NOT DESIGNATED FOR PUBLICATION

No. 125,213

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JENNIFER M. MILLER,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; ERIC WILLIAMS, judge. Opinion filed September 8, 2023. Appeal dismissed.

Kai Tate Mann, of Kansas Appellate Defender Office, for appellant.

Lance J. Gillett, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before COBLE, P.J., GARDNER and CLINE, JJ.

PER CURIAM: Jennifer M. Miller was arrested for two counts of aggravated assault of a law enforcement officer with a deadly weapon. Miller pleaded guilty to the charges and the district court imposed a total sentence of 57 months' imprisonment with 24 months' postrelease supervision. Miller was also ordered to register under the Kansas Offender Registration Act (KORA), K.S.A. 2022 Supp. 22-4901 et seq.

Miller raises for the first time on direct appeal three claims: (1) The district court erred by calculating her criminal history score based on an insufficient presentencing

investigation (PSI) report; (2) KORA violates her free speech rights under the First Amendment to the United States Constitution because it unconstitutionally compels speech; and (3) KORA violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it unconstitutionally treats similarly situated offenders under KORA differently. On our review, we find Miller fails to meet her burden to designate a record showing an error in her criminal history calculation under K.S.A. 2021 Supp. 21-6814(d) and both of her constitutional claims are unpreserved. As a result, we dismiss her appeal.

FACTUAL AND PROCEDURAL BACKGROUND

After a confrontation involving gunfire between Miller and two law enforcement officers on March 31, 2021, she was arrested and charged with two counts of aggravated assault of a law enforcement officer with a deadly weapon. Other facts pertaining to the underlying charges are not relevant to the issues on appeal.

Miller later entered into a plea agreement with the State in which she pleaded guilty to two charges of aggravated assault of a law enforcement officer, each a severity level 6, person felony. The district court accepted Miller's plea and she was notified of her duty to register as a violent offender in accordance with both KORA and the plea agreement. Miller presented no objections during the plea hearing.

The PSI reported Miller's criminal history score to be C. During the sentencing hearing, Miller, once again, did not object to the KORA registration requirements and accepted the criminal history score determined by the State. The district court imposed presumptive sentences of 38 months' imprisonment on count one, to run consecutive with 19 months' imprisonment on count two, resulting in a total of 57 months' imprisonment with 24 months' postrelease supervision. The district court reminded Miller that she was required to register as an offender under KORA.

Miller timely appeals.

MILLER FAILS TO MEET HER BURDEN TO SHOW THE DISTRICT COURT ERRED WHEN DETERMINING HER CRIMINAL HISTORY SCORE

Miller first claims that the prosecution failed to meet its burden of proving her criminal history score because the PSI was deficient. Miller argues that the PSI failed to state whether her prior 2018 fleeing and eluding conviction was a person felony, and the crime could have been a misdemeanor or a felony charge, depending on the circumstances. Miller claims that she is serving an illegal sentence because her criminal history score was ambiguous.

Applicable Legal Standards

As provided under the revised Kansas Sentencing Guidelines Act (KSGA), a court arrives at a presumptive sentence for most felonies from a combination of the severity level of the current offense and the defendant's prior criminal history, which is shown by a criminal history score. *State v. Steinert*, 317 Kan. 342, 343, 529 P.3d 778 (2023) (citing K.S.A. 2022 Supp. 21-6804 and K.S.A. 2022 Supp. 21-6805). Another statute, K.S.A. 2022 Supp. 22-3504, governs the correction of an illegal sentence, which can be done "at any time" if the sentence does not align with these or other "applicable statutory provisions." If a defendant argues her criminal history score is wrong, making her sentence illegal, "Kansas appellate courts commonly review challenges at the intersection" of K.S.A. 2022 Supp. 21-6804 and K.S.A. 2022 Supp. 22-3504. *Steinert*, 317 Kan. at 343.

Whether a sentence is illegal is a question of law over which this court exercises unlimited review. *State v. Dawson*, 310 Kan. 112, 116, 444 P.3d 914 (2019). Likewise, the classification of a defendant's prior conviction is a question of law subject to unlimited review. *State v. Dickey*, 305 Kan. 217, 220, 380 P.3d 230 (2016).

