

NOT DESIGNATED FOR PUBLICATION

No. 124,973

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

BRIAN STEVEN RICHMOND,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; ROBERT G. SCOTT, magistrate judge. Opinion filed June 23, 2023. Affirmed.

Brian Richmond, appellant pro se.

Jacob M. Gontesky, assistant district attorney, *Stephen M. Howe*, district attorney, and *Derek Schmidt*, attorney general, for appellee.

Before MALONE, P.J., HURST and COBLE, JJ.

PER CURIAM: Brian Steven Richmond appeals his conviction for driving on a suspended license in violation of K.S.A. 2020 Supp. 8-262(a)(1). Interpreting Richmond's pro se appellate brief broadly, he asserts three general categories of claims: (1) the district court misinterpreted K.S.A. 2020 Supp. 8-262(a)(1); (2) he has a fundamental right to drive for personal pleasure; and (3) the State violated his due process rights by not disclosing evidence upon request. Finding no error, this court affirms.

FACTUAL AND PROCEDURAL BACKGROUND

As an initial matter, the record on appeal relied upon by both Richmond and the State appears to contain an unofficial trial transcript. In his pro se pleadings, Richmond alleges that he prepared the transcripts because an official transcript of the proceedings was not prepared:

"Brian Richmond presenting himself In Pro Per will not be requesting transcripts due to the fact that a full and complete copy cannot be created as the person, or persons responsible for meeting the obligation both by statute and oath of office to record proceeding for the official record failed to do so. At this time . . . is refusing to provide an affidavit to address the failure to fully capture the proceedings."

However, pursuant to Kansas Supreme Court Rule 3.04(a) (2023 Kan. S. Ct. R. at 24), Richmond apparently prepared a transcript of the proceedings recreated from his memory and a partial audio file that he allegedly received from the court reporter.

Rule 3.04(a) provides:

"If the transcript of a hearing or trial is unavailable, a party to an appeal may prepare a statement of the evidence or proceedings from the best available means, including the party's own recollection, for use instead of a transcript. The statement must be served on all parties, who may serve an objection or proposed amendment no later than 14 days after being served. The statement and any objection or proposed amendment then must be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the clerk of the district court in the record on appeal."

The record is scant on details of whether this transcript was approved by the district court in accordance with the procedures of Rule 3.04(a). However, it was included with the record on appeal and is relied upon by the State in its briefing. Given the parties' apparent

agreement on the accuracy of Richmond's self-prepared trial transcript and its inclusion in the record on appeal, this court will rely upon the self-prepared transcript as it would an official transcript.

There appears to be no disagreement on the facts relevant to this appeal. On February 20, 2018, the State suspended Richmond's driver's license and mailed him notification of such suspension. On March 2, 2021, while his driver's license was still suspended, Richmond was involved in a car accident while driving his 2006 Chevrolet Trailblazer westbound on Interstate 435 (I-435) in Johnson County. Following the accident, Richmond called the Kansas Highway Patrol to request assistance. After responding to the accident, the highway patrol troopers discovered that Richmond's driver's license was suspended.

Richmond was subsequently charged with one count of driving while his license was suspended, a class B nonperson misdemeanor. See K.S.A. 2020 Supp. 8-262(a)(1). On January 20, 2022, the district court conducted a bench trial at which Richmond represented himself and both Richmond and the responding highway patrol trooper testified. On cross-examination by Richmond, the trooper testified, "We have a video of you driving on interstate I435." The district court ultimately found Richmond guilty of driving while his license was suspended, and Richmond appealed.

DISCUSSION

In his pro se brief, Richmond presents four claims that can best be summarized as:

- (1) The district court erred in its application of the law;
- (2) the State withheld evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963);
- (3) the district court erred in the application of the facts to the law; and

(4) a constitutional challenge to construction of the statute that applies to driving for personal pleasure.

The State argues that Richmond's first and third issues should be consolidated and interpreted as a challenge to the sufficiency of the evidence. Although this court agrees that the two issues should be consolidated, it interprets them both as challenges to the district court's interpretation and application of K.S.A. 2020 Supp. 8-262(a)(1).

