

NOT DESIGNATED FOR PUBLICATION

No. 125,489

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

MATTHEW C. STRAHM,
Appellant.

MEMORANDUM OPINION

Appeal from Douglas District Court; AMY J. HANLEY, judge. Opinion filed June 2, 2023.
Sentence vacated and case remanded with directions.

Adam M. Hall, of Thompson-Hall P.A., of Lawrence, for appellant.

Brian Deiter, assistant district attorney, *Suzanne Valdez*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before BRUNS, P.J., CLINE and HURST, JJ.

PER CURIAM: Matthew C. Strahm appeals his sentence after pleading no contest to one count of aggravated assault and one count of aggravated endangering a child. Because Strahm committed these crimes with a firearm, a special sentencing rule applied. Under this rule, Strahm was to receive a presumptive prison sentence unless the district court exercised its discretion to impose a nonprison sentence. Rather than asking the district court to exercise its discretion under the special rule, Strahm moved for a dispositional departure. The district court denied the request finding that there were no substantial and compelling reasons to grant probation.

On appeal, Strahm does not challenge the district court's denial of his motion for dispositional departure. Rather, he contends that the district court erred in not considering the option of granting a discretionary nonprison sentence under the special sentencing rule. Based on our review of the record, we find that the district court failed to consider whether a nonprison sentence should have been imposed under the special sentencing rule. Although this was likely due to Strahm's failure to request an optional nonprison sentence under the special sentencing rule, we find that it is appropriate to vacate the sentence and remand this case to the district court for resentencing.

FACTS

On January 7, 2022, Lawrence Police Department officers were called to Strahm's residence after it was reported that he threatened his family with a gun. A week later, the State charged Strahm with one count of aggravated assault with a deadly weapon and two counts of aggravated endangering a child. Ultimately, Strahm entered into a plea agreement in which he agreed to plead no contest to the aggravated assault with a deadly weapon charge and to one of the counts of aggravated endangering a child. Under the terms of the plea agreement, the State agreed—among other things—to recommend that the district court place Strahm on 24 months of supervised probation.

The district court accepted Strahm's plea and found him guilty of the amended charges. Subsequently, a presentence investigation (PSI) report showed that Strahm's criminal history score was category D. In addition, the PSI report stated that Strahm was facing a presumptive prison sentence due to the application of a special sentencing rule. Specifically, the PSI report identified K.S.A. 2022 Supp. 21-6804(h), which states that "[w]hen a firearm is used to commit any person felony, the offender's sentence shall be presumed imprisonment. The court may impose an optional nonprison sentence as provided in subsection (q)." The PSI report also stated that another special sentencing

rule applied to the aggravated endangering a child charge under K.S.A. 2022 Supp. 21-5601(c)(2), which requires consecutive sentences.

Instead of requesting that the district court consider a nonprison sentence under the special sentencing rule, Strahm filed a motion for dispositional departure. In his motion, Strahm argued that there were substantial and compelling reasons for the district court to place him on probation rather than requiring him to serve a presumptive prison sentence. In support of his argument, Strahm stated that he had participated in various treatment programs and alleged that he posed no risk to community safety interests. The State did not file a response to Strahm's motion for dispositional departure.

The district court held a sentencing hearing on July 28, 2022. The parties advised the district court that they had no objections to the PSI report or to Strahm's criminal history score. In addition, Strahm's counsel presented his argument in support of the motion for dispositional departure. In response, the State confirmed that under the plea agreement, it supported the dispositional departure motion.

Because the prosecutor who attended the sentencing hearing was not the same one who negotiated the plea agreement with Strahm, he could not answer some of the questions asked by the district court regarding the plea negotiations. So, the district court granted a brief recess to allow the prosecutor to call his colleague—who was on a leave of absence—to obtain additional information as to why the State supported a dispositional departure in this case. After the recess, the prosecutor provided the district court with several reasons as to why the State supported probation.

The district court then directed the prosecutor to read the victim impact statement prepared by Strahm's wife into the record. Highly summarized, her statement highlighted the negative impact that Strahm's actions had on her as well as on their children. She also reviewed Strahm's prior violent behavior and pointed out that he was on probation at the

time this incident occurred. Finally, she urged the district court to deny Strahm's request for probation.

