NOT DESIGNATED FOR PUBLICATION

Nos. 119,816
119,817
119,818

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
*Appellee*,

v.

LARRY W. MOSLEY,
*Appellant*.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; ERIC A. COMMER, judge. Opinion filed March 1, 2019. Appeal dismissed.

Submitted for summary disposition pursuant to K.S.A. 2018 Supp. 21-6820(g) and (h).

Before MALONE, P.J., LEBEN and POWELL, JJ.

PER CURIAM: Larry Mosley appeals the sentence he received after he pleaded guilty to three counts of stalking. The primary issue Mosley raises relates to the length of his probation—36 months rather than the 12 months typically applied under the guidelines for a felony stalking offense. The district court concluded that a longer probation term would benefit both Mosley and the public because it would give him time to complete drug and alcohol treatment, anger management courses, and achieve cognitive-behavioral changes.

Mosley argues that the court should have given him only a 12-month probation. But Mosley recognizes that a statute authorizes the district court to enter a probation

period longer than the presumptive one. K.S.A. 2018 Supp. 21-6608(c)(5) provides for this—and it also says that such a sentence can't be appealed:

> "[I]f the court finds and sets forth with particularity the reasons for finding that the safety of the members of the public will be jeopardized or that the welfare of the inmate will not be served by the length of the probation terms [otherwise provided by statute], the court may impose a longer period of probation. Such an increase shall not be considered a departure and shall not be subject to appeal."

So the primary thing Mosley is challenging on appeal—the decision to increase his probation term from 12 months to 36 months—is not subject to appeal, according to the statute.

Our court has recognized a limited exception to that general rule of nonappealability: if the trial court fails to make the required factual findings about why a longer probation term is appropriate, then the extension of probation is an abuse of discretion and the resulting sentence is illegal. *State v. Jones*, 30 Kan. App. 2d 210, Syl. ¶ 6, 41 P.3d 293 (2001). But Mosley doesn't point on appeal to inadequate findings by the trial court.

Based on Mosley's drug and alcohol issues and criminal history, the court said a longer probation term was in the best interests of the members of the public. The court said that "there is not a strength or confidence in [cognitive-thinking changes] until therapy and treatment and abstinence has gone on for a period of two years or more. . . . So that would indicate to the Court that a longer period than 12 months is needed . . . ." In the context of these and the court's other comments at sentencing, we consider the court's findings sufficient under K.S.A. 2018 Supp. 21-6608(c)(5).

Mosley had pleaded guilty to three separate acts of stalking, and the court concluded that treatment for more than 12 months was needed to protect the public.

Mosley's argument on appeal really is that the court should have accepted his claims that he was making progress before sentencing and therefore didn't need a longer period of treatment. But K.S.A. 2018 Supp. 21-6608(c)(5) doesn't allow an appeal for the purpose of second-guessing the trial court's decision about how long a probation is needed. The only recognized exception for nonappealability is a lack of adequate findings; Mosley hasn't shown any inadequacy in the findings made by the trial court here. So we do not have jurisdiction to hear his appeal of the length of his probation.

Mosley has raised one other claim, presumably to preserve it for potential habeas relief should there be new caselaw while he's in custody. The additional claim is that the district court erred by "using his prior criminal history, without putting it to a jury and proving it beyond a reasonable doubt," which he claims violated his rights under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). But the underlying sentences in each of Mosley's cases are presumptive sentences under the Kansas Sentencing Guidelines, and we have no jurisdiction to consider the appeal of a presumptive sentence. See K.S.A. 2018 Supp. 21-6820(c)(1); *State v. Huerta*, 291 Kan. 831, Syl. ¶ 3, 247 P.3d 1043 (2011); *State v. Miller*, No. 116,572, 2017 WL 2022717, at *1 (Kan. App. 2017) (unpublished opinion). And even if we had jurisdiction over the issue, our Supreme Court has resolved this issue contrary to Mosley's position in *State v. Ivory*, 273 Kan. 44, 46-47, 41 P.3d 781 (2002); see *State v. Watkins*, 306 Kan. 1093, 1094, 401 P.3d 607 (2017).

On Mosley's motion, we accepted this appeal for summary disposition under K.S.A. 2018 Supp. 21-6820(g) and (h) and Supreme Court Rule 7.041A (2019 Kan. S. Ct. R. 47). We dismiss the appeal for lack of jurisdiction.