

NOT DESIGNATED FOR PUBLICATION

No. 125,026

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

LARRY G. EVANS JR.,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JEFFREY SYRIOS, judge. Opinion filed July 14, 2023.
Affirmed.

Larry G. Evans Jr., appellant pro se.

Julie A. Koon, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before GARDNER, P.J., HILL and PICKERING, JJ.

PER CURIAM: This is a sentencing appeal by a felon who claims to have received an illegal sentence. Larry G. Evans Jr. pled guilty in 2019 to one count of attempted aggravated human trafficking and two counts of sexual exploitation of a child. One of the criminal convictions listed in his criminal history was a 1999 conviction for fleeing or attempting to elude a police officer. Evans now claims, as he did in district court, that his conviction for fleeing or attempting to elude a police officer should have been scored as a nonperson felony. This change would lower his criminal history score from a B to a C

and result in a shorter incarceration term. He asks us to set aside his sentence and remand for resentencing because of this scoring error.

What came before: a plea, a presentence investigation, and a sentencing.

In May 2019, Larry G. Evans Jr. pled guilty to one count of attempted aggravated human trafficking and two counts of sexual exploitation of a child, for crimes committed in March 2017. His presentence investigation report set Evans' criminal history score as B. He had a prior conviction for voluntary manslaughter and a prior conviction for fleeing or attempting to elude a police officer.

At the sentencing hearing, the district court discussed Evans' criminal history score, and Evans said he did not know his conviction for fleeing or attempting to elude a police officer would be scored as a person felony until he received the presentence report. Even so, he agreed that he had a B criminal history score. The sentencing court denied Evans' motion for a sentencing departure and imposed a controlling sentence of 206 months' imprisonment.

Evans appealed the denial of his departure motion, but our Supreme Court summarily dismissed the appeal because Evans received a presumptive sentence.

After his attempt to appeal was dismissed, Evans, without counsel, moved to correct an illegal sentence under K.S.A. 2021 Supp. 22-3504. He argued the presentence report had improperly calculated his criminal history by scoring his previous conviction for fleeing or attempting to elude a police officer as a person felony. Evans believed that conviction should have been scored as a nonperson felony, which would have given him a criminal history score of C instead of B. Evans also argued his sentence for attempted aggravated human trafficking and sexual exploitation of a child were illegal because they were based on the same conduct. Thus, in his view, Evans believed he could only be

convicted of and punished for the more specific crime, consistent with the rule in K.S.A. 2021 Supp. 21-5109(d).

The State refuted Evans' arguments by contending that he had a B criminal history score because his previous conviction for fleeing or attempting to elude an officer was a person felony. The State also argued that attempted aggravated human trafficking and sexual exploitation of a child were not lesser included crimes of one another, nor were they crimes based on the same conduct because the elements of the crimes were different. Thus, with a B criminal history score, Evans' sentence was legal.

In the end, the district court agreed with the State and concluded that the presentence report properly scored Evans' criminal history because his conviction for fleeing or attempting to elude an officer was a person felony. The district court also found that Evans' sentence was legal and denied Evans' motion.

In this appeal, Evans again argues his sentence is illegal because he was sentenced pursuant to a B criminal history score instead of a C criminal history score.

We find no sentencing error.

We exercise unlimited review of a district court's classification of prior offenses for criminal history purposes because it involves interpretation of the revised Kansas Sentencing Guidelines Act. K.S.A. 2021 Supp. 21-6801 et seq. This is a question of law. *State v. Ewing*, 310 Kan. 348, 351, 446 P.3d 463 (2019).

A review of some fundamental points of sentencing law are helpful at this point. A prior conviction under the Sentencing Guidelines Act is any conviction, other than another count in the current case, brought in the same charging document or joined for trial under K.S.A. 22-3203, that occurred before sentencing in the current case, no matter

if the offense that led to the prior conviction occurred before or after the commission of the current offense or the conviction in the current case. K.S.A. 2021 Supp. 21-6810(a). All prior convictions must be counted in determining a defendant's criminal history score unless the convictions constitute an element of the present crime, enhance the severity level, or elevate the classification from a misdemeanor to a felony. K.S.A. 2021 Supp. 21-6810(d)(10); *State v. Fowler*, 311 Kan. 136, 142, 457 P.3d 927 (2020). In other words, prior felony convictions occur before those in the charging document, and all must be counted.

