

NOT DESIGNATED FOR PUBLICATION

No. 124,861

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

CHRISTOPHER MICHAEL JACOBSON,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; CHRISTINA DUNN GYLLENBORG, judge. Opinion filed September 22, 2023. Sentence vacated and case remanded with directions.

Emily Brandt, of Kansas Appellate Defender Office, for appellant.

Shawn E. Minihan, assistant district attorney, *Stephen M. Howe*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before SCHROEDER, P.J., MALONE, J., and MARY E. CHRISTOPHER, S.J.

PER CURIAM: In this direct appeal from his resentencing on remand for his robbery conviction, Christopher Michael Jacobson argues the district court erred in applying *State v. Vandervort*, 276 Kan. 164, 72 P.3d 925 (2003), to compare two prior out-of-state convictions for attempted first-degree robbery to a comparable Kansas offense when calculating his criminal history score. Instead, Jacobson asserts he is entitled to benefit from a change in the law and the district court should have applied *State v. Wetrich*, 307 Kan. 552, 412 P.3d 984 (2018), to find his two prior out-of-state offenses of attempted first-degree robbery were not comparable to a Kansas offense and

scored them as nonperson felonies in calculating his criminal history score. We agree. Therefore, we vacate his sentence and remand for a new sentencing hearing where Jacobson's two prior out-of-state offenses for attempted first-degree robbery must be scored as nonperson felonies.

FACTS

In 2015, Jacobson pled guilty to one count of robbery in violation of K.S.A. 2013 Supp. 21-5420(a), a severity level 5 person felony, for acts committed in December 2013. In exchange for his guilty plea, the State dismissed three counts of theft. Jacobson's presentence investigation (PSI) report reflected 53 prior convictions. Jacobson had a criminal history of A, based in part on two Missouri convictions of attempted first-degree robbery in 2014 that were classified as person felonies. Jacobson presented no objection to his criminal history score, and the district court sentenced him to 130 months' imprisonment and 24 months' postrelease supervision.

Nearly four years later, Jacobson filed a pro se motion to correct an illegal sentence, suggesting the district court erred in aggregating misdemeanor convictions that were more than three years old at the time of his current conviction into two person felonies. Jacobson's counsel filed a motion to correct his illegal sentence, essentially making the same argument and also arguing the district court erred in counting Jacobson's two prior Missouri convictions of attempted first-degree robbery as person felonies.

The district court denied in part and granted in part Jacobson's motion to correct illegal sentence, finding three of Jacobson's prior Missouri misdemeanor convictions should have been excluded from his criminal history. The district court found Jacobson's prior Missouri convictions of attempted first-degree robbery comparable to that of a

Kansas offense and scored the prior convictions as person felonies. Thus, Jacobson still had a criminal history score of A.

In a dispositional order filed August 18, 2021, another panel of this court granted the parties' joint motion to vacate Jacobson's sentence and remanded for resentencing with instructions not to include the Missouri municipal ordinance violations in Jacobson's criminal history. The panel noted the parties could raise other criminal history issues at resentencing.

Prior to resentencing, Jacobson filed a motion to reclassify his two Missouri attempted first-degree robbery convictions as nonperson felonies. In that motion, Jacobson indicated *Vandervort* should apply and pointed out two Kansas crimes—robbery and theft—were comparable to the Missouri crime of attempted robbery. Jacobson argued the district court should favor the defense in such situation and compare the offense to the Kansas crime of theft—the nonperson crime.

In January 2022, the district court held a resentencing hearing. Excluding the Missouri municipal ordinance violations reduced Jacobson's criminal history score to B. Jacobson's new PSI report listed seven entries consisting of four nonperson felonies, an unscored misdemeanor, and two person felonies. At resentencing, the parties disagreed on how to classify Jacobson's prior Missouri attempted first-degree robbery convictions. During argument, the State indicated, based on Jacobson's motion to reclassify, the parties agreed the district court should use the *Vandervort* standard to reclassify Jacobson's prior Missouri attempted first-degree robbery convictions. When asked by the court if Jacobson agreed the district court should use *Vandervort* instead of *Wetrich*, Jacobson responded, "Partly."

