NOT DESIGNATED FOR PUBLICATION

No. 118,252

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellant/Cross-appellee,

v.

DELORAH L. LINDEN,
Appellee/Cross-appellant.

MEMORANDUM OPINION

Appeal from Reno District Court; TRISH ROSE, judge. Opinion filed March 1, 2019. Affirmed in part, sentence vacated, and case remanded with directions.

Andrew R. Davidson, assistant district attorney, *Keith E. Schroeder*, district attorney, and *Derek Schmidt*, attorney general, for appellant/cross-appellee.

Shannon S. Crane, of Hutchinson, for appellee/cross-appellant.

Before GREEN, P.J., PIERRON and BUSER, JJ.

BUSER, J.: This is a sentencing appeal by the State and a cross-appeal by Delorah L. Linden.

Linden cross-appeals the district court's ruling denying her motion to suppress evidence based on an allegedly illegal inventory search of her vehicle that resulted in the seizure of marijuana and drug paraphernalia. Upon our review of Linden's cross-appeal, we find no error in the district court's search and seizure ruling. Accordingly, we affirm

Linden's conviction for the offense of possession of marijuana after a prior conviction (second time marijuana possession).

The State appeals, claiming the district court erred by imposing an illegal sentence when it classified Linden's conviction for second time marijuana possession as a class A nonperson misdemeanor rather than a severity level 5 drug felony. Upon our consideration of the State's appeal, we vacate the sentence and remand with directions to the district court to resentence Linden for second time marijuana possession based on a severity level 5 drug felony classification.

FACTUAL AND PROCEDURAL BACKGROUND

On March 2, 2015, Kansas Highway Patrol Trooper Matthew Peil noticed a driver wearing a jacket with the hood up traveling on Kansas highway K-14. Trooper Peil considered that unusual so he followed the vehicle and determined that its license plate expired in July 2014, but the plate displayed a current 2015 registration sticker. The trooper conducted a traffic stop and identified the driver as Linden.

During the traffic stop, Linden told Trooper Peil that she had removed the license plate from another vehicle she owned and attached it to this vehicle about six to eight months ago. The dispatcher, however, advised that the registration decal was stolen. Trooper Peil also established that Linden was driving on a suspended license, had no proof of insurance, and was driving without wearing a seatbelt. Trooper Peil placed Linden under arrest.

Trooper Peil impounded the vehicle. Prior to the arrival of the tow truck, he conducted an inventory search of the vehicle. According to the trooper, he conducted the inventory search of the vehicle's contents in accordance with the Kansas Highway Patrol Vehicle Tow/Inventory policy. The policy allowed the trooper to look for items of value

in any unlocked containers. During the search, Trooper Peil found marijuana and a so-called "hitter pipe" that contained burnt residue hidden inside a fake ibuprofen bottle. In a lunchbox in the backseat, Peil also found a small Tupperware container with marijuana, another hitter pipe, and a silver grinder.

Linden was charged with second time marijuana possession, possession of stolen property, no proof of liability insurance, possession of drug paraphernalia, driving with a suspended license, illegal display of a license plate, and failure to wear a seatbelt.

Linden filed a pretrial motion to suppress the incriminating evidence obtained from the inventory search. Relevant to this appeal, Linden claimed that Trooper Peil did not have reasonable suspicion to conduct the traffic stop and the inventory search was a ruse to discover incriminating evidence. The district court disagreed and denied the motion to suppress.

On June 28, 2017—more than two years after the vehicle stop which gave rise to the charges—a bench trial was held on stipulated facts, and the district court found Linden guilty of second time marijuana possession and possession of drug paraphernalia. The presentence investigation report indicated that Linden had a prior conviction for possession of marijuana, which increased her current conviction to a severity level 5 drug felony. See K.S.A. 2015 Supp. 21-5706(c)(2)(B). Prior to sentencing, Linden objected to the felony classification and asserted the offense should be classified as a class A nonperson misdemeanor under the amended statute. See K.S.A. 2016 Supp. 21-5706(c)(3)(B).

The district court agreed with Linden's legal contention and, as a result, sentenced her in accordance with a class A nonperson misdemeanor. On September 8, 2017, Linden was sentenced to 12 months in jail but granted a 12-month probation on the second time

marijuana possession conviction. Linden was sentenced to the identical sentence for possession of drug paraphernalia. Both sentences were ordered to run concurrent.

