NOT DESIGNATED FOR PUBLICATION

Nos. 124,424
124,425

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

TAYLOR NICOLE REYES,
Appellant.

MEMORANDUM OPINION

Appeal from Riley District Court; GRANT D. BANNISTER, judge. Opinion filed April 28, 2023. Affirmed in part and vacated in part.

Peter Maharry, of Kansas Appellate Defender Office, for appellant.

David Lowden, deputy county attorney, *Barry R. Wilkerson*, county attorney, and *Derek Schmidt*, attorney general, for appellee.

Before ATCHESON, P.J., BRUNS, J., and PATRICK D. MCANANY, S.J.

PER CURIAM: Defendant Taylor Nicole Reyes contends the Riley County District Court violated her equal protection rights when it sentenced her in two separate cases handled in a single hearing. Relying primarily on a recent opinion of this court, Reyes submits the district court was constitutionally obligated to treat the charges as if the State brought them in one complaint, thereby reducing the statutory punishments she faced. See *State v. Dixon*, 60 Kan. App. 2d 100, 140-41, 492 P.3d 455, *rev. denied* 314 Kan. 856

(2021). Reyes' argument fails because the critical component of the successful constitutional challenge in *Dixon* is missing here.

In *Dixon*, the district court granted the State's motion to consolidate two cases for trial because they could have been charged in one complaint. After consolidation, such a defendant is legally indistinguishable for sentencing purposes from a defendant who has been charged with the same crimes in a single complaint. Consistent with constitutional equal protection principles, the defendant, therefore, cannot be punished more harshly notwithstanding statutes requiring that result. But the cases against Reyes were never consolidated, so *Dixon* and several more recent decisions resting on *Dixon* do not apply.

Reyes also raises an entirely separate challenge to the fines the district court imposed on her for a pair of forgery convictions. Her argument on that point has merit. Because she forged applications to rent property—documents without any ostensible monetary value in and of themselves—the fines the district court ordered under the forgery statute were improper. We, therefore, vacate those fines and otherwise affirm the sentences the district court imposed on Reyes.

FACTUAL AND PROCEDURAL HISTORY

We need not detail Reyes' criminal wrongdoing for purposes of the appeal. She was charged in two cases with an array of crimes including multiple counts of forgery and identity theft. Through her lawyer, Reyes worked out an arrangement with the State in April 2021 calling for her to plead guilty to five counts spread across the two cases—one count of identity theft in each case, two forgeries in one case, and one forgery in the other case. All of the crimes are felonies. The plea agreement states the "parties believe [Reyes] is a criminal history category 'H'" and the parties jointly recommend the district court place Reyes on probation, although the State reserved the right to request a 60-day stint in jail as a condition of probation.

The district court held one plea hearing and one sentencing hearing dealing with both cases. But the district court was never asked to formally consolidate the cases for trial and did not do so.

Under K.S.A. 2022 Supp. 21-6810(a)—colloquially known as the crisscross rule—Reyes' convictions in each case had to be scored as part of her criminal history in the other case. The statute, in pertinent part, states:

> "A prior conviction is any conviction, other than another count in the current case, which was brought in the same information or complaint or which was joined for trial with other counts in the current case pursuant to K.S.A. 22-3203, and amendments thereto, which occurred prior to sentencing in the current case, regardless of whether the offense that led to the prior conviction occurred before or after the current offense or the conviction in the current case." K.S.A. 2022 Supp. 21-6810(a).

As a result, Reyes had a criminal history of E in one case and F in the other, increasing her presumptive guidelines sentences over what they would have been had the charges been filed in a single complaint. The parties did not account for the crisscross rule in their plea agreement, since its application precluded Reyes from having a criminal history of H. At the sentencing hearing, the prosecutor stated that she viewed the representation of Reyes' criminal history in the plea agreement to be what it was when the parties signed the document and not what it would be after Reyes pleaded to the five charges in conformity with the agreement.

The convictions also triggered some special sentencing rules. The crisscrossing identity theft convictions carried presumptions of imprisonment rather than probation under the rule in K.S.A. 2019 Supp. 21-6804(u) for persons who repeatedly commit that crime. The multiple forgery convictions made Reyes a recidivist forger, subjecting her to mandatory penalties under K.S.A. 2019 Supp. 21-5823(b), the statute criminalizing forgery. So Reyes had to serve jail terms on the successive forgery convictions as a

condition of probation and to pay fines corresponding to the lesser of the amount of the forged instruments or $1,000 for a second conviction or $2,500 for any additional conviction. K.S.A. 2019 Supp. 21-5823(b)(3), (b)(4).

