

No. 125,120

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellant,*

v.

CODY MICHAEL DEGAND,  
*Appellee.*

SYLLABUS BY THE COURT

1.

With some express exceptions, the Legislature intended for all prior convictions and juvenile adjudications—including convictions and adjudications occurring before implementation of the Sentencing Guidelines Act—to be considered and scored for purposes of determining an offender's criminal history score.

2.

Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes.

3.

The State bears the burden to prove an offender's criminal history score by a preponderance of the evidence.

4.

When a sentencing court is making an inquiry on the nature of an offender's prior conviction, the court may use a modified categorical approach in its search. Such an

approach means that the court can examine the charging documents of the old case, any plea agreements, transcripts of plea hearings, findings of fact and conclusions of law from any bench trial, as well as jury instructions and completed verdicts.

Appeal from Shawnee District Court; NANCY E. PARRISH, judge. Opinion filed May 5, 2023. Affirmed.

*Jodi Litfin*, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellant.

*Patrick H. Dunn*, of Kansas Appellate Defender Office, for appellee.

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

HILL, J.: This is a sentencing appeal by the State. The State argues that the sentencing court miscalculated Cody Michael Degand's criminal history score by not including a felony criminal threat conviction. This error meant that the court set his score too low. The State asks us to vacate Degand's sentence and remand for resentencing. Our review of the record reveals no error, and we affirm.

*Because this is a sentencing appeal, the details of Degand's crimes are immaterial.*

Degand and the State reached a plea agreement concerning three separate cases from 2020. According to their agreement, Degand would plead guilty to one count each of burglary of a vehicle and theft in one case and he would also plead guilty to one count each of theft and battery in a second case. In exchange, the State agreed to dismiss one count in one of those cases and dismiss a third case entirely. The parties had no specific agreement on sentencing.

A presentence investigation report was prepared and it listed all of Degand's various convictions. One conviction in 2018 was for criminal threat and the report rated it

as a person felony. This meant that Degand's criminal history score was B. Degand disagreed with that score and asked the court not to count that criminal threat conviction. If granted, Degand's criminal history score would be lowered from B to C. The State opposed, arguing Degand's criminal threat conviction should be considered a person felony for criminal history scoring purposes.

At the hearing on the matter, Degand maintained that his criminal threat conviction should not be counted in his criminal history because there was no showing that the conviction was for intentional criminal threat. The State disagreed and argued the district court should read the transcript of the plea hearing in that conviction and it would show that Degand had intentionally made the criminal threat in that older case. Thus, the court could include the conviction in setting his criminal history.

The district court was unconvinced. It held that the State failed to carry its burden to establish that Degand's conviction was for an intentional criminal threat. The court therefore did not include that conviction in his criminal history. The court then ruled that Degand had a C criminal history score. The district court then sentenced Degand to various terms of imprisonment and probation for his crimes.

*Some fundamental points of sentencing law provide a context for our ruling.*

In order to pass sentence on an offender, a court needs to know two things. First, the severity level of the crime that was committed. And second, the criminal history of the offender. With these two components, the court can find the appropriate grid box in our sentencing grid and then choose the number of months that, in the eyes of the court, are appropriate for the offense. Because the criminal history score is an important sentencing component, it has been the subject of many appeals.

Our Supreme Court has held that, "except as specifically stated otherwise, the legislature intended for all prior convictions and juvenile adjudications—including convictions and adjudications occurring before implementation of the [Sentencing Guidelines Act]—to be considered and scored for purposes of determining an offender's criminal history score." *State v. Keel*, 302 Kan. 560, 581, 357 P.3d 251 (2015).

There are, however, exceptions. One such exception to including all prior convictions is found in K.S.A. 2022 Supp. 21-6810(d)(9). It states: "Prior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes."

The State bears the burden to establish a criminal defendant's criminal history score by a preponderance of the evidence. K.S.A. 2022 Supp. 21-6814(a); *State v. Obregon*, 309 Kan. 1267, Syl. ¶ 4, 444 P.3d 331 (2019).

This brings us to the focus of this appeal.