I. THE DISTRICT COURT DID NOT ERR IN ITS INTERPRETATION OF K.S.A. 2020 SUPP. 8-262(a)(1)

This court exercises unlimited review over questions of statutory interpretation. *State v. Stoll*, 312 Kan. 726, 736, 480 P.3d 158 (2021). When interpreting a statute, this court must give effect to the Legislature's intent as expressed in the language of the statute. *State v. LaPointe*, 309 Kan. 299, 314, 434 P.3d 850 (2019). This endeavor ordinarily begins and ends with the text of the statute, and requires that the court give "common words their ordinary meaning." *State v. Pulliam*, 308 Kan. 1354, 1364, 430 P.3d 39 (2018); see *State v. Ayers*, 309 Kan. 162, 163-64, 432 P.3d 663 (2019). "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." *Pulliam*, 308 Kan. at 1364 (quoting *State v. Keel*, 302 Kan. 560, Syl. ¶ 6, 357 P.3d 251 [2015]).

In relevant part, K.S.A. 2020 Supp. 8-262(a)(1) provides that "[a]ny person who drives a motor vehicle on any highway of this state at a time when such person's privilege so to do is . . . suspended . . . shall be guilty of a class B nonperson misdemeanor on the first conviction." This court finds no ambiguity in this statute. Using the common meaning of the terms "drive," "motor vehicle," and "highway"—which need not be defined here—the statute clearly criminalizes Richmond's conduct. See *Keel*, 302 Kan. at

571-72 (noting that in statutory interpretation, courts must give common words their ordinary meaning). Richmond (a person) drove his 2006 Chevrolet Trailblazer (a motor vehicle) on I-435 in Johnson County (a highway of the State of Kansas) on March 2, 2021 (a time when his driver's license was suspended).

Despite the clear meaning of the statute's plain and unambiguous text, Richmond argues that his conduct did not fall within the statute's prohibition because he was "traveling," not "driving." According to Richmond, "driving" entails "accessing the public roads to engage in commercial activity(ies)," while "traveling" entails "accessing the public roads for personal pleasure." Therefore, according to Richmond, because he was not operating a motor vehicle on a Kansas highway for a commercial purpose, he was not "driving." Richmond points to no legal authority to support his unique interpretation of the statute or definition of the word "driving."

While Chapter 8 of the Kansas Statutes Annotated does not define the term "drives," it is a common word, not an obscure legal term of art. The ordinary meaning of the word "drives" is not limited to maneuvering a motor vehicle to engage in commercial activity, although it would include those activities. Contrary to Richmond's proposition, the ordinary meaning of the word "drives" includes operating a motor vehicle for leisure or other noncommercial activities. Dictionary definitions predictably support this ordinary meaning. For example, Black's Law Dictionary 625 (11th ed. 2019) defines "driving" as "[t]he act of directing the course of something, such as an automobile or a herd of animals." And it defines "driver" as "[s]omeone who steers and propels a vehicle." Black's Law Dictionary 624 (11th ed. 2019).

The Kansas Supreme Court has interpreted the statute at issue and explained:

"It is clear that the statute makes it unlawful to drive a vehicle on the highways when the license to so drive has been suspended. *The legislature made no exceptions*, and

the question of intent is not involved, and *the motive or the circumstances under which the driving took place are immaterial.*" (Emphasis added.) *State v. Merrifield*, 180 Kan. 267, 269, 303 P.2d 155 (1956).

Merrifield was convicted of driving while his license was suspended—even though he was not operating a motor vehicle for commercial purposes—and the Kansas Supreme Court affirmed that conviction. 180 Kan. at 268. Common sense, and the court's decision in *Merrifield*, foreclose Richmond's imaginative construction of K.S.A. 8-262.