Analysis

Although Miller did not raise her criminal history challenge with the district court, as noted above an illegal sentence can be corrected at any time, and Miller may raise the issue with the appellate courts. K.S.A. 2022 Supp. 22-3504(a); *Steinert*, 317 Kan. at 349 (holding that "a challenge to the classification of a prior conviction and the resulting criminal-history score could be raised for the first time on appeal because it presented an illegal-sentence claim") (citing *State v. Dickey*, 301 Kan. 1018, 350 P.3d 1054 [2015]).

As described, the revised KSGA establishes presumptive sentences on a grid, at the intersection of a defendant's current crime's severity level and her criminal history score. The offender's criminal history is scored from I (lowest) to A (highest). See K.S.A. 2022 Supp. 21-6804 (nondrug offense grid). Miller challenges the district court's basis for classifying her prior fleeing and eluding conviction as a person felony, contributing to her criminal history score of C. She asserts that although the fleeing and eluding statute, K.S.A. 2017 Supp. 8-1568, outlines both felony and misdemeanor offenses, the PSI failed to designate which provision applies to her prior crime. If her prior crime had been classified as a misdemeanor, Miller argues she would have no person felonies in her criminal history, which would lower her criminal history score from C to E.

Miller's PSI criminal history worksheet, part of the PSI, is included in the appellate record. This document reflects that she was convicted of a *person felony* for fleeing and eluding under K.S.A. 8-1568 on January 11, 2018. This is gleaned from the "conviction code" of "AFP"—an "Adult Felony Person". Because her crime occurred in 2017, K.S.A. 2017 Supp. 8-1568 controls. See *State v. Rice*, 308 Kan. 1510, 1512, 430 P.3d 430 (2018) ("Criminal statutes and penalties in effect at the time of the criminal act are controlling."). This statute states, in pertinent part:

"(c)(1) Violation of subsection (a), upon a:

(A) First conviction is a class B nonperson misdemeanor;

(B) second conviction is a class A nonperson misdemeanor; or

(C) third or subsequent conviction is a severity level 9, person felony.

"(2) Violation of subsection (b) is a severity level 9, person felony." K.S.A. 2017 Supp. 8-1568.

This law specifies that a fleeing and eluding charge is not a person felony unless it is the third or subsequent conviction, or if an offender commits an additional violation prescribed under K.S.A. 2017 Supp. 8-1568(b). Despite the coding of Miller's prior offense as a person felony in the PSI, the district court did not specify under which subsection Miller was convicted during the sentencing hearing or in its journal entry.

Miller contends that because the PSI did not include whether the conviction was under K.S.A. 2017 Supp. 8-1568(a) or (b), it was not sufficient to determine her criminal history score. She argues that the State bore the burden and failed to properly establish her criminal history score because the State failed to specify the applicable subsection of the fleeing and eluding statute. Citing *State v. Obregon*, 309 Kan. 1267, 1275, 444 P.3d 331 (2019), she reasons that because "more is required when the summary does not indicate which version" of an offense has been committed, the PSI could not establish that Miller's prior fleeing and eluding conviction was a person felony. Miller asks that this court remand her case to the district court under K.S.A. 2022 Supp. 22-3504(a) for resentencing.

The State argues that because Miller admitted her criminal history during the sentencing hearing, her admission was sufficient to establish her criminal history score. The State relies on our Supreme Court's ruling in *State v. Corby*, 314 Kan. 794, 502 P.3d 111 (2022), to reason that the State was not required to present anything more once Miller admitted to the criminal history during the sentencing hearing.

In *Corby*, the defendant faced a similar scenario: his PSI showed two prior felony convictions for fleeing and eluding under K.S.A. 8-1568. But because the PSI did not cite a subsection of that statute, he argued it was possible that his convictions were misdemeanors, not felonies. But Corby had admitted to his criminal history at sentencing and did not argue on appeal that his prior convictions *were* misdemeanors; he simply argued they *might* have been, and it was the State's burden to produce evidence to support the classification. But our Supreme Court disagreed, finding that Corby's admission relieved the State from having to produce additional evidence to support his criminal history score under K.S.A. 2020 Supp. 21-6814(a). 314 Kan. at 796-97.

