NOT DESIGNATED FOR PUBLICATION

No. 126,552

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

BUDDY A. EXTINE,
Appellant.

MEMORANDUM OPINION

Appeal from Pottawatomie District Court; JEFFREY R. ELDER, judge. Submitted without oral argument. Opinion filed June 7, 2024. Affirmed.

Jacob Nowak, of Kansas Appellate Defender Office, for appellant.

Tyler W. Winslow, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before COBLE, P.J., SCHROEDER and CLINE, JJ.

PER CURIAM: Buddy A. Extine appeals the portion of his criminal sentence ordering lifetime postrelease supervision because he claims the district court engaged in improper extrajudicial fact-finding. Extine contends the district court's finding that he was over 18, which was required before imposing lifetime postrelease supervision, violated rights guaranteed to him through *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). In *Apprendi*, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Although Extine waived his right to

a jury trial on the issue of his guilt, he claims he did not waive his right to have a jury make the age finding that enhanced his postrelease sentence.

Since Extine admitted his age to the district court in his plea agreement, no extrajudicial fact-finding occurred in violation of *Apprendi*. We therefore affirm his sentence.

FACTUAL AND PROCEDURAL BACKGROUND

On January 27, 2023, Extine entered a plea agreement with the State to plead no contest to one count of sexual exploitation of a child, committed in April 2021. He simultaneously reviewed and signed a document titled "Defendant's Acknowledgement of Rights and Entry of Plea," on which his age of 49 years was handwritten. At his plea hearing, Extine confirmed he read, signed, and discussed this document with his attorney. He pled no contest to the charge, and the district court found him guilty.

Extine continued to admit his age, or at least acknowledge he was over the age of 18, several times throughout proceedings in his case. In asking the district court not to impose lifetime postrelease supervision, Extine's attorney told the court, "He has one misdemeanor from twenty-seven years ago." Further, in his presentence investigation (PSI) report filed on April 11, 2023, it labeled his criminal history score as I and listed his age as 48. At the first sentencing hearing, Extine was given an opportunity to privately discuss the PSI report with his attorney. He did not object to the criminal history score assigned in the PSI report, nor did he assert any issues with the report's listing of his age. In Extine's motion for border box probation, he submitted a forensic psychological evaluation report to the court which listed his birth year as 1973. He also acknowledged he was born in 1973 in his notice of duty to register.

At the initial sentencing hearing on April 20, 2023, the district court denied Extine's border box motion and sentenced him to serve 31 months in prison and 24 months of postrelease supervision. Extine timely appealed from that sentence. Before the appeal was docketed, the State filed a "Notice of Re-Sentencing Hearing." The notice was filed in response to a letter received from Takiyah Suttles of the Kansas Department of Corrections Sentence Computation Unit. According to the district court, Suttles informed the parties that K.S.A. 22-3717(d)(l)(G) required the district court to sentence Extine to lifetime postrelease supervision for his offense. The court, therefore, set a resentencing hearing for June 6, 2023.

Before resentencing, Extine filed a "Motion for Post Release Durational Departure." He argued substantial and compelling reasons existed to depart from the imposition of lifetime postrelease supervision. He noted this offense was extremely out of character for him because he "only has one misdemeanor from 27 years ago." At the resentencing hearing, the district court denied the departure motion and resentenced Extine to lifetime postrelease supervision. Extine timely appealed.

REVIEW OF EXTINE'S APPELLATE CHALLENGE

Extine argues the district court engaged in improper judicial fact-finding in ordering him to serve a lifetime postrelease supervision term. He specifically contends the court erred in concluding he was over the age of 18 when he committed the crime he pleaded guilty to. He asserts that under *Apprendi*, a jury, not the district court, should have found whether he was 18 years old when he committed his crime. And consequently, he asks us to reverse the portion of his sentence ordering lifetime postrelease supervision.

Extine concedes that he is raising this issue for the first time on appeal and argues this court should consider his claim because it involves only a question of law on proved

or admitted facts and is finally determinative of the case or because consideration of the issue is necessary to serve the ends of justice or to prevent denial of fundamental rights. See *State v. Phillips*, 299 Kan. 479, 493, 325 P.3d 1095 (2014). Other panels of this court have addressed identical claims under these exceptions. See *State v. Entsminger*, No. 124,800, 2023 WL 2467058, at *6 (Kan. App.) (unpublished opinion), *rev. denied* 317 Kan. 847 (2023); *State v. Schmeal*, No. 121,221, 2020 WL 3885631, at *8 (Kan. App. 2020) (unpublished opinion). The State agrees Extine is permitted to raise this issue for the first time on appeal. We agree these exceptions apply and exercise our discretion to newly consider this issue.

