

NOT DESIGNATED FOR PUBLICATION

No. 125,434

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellee,*

v.

JAY E. BAZY,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Wyandotte District Court; MICHAEL A. RUSSELL, judge. Opinion filed June 16, 2023. Affirmed.

*Peter Maharry*, of Kansas Appellate Defender Office, for appellant.

*Garett C. Relph*, assistant district attorney, *Mark A. Dupree Sr.*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

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

PER CURIAM: Jay E. Bazy appeals the district court's denial of his motion to correct an illegal sentence in which he raised a constitutional challenge to his sentence. While a motion to correct an illegal sentence under K.S.A. 2022 Supp. 22-3504 is not limited in terms of when the motion may be raised, the illegal sentence statute is limited in terms of its application. Because a motion to correct an illegal sentence is an inappropriate vehicle for a constitutional challenge, we find the district court did not err. For these reasons, we affirm.

## BAZY'S DISTRICT COURT PROCEEDINGS

In early 2016, the State filed an amended information charging Bazy with eight offenses for crimes committed in December 2014. Ultimately, Bazy entered into a plea agreement with the State and pleaded no contest to possession of heroin with intent to distribute, a severity level 2 drug felony in violation of K.S.A. 2014 Supp. 21-5705(a)(1) and (d)(3)(C), and criminal possession of a firearm, a severity level 8 nonperson felony under K.S.A. 2014 Supp. 21-6304(a)(3)(A) and (b). Bazy's presentence investigation report indicated that his criminal history score was C and included a 1989 conviction for attempted aggravated battery.

At his sentencing held later that year, Bazy did not object to his criminal history score of C. The district court followed the plea agreement, granted Bazy a downward durational departure, and imposed a controlling sentence of 100 months in prison.

Bazy subsequently filed a bevy of pro se postsentence motions, including three motions to correct an illegal sentence and a motion to suppress evidence (which the district court liberally construed as a postsentence motion to withdraw plea), all of which were summarily denied. In his most recent pro se motion to correct an illegal sentence—which is the subject of this appeal—Bazy appeared to argue that the inclusion of his 1989 conviction for attempted aggravated battery in the calculation of his criminal history score violated his right under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). That is, he asserted that this 1989 conviction should have been submitted to a jury and proved beyond a reasonable doubt.

The district court summarily denied the motion, stating: "[T]he defendant is further alleging that the court engaged in fact finding by using his prior conviction from 1989 where he was convicted of attempted aggravated battery. It is not clear what the defendant is alleging. His argument is conclusory and denied for that reason."

Bazy now appeals the denial of his most recent motion to correct an illegal sentence.

#### ANALYSIS

Before us, Bazy continues his claim that his sentence is illegal under *Apprendi*. Whether a sentence is illegal is a question of law over which we exercise unlimited review. *State v. McAlister*, 310 Kan. 86, 89, 444 P.3d 923 (2019).

Bazy asserts that the inclusion of his 1989 conviction for attempted aggravated battery in the calculation of his criminal history score without the conviction being included in the charging document or proven to a jury warrants reversal. He does not raise any additional issues. Bazy has thereby waived or abandoned any other claims he asserted in his motion. See *State v. Meggerson*, 312 Kan. 238, 246, 474 P.3d 761 (2020) ("Issues not briefed or not adequately briefed are deemed waived or abandoned.").

Specifically, Bazy argues that his sentence was constitutionally defective because "there was no jury finding to establish his conviction was for attempted aggravated battery, violating his constitutional rights to a jury trial." According to Bazy, when his "criminal history was determined to be C based on his attempted aggravated battery conviction, it violated his constitutional right to have each and every element of the offense included in the charging document, put to a jury and proven beyond a reasonable doubt." Therefore, Bazy argues, his prior attempted aggravated battery conviction should not have been "included in his criminal history to increase his sentence."

In response, the State argues the ruling in *Apprendi* does not apply to prior convictions being used in a defendant's criminal history; "[t]hus, the prior conviction need not be presented in the indictment and proven to a jury in order to be used by the

court to increase the sentenced imposed." The State thereby asks us to affirm the district court's ruling. We must agree.

In Kansas, an illegal sentence is a sentence "[i]mposed by a court without jurisdiction; that does not conform to the applicable statutory provision, either in character or punishment; or that is ambiguous with respect to the time and manner in which it is to be served at the time it is pronounced." K.S.A. 2022 Supp. 22-3504(c)(1); *State v. Moncla*, 301 Kan. 549, Syl. ¶ 2, 343 P.3d 1161 (2015).

The Kansas Supreme Court has repeatedly held that K.S.A. 2022 Supp. 22-3504(a)—the basis of Bazy's claim—"has very limited applicability." *State v. Edwards*, 281 Kan. 1334, 1336, 135 P.3d 1251 (2006) (citing K.S.A. 22-3504[1], now K.S.A. 2022 Supp. 22-3504[a]). Kansas courts also have "long held the plain language of this narrow statutory definition does not include a claim that the sentence is illegal because it violates a constitutional provision." *State v. Hayes*, 312 Kan. 865, 868, 481 P.3d 1205 (2021).

In his motion to correct an illegal sentence, Bazy claims he is challenging the legality of his sentence as failing to conform to the applicable statutory provision in terms of the punishment authorized (which, if true, would constitute an illegal sentence under K.S.A. 2022 Supp. 22-3504[c][1]). Bazy cannot explain in his motion or appellate brief how his sentence is inconsistent with the applicable sentencing statute. He does not identify any nonconformity with the applicable sentencing statute or controlling interpretations of that statute. Bazy's argument, therefore, does not fall within the illegal sentence statute's specific and limited application.

Bazy's motion to correct an illegal sentence, moreover, is fatally flawed because his challenge is a purely constitutional one. He cites to *Apprendi*'s holding, which rests on constitutional grounds, namely the Sixth Amendment to the United States Constitution. *Apprendi*, 530 U.S. at 476-77. And as noted above, "[a] claim that a sentence fails to

conform to constitutional requirements is not a claim the sentence fails to conform to statutory requirements as is necessary to come within the narrow definition of 'illegal sentence' under K.S.A. 22-3504(1)." *Edwards*, 281 Kan. 1334, Syl. ¶ 2.

While the district court denied the motion under reasoning that differs from ours, it nevertheless reached the correct result. See *Gannon v. State*, 302 Kan. 739, 744, 357 P.3d 873 (2015) ("If a trial court reaches the right result, its decision will be upheld even though the trial court relied upon the wrong ground or assigned erroneous reasons for its decision.").

Simply put, Bazy asserts a claim in an inappropriate motion. He "may not use a motion to correct illegal sentence to litigate his constitutional claim." *State v. Reese*, 306 Kan. 279, 281, 393 P.3d 599 (2017). The district court's denial was, therefore, appropriate.

Affirmed.