The State is somewhat correct, in that our Supreme Court's ruling in *Corby* directs our decision, in part. Here, Miller admitted her criminal history at sentencing—she conceded when the district court asked if she agreed that the 34 convictions listed in the PSI were hers. Like the defendants in both *Corby* and *State v. Roberts*, 314 Kan. 316, 498 P.3d 725 (2021), Miller had two options under K.S.A. 2021 Supp. 21-6814(a)—to either admit her criminal history in open court—which she did—or to allow the sentencing judge to determine the history by a preponderance of evidence. *Corby*, 314 Kan. at 797 (citing *Roberts*). Our Supreme Court explained that the admission of criminal history distinguishes these cases from *Obregon*, on which Miller tries to rely, because unlike Miller, Corby, and Roberts—Obregon did not admit to his criminal history, his PSI failed to specify which version of the out-of-state crime Obregon had committed, and the State failed to offer other evidence to support the classification under K.S.A. 2018 Supp. 21-6814(b), (c). See *Obregon*, 309 Kan. at 1275.

But what neither party addresses in their briefs is that while Miller's appeal was pending (appeal filed June 2, 2022), the Kansas Legislature amended the statute controlling criminal history challenges raised by a defendant for the first time on appeal—K.S.A. 2022 Supp. 21-6814. In fact, our Supreme Court recently found that this amendment applied to a defendant's direct appeal pending at the time of the statutory

amendment. *Steinert*, 317 Kan. at 343 (citing L. 2022, ch. 73, § 4; K.S.A. 2022 Supp. 21-6814, effective July 1, 2022). Under the prior version of the statute, the State bore the initial burden to prove criminal history at sentencing, with that burden shifting to the defendant depending upon when and how the offender provided notice of any error in the criminal history. See, e.g., *Roberts*, 314 Kan. at 323 (Kansas caselaw "assign[s] burden of proof based on *when* the defendant challenges the constitutional validity of a prior conviction"; here, in the context of a defendant's absence of counsel.).

However, in the 2022 amendment to K.S.A. 21-6814, the Legislature added subsection (d), which now specifies the burden of proof when a defendant alleges a criminal history error for the first time on appeal:

> "If an offender raises a challenge to the offender's criminal history for the first time on appeal, *the offender shall have the burden of designating a record that shows prejudicial error. If the offender fails to provide such record, the appellate court shall dismiss the claim*. In designating a record that shows prejudicial error, the offender may provide the appellate court with journal entries of the challenged criminal history that were not originally attached to the criminal history worksheet, and the state may provide the appellate court with journal entries establishing a lack of prejudicial error. The court may take judicial notice of such journal entries, complaints, plea agreements, jury instructions and verdict forms for Kansas convictions when determining whether prejudicial error exists. The court may remand the case if there is a reasonable question as to whether prejudicial error exists." (Emphasis added.) K.S.A. 2022 Supp. 21-6814(d).

Because Miller challenges her criminal history score for the first time on appeal, it is her burden—not the State's—to designate a record showing prejudicial error. But Miller provides nothing to demonstrate her prior conviction was not a felony as listed on the PSI worksheet.

Under K.S.A. 2022 Supp. 21-6814(d), because Miller raised a challenge to her criminal history score for the first time on appeal, we must focus on whether she met her burden of designating a record that shows prejudicial error. But on appeal, Miller provides no journal entry of the challenged fleeing and eluding conviction, as she is permitted to do under K.S.A. 2022 Supp. 21-6814(d). She only argues that because the PSI includes no other prior fleeing or eluding convictions, her conviction must have logically been a nonperson misdemeanor under K.S.A. 2017 Supp. 8-1568(c)(1)(A). But not only does she fail to provide a record to bolster this claim, her theory is fundamentally flawed.

