

NOT DESIGNATED FOR PUBLICATION

No. 124,996

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JOKER BROWN,
Appellant.

MEMORANDUM OPINION

Appeal from Harvey District Court; MARILYN M. WILDER, judge. Opinion filed March 24, 2023.
Sentence vacated in part and remanded with directions.

Jacob Nowak, of Kansas Appellate Defender Office, for appellant.

Natalie Chalmers, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before ISHERWOOD, P.J., MALONE and WARNER, JJ.

PER CURIAM: Joker Brown appeals his sentence and order to register under the Kansas Offender Registration Act (KORA), K.S.A. 22-4901 et seq., after being convicted in a bench trial of two counts of breach of privacy. Brown raises two alternative claims affecting only the KORA registration order. First, Brown claims the district court failed to ensure that Brown knowingly and voluntarily waived his right to a jury trial on the determination that his crimes were sexually motivated. Alternatively, because the Kansas Legislature has amended K.S.A. 2022 Supp. 22-4902(b)(7) and expanded the definition of sex offender to include persons convicted of breach of privacy, Brown claims his convictions are improperly classified as sexually violent crimes under K.S.A. 2019 Supp.

22-4902(c). The State concedes the second issue which renders the first issue moot. As a result, we vacate the district court's sexual motivation finding and remand with directions for the district court to issue a nunc pro tunc order requiring Brown to register under KORA for his breach of privacy convictions under K.S.A. 2022 Supp. 22-4902(b)(7).

FACTS

In September 2019, A.B. and L.R. found a cellphone hidden in the ceiling of their apartment bathroom. The phone contained recordings of A.B. and L.R. in various states of nudity as they used the toilet and shower. The cellphone also contained a video of Brown, a former friend of A.B. and L.R., placing the phone in the ceiling and adjusting the angle of the camera to see the toilet and shower.

After A.B. and L.R. turned the cellphone over to law enforcement officers, the State charged Brown with four counts of breach of privacy in violation of K.S.A. 2019 Supp. 21-6101(a)(6), (b)(2)(A). Before trial, Brown stipulated to facts and proceeded with a bench trial in exchange for the State dismissing two of the four counts against him. The stipulation included that Brown "knowingly and voluntarily waives his right to a jury trial in this case." The stipulation also acknowledged that the parties "are free to argue regarding sentencing recommendations and whether the defendant is legally required to register under the Kansas Offender Registration Act."

During the district court's colloquy with Brown, the court confirmed that Brown waived his right to a jury trial on whether he was guilty of the breach of privacy charges but discussed nothing about a jury determination of whether his crimes were sexually motivated. The district court found that Brown had knowingly and voluntarily waived his right to a jury trial. Based on the stipulated facts, the district court found Brown guilty of the remaining two counts of breach of privacy. The district court also found that Brown's crimes were sexually motivated and classified his convictions as sexually violent crimes

under K.S.A. 2019 Supp. 22-4902(c)(18), requiring Brown to register for 15 years. The district court sentenced Brown to a controlling term of 20 months' imprisonment with 12 months' postrelease supervision but granted probation for 18 months to be supervised by community corrections. Brown timely appealed the district court's judgment.

ANALYSIS

Brown does not challenge his breach of privacy convictions on appeal. He raises two alternative claims affecting only the KORA registration order. First, Brown claims the district court failed to ensure that Brown knowingly and voluntarily waived his right to a jury trial on the determination that his crimes were sexually motivated. Alternatively, because the Kansas Legislature has amended K.S.A. 2022 Supp. 22-4902(b)(7) and expanded the definition of sex offender to include persons convicted of breach of privacy, Brown claims his convictions are improperly classified as sexually violent crimes under K.S.A. 2019 Supp. 22-4902(c). We will address these claims in reverse order.

In May 2022, while this appeal was pending, the Kansas Legislature amended K.S.A. 22-4902(b) and expanded the definition of sex offender to include persons convicted of breach of privacy, as defined in K.S.A. 2022 Supp. 21-6101(a)(6), (a)(7) or (a)(8). L. 2022, ch. 83, § 2; K.S.A. 2022 Supp. 22-4902(b)(7). Brown claims the 2022 amendment requires the district court to issue a nunc pro tunc order requiring him to register as a sex offender under K.S.A. 2022 Supp. 22-4907(b)(7). The registration period is still 15 years from the date of conviction. K.S.A. 2022 Supp. 22-4906(a)(1)(M). But registration under this KORA subsection renders moot the district court's finding that Brown's crimes were sexually motivated and the classification of his convictions as sexually violent crimes under K.S.A. 2019 Supp. 22-4902(c). The State concedes Brown's claim.

Brown is correct that he is entitled to retroactive application of the 2022 amendment. The Kansas Supreme Court has held that amendments to the KORA statutes apply retroactively because the Legislature intended KORA to be a nonpunitive remedial scheme. *State v. Merideth*, 306 Kan. 906, 911-13, 399 P.3d 859 (2017). Plus, Kansas adheres to the "longstanding rule that in a direct appeal, a defendant will receive the benefit of any change in the law that occurs while the direct appeal is pending." *State v. Murdock*, 309 Kan. 585, 591, 439 P.3d 307 (2019).

Thus, as the State concedes in its brief, "since [Brown] is correct that he is now required to register under K.S.A. 2022 Supp. 22-4902(b)(7), a nunc pro tunc order should [be] issue[d]." The nunc pro tunc order will render moot Brown's claim that the district court failed to ensure that Brown knowingly and voluntarily waived his right to a jury on the finding that his crimes were sexually motivated. None of that matters now. This court has held that the Legislature did not intend for specifically enumerated KORA offenses to fall under the catch-all provision for sexually motivated offenses. *State v. Gallardo*, 48 Kan. App. 2d 756, 760, 300 P.3d 89 (2013). We vacate the district court's sexual motivation finding and remand with directions for the district court to issue a nunc pro tunc order requiring Brown to register under KORA for his breach of privacy convictions under K.S.A. 2022 Supp. 22-4902(b)(7) and K.S.A. 2022 Supp. 22-4906(a)(1)(M).

Sentence vacated in part and remanded with directions.