

NOT DESIGNATED FOR PUBLICATION

No. 125,665

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellee,*

v.

JEREMY W. KESSLER,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Sedgwick District Court; RODGER L. WOODS, judge. Opinion filed September 29, 2023. Appeal dismissed.

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

*Lance J. Gillett*, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

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

PER CURIAM: Jeremy W. Kessler appeals his sentence following his convictions of two counts of making false information and two counts of felony theft. The only issue he raises on appeal is that the district court erred when it imposed Board of Indigents' Defense Services (BIDS) fees totaling \$200 without stating on the record the specific factors it considered in determining that amount. While his appeal was pending, the State notified this court that Kessler has passed away, and Kessler's attorney does not dispute Kessler's death. Because of Kessler's unfortunate passing, and for reasons more fully explained below, we find this appeal is moot and should be dismissed.

## FACTS

In November 2021, Kessler pled guilty to two counts of making false information and two counts of felony theft. The district court sentenced Kessler to a controlling term of 13 months' imprisonment and granted probation for 18 months. The district court ordered Kessler to pay \$565 in restitution, a \$100 BIDS application fee, and BIDS attorney fees of \$100 instead of the usual attorney fee reimbursement of \$500. The district court ordered restitution and fees to be paid at \$50 per month. Before assessing the BIDS attorney fees, the court had the following exchange with defense counsel:

"THE COURT: . . . And, [defense counsel], did you wish to discuss *State v. Robinson*[, 281 Kan. 538, 132 P.3d 934 (2006)]?"

[DEFENSE COUNSEL]: Yes, Your Honor. So my client has indicated to me that he does have child support to pay in the amount of \$700 a month plus he is on probation in another county and does have to pay fees for that, and for that reason, plus the fact that he has other family members to support, that just plus the restitution in this case which is \$565, all of that together imposes a great financial burden on him already and the \$500 BIDS fee would be an additional burden beyond what he would practically be able to pay; so for that reason under *State v. Robinson*, we would ask the Court waive that \$500 and—excuse me, \$500 fee.

THE COURT: Having considered those factors laid out by counsel, I do believe that there is a substantial burden on Mr. Kessler. I do also think it's clear that Mr. Kessler does have some means to reimburse BIDS; so I will require in addition to the \$100 administrative fee, a \$100 BIDS reimbursement payment."

Kessler appealed his sentence. Kessler's original brief, filed in January 2023, raises only one issue that the district court erred when it imposed the BIDS fees totaling \$200 without stating on the record the specific factors it considered in determining that amount. In May 2023, the State notified this court that Kessler passed away on April 26, 2023. The State's brief, filed in June 2023, argues that Kessler's appeal is moot but

alternatively argues that the district court properly assessed the BIDS fees. Kessler's reply brief does not dispute Kessler's death but argues the appeal is not moot.

### IS KESSLER'S APPEAL MOOT?

The State argues that Kessler's appeal from the imposition of BIDS reimbursement fees is moot because he passed away after filing his brief. Citing *State v. Hollister*, 300 Kan. 458, 329 P.3d 1220 (2014), it asserts that Kessler's sole issue on appeal—whether the district court sufficiently explained its rationale for imposing the \$200 BIDS fee—does not fall into the narrow category of issues that ought to be reviewed in a criminal defendant's postmortem appeal. Kessler appellate counsel maintains that this court should not treat Kessler's appeal as moot because the BIDS fees are still outstanding and could theoretically be collected from Kessler's estate.

Although not a jurisdictional issue, mootness is a doctrine that recognizes that the role of courts is to determine real rather than abstract or hypothetical controversies. Appellate courts do not consider moot questions or issue advisory opinions. *State v. Roat*, 311 Kan. 581, 590, 466 P.3d 439 (2020). "A case is moot when a court determines that "it is clearly and convincingly shown the actual controversy has ended, the only judgment that could be entered would be ineffectual for any purpose, and it would not impact any of the parties' rights."" 311 Kan. at 584. Because mootness is a doctrine of court policy, appellate review is unlimited. 311 Kan. at 590. The State—as the party asserting mootness—"bears the initial burden of establishing that the case is moot in the first instance." 311 Kan. at 593. "The burden then shifts to the party opposing the mootness challenge to show the existence of a substantial interest that would be impaired by dismissal or that an exception to the mootness doctrine applies." 311 Kan. at 593.