This criminal history information is not secret. Indeed, K.S.A. 2021 Supp. 21-6814(a) states that "[t]he offender's criminal history shall be admitted in open court by the offender or determined by a preponderance of the evidence at the sentencing hearing by the sentencing judge." That subsection of the statute sets forth "two potential paths for calculating criminal history: the defendant admits criminal history; or the defendant does not admit criminal history and the court must determine criminal history by a preponderance of the evidence." *State v. Corby*, 314 Kan. 794, 796, 502 P.3d 111 (2022).

Evans admitted at the sentencing hearing that he had a B criminal history score. Thus, Evans "relieved the State of having to present anything more to support the criminal history score." 314 Kan. at 797 (citing K.S.A. 2020 Supp. 21-6814[b], [c]). Even so, we find Evans' arguments about the nature of the conviction to be unpersuasive.

When we look deeper into the record, we find that the amended complaint filed against Evans in December 1999 charged him with fleeing or attempting to elude a police officer on May 14, 1999, in violation of K.S.A. 1998 Supp. 8-1568(b)(1)(D). The statute in effect at the time defined fleeing or attempting to elude a police officer as:

"(a) Any driver of a motor vehicle who willfully fails or refuses to bring such driver's vehicle to a stop, or who otherwise flees or attempts to elude a pursuing police

vehicle or police bicycle, when given visual or audible signal to bring the vehicle to a stop, shall be guilty as provided by subsection (c)(1), (2) or (3). The signal given by the police officer may be by hand, voice, emergency light or siren. The officer giving such signal shall be in uniform, prominently displaying such officer's badge of office, and the officer's vehicle or bicycle shall be appropriately marked showing it to be an official police vehicle or police bicycle.

"(b) Any driver who violates the provisions of subsection (a) and who: (1) Commits any of the following during a police pursuit: (A) Fails to stop for a police road block; (B) drives around tire deflating devices placed by a police officer; (C) engages in reckless driving as defined by K.S.A. 8-1566 and amendments thereto; (D) is involved in any motor vehicle accident or intentionally causes damage to property; or (E) commits five or more moving violations." L. 1998, ch. 145, § 1.

People convicted of violating subsection (b) of the statute were guilty of a severity level 9 person felony. K.S.A. 1998 Supp. 8-1568(c)(4).

The amended complaint incorrectly labeled this charge as a nonperson felony. That error does not transform the conviction into a nonperson crime. See K.S.A. 2021 Supp. 21-6810 that provides that criminal history categories in the sentencing guideline grids are based on prior convictions. The statute charges a person crime; therefore, a conviction of that charge was for a person crime.

But Evans disputes this reasoning. He now claims that the prosecutor in his 1999 case reduced the fleeing or attempting to elude a police officer charge to a nonperson felony. In fact, he relies on the power of the prosecutor to reduce any charge as support for his position, citing *State v. Ratley*, 253 Kan. 394, 401, 855 P.2d 943 (1993).

In *Ratley*, our Supreme Court stated that "[t]he district attorney is the representative of the state in criminal prosecutions. He controls criminal prosecutions. He has the authority to dismiss any charge or to reduce any charge." 253 Kan. at 401. But

such authority supports the position that a prosecutor may reduce charges to lesser offenses, not change the classification of a crimes.

This brings us to a simple question. Where is the proof in this record that his 1999 charge was reduced? Evans has the burden to designate a record that demonstrates prejudicial error. K.S.A. 2021 Supp. 21-6814(d); *State v. England*, 45 Kan. App. 2d 33, 40, 245 P.3d 1076 (2010). His failure to do so—including his failure to include the "charge agreement" he discusses in his brief—leads us to disbelieve his argument.

We find no sentencing error and affirm.