

NOT DESIGNATED FOR PUBLICATION

Nos. 125,464  
125,465

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellee,*

v.

TOMMY LYNN SHERRILL SR.,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Shawnee District Court; CHERYL A. RIOS, judge. Opinion filed September 22, 2023.  
Sentences vacated and cases remanded with directions.

*Korey A. Kaul*, of Kansas Appellate Defender Office, for appellant.

*Jodi Litfin*, deputy district attorney, *Michael Kagay*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before COBLE, P.J., MALONE and WARNER, JJ.

PER CURIAM: Tommy Sherrill appeals the district court's order that he serve consecutive prison sentences in two separate cases. He argues that the district court's order was based on the erroneous belief that it had no discretion to run the sentences concurrent. We agree with Sherrill that remand is required, albeit for different reasons than the parties discussed in their briefing. We thus vacate Sherrill's sentences in the cases on appeal and remand the cases for resentencing with an appropriate understanding of the district court's discretion.

Sherrill was charged with possession with intent to distribute methamphetamine and possession of drug paraphernalia in January 2020. He was released on bond as the case progressed. A few months later, Sherrill was charged in a separate case with several crimes that he allegedly committed while he was on bond in the first case.

The two cases were not consolidated before the district court, but Sherrill eventually entered a global plea deal that covered both. Sherrill pleaded guilty to an amended charge of possession of methamphetamine in this case and pleaded guilty to involuntary manslaughter and leaving the scene of an accident in the other case. The State dismissed all remaining charges.

On July 21, 2022, the district court held a sentencing hearing for both cases at the same time. The State indicated that the sentences "must run consecutive" because Sherrill was "on felony bond at the time that [the new crimes were] committed." Sherrill's counsel concurred that the sentences must be served consecutively. The district court sentenced Sherrill to controlling 34-month and 136-month prison sentences. The court ordered that the sentences must be served consecutively "by operation of law" based on K.S.A. 2022 Supp. 21-6606(d)—a default rule requiring consecutive sentences when a defendant commits a crime while on felony bond in another case.

Sherrill appealed, challenging the district court's ruling that the sentences must be served consecutively. His briefing initially claimed that this ruling was based on the prosecutor's misstatement of and the district court's misapplication of Kansas sentencing law. Sherrill believed that K.S.A. 2022 Supp. 21-6819(a), a possible exception to the default rule in K.S.A. 2022 Supp. 21-6606(d), should apply. He argued that the district court erred when it ordered him to serve his sentences consecutively without considering whether that decision resulted in manifest injustice under K.S.A. 2022 Supp. 21-6819(a). The State responded that K.S.A. 2022 Supp. 21-6819(a) did not apply and that Sherrill's arguments were unpreserved.

After the briefs were submitted, we ordered the parties to show cause as to why Sherrill's sentences are not controlled by K.S.A. 2022 Supp. 21-6606(a), which grants a district court discretion to impose consecutive or concurrent sentences in separate cases sentenced on the same day. Sherrill was sentenced in two separate cases at one hearing, and Kansas courts have held that previous versions of K.S.A. 21-6606(a)—not subsection (d)—governs this situation. See *State v. Dunham*, 58 Kan. App. 2d 519, 526-27, 472 P.3d 604 (2020); see also *State v. Edwards*, 252 Kan. 860, 870, 852 P.2d 98 (1993) (applying a previous but identically worded sentencing statute). In each case, the appellate court held the district court erred when it based its sentencing decision on a belief that it was required to run the sentences consecutive, rather than with understanding that it had discretion to run them consecutive or concurrent. And in each case, the appellate court vacated the defendant's sentences and remanded the case for resentencing with an appropriate understanding of the district court's discretion.

The State and Sherrill have now responded to our show-cause order. Both acknowledge that the parties' comments and the district court's decision at sentencing were rooted in a belief that the court was required to run Sherrill's sentences consecutive. Both parties agree that this belief was inconsistent with the reasoning in *Edwards* and *Dunham* and that these cases govern the outcome here.

Because Sherrill was sentenced in multiple cases on the same day, the district court erred in finding that it was required "by operation of law" to run the sentences consecutive. We therefore vacate Sherrill's sentences and remand so the district court may exercise its discretion under K.S.A. 2022 Supp. 21-6606(a) in assessing whether to run his sentences concurrent or consecutive.

Sentences vacated and cases remanded with directions.