

NOT DESIGNATED FOR PUBLICATION

No. 125,194

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

LATRALE JEROME NOLAND,
Appellant.

MEMORANDUM OPINION

Appeal from Riley District Court; KENDRA LEWISON, judge. Opinion filed June 2, 2023. Vacated in part and remanded with directions.

Grace E. Tran, of Kansas Appellate Defender Office, for appellant.

David Lowden, deputy county attorney, *Barry R. Wilkerson*, county attorney, and *Kris W. Kobach*, attorney general, for appellee.

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

PER CURIAM: After Latrale Jerome Noland's diversion was revoked, the district court convicted him of aggravated assault with a deadly weapon based on the stipulated facts in his diversion agreement. Noland asked the district court not to order him to register as a violent offender under the Kansas Offender Registration Act (KORA), K.S.A. 2019 Supp. 22-4901 et seq. The district court determined that it had no discretion to decline to make a finding that a deadly weapon was used in the commission of the offense based on the elements of the crime and the stipulated facts, and the district court ordered Noland to register as a violent offender under KORA.

Noland appeals only the registration order, arguing the district court erred in determining it could not decline to make a deadly weapon finding. For the reasons explained herein, we agree with Noland that the district court failed to properly exercise its discretion in making the deadly weapon finding. As a result, we vacate the KORA registration order and remand with directions for the district court to reconsider the order.

FACTS

The State charged Noland with one count of aggravated assault with a deadly weapon, a severity level 7 person felony, in violation of K.S.A. 2019 Supp. 21-5412(b)(1) and (e)(2), for acts committed in January 2020. More specifically, the State alleged that Noland placed his victim, Elijah Timmons, "in reasonable apprehension of immediate bodily harm with a deadly weapon, to wit: a handgun." In December 2020, Noland entered into a diversion agreement with the State in which he stipulated he was in an altercation with Timmons, pulled out a handgun and placed it against Timmons' ribs, and threatened to kill Timmons. The stipulated facts also revealed that Timmons was placed in reasonable apprehension of immediate bodily harm with a firearm, that law enforcement officers found two loaded Glock 19 pistols in Noland's possession soon after the altercation, and that Noland admitted pointing one of the pistols at Timmons.

In November 2021, the State moved to revoke Noland's diversion, alleging he committed new crimes, failed to meet with his diversion officer as required, and failed to refrain from consuming alcohol. Noland stipulated to the violations alleged in the State's motion, and the district court revoked his diversion. The district court then held a trial based on the stipulated facts in the diversion agreement and found Noland guilty of aggravated assault as charged. The district court did not make a finding that a deadly weapon was used in the commission of the offense at the time of the conviction.

Noland moved for a dispositional departure to probation. At the initial sentencing hearing, Noland also asked that the district court not require him to register as a violent offender under KORA. The court suggested that it was unsure whether it had discretion not to order Noland to register and continued sentencing so the parties could research the relevant caselaw and prepare KORA paperwork.

At the continued sentencing hearing, Noland argued that the district court had discretion not to make a deadly weapon finding. The State argued the opposite. The court acknowledged it had not yet made an explicit finding that a deadly weapon was used in the commission of the offense but did not believe it had discretion to decline to make the finding based on the elements of the offense and the stipulated facts. The district court then made a finding that Noland committed the offense with a deadly weapon and ordered him to register under KORA for a period of 15 years. The district court sentenced Noland to 11 months' imprisonment but granted his motion for a dispositional departure to probation for 24 months. At the end of the hearing, the district judge stated that "if I thought I had the discretion I would have been very tempted and likely to exercise that discretion to not have [Noland] register." Noland timely appealed.

ANALYSIS

Noland appeals only the KORA registration order. He claims "[t]he district court erred when it stated that it was obligated to make a deadly weapon finding and therefore require [him] to register." He asserts there is no affirmative obligation for the district court to make such a finding under K.S.A. 2019 Supp. 22-4902(e)(2), and so the district court failed to properly exercise its discretion. For the appropriate remedy, Noland asserts that this court "should vacate the district court's order for [him] to register."

The State responds that "[t]his court must affirm the district court's registration decision because the court could not lawfully disregard the State's request to make a

deadly-weapon finding when the undisputed evidence established [Noland] committed an aggravated assault with a deadly weapon." But the State asserts that if this court disagrees with its position, "the proper remedy is to remand the case so the district court can exercise the judicial discretion it purportedly has regarding the deadly-weapon finding."