During his argument, though, Jacobson contended *Wetrich* applied because it was the law at the time of the resentencing and Jacobson was entitled to the benefit of changes

in caselaw. Jacobson also argued he should prevail under either standard. The State responded *Wetrich* had essentially been eliminated based on the amended statute—K.S.A. 2019 Supp. 21-6811(e)(3)(B). The State suggested the amended statute should not apply as it would be unfair for Jacobson to prevail on his prior appeal only to face a less favorable statutory standard. The State contended *Wetrich* did not apply and the correct standard was that of *Vandervort*.

The district court determined *Vandervort* was the correct legal standard to address whether the Kansas and Missouri statutes were comparable at the time of Jacobson's original sentencing. The district court found the Kansas crime most comparable, or the closest approximation to the Missouri attempted first-degree robbery statute, was the Kansas statute of attempted robbery—a person crime. Jacobson was resentenced to 120 months' imprisonment and 24 months' postrelease supervision.

ANALYSIS

The District Court Erred in Applying Vandervort, Rather Than Wetrich, in Classifying Jacobson's Out-of-State Convictions as Person Felonies

Jacobson argues his two prior Missouri convictions in 2014 of attempted first-degree robbery must be comparable to a Kansas offense under *Wetrich*, not *Vandervort*, to determine whether the prior convictions should be scored as person or nonperson felonies. Jacobson specifically argues the district court should have sentenced him under the governing law at the time of his resentencing in January 2022 because his resentencing appeal was a direct appeal, not an appeal from the denial of a motion to correct illegal sentence. Jacobson contends his sentence is illegal and asks us to remand with instructions to apply *Wetrich*.

Standard of review

Whether a sentence is illegal under K.S.A. 2022 Supp. 22-3504 turns on interpretation of the revised Kansas Sentencing Guidelines Act, K.S.A. 2022 Supp. 21-6801 et seq. (KSGA). *State v. Dickey*, 305 Kan. 217, 220, 380 P.3d 230 (2016). An "[i]llegal sentence" as defined by K.S.A. 2022 Supp. 22-3504(c)(1) is "a sentence: Imposed by a court without jurisdiction; that does not conform to the applicable statutory provision, either in character or punishment; or that is ambiguous with respect to the time and manner in which it is to be served at the time it is pronounced." To determine whether a prior conviction should be designated as a person or nonperson offense involves statutory interpretation of the KSGA. Statutory interpretation is a question of law subject to unlimited review. *State v. Keel*, 302 Kan. 560, 571-72, 357 P.3d 251 (2015).

The classification statute in effect on the date Jacobson committed his current crime of conviction governs his resentencing.

Prior to the 2019 statutory amendments, Kansas courts determined whether prior out-of-state convictions were person or nonperson offenses by comparing the out-of-state statutes to the "comparable offense" in effect in Kansas on the date the current crime of conviction was committed. If there was a comparable Kansas person offense, the sentencing court classified the prior conviction as a person crime; if not, the prior conviction was classified as a nonperson crime. K.S.A. 2018 Supp. 21-6811(e)(3).

Effective May 23, 2019, the Kansas Legislature amended K.S.A. 2018 Supp. 21-6811(e)(3) to replace the comparable offense test with a less complicated test to determine whether an out-of-state felony was a person or nonperson offense. See L. 2019, ch. 59, § 13. The statute, as amended, provides clarity as to what acts committed during the commission of an out-of-state offense should be classified as person felonies in

Kansas. See K.S.A. 2019 Supp. 21-6811(e)(3)(B)(i). The amended statute also states, in relevant part:

"An out-of-state conviction or adjudication for the commission of a felony offense, or an attempt, conspiracy or criminal solicitation to commit a felony offense, shall be classified as a person felony if the elements of the out-of-state felony offense that resulted in the conviction or adjudication necessarily prove that a person was present during the commission of the offense." K.S.A. 2019 Supp. 21-6811(e)(3)(B)(ii).

