

NOT DESIGNATED FOR PUBLICATION

No. 125,252

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ROBERT BRUCE MANS JR.,
Appellant.

MEMORANDUM OPINION

Appeal from Marion District Court; MARK S. BRAUN, judge pro tem. Opinion filed May 12, 2023. Sentence vacated in part and case remanded with directions.

Emily Brandt, of Kansas Appellate Defender Office, for appellant.

Steven J. Obermeier, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before ISHERWOOD, P.J., SCHROEDER, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: Robert Bruce Mans Jr. pled no contest to one count each of voluntary manslaughter and aggravated battery. At sentencing, the district court ordered Mans to pay \$5,000 to the Board of Indigents' Defense Services (BIDS) to cover a reduced portion of his incurred attorney fees. On appeal, Mans argues the district court failed to make the necessary findings under K.S.A. 22-4513 before imposing BIDS fees. After reviewing the record and the issues presented, we find the order requiring Mans to reimburse BIDS fees must be vacated and the case remanded for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

In October 2020, the State charged Mans with premeditated first-degree murder in violation of K.S.A. 2019 Supp. 21-5402(a)(1), an off-grid person felony. Because he was indigent, the district court appointed attorney David Harger to represent Mans. In November 2021, Mans filed a motion for appointment of additional defense counsel because of the complexity of the case and the volume of discovery. The court granted the motion, appointing Carol Longenecker Schmidt as additional defense counsel. A jury trial was ultimately scheduled for late April 2022.

On the eve of trial, the parties reached a plea agreement in which Mans would plead no contest to one count of voluntary manslaughter in violation of K.S.A. 2019 Supp. 21-5404(a)(1), a severity level 3 person felony, and one count of aggravated battery in violation of K.S.A. 2019 Supp. 21-5413(b)(1)(A), a severity level 4 person felony. The district court accepted Mans' plea at a hearing after thoroughly reviewing the terms of the agreement with Mans and confirming that he had freely, voluntarily, and intelligently entered the plea.

At sentencing, the parties recommended the district court follow the terms of the plea agreement by imposing the standard number in the appropriate grid box for each charge and running the sentences consecutively. The State asked the court to order Mans to reimburse the Crime Victims' Compensation Board in the amount of \$3,224.25 as restitution and recommended the court order him to pay 25 percent of his monthly disposable income towards any costs and fees imposed as part of the sentence. As for BIDS attorney fees, the State asked the court to inquire about Mans' ability to pay. Although Mans did not object to payment of restitution or other costs, defense counsel asked the court to consider waiving reimbursement for BIDS attorney fees. By defense counsel's estimate, attorney fees would be around \$40,000.

The district court deviated slightly from the plea agreement by imposing the aggravated sentence for each count, sentencing Mans to serve 228 months' imprisonment on the voluntary manslaughter charge and 43 months' imprisonment on the aggravated battery charge, running the sentences consecutively.

After announcing the prison portion of Mans' sentence, the district court noted it would be "difficult . . . to order full costs in this matter not knowing the exact amount of attorney fees." The court asked about the "cap" of attorney fees that could be imposed, to which defense counsel offered, "I think the cap's at \$5,000." The court ordered Mans to pay restitution of \$3,224.25, court costs of \$193, KBI lab fee of \$400, BIDS application fee of \$100, and a booking fee of \$45. As for attorney fees, the court said it would set the amount at \$5,000, noting the amount "may seem high, but I've seen different things based on percentages." The court then engaged in the following discussion with Mans:

"[THE COURT:] Mr. Mans, let me ask you this. What kind of skills do you have employment-wise?

"THE DEFENDANT: I got a Saint Mary's College, I've got a sheet metal trade. I work[ed] in a machine shop when I was younger.

"THE COURT: So you're a machinist, and you work [in] sheet metal, both of which are in high demand, and both of which pay well in the real world. Correct?

"THE DEFENDANT: Correct.

"THE COURT: All right. And I know some of the facilities will use those people to get them work or do work. So, I don't know how much money—do you have any bank accounts or lottery winnings sitting anywhere?

"THE DEFENDANT: Not that I'm aware of.

"THE COURT: I'm going to go ahead and order that five thousand based on the fact that I think that, . . . with your skills, whether you get a job while in prison or outside, that there are amounts that can be paid, five thousand of attorneys fees, as opposed to the likely amount that's to be done."

The parties advised the district court that it needed to address the workability of any restitution payment plan, agreeing that it would be appropriate for the court to require Mans to pay 25 percent of his disposable income towards restitution until paid. Likewise, because that payment plan would not apply to payment of BIDS fees, defense counsel asked the court to defer repayment of attorney fees until Mans' release from prison. The court explained there were "difficult[ies]" that "always bothered me" with deciding the workability of restitution based on the uncertainty surrounding a defendant's incarceration. The court opined that Mans "[has] skills other people would love to have, and that would generate an income for even an average machinist, even an average sheet metal person." Ultimately, the court agreed to order the payment plan for restitution as requested by the parties.