There are two standards of review implicated by the issue on appeal. Whether Noland has to register under KORA turns on statutory interpretation, which is a question of law subject to unlimited review. *State v. Marinelli*, 307 Kan. 768, 788, 415 P.3d 405 (2018). If, as Noland asserts, the district court had discretion not to make a deadly weapon finding triggering the requirement to register under KORA, this court reviews the district court's decision for an abuse of discretion. A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). An error of law occurs when the district court's exercise of discretion is guided by an erroneous legal conclusion. *State v. Gonzalez*, 290 Kan. 747, 755, 234 P.3d 1 (2010).

Under K.S.A. 2019 Supp. 22-4902(e)(1), a "violent offender" includes any person who is convicted of certain crimes enumerated in the statute. Aggravated assault is not an enumerated crime under the statute that automatically requires the defendant to register as a violent offender. See K.S.A. 2019 Supp. 22-4902(e)(1)(A)-(I). Thus, the district court could order Noland to register as a violent offender only if Noland "is convicted of any person felony and the court makes a finding on the record that a deadly weapon was used in the commission of such person felony." K.S.A. 2019 Supp. 22-4902(e)(2). But as we will explain, nothing in the statute requires the district court to make such a finding.

We find the outcome of Noland's appeal is controlled by the Kansas Supreme Court's decision in *State v. Thomas*, 307 Kan. 733, 415 P.3d 430 (2018). In that case, two exotic dancers engaged in a fight that ended in Thomas stabbing the other with the stiletto heel of a shoe. Thomas was charged with aggravated battery and convicted by a jury.

While the jury found that the stiletto heel was indeed a deadly weapon, the district court neither considered that question nor made such a finding on the record. Still, the district court ordered Thomas to register as a violent offender.

On appeal, Thomas challenged the registration order because the district court never made a deadly weapon finding. The Supreme Court determined that a criminal defendant needs to register under KORA if one or more of the statutorily defined conditions exist: (1) the mere fact of a conviction classifies the defendant as an offender; (2) the fact of a conviction plus some statutorily permitted judicial fact-finding classifies the defendant as an offender; or (3) a judicial order determines, through the exercise of judicial discretion, that the defendant should be considered an offender. 307 Kan. at 748. Because the district court did not explicitly find that Thomas used a deadly weapon in the commission of her crime—although the jury had made such a finding—the Supreme Court found that no statutorily defined condition for the registration order had been met. 307 Kan. at 750. More specifically, the court held that "K.S.A. 2011 Supp. 22-4902(e)(2) does not affirmatively require the district court to consider and determine whether Thomas used a deadly weapon in the commission of her offense." 307 Kan. at 750.

But the Supreme Court also decided that "the absence of a court-made finding on the record that Thomas used a deadly weapon cannot be a sentencing error amenable to the remedy of a remand." 307 Kan. at 750. Instead, the court found that the only appropriate remedy under the circumstances was to vacate the registration order. 307 Kan. at 750; see also *State v. Gilkes*, 307 Kan. 725, 728-29, 415 P.3d 427 (2018) (holding that when the classification of the defendant as an offender under KORA requires district court fact-finding, the defendant cannot be ordered to register without such fact-finding and the remedy is to vacate the registration order).

Under the analysis in *Thomas*, even if a defendant is found guilty of a person felony and the evidence shows it was committed with a deadly weapon, the district court

must still make an explicit finding on the record that the defendant used a deadly weapon in the commission of the crime to require registration under KORA. Without such a finding, the KORA registration order must be vacated. Based on this analysis, Noland is correct that the district court erred when it found that it lacked discretion about whether to make a deadly weapon finding that required Noland to register under KORA.

This brings us to the appropriate remedy for the error, if any. Noland asserts that this court "should vacate the district court's order for [him] to register." The State asserts that "the proper remedy is to remand the case so the district court can exercise the judicial discretion it purportedly has regarding the deadly-weapon finding."

In *Thomas*, the Supreme Court held that if the district court *fails* to make the necessary deadly weapon finding to order registration, this is not a "sentencing error" that can be remanded to give the district court a second chance to make the appropriate finding—the remedy is simply to vacate the registration order. 307 Kan. at 750; see *Gilkes*, 307 Kan. at 729. But in Noland's case, the district court made a deadly weapon finding, albeit without applying its proper discretion. The district court stated it would have been "tempted" to not order registration if it believed it had the discretion whether to make a deadly weapon finding. In this situation, the appropriate remedy is to vacate the registration order but remand to the district court with directions to properly exercise its discretion in deciding whether to make the deadly weapon finding and order registration.

In sum, we agree with Noland that the district court failed to properly exercise its discretion in making the deadly weapon finding. But under the facts here, we agree with the State on the appropriate remedy. Noland's KORA registration order is vacated, and the case is remanded with directions for the district court to reconsider the order and to exercise its discretion in deciding whether to make a deadly weapon finding.

Vacated in part and remanded with directions.