The district court then gave Strahm an opportunity to speak regarding his request for a dispositional departure. In doing so, Strahm expressed regret for his actions and stated that he was taking "the appropriate steps to be a better person" and "a better father." After Strahm finished speaking, the district court asked the parties for their sentencing recommendations. Strahm's counsel requested that the district court impose a 24-month sentence for the aggravated assault with a deadly weapon conviction and a consecutive 6-month sentence for the endangering a child conviction. He also requested that the district court grant his motion for dispositional departure and place his client on supervised probation for 24 months with the special requirements as stated in the plea agreement. The State joined in the recommendation made by Strahm's counsel.

After a brief recess, the district court denied Strahm's motion for dispositional departure. Specifically, the district court determined:

"Special Rule 1 makes this a presumptive prison offense which the legislature has set out the departure is up to me as to whether or not I find that there are substantial and compelling grounds in the motion to depart from the presumed prison sentence. I am not persuaded by the grounds in the motion and I find that there are not substantial and compelling reasons to depart. The motion will be denied. I am imposing the 30-month prison sentence together with 12 months of post-release."

In its closing remarks, the district court stated that the imposition of a prison sentence was necessary to hold Strahm accountable in "a case involving the most serious of domestic violence in the home with a rifle and two young children."

Thereafter, Strahm timely filed a notice of appeal.

ANALYSIS

On appeal, Strahm contends that the district court failed to consider or misinterpreted its authority to impose a nonprison option—instead of a presumptive prison sentence—under the special sentencing rule set forth in K.S.A. 2022 Supp. 21-6804(h) and (q). As Strahm points out, the special sentencing rule does not require a district court to find substantial and compelling grounds for granting a nonprison sentence. In response, the State contends that the district court did not err by imposing a presumptive sentence. The State also argues that even if the district court erred, it was invited by Strahm.

Appellate Jurisdiction

Before addressing the merits of Strahm's argument, we will first consider the State's argument that we lack jurisdiction over this appeal because the district court imposed presumptive sentences. Whether appellate jurisdiction exists is a question of law over which our scope of review is unlimited. *State v. Lundberg*, 310 Kan. 165, 170, 445 P.3d 1113 (2019). As a general rule, we lack jurisdiction to consider appeals from presumptive sentences imposed under the Kansas Sentencing Guidelines. *State v. Farmer*, 312 Kan. 761, 764, 480 P.3d 155 (2021). Furthermore, statutory interpretation presents a question of law over which we also have unlimited review. *State v. Stoll*, 312 Kan. 726, 736, 480 P.3d 158 (2021).

Here, it is undisputed that the district court imposed a presumptive prison sentence under the special sentencing rule set forth in K.S.A. 2022 Supp. 21-6804(h). It is also undisputed that we generally lack jurisdiction to review an appeal from a presumptive sentence. K.S.A. 2022 Supp. 21-6820(c)(1). So, it is necessary for us to determine whether there is an applicable exception to the general rule that allows us to consider Strahm's appeal.

In *State v. Warren*, 297 Kan. 881, 885, 304 P.3d 1288 (2013), the Kansas Supreme Court found that even when a district court imposes a presumptive sentence, a criminal defendant may seek appellate review of whether a district court misinterpreted its own statutory authority. In other words, although appellate courts do not normally review the imposition of a presumptive sentence, we may consider an appeal that involves statutory interpretation relating to a district court's sentencing authority. 297 Kan. at 883 (quoting *State v. Warren*, 47 Kan. App. 2d 57, 59, 270 P.3d 13 [2012]). Here, we find the limited exception set forth in *Warren* to be applicable because the issue presented is whether the district court misinterpreted—or did not fully consider—its own sentencing authority.

Sentencing Authority under K.S.A. 2022 Supp. 21-6804(h) and (q)

K.S.A. 2022 Supp. 21-6815(a) requires a sentencing court to "impose the presumptive sentence provided by the sentencing guidelines unless the judge finds substantial and compelling reasons to impose a departure sentence." But a special sentencing rule applies when a firearm is used in the commission of a person felony. K.S.A. 2022 Supp. 21-6804(h) provides that "[w]hen a firearm is used to commit any person felony, the offender's sentence shall be presumed imprisonment." At the same time, the statute also grants a district court the discretion to impose an optional nonprison sentence under certain circumstances.

