NOT DESIGNATED FOR PUBLICATION

No. 125,053

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

AMBER JO BEIERLY,
Appellant.

MEMORANDUM OPINION

Appeal from Jackson District Court; NORBERT C. MAREK JR., judge. Opinion filed March 3, 2023. Affirmed in part and dismissed in part.

Submitted by the parties for summary disposition pursuant to K.S.A. 2022 Supp. 21-6820(g) and (h).

Before GARDNER, P.J., MALONE and HILL, JJ.

PER CURIAM: Claiming three sentencing errors, Amber Jo Beierly asks for summary disposition of her sentencing appeal. We review her case under Kansas Supreme Court Rule 7.041A (2022 Kan. S. Ct. R. at 48).

After accepting her guilty plea for one count of forgery, a severity level 8 nonperson felony, the district court sentenced Beierly to 10 months in prison instead of imposing the presumptive term of probation. Beierly had been released on bond in a prior felony forgery charge when she committed this crime. In other words, Beierly was charged, convicted, and sentenced for this offense before her prior charge was disposed of.

The first of her three claimed errors begins with a claim that the sentencing court could not set her criminal score unless that score was first submitted to a jury, and the State proved her criminal history beyond a reasonable doubt. This argument has been raised frequently in prior cases—all have been unsuccessful. Kansas courts have consistently rejected the argument that the use of a defendant's prior convictions to calculate criminal history at sentencing violates due process under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). See *State v. Sullivan*, 307 Kan. 697, 708, 414 P.3d 737 (2018) (reaffirming *State v. Ivory*, 273 Kan. 44, 41 P.3d 781 [2002]). We are duty-bound to follow Kansas Supreme Court precedent, unless there is some indication of a departure from a previous position. *State v. Rodriguez*, 305 Kan. 1139, 1144, 390 P.3d 903 (2017). This argument is meritless.

Next, she argues the sentencing court should not have departed from the presumptive guideline disposition of probation and sent her to prison. The sentencing court invoked K.S.A. 2022 Supp. 21-6604(f)(4) when it imposed this sentence. That law provides that when an offender is on release for a felony, a district court "may sentence the offender to imprisonment for the new conviction, even when the new crime of conviction otherwise presumes a nonprison sentence." K.S.A. 2022 Supp. 21-6604(f)(4). Such a sentence is not considered a dispositional departure. K.S.A. 2022 Supp. 21-6604(f)(4). Thus, we find the court did not depart from the guidelines. We find no error here.

Because we hold that the sentencing court did not depart, that means it imposed a guideline sentence. This ruling means that this court has no jurisdiction to review this sentence. A district court's imposition of this special sentencing rule does not constitute a departure from the statutorily permissible sentencing guidelines. See K.S.A. 2022 Supp. 21-6604(f)(4). Defendants may appeal a sentence that departs from the sentencing guidelines, but they cannot appeal a presumptive guidelines sentence. See K.S.A. 2022 Supp. 21-6820(a), (c)(1). The court imposed a 10-month prison sentence—the standard

term for Beierly's offense when imposing the special rule, and within the presumptive sentencing range. Thus, Beierly received a presumptive guidelines sentence. See K.S.A. 2022 Supp. 21-6803(q).

Finally, Beierly contends that the sentencing court erred by ordering this sentence to be served consecutively to any sentence she may receive when her prior charges are resolved. In that case, she was released on bond when she committed this crime. We see no error here, as the court made a correct application of our sentencing rules.

The application also involves K.S.A. 2022 Supp. 21-6604(f)(4). That law provides that when an offender is released for a felony bond and is being sentenced in another case "*a new sentence may be imposed consecutively*" by the district court. (Emphasis added.) In *State v. Vaughn*, 58 Kan. App. 2d 585, Syl. ¶ 1, 472 P.3d 1139 (2020), our court held:

> "A district court sentencing a defendant for a new felony committed while on felony bond . . . may impose a nonprison sanction or a prison sanction, even though the new crime of conviction otherwise presumes a nonprison sentence. If a prison sentence is imposed, that sentence must be consecutive unless the defendant shows manifest injustice."

Beierly makes no argument of manifest injustice. We find the district court did not abuse its discretion in ordering the sentence in this case to be served consecutively to the sentence she receives in her prior case.

Affirmed in part and dismissed in part.