The State filed a timely notice of appeal claiming the district court had imposed an illegal sentence for second time marijuana possession. Linden filed a cross-appeal seeking reversal of the district court's denial of the motion to suppress evidence. We will first address the cross-appeal.

LINDEN'S CROSS-APPEAL OF DISTRICT COURT'S DENIAL OF MOTION TO SUPPRESS

In her cross-appeal, Linden contends the district court erred in denying her motion to suppress evidence obtained from the inventory search. Linden argues that Trooper Peil did not have reasonable suspicion to follow her vehicle, stop it, impound it, and conduct an inventory search of its interior. The State responds by asserting that Linden's expired license plate gave Trooper Peil reasonable suspicion to stop her vehicle. Moreover, the State argues that the inventory search conducted by Trooper Peil after the vehicle was impounded was lawful because the vehicle could not be legally operated on the roadway because of the expired license plate, the stolen registration sticker, and no insurance coverage.

We begin with a brief summary of our standards of review. Courts review a motion to suppress evidence under a bifurcated standard. *State v. Karson*, 297 Kan. 634, 639, 304 P.3d 317 (2013). The appellate court examines the district court's findings to determine whether they are supported by substantial competent evidence and reviews the district court's legal conclusions de novo. 297 Kan. at 639.

In the context of the Fourth Amendment to the United States Constitution and Kansas statutory law, it is well established that a law enforcement officer may conduct a

lawful traffic stop provided the officer has "'a reasonable and articulable suspicion, based on fact, that the person stopped has committed, is committing, or is about to commit a crime.' [Citations omitted.]" *State v. Thompson*, 284 Kan. 763, 773, 166 P.3d 1015 (2007); K.S.A. 22-2402(1). In this regard, an officer must be able to articulate more than a mere hunch of criminal activity. *State v. Martinez*, 296 Kan. 482, Syl. ¶ 4, 293 P.3d 718 (2013).

Linden asserts that Trooper Peil did not have reasonable and articulable suspicion to follow her vehicle solely because she was wearing a jacket with the hood up. But, an officer does not need reasonable suspicion to simply follow and observe a vehicle. Reasonable suspicion is necessary to stop or seize a vehicle. Moreover, "[a] traffic violation provides an objectively valid reason to effectuate a traffic stop, even if the stop is pretextual." *State v. Anderson*, 281 Kan. 896, 901, 136 P.3d 406 (2006).

In ruling on Linden's motion to suppress, the district court found that "[t]he illegal tag gave Trooper Peil reasonable suspicion to stop defendant. The stop was not initiated until Trooper Peil ran the tag." There was substantial competent evidence to support this factual finding and legal conclusion. It was only after Trooper Peil conducted a check on the vehicle's license plate and determined that the registration was expired did he stop Linden's vehicle. Because an expired license plate is a traffic violation, Trooper Peil had an objectively valid reason to make the traffic stop. See K.S.A. 2018 Supp. 8-142 *First*.

Next, Linden acknowledges that her arrest for driving while suspended was lawful. She asserts, however, that the "arrest does not give the highway patrol the ability to impound the car and do an inventory search. Neither does the failure to find liability insurance, without further inquiry, allow for said impoundment and search." Linden also claims—without citation to evidence in the record—that Trooper Peil used the inventory search as a ruse to search the vehicle without a warrant.

At the conclusion of the evidentiary hearing on Linden's motion, the district court found:

> "Trooper Peil was justified in conducting an inventory search and the search was conducted according to applicable [Kansas Highway Patrol] policy. . . . Trooper Peil did not inventory every item in the vehicle. But officers are permitted to exercise judgment in conducting an inventory search and it does not have to be conducted in an all or nothing fashion. *State v. Shelton*, [278 Kan. 287, 93 P.3d 1200 (2004)]. There is no evidence suggesting Trooper Peil used the search as a ruse for a general rummaging to discover incriminating evidence."

