

NOT DESIGNATED FOR PUBLICATION

No. 125,186

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ROBERT LOWELL-LAWRENCE WARD,
Appellant.

MEMORANDUM OPINION

Appeal from Franklin District Court; DOUGLAS P. WITTEMAN, judge. Submitted without oral argument. Opinion filed November 3, 2023. Appeal dismissed.

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

Steven J. Obermeier, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before GREEN, P.J., SCHROEDER and CLINE, JJ.

PER CURIAM: After completing his prison sentence, Robert Lowell-Lawrence Ward filed a motion to correct illegal sentence. The district court declined to consider the motion, claiming it lacked jurisdiction because Ward had already filed a notice of appeal. Ward now appeals the dismissal of his motion to correct illegal sentence, arguing the district court did have jurisdiction. While the district court erred in its reasoning, we agree the district court did not have jurisdiction because, at the time the motion was filed, Ward had completed his prison sentence. Thus, we dismiss his appeal.

FACTS

In May 2015, Ward pled no contest to one count of criminal threat under K.S.A. 2014 Supp. 21-5415(a)(1). The district court sentenced Ward to 17 months' imprisonment and 12 months' postrelease supervision. Ward completed his prison term and postrelease supervision on March 8, 2017.

In June 2021, Ward filed a pro se motion to correct illegal sentence asking the district court to vacate his sentence and conduct a new sentencing proceeding. Ward alleged his presentence investigation report reflected a prior conviction of criminal threat which should not have been included in his criminal history score because the prior conviction "has been found unconstitutional as it relates to reckless threats." Before the district court heard Ward's motion, Ward filed a pro se notice of appeal in September 2021. The district court held a status conference hearing in November 2021 and determined Ward's premature notice of appeal divested the district court of jurisdiction to consider the underlying motion to correct illegal sentence.

The State filed a notice of change in custodial status in January 2023. Attached to the State's notice was a letter from the Kansas Department of Corrections Sentence Computation Unit confirming "Ward satisfied the sentence and post-release supervision period associated with the case on March 8, 2017."

ANALYSIS

Ward argues the district court erred in finding it lacked jurisdiction to reach the merits of his motion to correct an illegal sentence. Specifically, Ward argues the district court did not lose jurisdiction when he filed a premature notice of appeal because the appeal was not docketed and the district court retains authority to correct an illegal sentence. Ward primarily contends K.S.A. 2022 Supp. 21-6820(i), as amended, should

apply retroactively. Ward asks us to reverse the district court's jurisdictional ruling and remand with orders to consider the merits of the motion. However, Ward's sentence when imposed was not an illegal sentence and K.S.A. 2022 Supp. 21-6820(i), as amended, does not apply.

The State responds Ward completed his prison sentence as well as his postrelease supervision and, therefore, could not avail himself of relief under a motion to correct illegal sentence. In the alternative, the State contends Ward's appeal is moot because Ward completed his sentence and any decision about Ward's sentence would not impact his rights. The State also argues, in the alternative, Ward's sentence was legal when imposed and did not become illegal with a subsequent change in the law under *State v. Boettger*, 310 Kan. 800, 450 P.3d 805 (2019).

Appellate courts have unlimited review over jurisdictional matters, questions involving statutory interpretation, and questions of law such as the legality of a sentence. *State v. Deck*, 317 Kan. 101, 105, 525 P.3d 329 (2023).

The right to appeal is statutory and appellate jurisdiction exists only if a party files an appeal in the manner prescribed by Kansas statutes. *State v. Ehrlich*, 286 Kan. 923, 924, 189 P.3d 491 (2008). An appellate court has the duty to question jurisdiction on its own initiative, and when the record shows a lack of jurisdiction, the appellate court must dismiss the appeal. *State v. Gill*, 287 Kan. 289, 294, 196 P.3d 369 (2008). "[P]arties cannot confer subject matter jurisdiction by consent, waiver, or estoppel." *State v. Hoffman*, 45 Kan. App. 2d 272, 275, 246 P.3d 992 (2011).

Here, the district court found it did not have jurisdiction to hear Ward's motion to correct illegal sentence because Ward had filed a notice of appeal. However, at the time of the November 2021 status conference, Ward's appeal had not been docketed. A district court does not lose jurisdiction because a notice of appeal is filed; it loses jurisdiction

once the appeal is docketed. See *State v. Thurber*, 313 Kan. 1002, 1006-07, 492 P.3d 1185 (2021). Therefore, the district court erred in determining it lacked jurisdiction to address Ward's motion for this reason.

"[T]he legality of a sentence under K.S.A. 22-3504 is controlled by the law in effect at the time the sentence was pronounced." *State v. Murdock*, 309 Kan. 585, 591, 439 P.3d 307 (2019). A sentence that was legal when pronounced does not become illegal if the law subsequently changes. "[F]or purposes of a motion to correct an illegal sentence, neither party can avail itself of subsequent changes in the law." 309 Kan. at 591.

In his June 2021 motion to correct illegal sentence, Ward argued that a prior criminal threat conviction should not have been included in his criminal history score because the reckless disregard provision of the criminal threat statute—K.S.A. 2018 Supp. 21-5415(a)(1)—had been found to be unconstitutionally overbroad. See *Boettger*, 310 Kan. at 823. While *Boettger* was a change in the law in 2019—four years after Ward was sentenced and two years after Ward completed his sentence—Ward's sentence was legal at the time it was pronounced in 2015 and did not become illegal with the subsequent change in the law. See *Murdock*, 309 Kan. at 591.

The district court is permitted to "correct an illegal sentence *at any time while the defendant is serving such sentence*." Here, Ward filed his motion to correct illegal sentence two years after the 2019 amendments to K.S.A. 22-3504. The district court lacked jurisdiction to hear Ward's motion because Ward did not file his motion while he was serving his sentence as the statute required. As such, we find the district court was right for the wrong reason in dismissing Ward's appeal. See *State v. Smith*, 309 Kan. 977, 986, 441 P.3d 1041 (2019) (appellate court may affirm district court as right for wrong reason).

In conclusion, Ward's sentence was lawful when originally imposed; he was not serving his sentence when he filed his motion to correct illegal sentence; and the district court, under K.S.A. 2022 Supp. 22-3504(a), had no jurisdiction to address his motion.

Appeal dismissed.