With the enactment of K.S.A. 2019 Supp. 21-6811(e)(3)(B), the Legislature removed the term "comparable offense." As our Supreme Court has explained: "When the legislature amends a statute, this court presumes that it intended to change the law that existed prior to the amendment." *State v. Mishmash*, 295 Kan. 1140, 1144, 290 P.3d 243 (2012).

But, here, the parties seem to agree the statute as amended in 2019 should not apply despite the fact Jacobson was resentenced in 2022. In fact, at Jacobson's resentencing hearing, the State noted it would be unfair to apply the statute as amended in 2019 because Jacobson won his appeal and applying the amended statute would make it more difficult for Jacobson to establish his conviction should have been classified as a nonperson offense. The parties both agree the pre-2019 statute using the comparable offense test should govern but disagree on whether the comparable offense test should be applied through the closest-approximation test under *Vandervort*, 276 Kan. at 179, or the stricter identical-to-or-narrower-than test provided in *Wetrich*, 307 Kan. at 562.

"The penalty parameters for an offense are fixed on the date the offense was committed. And the legality of a sentence is controlled by the law in effect at the time the sentence was pronounced under K.S.A. 22-3504. [Citation omitted.]" *State v. Gales*, 312 Kan. 475, 481, 476 P.3d 412 (2020); see *State v. Murdock*, 309 Kan. 585, 586, 439 P.3d 307 (2019) (classification statute in effect on date criminal defendant commits current

crime of conviction governs for criminal history purposes). We, therefore, apply the version of the KSGA in effect at the time Jacobson committed his current crime of conviction on December 13, 2013, and review the legality of his sentence under the law in effect at the time his sentence was pronounced.

The applicable statute in effect when Jacobson committed his crime of robbery was K.S.A. 2013 Supp. 21-6811(e), which stated in part:

"Out-of-state convictions and juvenile adjudications shall be used in classifying the offender's criminal history. An out-of-state crime will be classified as either a felony or a misdemeanor according to the convicting jurisdiction. If a crime is a felony in another state, it will be counted as a felony in Kansas. The state of Kansas shall classify the crime as person or nonperson. In designating a crime as person or nonperson comparable offenses shall be referred to. If the state of Kansas does not have a comparable offense, the out-of-state conviction shall be classified as a nonperson crime."

Jacobson was entitled to the benefit of a change in the law under Wetrich.

In 2019, Jacobson filed a motion claiming his sentence was illegal and must be corrected. The district court denied the motion in part, and Jacobson appealed. Another panel of our court granted the parties' joint motion to vacate Jacobson's sentence and remanded for resentencing in accordance with *State v. Smith*, 309 Kan. 929, 930, 411 P.3d 472 (2019) (district court should not include Missouri municipal ordinance violations in criminal history score). The panel noted the parties could still raise other criminal history issues at resentencing. On remand, the district court resentenced Jacobson. This is his direct appeal from his resentencing.

Our Supreme Court has explained: "On concluding one or more of the sentences in a multiconviction case to be illegal, the district court, like an appellate court, must vacate the illegal sentence and correct it by resentencing in accordance with the KSGA."

State v. Jamerson, 309 Kan. 211, 216, 433 P.3d 698 (2019). While Jacobson has only one sentence at issue, the parties agree the district court illegally sentenced Jacobson in 2015 by including his Missouri municipal ordinance violations in his criminal history. Resentencing was, therefore, necessary to correct the illegal sentence in accordance with the KSGA.

Now, Jacobson relies on *State v. Smith*, No. 118,042, 2020 WL 2504566, at *11 (Kan. App. 2020) (unpublished opinion), where another panel of this court explained:

"Smith filed a motion to correct illegal sentence in 2014 which the district court denied. On appeal, this court vacated Smith's sentence and remanded to the district court for resentencing. The order vacating Smith's original sentence became final when our Supreme Court denied the State's petition for review. That action marked the end of the proceedings on Smith's motion to correct illegal sentence. On remand, the district court resentenced Smith as directed by this court. Smith timely appealed from that sentence—his only sentence that has any operative effect. This constitutes a direct appeal of his sentence imposed by the district court on May 12, 2017."