Whether a defendant's constitutional rights under *Apprendi* were violated by a sentencing court raises a question of law subject to unlimited review. *State v. Huey*, 306 Kan. 1005, 1009, 399 P.3d 211 (2017); *State v. Anthony*, 273 Kan. 726, 727, 45 P.3d 852 (2002).

Under K.S.A. 22-3717(d)(1)(G)(i): "[P]ersons sentenced to imprisonment for a sexually violent crime committed on or after July 1, 2006, when the offender was 18 years of age or older, and who are released from prison, shall be released to a mandatory period of postrelease supervision for the duration of the person's natural life." Disparately, if a person commits an applicable crime when the offender is under the age of 18, K.S.A. 22-3717(d)(1)(G)(ii) mandates "postrelease supervision for 60 months."

Extine contends that since the "period of postrelease may be increased to lifetime upon an additional factual finding that the defendant committed offense when they were 18 years of age or older" under K.S.A. 22-3717(d)(1)(G)(i), *Apprendi* requires the State to prove his age to a jury beyond a reasonable doubt.

Following *Apprendi*, the United States Supreme Court clarified multiple times that facts admitted by a defendant can elevate a sentence without violating the right to a jury

trial. In *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." The following year, the Court reaffirmed this holding in *United States v. Booker*, 543 U.S. 220, 244, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) ("Accordingly, we reaffirm our holding in *Apprendi*: Any fact [other than a prior conviction] which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.").

As outlined above, Extine admitted to the district court several times that he was over the age of 18 when he committed his crime. But despite these admissions, Extine argues this evidence should be presented to a jury to protect his *Apprendi* rights. But this court has consistently dismissed the same arguments as Extine's in similar cases based on *Apprendi*, *Blakely*, and *Booker*. See, e.g., *State v. Conkling*, 63 Kan. App. 2d 841, 843-45, 540 P.3d 414 (2023), *rev. denied* 318 Kan. ___ (March 28, 2024); *State v. Nunez*, No. 125,141, 2023 WL 6172190, at *14-16 (Kan. App.) (unpublished opinion), *rev. granted* 317 Kan. 849 (2023); *State v. Walker*, No. 125,554, 2023 WL 7983816, at *3-4 (Kan. App.) (unpublished opinion), *rev. denied* 318 Kan. ___ (March 28, 2024); see also *Entsminger*, 2023 WL 2467058, at *7 (collecting cases "reject[ing] the exact argument" Extine is making).

In those cases, we largely focused on the defendants' own admissions in finding no *Apprendi* violation. For instance, in *Schmeal*, 2020 WL 3885631, at *9, this court found: "Given Schmeal's repeated admissions throughout the proceedings about his age, the district court's finding that he was at least 18 years old when he committed the crime of conviction falls under the *Blakely* exception to the *Apprendi* rule when the defendant admits a fact. [Citation omitted.]" Likewise, in both *Conkling* and *State v. Reinert*, No. 123,341, 2022 WL 1051976 (Kan. App.) (unpublished opinion), *rev. denied* 316

Kan. 762 (2022), this court relied on similar admissions to what Extine made here when finding no judicial fact-finding occurred: Conkling admitted his age in his plea document and at his plea hearing, and Reinert admitted his age in his motion for departure, during his sentencing hearing, and did not object to his presentence report. *Conkling*, 63 Kan. App. at 844; *Reinert*, 2022 WL 1051976, at *3.

While Extine acknowledges *Blakely*'s exception to *Apprendi*, this court's consistent reliance on this exception, and the fact he listed his age as 49 in his entry of plea, he still contends we have misinterpreted the *Blakely* exception. He states this court believes "*any* statement" in the record constitutes an admission for purposes of *Apprendi*. Extine argues this approach is wrong, and the *Blakely* admission exception is limited to "facts admitted in a guilty plea." But even if we agreed with Extine, narrowing the *Blakely* exception as he requests does not help his position because he admitted his age in his acknowledgment of rights and entry of plea.