*A part of the criminal threat statute has been struck down by our Supreme Court.*

Our Supreme Court ruled in *State v. Boettger*, 310 Kan. 800, 822-23, 450 P.3d 805 (2019), *cert. denied* 140 S. Ct. 1956 (2020), that a conviction for criminal threat based solely on recklessness was unconstitutional. In so finding, our Supreme Court held the recklessness provision was "unconstitutionally overbroad because it [could] apply to statements made without the intent to cause fear of violence," and the language of the statute "provide[d] no basis for distinguishing circumstances where the speech is constitutionally protected from those where the speech does not warrant protection under the First Amendment." 310 Kan. at 822-23. The ruling struck down the reckless criminal threat crime but left the intentional criminal threat crime untouched.

That ruling applies here. The presentence investigation report ordered after Degand entered the plea agreement designated his 2018 conviction for criminal threat as a person felony. See K.S.A. 2022 Supp. 21-5415(c)(1). But the report did not reveal whether his conviction was for a reckless or intentional criminal threat. This distinction is important here, because if the conviction was for an intentional criminal threat, Degand's criminal history would be scored as B. If it was for a reckless criminal threat, then his score would be a C since the conviction could not legally be included in his history.

The district court resolved all of these issues at the sentencing hearing. First, it took up Degand's objection to the presentence investigation report's inclusion of the prior criminal threat conviction. At the same time, it considered the State's reply that supported the report's score. The court used a "modified categorical approach" in its treatment of this dispute.

Such an approach means that the court can examine the charging documents of the old case, any plea agreements, transcripts of plea hearings, findings of fact and conclusions of law from any bench trial, as well as jury instructions and completed verdicts. This procedure has been approved by the Supreme Court in *State v. Dickey*, 301 Kan. 1018, 1037-38, 350 P.3d 1054 (2015).

In the amended indictment filed in the prosecution of the 2018 criminal threat conviction, Degand was charged with one count each of criminal threat, aggravated assault on a law enforcement officer, interference with law enforcement, and disorderly conduct. The language pertaining to the criminal threat charge stated:

"On or about the 25th of November, 2017 in the State of Kansas and County of Shawnee, CODY MICHAEL DEGAND, did, then and there, unlawfully and feloniously, threaten to commit violence against, to-wit: Deputy Robert Miller, and communicated that threat with the intent to place another in fear, or to cause the evacuation, lock down or

disruption in regular, ongoing activities of any building, place of assembly or facility of transportation, or communicated that threat in reckless disregard of the risk of causing such fear, or evacuation, lock down or disruption in regular, ongoing activities, contrary to the form of the statutes in such case made and provided and against the peace and dignity of the State of Kansas."

This language essentially mirrors the language from the criminal threat statute. See K.S.A. 2022 Supp. 21-5415(a)(1). The charge does not differentiate between intentional or reckless criminal threat.

In trying to convince the court that Degand's prior conviction was for intentional criminal threat, the State offered its rendition of the factual basis of Degand's plea of guilty that he made at the plea hearing in the 2018 prosecution. Before Degand entered his guilty plea in that case, the State gave the factual basis for the plea at the plea hearing as required by K.S.A. 2022 Supp. 22-3210(a)(4). In doing so, the State said:

"Your Honor, if the State were to proceed to trial, the State would introduce evidence that on or about the 25th of November, 2017, that deputies were dispatched to [Degand's father's residence], which is located in Shawnee County, for a domestic disturbance.

"Upon arrival, deputies located an individual who was later identified as Cody Degand and was acting belligerent towards his father while deputies were on scene. Deputies observed Cody wanting to fight with deputies and called deputies explicit names on the scene.

"Eventually, Cody was transported to his mother's residence, which is located [in] Shawnee County, by his father. While at [his mother's residence], Cody continued to act belligerent. Cody's stepfather . . . did not want Cody at his residence and was asked to leave, and Cody was asked to leave by Corporal Foster.

"Cody then made gestures and said he would shoot Corporal Foster, as well as Deputy Miller with the Shawnee County deputy or Sheriff's Office. He additionally called them explicit names.

"While on scene, Cody grabbed a pair of gardening shears in one hand and a gardening picket in his other hand and approached Corporal Foster as well as Deputy Miller. Deputy Miller reported that he was afraid for [the] safety of himself and Corporal Foster [when] Cody approached with the tools. Cody asked Deputy Miller as well as Corporal Foster to shoot him. Cody then threw the tools on the ground and walked away.

