NOT DESIGNATED FOR PUBLICATION

No. 125,228

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

MICHELLE LEIGH ECKLUND,
Appellant.

MEMORANDUM OPINION

Appeal from Shawnee District Court; PENNY R. MOYLAN, judge. Opinion filed April 7, 2023. Appeal dismissed.

Gerald E. Wells, of Jerry Wells Attorney-at-Law, of Lawrence, for appellant.

Michael R. Serra, deputy district attorney, *Michael F. Kagay*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before GREEN, P.J., GARDNER, J., and PATRICK D. MCANANY, S.J.

PER CURIAM: After entering a guilty plea, Michelle L. Ecklund appeals her conviction and sentence, arguing the district court violated her right to be physically present at her combined plea and sentencing hearing because it failed to get a waiver of that right before allowing her to appear over Zoom. Ecklund bases her claim on Kansas Supreme Court Administrative Order 2020-PR-056, effective May 7, 2020—a provision allowing use of two-way electronic audio-visual communications for court appearances during the COVID-19 pandemic. But we lack jurisdiction to consider an appeal of

Ecklund's conviction or of Ecklund's sentence, which raises a constitutional claim for the first time on appeal. We thus dismiss.

In June 2021, the State charged Ecklund with single misdemeanor counts of violating a protective order and interference with a law enforcement officer. Ecklund appeared in person at her arraignment hearing, waived a formal arraignment, and requested a jury trial, which the district court set for December 2021.

Before trial, Ecklund entered into a plea agreement with the State. She agreed to plead guilty to both charges and the State agreed to recommend a sentence of nine months in jail suspended in favor of six months of unsupervised probation.

The district court held a combined plea and sentencing hearing in November 2021. Ecklund and her attorney appeared by Zoom from the Shawnee County Jail. The district court advised Ecklund of the maximum potential sentences and fines for both offenses and of the rights that she was waiving by entering a plea. The district court also confirmed that Ecklund was entering her plea voluntarily and without being pressured or coerced or while suffering from a mental condition or undue influence of drugs or alcohol.

Ecklund pleaded guilty to both offenses and submitted an affidavit stipulating to the factual basis for her plea. The district court received the stipulated facts, accepted Ecklund's plea, and sentenced Ecklund to probation in accordance with her plea agreement.

Ecklund timely appeals.

Did the District Court Err in Sentencing Ecklund?

Ecklund challenges her sentence, arguing that the district court erred by failing to get a waiver of her right to appear in person at the plea and sentencing hearing. Citing *State v. McDaniel*, 306 Kan. 595, 600-02, 395 P.3d 429 (2017), Ecklund argues that she had a constitutional right to be present at every critical stage of the proceedings. From this she implies that "present" means physically present. But see *State v. Kelly*, 213 Kan. 237, 242, 515 P.2d 1030 (1973) (holding that in misdemeanor cases, constitution and statute authorize trial with only counsel present).

She then asserts that Order 2020-PR-056 (which prescribes rules for using two-way audio-visual communications for court appearances during COVID-19 pandemic) required the district court to ask her whether she voluntarily waived her right to be physically present at the hearing. She also claims that her waiver had to be written and filed in the district court. Finally, maintaining that her sentence is illegal, Ecklund asks for an order finding her "conviction and sentence are null and void, and for such other relief . . . deem[ed] proper."

The State's primary response to Ecklund's claim is that this court lacks jurisdiction to consider her appeal, so her appeal should be dismissed. We agree.

Jurisdiction

Appellate courts exercise unlimited review when determining whether jurisdiction exists because this issue presents a question of law. *Via Christi Hospitals Wichita v. Kan-Pak*, 310 Kan. 883, 889, 451 P.3d 459 (2019). If appellate jurisdiction does not exist, Ecklund's appeal must be dismissed. See *State v. Phinney*, 280 Kan. 394, 398-99, 122 P.3d 356 (2005).

Our general rule provides: "No appeal shall be taken by the defendant from a judgment of conviction before a district judge upon a plea of guilty or nolo contendere." K.S.A. 2022 Supp. 22-3602(a). "A guilty or no contest plea surrenders a criminal defendant's right to appeal his or her conviction but not his or her sentence." *State v. Key*, 298 Kan. 315, 321, 312 P.3d 355 (2013). Ecklund may thus not file a direct appeal from a plea unless she first moves to withdraw her plea and the district court denies that motion. See *State v. Solomon*, 257 Kan. 212, 218-19, 891 P.2d 407 (1995). She has not done so. So to the extent that Ecklund challenges her conviction, we lack jurisdiction.

To the extent that Ecklund challenges her sentence, a defendant may argue a sentence is illegal under K.S.A. 2022 Supp. 22-3504 at any time. See *Phinney*, 280 Kan. at 399. Ecklund cites *State v. Marinelli*, 307 Kan. 768, 778, 415 P.3d 405 (2018), for its holding that "one who pleads guilty or nolo contendere is not precluded by K.S.A. 22-3602 from taking a direct appeal from the sentence imposed." We agree.

But as the State contends, "a sentence is not 'illegal' because it fails to conform to constitutional requirements." *State v. Gayden*, 281 Kan. 290, 293, 130 P.3d 108 (2006) ("A claim that a sentence fails to conform to *constitutional* requirements is not a claim it fails to conform to statutory requirements."). Instead, K.S.A. 2022 Supp. 22-3504(c) defines an illegal sentence as one that does not conform to applicable *statutory* provisions. See *State v. Howard*, 287 Kan. 686, 691, 198 P.3d 146 (2008). Ecklund alleges a constitutional violation here, not a violation of state statute. So her claim does not fall within the definition of an "illegal sentence" under K.S.A. 2022 Supp. 22-3504.

And constitutional grounds for reversal asserted for the first time on appeal are not properly before the appellate court for review. *State v. Coman*, 294 Kan. 84, 89, 273 P.3d 701 (2012). Although there are exceptions to this general rule, Ecklund makes no attempt

to argue in her brief that any of the exceptions apply. Accordingly, we decline to consider Ecklund's constitutional argument that she failed to raise in district court.

We thus do not reach the State's argument that Ecklund inadequately briefed her claim or that Order 2020-PR-056 lacks the requirements Ecklund attributes to it.

Appeal dismissed.