed-upon or determined amount of restitution because the defendant cannot pay all of it at once and will make periodic payments until the obligation is satisfied? The best reading of K.S.A. 2018 Supp. 21-6604(b) requires that we answer, "No." In criminal cases, restitution is purely a creature of statute. *State v. Arnett*, 314 Kan. 183, 189, 496 P.3d 928 (2021) ("[C]riminal restitution as we know it today was not part of the common law at all in 1859."); 24 C.J.S., Criminal Procedure and Rights of Accused § 2483. So the statutory language controls.

The Legislature has set out a detailed description of restitution in K.S.A. 2022 Supp. 21-6604(b) generally applicable to criminal defendants along with several specific applications for particular crimes. Despite the detail, the statute says nothing about a district court ordering the payment of interest on the amount of restitution determined at sentencing. Silence is not itself ambiguity calling for judicial interpretation of the statutory language. And the appellate courts should not embellish that language to discover procedural or substantive mechanisms not readily apparent in the legislative wording. *State v. Betts*, 316 Kan. 191, 198, 514 P.3d 341 (2022); *Robinson v. City of Wichita Employees' Retirement Bd. of Trustees*, 291 Kan. 266, Syl. ¶ 6, 241 P.3d 15 (2010). Here, the obvious conclusion must be that the Legislature did not authorize payment of interest in the manner the district court ordered.

The majority identifies two aspects of the restitution scheme bolstering our conclusion. First, the Legislature amended K.S.A. 2019 Supp. 21-6604(b) in 2020 to codify the district courts' authority to order that restitution be paid "in specified installments" and to remove references to "a plan of restitution" that had provided a judicial vehicle for ordering periodic payments of large amounts of restitution. L. 2020,

ch. 9, §1. A shift from restitution plans to installment payments would logically invite consideration of whether interest should be permitted on those periodic payments, and the Legislature plainly did not include any such provision.

Second, and dovetailing with the first, the Legislature has expressly provided for interest on restitution for the crime of Medicaid fraud. K.S.A. 2022 Supp. 21-5933(a). Under the statute, defendants may be ordered to make "full restitution" of any fraudulent payments they receive including "payment of interest . . . at the maximum legal rate" on the amount. K.S.A. 2022 Supp. 21-5933(a)(1), (2). The statute illustrates that the Legislature knows how to craft a provision for interest on restitution and could have done so in K.S.A. 2022 Supp. 21-6604(b) had it wished to broadly allow the practice. Likewise, if K.S.A. 2022 Supp. 21-6604(b) had historically permitted interest on restitution, then the explicit inclusion of interest in K.S.A. 2022 Supp. 21-5933(a)(2) would have been superfluous. We typically refrain from reading a statute in a manner rendering some of its language vestigial. *State v. Sedillos*, 279 Kan. 777, Syl. ¶ 3, 112 P.3d 854 (2005) ("The court should avoid interpreting a statute in such a way that part of it becomes surplusage.").

The circumstances here point up another problem that undercuts the district court's supposition that it could order interest on the amount it determined Wilson should pay as restitution—there is nothing in K.S.A. 2018 Supp. 21-6604(b) even hinting at a governing interest rate. The restitution request appears to have originated in Valley Hope's written victim-impact statement submitted to the district court as part of the presentence investigation report. Valley Hope asked for interest on the restitution at what it termed the market rate.

At the sentencing hearing, the district court directed Wilson to pay interest on any unsatisfied portion of the restitution at the statutory rate for civil judgments—a rate the district court recognized changes periodically. The district court, thus, intended the

interest rate to be that set annually for civil judgments under K.S.A. 16-204(e)(1). For reasons that aren't clear from the record, the clerk of the district court computed the interest at 12 percent a year, a fixed rate applicable to money judgments entered in Chapter 61 actions. See K.S.A. 16-204(e)(2). It seems doubly improbable the Legislature both created an unwritten right to interest on restitution in K.S.A. 2022 Supp. 21-6604(b) and handed district courts the unfettered discretion to pluck some interest rate out of the statute books, to use the Wall Street Journal's published prime rate on the day of sentencing, or to scan the stratosphere for some other number. See K.S.A. 10-1009(a) (interest on fixed-rate municipal bonds tied to fluctuating yield for ten-year treasury bonds); K.S.A. 16-201 (creditor allowed annual interest at 10 percent when no rate otherwise agreed upon); K.S.A. 40-3110 (insurance carrier liable for 18 percent interest on overdue PIP benefits owed insured).

For those reasons, I conclude a district court lacks the authority to order interest on a restitution amount a defendant will pay in "specified installments" under K.S.A. 2022 Supp. 21-6604(b). In turn, the district court's restitution order amounts to an illegal sentence imposed on Wilson and must be set aside. On that basis, I concur in the result the majority reaches and what I construe as the underlying reasoning.

But I am concerned the reasoning may be clouded by the majority's discussion of a different, though tangentially related, issue that is not before us here: Whether restitution may sometimes include a component for a demonstrable loss of return on investment attributable to the money the defendant has unlawfully taken from the victim. Two complementary examples illustrate the concept. Suppose in a home burglary, a defendant takes $5,000 in cash from the victim's desk drawer. The victim suffers no investment loss on the money because it was just sitting there. So the restitution amount ought to be $5,000. Conversely, if a defendant embezzles $5,000 from a company's operating account at an area bank that earns 5 percent annual interest, the actual financial harm to the business owner would be the $5,000 plus the investment return lost because the money

had been removed from the account. And arguably, a full restitution award should include an amount for the investment loss. The language of K.S.A. 2022 Supp. 21-6604(b) at least suggests as much since restitution for theft may include "the reasonable cost of any loss of production" among other identified financial harms—a phrase seemingly broad enough to encompass a return on investment the stolen money would have produced. Cf. *State v. Hall*, 297 Kan. 709, 713-14, 304 P.3d 677 (2013) (restitution sufficiently flexible to require defendant to pay victim retail value of stolen inventory, reflecting loss of profits that would have been realized had items been available and sold).

Here, Valley Hope did not request restitution for some lost investment return, and the district court did not presume to include such an amount as a component of the restitution itself. The issue is not in front of us. So, today, I would not presume to categorically rule in or rule out that sort of restitution. Nor do I suggest the dimensions of such restitution if it may be proper in some form in some circumstances.

I take the majority to be similarly circumspect with its discussion of the varied kinds of compensation that properly have been included in restitution awards and the possibility that some form of time value or investment loss might be appropriate in a given theft case. Likewise, I do not understand the majority to be suggesting that had the district court here ordered interest to accrue on the unpaid installments as "part of" Wilson's restitution rather than "on" the restitution, the order would have been legally sufficient. As a general rule, the efficacy of statutory directives and other legal principles should not depend on the occasionally indiscriminate phrasing of orally pronounced judicial rulings. In short, judicial decision-making ought not be reduced to a parlor game requiring the utterance of magic words.

The restitution order here presents no exception to the general rule. The order fails not because of how it was phrased but because unpaid installments of restitution do not

accrue interest under K.S.A. 2022 Supp. 21-6604(b) whether interest is characterized as being "part of" or "on" the compensatory amount. With that understanding, I join in the majority's resolution of the issue.