Miller fails to acknowledge that there is a possibility—even a probability—that her fleeing and eluding conviction fell under K.S.A. 2017 Supp. 8-1568(b) and, if so, even as a first offense it would be a person felony under K.S.A. 2017 Supp. 8-1568(c)(2). In fact, it is just as reasonable to conclude that the conviction fell under one of the exceptions of K.S.A. 2017 Supp. 8-1568(b) and was rightfully classified as a felony, as it is to assume her conviction was a misdemeanor. And the record lends credence to this theory: the detective stated in the PSI affidavit that Miller's prior arrest for felony fleeing or attempting to elude an officer was under K.S.A. 2017 Supp. 8-1568(b)(1)(E) and (c)(2).

Although the record does not include the journal entry of Miller's prior conviction, it is not the State's burden to provide it, according to K.S.A. 2022 Supp. 21-6814(d). By presenting no other evidence of her fleeing and eluding conviction, Miller fails to meet her burden to designate a record showing that the prior conviction was not a person felony and that any error in the PSI was prejudicial. Because Miller does not meet her burden, her claim must be dismissed as required by K.S.A.2022 Supp. 21-6814(d).

WE DO NOT REACH THE ISSUE OF KORA'S CONSTITUTIONALITY

Miller's final two arguments contend KORA violates her rights under the United States Constitution. First, she argues KORA violates her First Amendment rights because the registration compels her to speak on behalf of the government and prohibits her from speaking anonymously. Second, she claims KORA violates her equal protection rights under the Fourteenth Amendment because it creates an exit mechanism for some offenders, but not others, with no rational basis. The State counters that neither constitutional claim is preserved for appeal, and we agree. Because the claims are unpreserved for our review, we decline to reach them.

The Issues Are Not Properly Preserved for Our Review

Before reviewing the constitutionality of the KORA mechanism, we must first determine whether Miller's arguments are properly before us. Critical to our analysis is that Miller concedes she did not raise a KORA registration argument before the district court. A longstanding credo in the appellate court is that, generally, constitutional issues not raised before the district court cannot be raised on appeal. *State v. Valdez*, 316 Kan. 1, 10, 512 P.3d 1125 (2022).

As noted by Miller, there are three established exceptions to this general rule, including: (1) The newly-asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; (2) resolution of the question is necessary to serve the ends of justice or to prevent denial of fundamental rights; and (3) the district court was right for the wrong reason. *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019). Miller argues that two of these exceptions apply: first, because she raises a facial challenge to KORA, she reasons that no other factual development is necessary. And she maintains the second exception should apply because there is no dispute that the rights provided under the First and Fourteenth Amendments

are fundamental. *State v. Jones*, 313 Kan. 917, 933, 492 P.3d 433 (2021) (recognizing freedom of speech as fundamental right and liberty); *State v. Limon*, 280 Kan. 275, 283, 122 P.3d 22 (2005) (right recognized by Fourteenth Amendment to the United States Constitution and sections 1 and 2 of the Kansas Constitution Bill of Rights). A facial challenge to the constitutionality of a statute is usually a pure question of law. *State v. Hinnenkamp*, 57 Kan. App. 2d 1, 4-6, 446 P.3d 1103 (2019) (explaining that a facial attack on a statute is a pure question of law).

But we find Miller's arguments unpersuasive. Even if these two exceptions permitted us to review the issue for the first time on appeal, our decision to do so is a prudential one, and we are not bound to do so. See *State v. Genson*, 316 Kan. 130, 135-36, 513 P.3d 1192 (2022) ("[I]f the issues were *not* being raised for the first time on appeal, the panel would not have had discretion to refuse to consider them. But since these arguments *were* newly raised before the panel, the panel could exercise its discretion to consider whether to apply a prudential exception to the general rule that issues not raised before the district court cannot be raised for the first time on appeal."); *State v. Robison*, 314 Kan. 245, 248, 496 P.3d 892 (2021); see also *State v. Gray*, 311 Kan. 164, 170, 459 P.3d 165 (2020) (declining to reach an unpreserved claim and finding the failure to present the argument to the district court "deprived the trial judge of the opportunity to address the issue in the context of this case and such an analysis would have benefitted our review").