In August 2021, the district court imposed guidelines sentences on Reyes and granted her a downward dispositional departure placing her on probation consistent with the plea agreement, bypassing the special rule applicable to the identity theft convictions. The district court identified particular grounds warranting the departure. On the forgery convictions, the district court accepted the State's argument that the general crisscross rule in K.S.A. 2019 Supp. 21-6810(a) applied to the specific penalty provisions in the forgery statute, K.S.A. 2019 Supp. 21-5823(b). As a result, the district court concluded the single forgery conviction in the one case served as a predicate conviction making both forgery convictions in the other case second offenses. And, in turn, those two convictions were predicates for treating the single conviction as a third offense for sentencing under K.S.A. 2019 Supp. 21-5823(b). The district court imposed mandatory 30-day jail terms on Reyes for the forgery convictions designated as second offenses and ordered the terms be served concurrently. The district court imposed a $1,000 fine on each of those convictions—a decision we discuss later in explaining why we find it erroneous. The district court imposed a mandatory 45-day jail term on the third forgery offense to be served consecutive to the 30-day terms. The district court found the particular forged document for that offense to have no value and, therefore, ordered a fine of $0.

At the sentencing hearing, Reyes objected to the application of the crisscross rule as an equal protection violation and cited *Dixon* as analogous authority. The district court rejected the argument. Reyes has appealed. As we have indicated, Reyes advances her equal protection claim and challenges the factual basis for the forgery fines.

LEGAL ANALYSIS

Before considering those points, we decline to offer an opinion on the State's suggested interplay between the crisscross rule and the recidivist sentencing provisions contained in the forgery statute, since Reyes has not challenged the contention. Arguably, however, the graduated forgery punishments apply without regard to K.S.A. 2022 Supp. 21-6810(a). See *State v. Raschke*, 289 Kan. 911, 922-23, 219 P.3d 481 (2009) (escalating fines for recidivists in K.S.A. 21-3710[b], predecessor to current forgery statute, held mandatory and, as specific enactment, controlled over general statutes governing criminal fines). The crisscross rule governs scoring "prior" convictions for criminal history purposes and not punishment for present crimes of conviction. K.S.A. 2022 Supp. 21-6810(a). By contrast, the forgery statute imposes graduated punishments for successive forgery convictions without regard to the defendant's overall criminal history. See *State v. Arnett*, 290 Kan. 41, 45, 223 P.3d 780 (2010).

Assuming the crisscross rule were inapplicable, Reyes would have faced sentencing for sequential first, second, and third forgery convictions consistent with *Arnett*. Given the ultimate disposition here in which we vacate the graduated fines the district court imposed on two of the convictions, Reyes would have fared no better—she still would have faced a mandatory 30-day jail term for a second conviction that could have been run consecutive to the mandatory 45-day jail term for a third conviction.

Equal Protection Claim

That said, we now turn to Reyes' equal protection claim that rests on the rationale articulated first in *Dixon* and then in *State v. Myers*, 62 Kan. App. 2d 149, 192, 509 P.3d 563 (2022). In each of those prosecutions, the State charged the defendant in separate cases with various felonies and then successfully sought to consolidate the cases for trial under K.S.A. 22-3203 because they could have been charged in a single complaint (and,

thus, in one case) as provided in K.S.A. 22-3202(1). The consolidation conferred procedural and tactical advantages on the State, at the very least entailing considerable efficiencies in avoiding multiple jury trials and the need to call various witnesses in successive trials.

When a district court grants a motion to consolidate, the parties then occupy the same legal position for trial of the charges as they would have if the State had brought all of the charges in a single complaint. Upon conviction, however, the sentencing guidelines apply in materially different ways to a defendant charged with several crimes in separate cases consolidated for trial and a defendant charged with those same crimes in a single complaint. That disparate treatment suggests equal protection problems, as this court recognized in *Dixon* and *Myers*.

For example, the sentencing guidelines impose a cap on the maximum prison term that may be imposed on a defendant convicted of multiple felonies charged in a single complaint. See K.S.A. 2022 Supp. 21-6819(b)(4). But a separate cap would apply to each case consolidated for trial, permitting a district court to impose a much longer overall term of imprisonment on that defendant. In *Dixon*, this court found the sentencing disparity between a defendant convicted at trial of multiple crimes charged in one complaint and a defendant convicted at trial of the same crimes charged in separate complaints consolidated for trial at the State's request to be without any rational basis and, therefore, a violation of the Equal Protection Clause of the Fourteenth Amendment. 60 Kan. App. 2d at 130-31, 139 (describing the sentencing disparity; finding equal protection violation).