The State suggests *State v. Clark*, 313 Kan. 556, 486 P.3d 591 (2021), effectively overruled *Smith*. The State contends *Clark* stands for the proposition the law in effect at the date of the original sentencing should have controlled at the resentencing hearing. While our Supreme Court determined Clark's sentence should have been controlled by the date of the original sentencing, rather than the date of resentencing, the factual circumstances differed from those here. In *Clark*, our Supreme Court determined Clark's original sentence was lawful and he never should have been resentenced. In other words, the legality of Clark's sentence became "'fixed at a discrete moment in time'" when his lawful sentence was pronounced at his original sentencing. 313 Kan. at 572-73.

Here, Jacobson's original sentence was illegal. Thus, it was necessary for Jacobson's original sentence to be vacated and for the district court to resentence him.

The legality of Jacobson's sentence is controlled by the law in effect at the time of his resentencing in 2022 for his current crime of conviction. See *Gales*, 312 Kan. at 481. The proceedings on Jacobson's motion to correct illegal sentence and the order vacating Jacobson's original sentence became final when we issued our mandate on August 20, 2021. This appeal is not a continuation of the prior proceedings involving Jacobson's 2019 motion to correct illegal sentence. On remand, the district court resentenced Jacobson as directed by this court. Jacobson's current appeal is from the new sentence imposed in 2022—"the only sentence that has any operative effect." See *Smith*, 2020 WL 2504566, at *11. Because this is Jacobson's direct appeal from his new sentence, he "may seek and obtain the benefit of a change in the law during the pendency of [his] direct appeal." *Murdock II*, 309 Kan. at 591-92." *State v. Williams*, 311 Kan. 88, 95-96, 456 P.3d 540 (2020).

In 2018, before Jacobson's resentencing, *Wetrich* provided a change in the law as our Supreme Court interpreted the term "comparable" as used within K.S.A. 2017 Supp. 21-6811(e), based on the legislative history of the KSGA. *Wetrich*, 307 Kan. at 559-62; see *State v. Weber*, 309 Kan. 1203, 1209, 442 P.3d 1044 (2019). Our Supreme Court explained that "the elements of the out-of-state crime cannot be broader than the elements of the Kansas crime. In other words, the elements of the out-of-state crime must be identical to, or narrower than, the elements of the Kansas crime to which it is being referenced." *Wetrich*, 307 Kan. at 562. Jacobson is entitled to the benefit of the change in the law under *Wetrich*.

The Elements of Jacobson's 2014 Attempted First-Degree Robbery Convictions in Missouri Are Broader than the Elements of Attempted Robbery in Kansas

Both parties agree Jacobson's prior out-of-state convictions at issue were felonies in Missouri and, accordingly, are classified as felonies in Kansas. See K.S.A. 2013 Supp. 21-6811(e). The sole issue is whether Jacobson's prior out-of-state convictions of

attempted first-degree robbery should be classified as person or nonperson offenses. As discussed above, the penalty parameters for Jacobson's offense were fixed on the date his current offense was committed in December 2013. See *Gales*, 312 Kan. at 481. The statute in effect when Jacobson committed his current crime of conviction was K.S.A. 2013 Supp. 21-6811(e), which used the "comparable offense" test. For purposes of this case, the legality of Jacobson's sentence is then controlled by the law in effect when the operative sentence was pronounced in January 2022—that being *Wetrich*. See *Gales*, 312 Kan. at 481. To clarify, the statutory interpretation of K.S.A. 2017 Supp. 21-6811(e) in *Wetrich* is controlling in this case because Jacobson's crime of conviction (robbery) was committed before the July 1, 2019 statutory amendments to K.S.A. 21-6811 and Jacobson was resentenced after *Wetrich* was decided on March 9, 2018.