Additionally, a panel of this court has rejected an argument similar to Richmond's here. See *State v. Hershberger*, 27 Kan. App. 2d 485, 492-94, 5 P.3d 1004 (2000). In *Hershberger*, the defendant argued that "the State had no authority to charge him with driving on a suspended license because he was using his car for personal and not commercial purposes," but a panel of this court nevertheless affirmed his conviction. 27 Kan. App. 2d at 492.

The rest of the statutory terms are similarly unambiguous. "Motor vehicle" is defined as "every vehicle, other than a motorized bicycle or a motorized wheelchair, that is self-propelled." K.S.A. 2020 Supp. 8-126(v). Richmond's 2006 Chevrolet Trailblazer—a gas-powered, self-propelled sport utility vehicle—plainly satisfies this statutory definition. "Highway" is defined as "every way or place of whatever nature open to the use of the public as a matter of right for the purpose of vehicular travel. The term 'highway' does not include a roadway or driveway upon grounds owned by private owners, colleges, universities or other institutions." K.S.A. 2020 Supp. 8-126(p). Here, I-435 meets this definition as it is open to the use of the public as a matter of right for the purpose of vehicular travel and is not located upon grounds owned by private owners, colleges, universities, or other institutions. Finally, Richmond does not dispute that the incident occurred within the State of Kansas or that his driver's license was suspended at the time the incident occurred.

The plain and unambiguous language of the statute simply does not support Richmond's attempt to evade its reach. As the court explained in *Merrifield*, "the motive or the circumstances under which the driving took place are immaterial" to the determination of guilt. 180 Kan. at 269. Accordingly, the district court did not err in its interpretation of the applicable statute and finding that Richmond's conduct violated K.S.A. 2020 Supp. 8-262(a)(1)'s prohibition against driving on a suspended license.

II. RICHMOND'S UNPRESERVED CONSTITUTIONAL CLAIM LACKS MERIT

Richmond appears to assert that application of K.S.A. 2020 Supp. 8-262(a)(1) to noncommercial driving would infringe on a constitutional, fundamental right to drive for pleasure, and he argues:

"It is correct, and lawful to regulate accessing the public roads being access [*sic*] for commercial activities. This regulation is not the issue at hand, it is instead the willful, and knowingly callous disregard for rule of law in both letter and spirit through the intentional misrepresentation of all activity when accessing the public roads be subject to the rules and regulations explicitly designed for and strictly limited to addressing accessing the public roads for the express purpose of engaging in commercial activity(ies). The obtaining of a license, permit, or other legal instruments does not create a forfeiture of the basic inherit rights of We the People, nor does it create an obligation to only access the public roads in pursuit of the activity(ies) which are regulated. Doing so only creates an opportunity to engage in such activities ad-hoc by the license, or permit holders so long as all lawful requirements are met. The same is true of granting equitable title to a governing agency with regard to automobiles and other devices which may be utilized in accessing the public roads for commercial activities. There is no lawful requirement for a person to obtain the additional endorsements to be applied to a government issued id for the purpose of creating a license, nor granting equitable title to an automobile if the person and automobile should access the public roads strictly for personal pleasure in pursuit to life, liberty, and happiness."

Richmond cites no authority to support his claim of a constitutional right to drive for personal pleasure, nor did he raise the issue before the district court. "Failure to support a point with pertinent authority or show why it is sound despite a lack of supporting authority or in the face of contrary authority is akin to failing to brief the issue," and "[i]ssues not briefed or not adequately briefed are deemed waived or abandoned." *State v. Meggerson*, 312 Kan. 238, 246, 474 P.3d 761 (2020). Richmond's constitutional claim is therefore waived and abandoned. However, even if this court were to reach the merits of Richmond's constitutional claim, it would fail.