Similarly, in *Myers*, this court determined that the statutory process of designating a primary crime of conviction in a case with multiple felony convictions under K.S.A. 2020 Supp. 21-6819(b) violates the equal protection rights of a defendant charged and convicted in separate cases consolidated for trial. 62 Kan. App. 2d at 192. A defendant's

criminal history score is used to determine the presumptive guidelines sentence for the primary crime of conviction; the presumptive sentences for all of the other convictions are determined without considering the criminal history, typically resulting in markedly shorter prison terms. But with cases consolidated for trial, a defendant faces a primary crime of conviction—and a higher presumptive sentence—in each case and, thus, a longer overall period of imprisonment than if the crimes had been charged in one case as they could have been. 62 Kan. App. 2d at 181. The *Myers* court found the sentencing disparity created in the K.S.A. 2020 Supp. 21-6819(b) regimen for primary crimes of conviction lacked a rational basis when applied to cases consolidated for trial and was, therefore, legally infirm under the Equal Protection Clause. 62 Kan. App. 2d at 192.

Panels of this court have since applied *Dixon* and *Myers* to circumstances in which the district court consolidated multiple cases against a defendant for trial and the defendant has pleaded guilty or no contest to several felonies. The panels held that the defendants should be sentenced as if they had been convicted of felonies charged in a single complaint rather than in more than one case. *State v. Anderson*, No. 124,727, 2023 WL 176658, at *6 (Kan. App. 2023) (unpublished opinion) (when defendant pleaded guilty to felonies charged in three cases that had been consolidated for trial, district court erred in establishing primary crime of conviction in each case for sentencing purposes and should have established one primary crime applicable to all three cases, consistent with *Myers*); *State v. Fitzgerald*, No. 123,121, 2022 WL 815839, at *5-6 (Kan. App. 2022) (unpublished opinion) (defendant entered guilty pleas to multiple felonies and misdemeanors in four cases consolidated for trial before sentencing; district court erred in failing to apply sentencing cap in K.S.A. 2019 Supp. 21-6819[b] to felonies charged in two cases, consistent with *Dixon*).

Although we have no particular quarrel with those cases, we need not endorse them to resolve Reyes' appeal. We, therefore, simply assume *Dixon*, *Myers*, *Fitzgerald*, and *Anderson* to be correct applications of equal protection principles. Reyes' claim,

however, is distinguishable in two material respects that undermine her equal protection challenge.

First, Reyes' cases were never consolidated for trial. A district court's decision to consolidate criminal cases at the State's request or with the State's ascent because they could have been charged in a single complaint is a necessary factual predicate for the central equal protection analysis. In the run of prosecutions, the State reaps benefits from consolidation for trial. And the defendant is then functionally indistinguishable from a defendant charged with the same crimes in one complaint, at least through adjudication to the point of sentencing. The sentencing guidelines, however, treat those defendants differently for no discernably rational reason—demonstrably disadvantaging the defendant charged in separate cases that have been consolidated.

Here, that didn't happen. So Reyes would have been entitled to a separate trial in each of the cases against her. Reyes has not been disadvantaged by facing a consolidated trial, meaning the essential foundation for her equal protection argument is missing. Reyes tries to avert that result by arguing the cases *could* have been consolidated. Well, yes, they probably could have been. The charges in both cases arose from crimes of a like character; that's sufficient for consolidation under K.S.A. 22-3202(1). But each case involved a different victim and substantially different time periods. And they were filed nearly a year apart. The cases entailed distinct criminal episodes. The State chose not to seek their joinder for a single trial.

In short, Reyes is not and has not been situated similarly to a defendant charged with several crimes in a single complaint, undercutting her equal protection claim. To extend *Dixon* and *Myers* to defendants charged in multiple cases merely because the cases could be consolidated would intrude deeply into prosecutorial discretion without furthering the constitutional protections identified in those decisions. The court made precisely that point in *Dixon*: "[O]ur decision stands for the proposition that when the

State chooses to consolidate cases for trial because the charges could have been brought in one charging document, then the State must be held to the sentencing limitations applicable to a trial based on one charging document." 60 Kan. App. 2d at 140.

Moreover, Reyes could have averted the crisscross rule if she secured an agreement with the State that called for her to plead to the charges in one of the cases conditioned on the dismissal of the other case or that called for the filing of an amended complaint containing all of the charges to which she would plead. For whatever reason, no such deal was struck.

There is another flaw in Reyes' equal protection argument. The statutes she attacks—the crisscross rule in K.S.A. 2022 Supp. 21-6810(a) and the recidivist punishments for forgers in K.S.A. 2022 Supp. 21-5823(b)—do not disadvantage a defendant with multiple cases consolidated for trial as compared to a defendant charged with the same crimes in a single case. So they do not replicate the equal protection violations this court recognized in *Dixon* and *Myers*, and those decisions, in turn, do not support Reyes' argument.