Extine takes another tact in his next argument. He asks us not to look at his admission of the fact at issue but look at the "effect" of that admission, which he says relieves the State "of its constitutional burden to submit and prove an element to the jury." According to him, because the "action" of admitting his age means the "effect of the action" is the State being relieved of its constitutional obligation to prove his age, he is waiving his jury trial right.

Extine is correct that *Apprendi* rights may be waived if that waiver is "an intentional abandonment or relinquishment of a known right." *State v. Duncan*, 291 Kan. 467, 472, 243 P.3d 338 (2010), *overruled on other grounds by State v. Johnson*, 317 Kan. 458, 531 P.3d 1208 (2023). He is also right that a valid jury trial waiver requires both the court to clearly advise defendants that they have the right to have their case tried by a jury and the court must confirm the waiver is freely and voluntarily made. See *State v. Harris*, 311 Kan. 371, 376, 461 P.3d 48 (2020).

But he fails to recognize that this court has repeatedly held no *Apprendi* waiver is necessary if a defendant admits their age. *Schmeal*, 2020 WL 3885631, at *9 (Since Schmeal admitted his age, his *Apprendi* rights were not violated *and* there is no need to have the "State obtain a waiver from him voluntarily relinquishing his right to jury trial on the issue of age for purposes of imposing lifetime postrelease supervision."). And more importantly, what Extine fails to observe about his "action," "effect of the action," and "waiver" argument is that no *Apprendi* waiver is required because the district court is not engaging in extra judicial fact-finding to determine his age. The State might want to seek a waiver if Extine chose not to admit his age. For instance, if Extine had decided not to admit his age, he could have either had a jury hear evidence of his age or waived his *Apprendi* rights by "consent[ing] to judicial factfinding as to sentence enhancements." See *Blakely*, 542 U.S. at 310. But such actions were not necessary here.

Since Extine admitted his age, the State did not need to pursue an *Apprendi* waiver because no extrajudicial fact-finding had to occur to determine Extine's age. Since no extrajudicial action occurred, there is no *Apprendi* violation and therefore, no waiver is necessary. *Blakely* stated a judge can impose the statutory maximum based on "facts reflected in the jury verdict *or* admitted by the defendant." *Blakely*, 542 U.S. at 303. Ultimately, Extine admitted his age and thus it was constitutional for the district court to impose a lifetime postrelease supervision without a jury trial waiver to prove Extine's admitted fact. See 542 U.S. at 303.

Extine next argues that this panel should not follow its prior decisions because they are noncompliant with *Hurst v. Florida*, 577 U.S. 92, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016). He contends the Court "rejected an argument that the *Apprendi* rule 'does not require jury findings on facts defendants have admitted.'" But Extine wholly misses the Court's reasoning behind making this statement. The Court rejected the argument that Hurst's counsel could admit the existence of robbery and have those "'admissions' ma[ke] Hurst eligible for the death penalty." 577 U.S. at 100. The Court made clear: "*Blakely*,

however, was a decision applying *Apprendi* to facts admitted in a guilty plea, in which the defendant necessarily waived his right to a jury trial." 577 U.S. at 100. Not only is the death penalty irrelevant here, but *Hurst* is further distinguishable because Extine, not his attorney, admitted his age in his entry of plea.

Extine briefly analogizes this issue to Jessica's Law cases. He notes that in *State v. Bello*, 289 Kan. 191, 199-200, 211 P.3d 139 (2009), "the Kansas Supreme Court has . . . held the *Apprendi* rule requires an offender's age to be proven to the jury, beyond a reasonable doubt, before a lifetime sentence may be imposed." But *Bello* and Jessica's Law are irrelevant here. *Bello* is unpersuasive "because the defendant's age is not an essential element of the offense for which he was convicted," as it is in Jessica's Law cases. And even the *Bello* court recognized *Blakely*'s *Apprendi* exception that facts admitted by a defendant can serve as the basis for elevating a sentence. *Bello*, 289 Kan. at 199; see *Walker*, 2023 WL 7983816, at *4.

Since Extine admitted his age to the district court, that court was not required to engage in extrajudicial fact-finding to determine that fact. We therefore find no error in its imposition of lifetime postrelease supervision.

Affirmed.