Generally, a search and seizure is per se unreasonable without a warrant under the Fourth Amendment to the United States Constitution. However, there are numerous exceptions to the warrant requirement, one of those being an inventory search of a lawfully impounded vehicle. *State v. Teeter*, 249 Kan. 548, Syl. ¶¶ 1, 2, 819 P.2d 651 (1991). The United States Supreme Court has held that "[t]he decisions of this Court point unmistakably to the conclusion reached by both federal and state courts that inventories pursuant to standard police procedures are reasonable." *South Dakota v. Opperman*, 428 U.S. 364, 372, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976). Inventory searches serve the purpose of protecting the owner's property while in police custody, protecting against claims or disputes over stolen or lost property, and guarding police from potential danger. *State v. Branstetter*, 40 Kan. App. 2d 1167, 1170, 199 P.3d 1272 (2009). However, the inventory search "must not be a ruse for general rummaging in order to discover incriminating evidence." *Florida v. Wells*, 495 U.S. 1, 4, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990).

An inventory search of a vehicle is not valid unless the police first obtain lawful custody of the vehicle. *Teeter*, 249 Kan. at 550. Kansas courts have held that absent authority by statute or ordinance, the State must establish reasonable grounds for impoundment. *Branstetter*, 40 Kan. App. 2d at 1171. The prosecution has the burden to

prove that the impoundment was reasonable under the totality of the circumstances. *State v. Shelton*, 278 Kan. 287, 293, 93 P.3d 1200 (2004). While Kansas has not established a bright-line rule, our Supreme Court has provided a nonexhaustive list of six instances that constitute reasonable grounds for impoundment:

> "'the necessity for removing (1) an unattended-to car illegally parked or otherwise illegally obstructing traffic; (2) an unattended-to car from the scene of an accident when the driver is physically or mentally incapable of deciding upon steps to be taken to deal with his property, as in the case of the intoxicated, mentally incapacitated or seriously injured driver; (3) a car that has been stolen or used in the commission of a crime when its retention as evidence is necessary; (4) an abandoned car; (5) a car so mechanically defective as to be a menace to others using the public highway; [or] (6) a car impoundable pursuant to ordinance or statute which provides therefor as in the case of forfeiture.'" *Teeter*, 249 Kan. at 552 (quoting *State v. Boster*, 217 Kan. 618, 624, 539 P.2d 294 [1975]).

Linden argues that none of these situations apply to the circumstances of this case. The State responds that because Linden had a suspended driver's license with no proof of insurance and an expired license plate, it was not lawful to operate the vehicle on a Kansas highway. As a result, it was necessary for Trooper Peil to impound the vehicle prior to having the vehicle towed. The State also asserts that the trooper followed Kansas Highway Patrol policy that required him to perform an inventory search after impoundment.

Our holding is predicated on *Shelton*, which teaches:

> "Inventory searches are recognized as exceptions to the probable cause warrant requirements of the Fourth Amendment to the United States Constitution. When a defendant claims that a vehicle in his or her possession was unlawfully impounded by the police, the prosecution has the burden of proving that the impoundment *was reasonable under the totality of circumstances*." (Emphasis added.) 278 Kan. 287, Syl. ¶ 2.

In short, impoundment is lawful under either the specific instances listed in *State v. Boster*, 217 Kan. 618, 624, 539 P.2d 294 (1975), or under the totality of circumstances when such law enforcement action is reasonable.

In the case on appeal, Trooper Peil had statutory authority to tow Linden's vehicle under K.S.A. 8-1570(c)(3), which provides that any police officer may remove a vehicle found on a highway when "the person driving or in control of such vehicle is arrested for an alleged offense for which the officer is required by law to take the person arrested before a judge of the district court without unnecessary delay." Trooper Peil arrested Linden for driving on a suspended license in violation of K.S.A. 2015 Supp. 8-262(a)(3). As noted earlier, Linden concedes this arrest was lawful. As a consequence of Linden's lawful arrest, there was a statutory basis for the trooper to impound Linden's vehicle and have it towed.

Moreover, aside from the statutory authorization provided by K.S.A. 2015 Supp. 8-262(a)(3), our court has found reasonable grounds to impound a vehicle after the driver was arrested for driving on a suspended license. "A motor vehicle can be considered unattended if the driver has been arrested and no one else is present to remove or lawfully park it." *State v. Wilson*, No. 115,554, 2017 WL 3444509, at *3 (Kan. App. 2017) (unpublished opinion), *rev. denied* 307 Kan. 994 (2018). Similarly, in the present case, upon Linden's arrest there was no one present to remove or lawfully park the vehicle.