"Corporal Foster advised that Cody was under arrest and he placed his hands behind his back. When Corporal Foster and Deputy Miller attempted to take Cody into custody for aggravated assault on a law enforcement officer, he resisted. Eventually, he was able to place handcuffs on Cody's right wrist and Corporal Foster and Deputy Miller used their weight displacement technique to get Cody to the ground. Once Cody was on the ground, he continued to resist until the other half of the handcuff was placed on his left wrist.

"All of these events happened in Shawnee County, Kansas.

"THE COURT: Mr. Degand, are you familiar with what Ms. Heinen just read into the record?

"DEFENDANT DEGAND: Yes, but the only other thing is, my mom's—that was my mom's property, [my stepfather] had no names on the bills. My mom was allowing me to be on that property and he told me to get off the property. My mom allowed me to be on her property.

"THE COURT: The issues that we're talking about—because there's some more that Ms. Heinen may have read into the record that goes beyond what you're pleading to. So what I'm going to ask you is whether or not you admit to making a threat to Deputy Robert Miller on or about the 25th day of November, 2017, in Shawnee County, Kansas.

"DEFENDANT DEGAND: Yes."

Once again, the offered factual basis does not differentiate between reckless and intentional criminal threat.

Similarly, the 2018 journal entry of judgment from the case also failed to differentiate between reckless and intentional criminal threat, as it simply stated that Degand had been convicted under K.S.A. 2017 Supp. 21-5415(a)(1).

A case decided by another panel of this court offers us guidance. In *State v. Martinez-Guerrero*, No. 123,447, 2022 WL 68543 (Kan. App. 2022) (unpublished opinion), this court dealt with a similar situation. Martinez-Guerrero pled guilty to one count of aggravated domestic battery, and his presentence investigation report set his criminal history score as A based on three prior criminal threat convictions—all person felonies. Martinez-Guerrero objected to his criminal history score, and the district court agreed that two of his prior criminal threat convictions should be excluded.

His presentence investigation report, however, did not specify whether the remaining conviction was for making an intentional or reckless criminal threat. To resolve the issue, the district court looked to the plea transcript to see if it could tell which version of the criminal threat statute applied to the crime. After doing so, the district court found the remaining criminal threat conviction could be included in Martinez-Guerrero's criminal history score. 2022 WL 68543, at \*1-2.

On appeal, Martinez-Guerrero claimed the district court improperly calculated his criminal history score by including his prior criminal threat conviction. He challenged the district court's application of the burden of proof, as well as the sufficiency of the evidence on whether his conviction was for intentional or reckless criminal threat. On Martinez-Guerrero's first point, the panel agreed that the district court erred by framing the State's burden of proof as a challenge to the sufficiency of the evidence and viewing the evidence in the light most favorable to the State. Instead, the district court should have reviewed the evidence without deference to the State to determine whether Martinez-Guerrero had been convicted of intentional criminal threat by a preponderance of the evidence. 2022 WL 68543, at \*3.

In resolving the second issue, the panel noted that the district court relied on the transcript of the plea hearing from Martinez-Guerrero's 2018 criminal threat conviction when making its determination. The factual basis provided by the State during the plea



hearing demonstrated that Martinez-Guerrero threatened to shoot a police officer. The threat occurred during a conflict between the police officer and Martinez-Guerrero when Martinez-Guerrero disregarded the police officer's orders. Given all of this, the panel concluded that the State had failed to show that Martinez-Guerrero's prior criminal threat conviction was for an intentional threat or recklessly made in the heat of the moment. 2022 WL 68543, at \*4-6.

We come to the same conclusion here. The State's factual statement alleged Degand "made gestures and said he would shoot Corporal Foster, as well as Deputy Miller." The State also alleged Degand called the officers explicit names and approached them with "a pair of gardening shears in one hand and a gardening picket in his other hand." But like in *Martinez-Guerrero*, this is not enough to establish whether Degand made those comments in the heat of the moment or that he actually intended to threaten the officers. See 2022 WL 68543, at \*6; *State v. Jackson*, No. 124,271, 2022 WL 1906940, at \*5 (Kan. App. 2022) (unpublished opinion). Our Supreme Court has also previously rejected similar assertions even when the defendants made explicit death threats to their victims. See *State v. Lindemuth*, 312 Kan. 12, 18-19, 470 P.3d 1279 (2020); *State v. Johnson*, 310 Kan. 835, 843-44, 450 P.3d 790 (2019); *State v. Cardillo*, No. 120,606, 2021 WL 1149145, at \*6 (Kan. App. 2021) (unpublished opinion).