By its own terms, the crisscross rule does not apply to cases consolidated for trial. K.S.A. 2022 Supp. 21-6810(a); see *Dixon*, 60 Kan. App. 2d at 137-38. The statutory language is clear on the point. Had Reyes' cases been consolidated, the rule would have dropped out of the sentencing equation. In turn, Reyes would have been treated the same for criminal history purposes as if she had been charged with all of the crimes of conviction in a single complaint. In other words, were Reyes in the same legal posture as the defendants in *Dixon* and *Myers*, she could not successfully attack the crisscross rule on the equal protection grounds she has asserted. The crisscross provision in K.S.A. 2022 Supp. 21-6810(a) is not vulnerable in that way, setting it apart from the sentencing statutes successfully challenged in *Dixon* and *Myers.*

As we have indicated, Reyes tries to make the argument fit with the additional premise that her cases could have been consolidated, but that gets her nowhere legally. Again, as we have explained, the State's decision not to seek consolidation of cases for trial is a matter of prosecutorial discretion. And exercising that discretion in that way does not give rise to an equal protection violation of the sort Reyes suggests.

Reyes' position is even more fragile with respect to the forgery statute. The escalating penalties for repeat forgery convictions apply whether the crimes have been charged in separate cases or in one case—negating the foundation for an equal protection challenge based on *Dixon* and *Myers.* See *Arnett*, 290 Kan. at 45 (three forgery charges in single complaint become first, second, and third convictions for sentencing under predecessor to K.S.A. 2022 Supp. 21-5823[b]). In short, there is no equal protection violation on that score simply because Reyes' cases could have been consolidated for trial but were not. Moreover, had they been consolidated, Reyes would have faced the same escalating penalties for the forgery convictions.

Forgery Fines

Turning to Reyes' second point on appeal, we agree the district court improperly imposed $1,000 fines on two of the forgery convictions. As we have indicated, the recidivist penalties in the forgery statute require a district court to impose a fine of the lesser of "the amount of the forged instrument or $1,000" on a second conviction. K.S.A. 2019 Supp. 21-5823(b)(3). In doing so here, the district court appears to have misapprehended the character of the forged documents during the sentencing hearing.

At the plea hearing, the factual proffer established that Reyes had forged the victims' names on three applications to lease premises in Riley County. Each forgery count was based on one of the applications. The documents, then, were requests to be

considered as a possible tenant for a specified rental property. They were not leases for the properties.

When sentencing Reyes later, the district court mischaracterized two of the forged documents as "rental contracts" and presumed the "amount" of each to be the aggregate rent that would have been due—an amount exceeding $1,000. But the complaint charging those crimes did not identify the nature of the forged instruments. As we have said, the factual proffer the district court accepted at the plea hearing described them as rental applications. Based on its mistaken conclusion the forged documents were leases, the district court imposed the lesser statutory fine of $1,000 on Reyes for each of those convictions. K.S.A. 2019 Supp. 21-5823(b)(3). The district court correctly recognized the third forgery conviction to be for a lease application, as stated in the complaint charging that crime, and found the application itself had no intrinsic value. The court imposed a fine of $0 on that conviction, as the lesser amount of the instrument under K.S.A. 2019 Supp. 21-5823(b)(4).

The district court correctly applied K.S.A. 2019 Supp. 21-5823(b)(4) to the forged instrument it recognized to be a lease application. A panel of this court addressed an analogous situation in *State v. Lago*, No. 113,065, 2015 WL 9287042 (Kan. App. 2015) (unpublished opinion). There, the defendant forged his ex-wife's signature on an application for a life insurance policy on her that would name him as the beneficiary. The insurance company later issued the policy. The Stated charged the defendant with forging the application. The district court imposed a fine under K.S.A. 2014 Supp. 21-5823(b) based on the face amount of the insurance policy. We reversed because the charge rested on the application itself, not the policy, and the crime was complete upon submission of the forged application without regard to whether the company acted favorably on it. The application had no discernable value. 2015 WL 9287042, at *2-3.

The same is true here. The rental applications had neither intrinsic worth nor some stated monetary value, unlike a forged check. As the *Lago* decision pointed out, a fine of $0 might seem anomalous, but a forger passing a $10 check would face a mandatory fine of that comparatively nominal amount. The Legislature could have required the mandatory fine to be not less than, say, $250 nor more than $1,000 for a second conviction. 2015 WL 9287042, at *3. The legislative policy choice reflected in the plain statutory language permits a fine of $0 in some circumstances. This is one of them. We, therefore, vacate the $1,000 fines imposed on two of the forgery convictions and affirm the fine of $0 imposed on the third conviction. Like the panel in *Lago*, we see no point in remanding to the district court to impose substitute fines of $0. 2015 WL 9287042, at *3.

Convictions and sentences affirmed, except for the fines of $1,000 imposed on two of the forgery convictions that are hereby vacated.

Affirmed in part and vacated in part.