In Kansas, the death of a criminal defendant does not automatically abate the defendant's appeal. But in *Hollister*, the Kansas Supreme Court held that this non-

abatement rule does not require a court to consider all issues in an appeal. Rather, an appellate court should consider whether an issue: "(1) is of statewide interest and of the nature that public policy demands a decision, such as those issues that would exonerate the defendant; (2) remains a real controversy; or (3) is capable of repetition. Only issues meeting one of these criteria should be addressed." *Hollister*, 300 Kan. at 458-59.

The State asserts that because Kessler has passed away, the sole issue he raises in his appeal is moot because that issue is not an issue of statewide importance, would not exonerate him, and is not a real controversy. Kessler's counsel disagrees, arguing the State cannot show the actual controversy has ended because the BIDS fees imposed against his client have not been discharged and could be assessed against his estate.

Before continuing, we observe that both parties argue that BIDS fees totaling \$200 are at stake in this appeal including the \$100 application fee and the \$100 attorney fees assessed against Kessler. But the district court could assess the \$100 application fee without making any findings. See *State v. Hawkins*, 285 Kan. 842, 849-54, 176 P.3d 174 (2008). Thus, the only controversy in this appeal is the \$100 BIDS attorney fees the district court assessed against Kessler at his sentencing hearing.

In his appeal, Kessler asserts the district court failed to follow the proper procedure under K.S.A. 22-4513 when assessing the BIDS attorney fees. We find that Kessler's issue falls outside the *Hollister* exceptions to mootness. Kansas appellate courts have repeatedly noted the mandatory requirements of K.S.A. 22-4513. The issue is not a matter of statewide interest and any resolution in Kessler's favor would not exonerate him—at most the matter would be remanded for resentencing. See *State v. Robinson*, 281 Kan. 538, 547-48, 132 P.3d 934 (2006) (holding the remedy for a district court's violation of K.S.A. 22-4513 is vacating the order and remanding for explicit consideration of the defendant's ability to pay and any financial burden the fees would impose).

Still, Kessler's counsel insists that a real controversy remains because the BIDS fees are still outstanding and theoretically could be collected against Kessler's estate. But nothing in the record indicates whether an estate has been or will be opened, nor whether there might be funds in that hypothetical estate to pay the BIDS fees. Moreover, this court has rejected an argument similar to the one Kessler is making in *State v. Tucker*, No. 113,469, 2016 WL 3856982, at \*5 (Kan. App. 2016) (unpublished opinion). In that case, Tucker appealed his theft conviction and passed away while his appeal was pending. In response to the State's argument that the appeal was moot, Tucker's appellate counsel argued that a real controversy remained because if Tucker's conviction was reversed, the fees associated with the conviction would be vacated, possibly affecting his estate. In rejecting that argument, this court explained that "if [this court] accepted the argument that the assessment of fees automatically prevents an appeal from becoming moot upon the death of an appellant, [such a ruling] would eviscerate the holding in *Hollister* because most convicted defendants are assessed fees at sentencing." 2016 WL 3856982, at \*5. This court found that Tucker's appeal contained no real controversy and dismissed the appeal as moot. 2016 WL 3856982, at \*5.

The State met its initial burden of establishing that this appeal is moot by asserting that Kessler is deceased, which his counsel has not disputed. The burden then shifts to the party opposing the mootness challenge to show the existence of a substantial interest that would be impaired by dismissal or that an exception to the mootness doctrine applies. *Roat*, 311 Kan. at 593. We agree with this court's analysis in *Tucker*. While the BIDS attorney fee has not been discharged and presumably survives Kessler's death, the risk of this reimbursement being assessed against a hypothetical estate is not a sufficiently concrete controversy to negate application of the mootness doctrine. And Kessler does not argue that an exception to the mootness doctrine applies in this situation. Thus, we conclude that Kessler's appeal should be dismissed as moot.

Appeal dismissed.