The State asks us not to consider *Martinez-Guerrero* in this case. The State argues that *Martinez-Guerrero* "is distinguishable because unlike the defendant there who entered a no contest plea, here Degand pled guilty." The State also argues the panel erred by making its own determination of what type of criminal threat Martinez-Guerrero committed because the district court previously concluded Martinez-Guerrero committed an intentional criminal threat.

We reject the State's second argument immediately, as it mischaracterizes the holding in *Martinez-Guerrero*. First, the panel found that the district court used the

incorrect standard of review and resulting burden of proof when rendering its decision because it viewed the evidence in the light most favorable to the State. 2022 WL 68543, at \*3. Second, the panel did not determine which type of criminal threat Martinez-Guerrero committed. Instead, the panel reviewed the evidence and prior caselaw before concluding it could not discern whether Martinez-Guerrero pled no contest to intentional or reckless criminal threat. 2022 WL 68543, at \*4-6.

But considering the State's first argument, it is accurate that Martinez-Guerrero pled no contest in his case, but Degand pled guilty here. The State tries to distinguish Degand's guilty plea from Martinez-Guerrero's no-contest plea by arguing that Degand admitted all elements of the crime charged by pleading guilty. See *State v. Harned*, 281 Kan. 1023, 1045, 135 P.3d 1169 (2006). We fail to see the legal significance of the difference between the two pleas. In *Martinez-Guerrero*, the panel stated:

"Although "'a defendant does not expressly admit his [or her] guilt'" under a no-contest plea, such a plea "'authorizes the court for purposes of the case to treat him [or her] as if he [or she] were guilty.'" During such pleas a defendant is agreeing to refrain from contesting, rather than affirmatively voicing his [or her] guilt to, the charge or charges.'" A district court is required to establish a factual basis for the crime charged before it can accept a no-contest plea.

"By entering into a no-contest plea, Martinez-Guerrero did not admit to the underlying facts of the case. Strictly speaking, Martinez-Guerrero pled no contest to reckless or intentional criminal threat. A factual basis only needed to be established for reckless or intentional criminal threat for the district court to accept Martinez-Guerrero's plea because that was how he was charged. Thus, Martinez-Guerrero's no-contest plea does not help the State in this instance because his plea does not establish which version of criminal threat he pled to—intentional or reckless criminal threat. The State still had to prove Martinez-Guerrero's prior criminal threat conviction was for an intentional threat. It failed to do so on the record before us. [Citations omitted.]" 2022 WL 68543, at \*6.

It is true that Degand admitted to the underlying facts of the case by pleading guilty, but his plea does not establish which version of criminal threat he pled to. The language of the amended indictment, the factual basis given by the State during the plea hearing, and the journal entry of judgment in the case reinforce this conclusion. They all show it could be both intentional or reckless.

Degand's plea is similarly unhelpful to the State because of the following exchange during the 2018 plea hearing:

"THE COURT: At this time, I would ask you, how do you plea to Count I in the Amended Indictment, criminal threat?

"DEFENDANT DEGAND: Guilty."

Put differently, the State never differentiated between which version of criminal threat Degand pled guilty to. Instead, Degand pled guilty to what the State alleged—that he was guilty of either reckless or intentional criminal threat.

In sum, to resolve this sentencing issue before us, we must apply a statute to the facts. K.S.A. 2022 Supp. 21-6810(d)(9) prohibits the inclusion of prior convictions of laws that have since been determined unconstitutional. The statute does not have any exception for convictions obtained as the result of a guilty plea. Because the record before us fails to establish which version of criminal threat Degand pled to, the State failed to prove that Degand's prior criminal threat conviction was for an intentional threat. Thus, we affirm the district court's judgment.

Affirmed.