NOT DESIGNATED FOR PUBLICATION

No. 124,795

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JASON CHARLSEN,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; ERIC WILLIAMS, judge. Opinion filed May 19, 2023. Appeal dismissed.

Jennifer C. Roth, of Kansas Appellate Defender Office, for appellant.

Julie A. Koon, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before GREEN, P.J., GARDNER, J., and PATRICK D. MCANANY, S.J.

PER CURIAM: Jason Charlsen agreed to plead guilty to one count of sexual exploitation of a child in exchange for the State dropping the remaining charges and jointly recommending that Charlsen serve the low number in the appropriate sentencing grid box—which the parties believed to be 50 months based on Charlsen's criminal history which included one previous felony. After pleading guilty, a presentence investigation (PSI) report was created. This PSI report showed that Charlsen had one prior person felony for sexual exploitation of a child. This previous felony conviction

brought in special rule 5, the persistent sex offender rule under K.S.A. 2018 Supp. 21-6804(j)(1). And this rule would double Charlsen's sentence.

The district court denied the parties' requests to stick to the plea agreement and sentence Charlsen to the agreed upon 50-month sentence. Instead, the district court sentenced Charlsen to 55 months' imprisonment, doubled by the persistent sex offender rule, for a controlling sentence of 110 months' imprisonment.

Charlsen appeals, arguing that the district court violated his due process rights because he waived his rights entering his plea without having received notice that the special rule could apply to his sentence. Specifically, he argues that under K.S.A. 22-3201(b), the State was required to state, and failed to do so, "the statute, rule and regulation or other provision of law which the defendant is alleged to have violated" and that the failure to do so violates Charlsen's due process rights because he was entitled to notice of the severity level of the offense being charged.

We questioned whether we have jurisdiction to consider this appeal of Charlsen's conviction or of Charlsen's sentence, which raised a constitutional claim for the first time on appeal. Charlsen acknowledges that his claim was not presented below to the trial court. But he argues in his brief that we may consider his claim on appeal as (1) a question of law arising on proved or admitted facts that is determinative of the case and (2) necessary to prevent a denial of his fundamental right to due process of law. We ordered the parties to provide supplemental briefing on whether we have jurisdiction over the issues in this appeal.

In response to our order, Charlsen continues to maintain that we have jurisdiction over the issues in this appeal. In support of his position, he cites *State v. Jones*, No. 119,764, 2020 WL 3481527 (Kan. App. 2020) (unpublished opinion). There he states that "a panel of this Court took up the same issue, for the first time on appeal, and

decided it on its merits." The State, however, argues, in its response, that *Jones* is factually dissimilar from the instant case because the defendant in *Jones* did not enter a plea. The State maintains that this distinction is controlling because of what our Supreme Court in *State v. Melton*, 207 Kan. 700, 713, 486 P.2d 1361 (1971), stated: "[A] plea of guilty freely and voluntarily entered after consultation with counsel and with full knowledge of the possible consequences waives any defects or irregularities occurring in any of the prior proceedings. This is so even though the defects may reach constitutional dimensions. [Citations omitted.]"

Jurisdiction

Appellate courts exercise unlimited review when determining whether jurisdiction exists because this issue presents a question of law. *Via Christi Hospitals Wichita v. Kan-Pak*, 310 Kan. 883, 889, 451 P.3d 459 (2019). If appellate jurisdiction does not exist, Charlsen's appeal must be dismissed. See *State v. Phinney*, 280 Kan. 394, 398-99, 122 P.3d 356 (2005).

First, under K.S.A. 2022 Supp. 22-3602(a), "[n]o appeal shall be taken by the defendant from a judgment of conviction before a district judge upon a plea of guilty or nolo contendere." The Kansas Supreme Court has made it clear that an appellate court lacks jurisdiction to hear direct appeals from convictions that were the result of a guilty or no-contest plea. If a defendant pleads guilty or no contest and then makes no effort to withdraw his or her plea at the district court, appellate courts lack jurisdiction to review the merits on appeal. *State v. Hall*, 292 Kan. 862, 867, 257 P.3d 263 (2011) (holding "guilty plea without a subsequent motion to withdraw in the [district] court deprives us of appellate jurisdiction"). Charlsen has not moved to withdraw his plea. So, to the extent that Charlsen challenges his conviction, we lack jurisdiction.

Second, a defendant who pleads guilty is generally precluded from raising constitutional challenges for the first time on appeal. See *State v. Smith*, 311 Kan. 109, 114-18, 456 P.3d 1004 (2020); see also *State v. Reu-El*, 306 Kan. 460, 474-75, 394 P.3d 884 (2017) (holding a defendant generally waives Fifth Amendment double jeopardy challenges by entering a no-contest plea). Charlsen did not raise his claim of due process denial to the district court, so this rule applies as well.

Third, the district court here imposed a presumptive prison sentence, so we would be without jurisdiction to consider this issue. See K.S.A. 2022 Supp. 21-6820(c)(1) (appellate court shall not review any sentence within the presumptive sentence range for the crime); see also *State v. Huerta*, 291 Kan. 831, 837, 247 P.3d 1043 (2011) (reaffirming that K.S.A. 21-4721(c)(1), now K.S.A. 21-6820[c][1], eliminates appeals of presumptive sentences).

Lastly, we note that a defendant may argue that a sentence is illegal under K.S.A. 2022 Supp. 22-3504 at any time. See *Phinney*, 280 Kan. at 399. But a sentence is not illegal because it fails to conform to constitutional requirements. *State v. Gayden*, 281 Kan. 290, 293, 130 P.3d 108 (2006) (holding "[a] claim that a sentence fails to conform to *constitutional* requirements is not a claim it fails to conform to *statutory* requirements"). Instead, K.S.A. 2022 Supp. 22-3504(c)(1) defines an illegal sentence as one that does not conform to applicable *statutory* provisions. See *State v. Howard*, 287 Kan. 686, 691, 198 P.3d 146 (2008). Charlsen here raises a constitutional claim and not a statutory one. And, thus, his appeal does not fall within the definition of an "illegal sentence" in K.S.A. 2022 Supp. 22-3504.

Thus, we conclude that we lack jurisdiction to consider this appeal.

Appeal dismissed.