Another opinion from our court provides persuasive analysis in support of Trooper Peil's impoundment and inventory search. In *State v. Bennett*, No. 108,616, 2013 WL 3970199 (Kan. App. 2013) (unpublished opinion), Bennett was arrested for driving on a suspended license. Acting on police policy, Officer Jason Thompson called a tow truck without consulting Bennett about the vehicle's disposition. Before the vehicle was towed, Officer Thompson found cocaine during an inventory search. Bennett asserted the impoundment was unreasonable and moved to suppress the drug evidence because there

was no statutory support for impounding his vehicle prefatory to the inventory search. The district court disagreed.

Our court held the impoundment was reasonable under the circumstances because the vehicle's registration had expired and the driver was operating the vehicle with a suspended out-of-state driver's license. Our court ruled: "In the legitimate exercise of his law enforcement functions, it was reasonable under the circumstances for Officer Thompson to take custody of the vehicle to ensure compliance with Kansas registration statutes." 2013 WL 3970199, at *3. Our court relied on *United States v. Hannum*, 55 Fed. Appx. 872, 873-76 (10th Cir. 2003) (unpublished opinion) and agreed that the vehicle could not be legally operated on Kansas roads and there was no other way to move the vehicle other than impoundment. We held the district court did not err in denying Bennett's motion to suppress evidence from the inventory search. *Bennett*, 2013 WL 3970199, at *3.

Linden cites *Teeter* in support of the proposition that when the vehicle's owner or operator is capable and willing to instruct the officer as to the vehicle's disposition, absent some lawful reason for impounding the vehicle, his or her wishes regarding the vehicle's disposition should be followed.

Linden does not favor us with any evidence that she ever made a request to Trooper Peil to dispose of her vehicle in a particular way. Our Supreme Court, however, has ruled that an officer is not required to consult a defendant about the disposition of the vehicle. Whether an impoundment is lawful in a case is based upon the totality of the circumstances, not whether the defendant was consulted about the car's disposition. *Shelton*, 278 Kan. at 296. The *Shelton* court held:

> "The first question arising is whether under the Fourth Amendment, a police officer must give a driver who is competent of making a rational disposition of the vehicle, the

> opportunity to make that disposition in order to justify impoundment. The answer to this question is no. What is required under the Fourth Amendment is that the impoundment be reasonable under the totality of circumstances. The officer's inquiry of the driver regarding disposition is but one of the circumstances that is considered in the court's determination of whether the impoundment is reasonable." 278 Kan. at 293.

Under the totality of the circumstances, Trooper Peil's decision to impound and tow the vehicle was reasonable. Linden was under arrest. Regardless, her license was suspended. As a result, she could not legally operate her vehicle on the highway. See K.S.A. 2018 Supp. 8-262(a)(1). She also had no proof of insurance, and the license plate was expired; thus, the unregistered vehicle could not be operated lawfully on the highway. Moreover, even if the vehicle could have been lawfully operated, because Trooper Peil arrested Linden and she did not have a passenger with her to operate the vehicle, the trooper's decision to impound and conduct an inventory search was reasonable.

The trooper's actions were also in compliance with the Kansas Highway Patrol Vehicle Tow/Inventory policy which provides: "Any time a vehicle is towed, transported or otherwise removed as a result of an arrest authorized by K.S.A. 22-2401 or other lawful instances provided by statute, an inventory of the vehicle and its contents shall be conducted." Finally, contrary to Linden's argument and consistent with *Shelton*, Trooper Peil was not required to ask Linden how he should remove her vehicle.

In summary, the district court did not err in denying Linden's motion to suppress evidence. Trooper Peil's traffic stop was based on a reasonable suspicion that Linden had violated Kansas law by operating an improperly registered vehicle on the highway. Subsequent to the vehicle stop, Linden was lawfully arrested for driving on a suspended driver's license. Without a valid registration and proof of insurance, the vehicle could not have been lawfully operated on a Kansas highway. As a result, Trooper Peil's

impoundment and inventory search were consonant with Kansas statutes and Kansas Highway Patrol policy.