Comparable constitutional questions have been considered by several panels of this court, and this court has consistently opted not to review the issues for the first time on appeal. See *State v. Spilman*, 63 Kan. App. 2d ___, 2023 WL 4376272, at *16-17 (2023), *petition for rev. filed* August 7, 2023; *State v. Ontiberos*, No. 124,623, 2023 WL 3032204, at *2 (Kan. App.) (unpublished opinion), *rev. denied* ___ Kan. ___ (August 25, 2023); *State v. McDaniel*, No. 124,459, 2023 WL 2940490, at *6 (Kan. App.) (unpublished opinion), *petition for rev. filed* May 15, 2023; *State v. Pearson*, No.

125,033, 2023 WL 2194306, at *1 (Kan. App.) (unpublished opinion), *petition for rev. filed* March 20, 2023; *State v. Ford*, No. 124,236, 2023 WL 1878583, at *19 (Kan. App.) (unpublished opinion), *rev. granted* 317 Kan. ___ (June 23, 2023); *State v. Jones*, No. 124,174, 2023 WL 119911, at *5 (Kan. App.) (unpublished opinion), *rev. granted* 317 Kan. ___ (June 29, 2023). As the *Pearson* panel and the *Jones* panel articulated, a compelling reason to refrain from addressing these issues is because there are numerous factual questions that remain unanswered. *Pearson*, 2023 WL 2194306, at *1; *Jones*, 2023 WL 119911, at *5. "Factfinding is simply not the role of appellate courts." *State v. Nelson*, 291 Kan. 475, 488, 243 P.3d 343 (2010) (citing *State v. Thomas*, 288 Kan. 157, 161, 199 P.3d 1265 [2009]).

As recently explained by another panel of this court, even if we were to agree with Miller that KORA registration compels her speech as addressed under the First Amendment, KORA's restrictions on her free speech rights are only unconstitutional if the restrictions cannot survive the application of strict scrutiny. *Spilman*, 2023 WL 4376272, at *17 (citing *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 642, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994) ("'Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny'" as laws that "'suppress, disadvantage, or impose differential burdens upon speech because of its content.'"); *U.S.D. No. 503 v. McKinney*, 236 Kan. 224, 235, 689 P.2d 860 (1984). Because strict scrutiny would require the State to show a compelling government interest supporting the restrictions on speech and would require the restriction to be narrowly tailored to achieve that interest, this examination would require us to develop facts outside the appellate record. See *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 680, 440 P.3d 461 (2019).

Miller's equal protection claim suffers the same fate. Even if she can show standing and present a claim that she is treated disparately from similarly situated KORA registrants, our review of her Fourteenth Amendment claim requires rational basis

scrutiny. See *Spilman*, 2023 WL 4376272, at *17 (citing *State v. Huerta*, 291 Kan. 831, 834, 247 P.3d 1043 [2011] ["rational basis test applied in equal protection challenge to a criminal statute"]). To apply the rational basis test, we would need to determine whether similarly situated offenders are treated differently, and whether the classifications used to do so bear a rational relationship to a legitimate government goal. *Crawford v. Kansas Dept. of Revenue*, 46 Kan. App. 2d 464, 471, 263 P.3d 828 (2011) (quoting *FCC v. Beach Communications, Inc*., 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 [1993]). As the party challenging the classifications, Miller would bear the burden of disputing every reasonable basis to support the classifications. And here, we do not have enough information in the record about these classifications or the government interests to undergo a complete analysis of the KORA statutes without additional factual development.

We see no reason to depart from our court's prior rulings. Addressing the constitutional issues Miller presents would require this court to consider evidence and facts outside the record on appeal. For the preceding reasons, it is well within our discretion to decline review of these issues. We therefore decline to address Miller's arguments that KORA violates the First and Fourteenth Amendments to the United States Constitution for the first time on appeal.

Because Miller failed to designate a record on which we could consider her criminal history challenge under K.S.A. 2022 Supp. 21-6814(d), and because we decline to reach her constitutional challenges, we dismiss her appeal on those bases.

Appeal dismissed.