While the United States Supreme Court and Kansas Supreme Court have recognized a fundamental right to interstate travel, neither has recognized a fundamental right to drive a motor vehicle on public roadways—even if done solely for personal pleasure. See, e.g., *Saenz v. Roe*, 526 U.S. 489, 498, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999); *United States v. Guest*, 383 U.S. 745, 757-60, 86 S. Ct. 1170, 16 L. Ed. 2d 239 (1966); *Manzanares v. Bell*, 214 Kan. 589, 600, 522 P.2d 1291 (1974) ("[F]reedom to travel throughout this state and this nation is a fundamental right."). The Kansas Supreme Court has repeatedly held that it is an "elementary rule of law that the right to operate a motor vehicle upon a public street or highway is not a natural or unrestrained right, but a privilege which is subject to reasonable regulation under the police power of the state in the interest of public safety and welfare." *Popp v. Motor Vehicle Dept.*, 211 Kan. 763, Syl. ¶ 1, 508 P.2d 991 (1973), *overruled on other grounds by City of Kingman v. Ary*, 312 Kan. 408, 475 P.3d 1240 (2020); see also *State v. Mertz*, 258 Kan. 745, Syl. ¶ 11, 907 P.2d 847 (1995) ("In Kansas, a driver's license is not a natural right, but a privilege granted by the State. If a driver abuses this privilege, the State is entitled to take the privilege away."). Richmond's unpreserved and unsupported constitutional claim of a fundamental right to drive for personal pleasure is meritless.

III. THE STATE DID NOT COMMIT A *BRADY* VIOLATION

Richmond claims that the State violated his due process rights by not disclosing the existence of the video of him driving. In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. To prevail on a claim that the State committed a *Brady* violation: "(1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be material so as to establish prejudice." *State v. Lyman*, 311 Kan. 1, 19, 455 P.3d 393 (2020); see *State v. Breitenbach*, 313 Kan. 73, 97, 483 P.3d 448 (2021).

At trial, the State trooper testified on cross-examination by Richmond that "[w]e have a video of you driving on interstate I435." On appeal, Richmond asserts that the State's failure to provide him with the video constituted a *Brady* violation. Once again, Richmond failed to assert this violation to the district court. Generally, constitutional grounds for reversal asserted for the first time on appeal are not properly before this court for review. *State v. Pearce*, 314 Kan. 475, 484, 500 P.3d 528 (2021). However, there are three recognized exceptions to this general prohibition:

"(1) [T]he newly asserted claim involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) the claim's consideration is necessary to serve the ends of justice or to prevent the denial of fundamental rights; or (3) the district court's judgment may be upheld on appeal despite its reliance on the wrong ground or reason for its decision." *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021) (quoting *State v. Harris*, 311 Kan. 371, 375, 461 P.3d 48 [2020]).

When asserting a constitutional claim for the first time on appeal, "there *must* be an explanation why the issue is properly before the court." (Emphasis added.) Kansas Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36); see *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019). The Kansas Supreme Court has repeatedly cautioned litigants that courts will strictly enforce this rule and failure to provide reasons justifying this court's review of an unpreserved constitutional claim will preclude review. See *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018).

Richmond does not explain why his claim of a *Brady* violation is properly before this court despite his failure to raise the issue below. Accordingly, Richmond has failed to comply with Rule 6.02(a)(5) and his unpreserved claim of a *Brady* violation is waived or abandoned. Even if, however, this court were to reach the merits of Richmond's claim, it would fail.

The determination of whether a *Brady* violation occurred is a legal question over which this court exercises unlimited review. *Breitenbach*, 313 Kan. at 97. Richmond argues that he can satisfy the first prong of the *Brady* analysis because the video would have been exculpatory since "the video would clearly show there were no persons, nor goods being transported or drawn." Even assuming the video would have shown that Richmond was driving for personal pleasure rather than for a commercial purpose, that information cannot be exculpatory because, as explained above, the personal versus commercial purpose is wholly irrelevant to the determination of culpability under K.S.A. 2020 Supp. 8-262(a)(1). See *Merrifield*, 180 Kan. at 269. Accordingly, Richmond has failed to demonstrate that the video is favorable to him, and he cannot sustain a *Brady* violation claim.

CONCLUSION

The district court did not err in holding that Richmond's conduct violated K.S.A. 2020 Supp. 8-262(a)(1)'s prohibition against driving on a suspended license. The judgment of the district court is therefore affirmed.

Affirmed.