STATE'S APPEAL OF LINDEN'S SENTENCE FOR SECOND TIME MARIJUANA POSSESSION

The State appeals Linden's sentence for second time marijuana possession. The State contends the district court erred in classifying this second conviction as a class A nonperson misdemeanor rather than a severity level 5 drug felony. The State asserts this is an illegal sentence because it did not conform to the statutory provision in character or in terms of punishment as of the date Linden committed the crime.

Linden counters that she was appropriately sentenced to serve a misdemeanor punishment because the Kansas statute providing for punishment as a felony had been amended and was no longer in effect after she committed the offense but before she was convicted and sentenced. She contends the sentencing amendment effective July 1, 2016, should apply retroactively to March 2, 2015, the date she committed the latest offense.

At the time Linden was sentenced, September 8, 2017, the district court considered the parties' arguments regarding the proper sentence to be imposed. The district court determined that, under the circumstances, it was unclear whether the appropriate classification of the offense was a felony or misdemeanor. The district judge ruled: "[I]n general the Court has to apply the rule of lenity when it comes to criminal matters and that means I have to resolve uncertainty in favor of the defendant who is facing criminal penalty. So I will . . . sustain the objection to . . . the classification of the offense as a felony."

Whether a sentence is illegal is a question of law for which our court applies a de novo standard of review. *State v. Trotter*, 296 Kan. 898, 902, 295 P.3d 1039 (2013).

Under K.S.A. 2018 Supp. 22-3504(1), a Kansas court may correct an illegal sentence at any time. An illegal sentence includes a sentence that does not conform to the applicable statutory provision, either in character or in punishment. Moreover, resolution of this issue depends on the interpretation of sentencing statutes and their applicability as of the dates of Linden's offense, conviction, and sentence. Interpretation of a sentencing statute is a question of law over which appellate courts have unlimited review. *State v. Collins*, 303 Kan. 472, 473-74, 362 P.3d 1098 (2015).

The key facts are uncontroverted. K.S.A. 2015 Supp. 21-5706(b)(3) provides it is unlawful for any person to possess a hallucinogenic drug, such as marijuana. Linden committed the current offense on March 2, 2015, and at that time had one prior conviction for marijuana possession. At the time Linden committed the March 2, 2015 offense, K.S.A. 2015 Supp. 21-5706(c)(2)(B) classified second time marijuana possession as a severity level 5 drug felony. Subsequently, K.S.A. 2015 Supp. 21-5706(c)(2)(B) was amended effective July 1, 2016. L. 2016, ch. 90, § 1. That amendment reduced the penalty for second time marijuana possession to a class A nonperson misdemeanor. See K.S.A. 2016 Supp. 21-5706(c)(3)(B). Almost one year later, Linden was convicted on June 29, 2017, and then sentenced on September 8, 2017.

The question presented is whether the July 1, 2016 sentencing amendment applied retroactively to Linden's conviction for second time marijuana possession since that offense occurred prior to the effective date of the amendment but after her conviction and sentencing.

Our rules of statutory construction provide general guidance in resolving this question:

> "[T]he general rule of statutory construction is that a statute will operate prospectively unless its language clearly indicates that the legislature intended that it operate

> retrospectively. The foregoing rule of statutory construction is modified where the statutory change is merely procedural or remedial in nature and does not prejudicially affect the substantive rights of the parties. *As related to criminal law and procedure, substantive law is that which declares what acts are crimes and prescribes the punishment therefor*; whereas *procedural law* is that which provides or regulates the steps by which one who violates a criminal statute is punished. [Citations omitted.]" (Emphasis added.) *State v. Hutchison*, 228 Kan. 279, 287, 615 P.2d 138 (1980).

More specifically, our Supreme Court has held: "The fundamental rule for sentencing is that the person convicted of a crime is sentenced in accordance with the sentencing provisions *in effect at the time the crime was committed*." (Emphasis added.) *State v. Overton*, 279 Kan. 547, Syl. ¶ 5, 112 P.3d 244 (2005); *State v. Martin*, 270 Kan. 603, 608, 17 P.3d 344 (2001). Importantly, in *Overton*, a case that is factually similar to the one on appeal, our Supreme Court stated: "This court has previously determined that the amendments to the sentencing guidelines statutes are substantive and are not applied retroactively unless the statute's language clearly indicates the legislature's intent otherwise." *Overton*, 279 Kan. at 561.

