

NOT DESIGNATED FOR PUBLICATION

No. 125,731

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

TITHUS JEROME COLE,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; THOMAS KELLY RYAN, judge. Opinion filed July 21, 2023.
Affirmed.

Submitted by the parties for summary disposition under K.S.A. 2022 Supp. 21-6820(g) and (h).

Before ARNOLD-BURGER, C.J., MALONE and SCHROEDER, JJ.

PER CURIAM: Tithus Jerome Cole appeals his sentence following his conviction of attempted tampering with electronic monitoring equipment. Cole seeks summary disposition of his appeal under Kansas Supreme Court Rule 7.041A (2023 Kan. S. Ct. R. at 48). The State has not responded. We affirm the district court's judgment.

On July 12, 2022, Cole pled guilty to one count of attempted tampering with electronic monitoring equipment. Cole committed the offense in April 2020 while he was on felony probation in a prior case. The district court sentenced Cole to 18 months in prison. Although Cole's sentence was presumptive probation, the district court applied K.S.A. 2022 Supp. 21-6604(f)(1), which allows the district court to impose a prison

sentence when the offense was committed while the defendant was on felony probation. Cole timely appealed his sentence.

On appeal, Cole claims the district court "erred in applying K.S.A. 21-6604(f)(1)." K.S.A. 2022 Supp. 21-6604(f)(1) provides:

"When a new felony is committed while the offender is incarcerated and serving a sentence for a felony, or while the offender is on probation, assignment to a community correctional services program, parole, conditional release or postrelease supervision for a felony, a new sentence shall be imposed consecutively pursuant to the provisions of K.S.A. 2022 Supp. 21-6606, and amendments thereto, and the court may sentence the offender to imprisonment for the new conviction, even when the new crime of conviction otherwise presumes a nonprison sentence. In this event, imposition of a prison sentence for the new crime does not constitute a departure.

Cole pled guilty to committing a new felony while he was on felony probation. Under K.S.A. 2022 Supp 21-6604(f)(1), the district court had discretion to sentence Cole to prison. Because the imposition of this sentence was not a departure, and thus a presumptive sentence, this court lacks jurisdiction to review any sentence within the presumptive sentencing range for the offense. See K.S.A. 2022 Supp. 21-6820(c)(1).

Cole also claims that "the use of his prior criminal history, without putting it to a jury and proving it beyond a reasonable doubt, violated his constitutional rights under *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000)." This claim can be raised for the first time on appeal. *State v. Anthony*, 273 Kan. 726, 727, 45 P.3d 852 (2002). Whether a defendant's constitutional rights as described in *Apprendi* were violated by a district court at sentencing raises a question of law subject to unlimited review. *State v. Dickey*, 301 Kan. 1018, 1036, 350 P.3d 1054 (2015).

The Kansas Supreme Court has rejected this argument in *State v. Ivory*, 273 Kan. 44, 46-48, 41 P.3d 781 (2002). This court is duty-bound to follow Kansas Supreme Court precedent unless there is some indication that the Supreme Court is departing from its previous position. *State v. Rodriguez*, 305 Kan. 1139, 1144, 390 P.3d 903 (2017). We have no indication that our Supreme Court is departing from its holding in *Ivory*. See *State v. Albano*, 313 Kan. 638, 643, 487 P.3d 750 (2021).

Affirmed.