The circumstances in which a district court has the discretion to grant an optional nonprison sentence in a felony case in which a firearm is used are set forth in K.S.A. 2022 Supp. 21-6804(q):

"As used in this section, an 'optional nonprison sentence' is a sentence which the court may impose, in lieu of the presumptive sentence, upon making the following findings on the record:

"(1) An appropriate treatment program exists which is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism; and

"(2) the recommended treatment program is available and the offender can be admitted to such program within a reasonable period of time; or

"(3) the nonprison sanction will serve community safety interests by promoting offender reformation.

"Any decision made by the court regarding the imposition of an optional nonprison sentence shall not be considered a departure and shall not be subject to appeal."

In *State v. Foster*, 39 Kan. App. 2d 380, 383, 180 P.3d 1074 (2008), this court found that when the special sentencing rule set forth in K.S.A. 21-4704(h)—now K.S.A. 2022 Supp. 21-6804(h) and (q)—applies, a motion for dispositional departure is unnecessary. The *Foster* panel explained:

"When no special rule applies, a dispositional-departure motion may be used as a means of getting probation when a defendant is presumptive for prison, or in getting a prison sentence when a defendant is presumptive for probation. When a special rule does apply, however, one must first look closely at that rule. And the special rule applicable here does not require any further motion to get probation. Rather, this statute gives the judge the ability to grant probation if certain fact findings are made:

....

"So, under the statute, Foster could still get probation, but only upon a finding that probation would promote the safety interests of the community by allowing for his reformation." 39 Kan. App. 2d at 383-84.

In this case, Strahm likely caused at least some of the confusion by choosing to file a motion for dispositional departure—which requires "substantial and compelling reasons"—instead of simply requesting the district court to impose a nonprison sentence under the special sentencing rule. In any event, the issue of whether Strahm should

receive probation instead of a presumptive prison sentence was presented to the district court. Likewise, similar to the *Foster* case, the district court still could have granted Strahm probation under K.S.A. 2022 Supp. 21-6804(h) and (q) even though it denied his motion for dispositional departure. Significantly, the special sentencing rule set forth in K.S.A. 2022 Supp. 21-6804(q) does not require a district court to find "substantial and compelling reasons" before granting probation.

In sentencing Strahm, the district court stated: "Special Rule 1 makes this a presumptive prison offense which the legislature has set out the departure is up to me as to whether or not I find that there are substantial and compelling grounds in the motion to depart from the presumed prison sentence." Although the district court was correct in stating that the special rule—found at K.S.A. 2022 Supp. 21-6804(h)—applied in this case because Strahm used a firearm in the commission of a person felony, the district court did not acknowledge that the special rule also gave it the authority to grant an optional nonprison sentence based on the factors set forth in subsection (q) of the same statute.

The State argues that Strahm invited the district court to commit error by filing an unnecessary motion for dispositional departure. As the Kansas Supreme Court has held, a defendant may not invite an error and then complain about the error on appeal. *Stoll*, 312 Kan. at 735. When considering the application of the invited error doctrine, we are to carefully consider the defendant's actions and the context in which those actions occurred. *Kansas v. Fleming*, 308 Kan. 689, 706, 423 P.3d 506 (2018). In *Fleming*, our Supreme Court affirmed a finding of a panel of this court that "error introduced through counsel's inadvertence and without strategic design should not [be subjected to the invited error doctrine.] 'To hold otherwise would deprive an accused of individual fairness.'" 308 Kan. at 704 (citing *State v. Hargrove*, 48 Kan. App. 2d 522, 547, 293 P.3d 787 [2013]).

Based on our review of the record, it appears that Strahm's counsel—at the very least—contributed to the confusion by filing an unnecessary motion and by failing to request a nonprison option under K.S.A. 2022 Supp. 21-6804(h) and (q). By moving for dispositional departure, Strahm's counsel diverted the district court's attention and may have caused it to believe that it had to find substantial and compelling reasons in order to grant probation. Even so, when viewed in context, we do not find the actions or omissions of Strahm's counsel to rise to the level of invited error.

CONCLUSION

Under the unique circumstances presented, we find that the appropriate remedy is to vacate Strahm's sentence and remand this case to the district court for resentencing. At the resentencing hearing, the district court should consider whether to impose the presumptive prison sentence or to impose an optional nonprison sentence as authorized by K.S.A. 2022 Supp. 21-6804(h) and (q). Furthermore, we express no opinion on whether the district court should actually impose a nonprison sentence in this case as that is a matter left to the discretion of the district court. In light of our decision, we will not address the other issues presented on appeal.

Sentence vacated and case remanded with directions.