The case on appeal is also similar to *State v. Edwards*, 28 Kan. App. 2d 379, 15 P.3d 855 (2000). In *Edwards*, the defendant was charged with driving while suspended, a severity level 9 nonperson felony. At the time the defendant committed the offense, May 5, 1999, the law in effect stated that driving while suspended after two or more convictions was a felony. The Legislature amended the statute to reduce the penalty for the crime to a misdemeanor, effective July 1, 1999. The defendant asked the court to apply the amendment retroactively, although he was convicted and sentenced after the amendment.

Our court held the law is clear that a statute operates prospectively unless the Legislature's language clearly indicates that it intended for it to operate retrospectively or if the statute is procedural in nature. 28 Kan. App. 2d at 380. We noted that it is well

established that criminal statutes in effect at the time of the offense govern the sentence. 28 Kan. App. 2d at 380-81. The panel relied on the holding in *State v. Dailey*, 228 Kan. 566, 569, 618 P.2d 833 (1980), and stated "the fact that the defendant had been convicted and sentenced after the effective date of the statute made no difference." *Edwards*, 28 Kan. App. 2d at 381. Similar to *Edwards*, here it is irrelevant that Linden was not yet convicted or sentenced when the July 1, 2016 amendment took effect because Kansas courts apply the law in effect *at the time the offense was committed* absent specific language to the contrary in the statute.

Linden concedes the July 1, 2016 amendment does not state that it applied retroactively. She also does not assert that the sentencing amendment was procedural in nature. Instead, Linden asserts, based on testimony presented to the Legislature, the Legislature intended the amendment to apply retroactively because it would provide relief for the prison system which is over capacity and save millions of dollars on substance abuse programs. Linden also submits—as the district court found—that since the amendment is silent or ambiguous on this point, the rule of lenity requires that the lesser misdemeanor penalty should be imposed.

The State counters that the letters and testimony that comprise part of the July 1, 2016 amendment's legislative history do not include actual language incorporated in the amendment nor do they address the retroactivity issue. The State also asserts that the rule of lenity should not have been applied because it is reserved for situations where there is uncertainty regarding the Legislature's intent but there was no uncertainty in this case.

The State's argument has merit. The July 1, 2016 amendment does not mention retroactivity nor does its language provide a clear intent that it was to apply retroactively. As to the nature of the amendment, it is well established that "[t]he prescription of a punishment for a criminal act is substantive, not procedural, law." *Martin*, 270 Kan. at 608. "Generally, sentencing statutes are substantive because they affect the length of a

person's sentence." *State v. White*, 51 Kan. App. 2d 1121, 1124, 360 P.3d 484 (2015). Given that the July 1, 2016 amendment did not state that it was to be applied retroactively, it was substantive in nature because it related to the punishment for the offense of second time marijuana possession as found in the Kansas Sentencing Guidelines.

Finally:

> "'The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. When a statute is plain and unambiguous, an appellate court does not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it. Where there is no ambiguity, the court need not resort to statutory construction.'" *State v. Brownlee*, 302 Kan. 491, 508-09, 354 P.3d 525 (2015) (quoting *State v. Jolly*, 301 Kan. 313, Syl. ¶ 2, 342 P.3d 935 [2015]).

In the case on appeal, there is no need for a review of legislative history or invocation of the rule of lenity. The intent of the Legislature is clear by its omission of any language intimating that the July 1, 2016 amendment was to be applied retroactively or that it was procedural in nature. Given the plain language of the amendment and our long-standing precedent in these sentencing matters, "the rule of lenity may not be invoked where there is a reasonable and sensible judicial interpretation of the statutory provision that will effect legislative design." *State v. Coman*, 294 Kan. 84, 87, 273 P.3d 701 (2012). The district court erred in classifying Linden's offense as a misdemeanor.

Affirmed in part, sentence vacated, and the case is remanded with directions to the district court to resentence Linden for second time marijuana possession based on a severity level 5 drug felony classification.