Jacobson argues under *Wetrich* the two prior Missouri convictions in 2014 in his PSI report for attempted first-degree robbery are not identical to or narrower than the Kansas attempted robbery statute. Thus, his two prior Missouri attempted first-degree robbery convictions cannot be considered person felonies for criminal history purposes. If Jacobson's two prior Missouri convictions of attempted first-degree robbery were, in fact, broader than the Kansas offense of attempted robbery, then the offenses should have been classified as nonperson felonies. Jacobson's criminal history score would change from B to E because it would include three or more nonperson felonies but no person felonies. See K.S.A. 2013 Supp. 21-6804(a) (sentencing guidelines grid for nondrug felony crimes); K.S.A. 2013 Supp. 21-6809 (criminal history categories).

The State compares the robbery statutes in Kansas and Missouri but does not compare the attempt statutes.

Missouri's attempt statute states:

"A person is guilty of attempt to commit an offense when, with the purpose of committing the offense, he does any act which is a substantial step towards the commission of the offense. A 'substantial step' is conduct which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense." Mo. Rev. Stat. § 564.011.1 (2013).

In Kansas, "[a]n attempt is any overt act toward the perpetration of a crime done by a person who intends to commit such crime but fails in the perpetration thereof or is prevented or intercepted in executing such crime." K.S.A. 2013 Supp. 21-5301(a).

In *State v. Cunningham*, No. 118,011, 2018 WL 5726551, at *9-10 (Kan. App. 2018) (unpublished opinion), another panel of our court compared the Missouri and Kansas attempt statutes under the *Wetrich* standard. The statutory language analyzed in *Cunningham* is the same language from the statutes in effect at the time of Jacobson's current crime of conviction. Compare Mo. Rev. Stat. § 564.011.1 (2000) and K.S.A. 2017 Supp. 21-5301(a) with Mo. Rev. Stat. § 564.011.1 (2013) and K.S.A. 2013 Supp. 21-5301(a). The panel explained:

"Although the Kansas and Missouri attempt statutes appear similar at first blush, the legislative history of Missouri's attempt law reveals that Missouri's attempt statute is broader. Prior Missouri attempt law contained 'tougher' language, requiring that 'the defendant must have taken steps going beyond mere preparation, by doing something bringing him [or her] nearer the crime he [or she] intends to commit.' [Citation omitted.]' *State v. Molasky*, 765 S.W.2d 597, 600 (Mo. 1989) (prior attempt law required defendant 'to come very close to the actual commission of the offense in order to be convicted of attempt'). But Missouri changed the statutory definition of attempt with the enactment of the Missouri Criminal Code in 1979. 765 S.W. 3d at 600. By adopting Mo. Rev. Stat. § 564.011, Missouri "'abandoned the 'mere preparation' test or the requirement of an 'overt act' in attempt law.'" *Cunningham*, 2018 WL 5726551, at *10.

The *Cunningham* panel then noted the Missouri statute does not require an overt act to commit an attempted crime and, as a result, found the Missouri statute broader than the Kansas statute. The panel, following *Wetrich*, ultimately concluded the Missouri offense of attempted first-degree robbery was not comparable to the Kansas crime and Cunningham's prior Missouri conviction should not have been scored as a person felony in calculating his criminal history. 2018 WL 5726551, at *10. For the same reasons, we find Jacobson's prior Missouri convictions of attempted first-degree robbery are not comparable as identical to or narrower than under *Wetrich* and must be scored as nonperson felonies.

The district court correctly relied on the classification statute in effect on the date Jacobson committed his current crime of conviction—K.S.A. 2013 Supp. 21-6811(e)—but erred in applying *Vandervort* rather than *Wetrich* in interpreting the statute. The elements of Jacobson's prior Missouri convictions of attempted first-degree robbery are broader than the elements of attempted robbery in Kansas under *Wetrich*. Therefore, we vacate Jacobson's sentence and remand with directions for the district court to resentence him after scoring his two 2014 Missouri convictions of attempted first-degree robbery as nonperson felonies.

Sentence vacated and case remanded with directions.