

NOT DESIGNATED FOR PUBLICATION

Nos. 126,074
126,075

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

KELLI NICOLE ROSS,
Appellant.

MEMORANDUM OPINION

Appeal from Butler District Court; DAVID A. RICKE, judge. Opinion filed December 8, 2023. Affirmed.

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

Before HILL, P.J., MALONE and ATCHESON, JJ.

PER CURIAM: Arguing an abuse of discretion by the court, Kelli Ross appeals her sentences for two DUI convictions. The court ordered her to serve 120 days in jail rather than allowing her to be released after 72 hours' imprisonment. We granted Ross' motion for summary disposition of her appeal under Supreme Court Rule 7.041A (2023 Kan. S. Ct. R. at 48). After reviewing the record, we find that the district court did not abuse its discretion and affirm Ross' sentences.

In May 2021, Ross was arrested for driving under the influence, endangering a child, and driving with a suspended license. Both her children were in the car at the time

of arrest. Less than two weeks later, she was arrested again for driving under the influence.

Ross was charged, and she pleaded guilty to both counts of DUI in August 2022. These were Ross' fourth and fifth DUI convictions.

At a sentencing hearing for both convictions, the State recommended that Ross serve 120 days in jail for her fourth DUI—because of a 30-day enhancement for having children in the car—and serve 90 days in jail for her fifth, with the sentences to run consecutive. It also recommended consecutive one-year underlying sentences, \$5,000 in fines, and one-year post-imprisonment supervision.

Ross recommended that she serve 120 days in jail for her fourth DUI and 90 days for her fifth but that these sentences be served concurrently. She also recommended a one-year underlying sentence, \$5,000 in fines, and one-year post-imprisonment supervision. She then, however, requested that the court allow her to be released after 72 hours' imprisonment so she could serve the remainder of her sentence on house arrest and work release.

The district court ordered Ross to serve 120 days in jail for her fourth DUI and 90 days in jail for her fifth, to be served concurrently, and imposed a one-year jail sentence, \$5,000 in fines, and one-year post-imprisonment supervision. The court also granted Ross work-release privileges.

The district court declined to grant Ross' request for release for house arrest after 72 hours. The court explained that this was because Ross had committed the DUIs less than two weeks apart and told her that "[y]ou need to spend time in jail This needs to be impressed upon you that you cannot do this ever again." The court made clear that it had already shown Ross leniency in ordering her jail sentences to run concurrent and that

if it allowed her to be released after 72 hours, it "sends totally the wrong message to you and anyone else similarly situated."

About 90 days after sentencing— in January 2023— the district court granted Ross' motion to be released on house arrest with work-release privileges for the rest of her time in custody.

ANALYSIS

On appeal, Ross argues the district court abused its discretion when it ordered her to serve 120 days in jail rather than allow her to be released after 72 hours' imprisonment. DUI sentences are governed by the statutory framework laid out in K.S.A. 8-1567(b), which contains all the "elements, severity levels, and applicable sentences" for DUI convictions. *State v. Sprout*, No. 120,297, 2019 WL 5485148, at *2 (Kan. App. 2019) (unpublished opinion), *rev. denied* 312 Kan. 900 (2020). This means district courts treat felony DUI convictions as nongrid felonies and must follow the sentences required by the statute rather than those in the Kansas Sentencing Guidelines Act. *Sprout*, 2019 WL 5485148, at *2; see K.S.A. 8-1567(b)(1)(E).

For DUIs that occurred before July 1, 2022, the DUI statute requires a person convicted of a fourth or subsequent DUI to serve at least 90 days' imprisonment. K.S.A. 2021 Supp. 8-1567(b)(1)(E). The statute, however, gives the sentencing court the discretion to place the person under a house arrest program after the person "has served 72 consecutive hours' imprisonment." K.S.A. 2021 Supp. 8-1567(b)(1)(E).

On appeal, we will not reverse a sentence imposed within the statutory guidelines unless the district court abused its discretion. *Sprout*, 2019 WL 5485148, at *2. A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *State v. Bilbrey*, 317

Kan. 57, 63, 523 P.3d 1078 (2023). The party asserting the district court abused its discretion—here, Ross—bears the burden of showing such abuse of discretion. *State v. Keys*, 315 Kan. 690, 708, 510 P.3d 706 (2022).

At her sentencing hearing, Ross requested that she be released after 72 hours' imprisonment because she was worried that she would be unable to support her children and would lose her house and "everything in [her] name." Her counsel also told the court that Ross had not drunk alcohol since her DUI arrest in June 2021—nearly 500 days of sobriety.

Even so, we see no abuse of discretion here. Ross was arrested for driving under the influence with her children in the car—her fourth DUI. She was then arrested again for driving under the influence less than two weeks later. The district court imposed concurrent sentences within the statutory guidelines. It stated that Ross needed to spend time in jail so that she would never drive drunk again. It also noted that it had already shown Ross leniency in allowing her to serve her 90- and 120-day sentences concurrently and that if it allowed her to be released after 72 hours, it "sends totally the wrong message." The district court also granted Ross' request for work-release privileges during her jail sentences. Yet, the district court did not ultimately require Ross to serve her entire sentence; it released her on house arrest after a little over 90 days' imprisonment—nearly 30 days less than her original sentences required. We therefore find the district court did not abuse its discretion and affirm Ross' sentences.

Affirmed.