Mans timely appealed from the district court's order requiring him to pay \$5,000 in BIDS attorney fees.

ANALYSIS

Mans challenges the assessment of BIDS attorney fees at sentencing in two ways, arguing first that the district court failed to explicitly consider his financial resources and the burden such payment would impose, as required by K.S.A. 22-4513(b). See *State v. Robinson*, 281 Kan. 538, Syl. ¶ 1, 132 P.3d 934 (2006). Second, he contends that even if this court finds the district court's limited inquiry into his ability to pay was sufficient, the district court nonetheless failed to follow K.S.A. 22-4513(a) when setting the specific amount of the fee.

Mans acknowledges that while he asked the district court to waive attorney fees, he did not contest the imposition of BIDS attorney fees for noncompliance with K.S.A. 22-4513 below. Even so, that does not preclude him from raising the issue on appeal because K.S.A. 22-4513 places mandatory duties upon the district court that must be

fulfilled before imposing BIDS fees on a criminal defendant. *State v. Garcia-Garcia*, 309 Kan. 801, 822-23, 441 P.3d 52 (2019) (also finding that consideration of issue is necessary to serve ends of justice); *Robinson*, 281 Kan. at 541 (reviewing unpreserved BIDS fees claim as a question of law arising on proven or admitted facts and that was finally determinative of the case).

Resolving Mans' appeal requires interpretation of K.S.A. 22-4513, which presents a question of law subject to unlimited review. *State v. Stoll*, 312 Kan. 726, 736, 480 P.3d 158 (2021). Because Mans is also challenging the amount of BIDS attorney fees, we review that determination for an abuse of discretion. *State v. Hernandez*, 292 Kan. 598, 609, 257 P.3d 767 (2011). A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). The party asserting the district court abused its discretion bears the burden of showing such abuse of discretion. *State v. Crosby*, 312 Kan. 630, 635, 479 P.3d 167 (2021).

The district court failed to explicitly consider Mans' ability to pay before imposing BIDS fees.

K.S.A. 22-4513(b) provides, in relevant part: "In determining the amount and method of payment of such [BIDS] sum, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of such sum will impose." As both parties note, the Kansas Supreme Court's decision in *Robinson* interpreting this statute controls here. In *Robinson*, our Supreme Court held under the plain language of the statute that "[t]he sentencing court, at the time of initial assessment, must consider the financial resources of the defendant and the nature of the burden that payment will impose *explicitly*, stating on the record how those factors have been weighed in the court's decision." 281 Kan. at 546.

To begin, the State suggests *Robinson* should be overruled because the Legislature did not intend for K.S.A. 22-4513(b) to apply to criminal defendants who are sentenced to prison. But we are duty bound to follow Kansas Supreme Court precedent unless there is some indication of a departure from a previous position. See *State v. Rodriguez*, 305 Kan. 1139, 1144, 390 P.3d 903 (2017); *State v. Maberry*, 58 Kan. App. 2d 215, 225, 465 P.3d 191 (2020). The State rightfully concedes there are no cases indicating a departure, so this court must continue to apply *Robinson*. See *State v. Buck-Schrag*, 312 Kan. 540, 555-56, 477 P.3d 1013 (2020). As an alternative, the State contends that Mans fails to meet his burden of designating a record that affirmatively shows prejudicial error. See *State v. Galloway*, 311 Kan. 238, 251, 459 P.3d 195 (2020). The basis for the State's position relates to its explanation for why *Robinson* was incorrectly decided, so we need not belabor that discussion any further. See *Rodriguez*, 305 Kan. at 1144.

The limited inquiry by the district court here is similar to *State v. Chavez*, No. 114,244, 2017 WL 3202955, at *7 (Kan. App. 2017) (unpublished opinion), in which another panel of this court vacated and remanded a BIDS fee order based on *Robinson*. In *Chavez*, the district court ordered the defendant to reimburse BIDS attorney fees of \$750 after briefly inquiring about whether the defendant had any children, available assets or income, and any mental or physical disabilities that would prevent him from working full time. On appeal, the panel determined the court's inquiry insufficient because it made no attempt to inquire about the type of work or the defendant's expected earnings upon release from prison, nor did the court ask about his debts or other financial obligations. 2017 WL 3202955, at *7. In reaching that conclusion, the panel relied in part on *State v. Wade*, 295 Kan. 916, 927, 287 P.3d 237 (2012), in which our Supreme Court held that evidence of a defendant's employability is not enough standing alone to satisfy *Robinson*.

The State unpersuasively asserts that "a reasonable person would agree with [the district court]'s approach in considering and weighing the *Robinson* factors." Contrary to the State's suggestion, the district court could not have made a proper determination of

Mans' ability to pay based on its brief questioning. Although the district court learned that Mans had sheet metal training and previously worked in a machine shop, the district court did not ask about the actual income Mans might earn or *explicitly* consider the nature of the burden being imposed. The fact that Mans—who is in his fifties—must serve more than 22 years in prison before he can engage in his trade, seems a relevant consideration. Likewise, although the court asked if he had any bank accounts or lottery winnings, it did nothing to ascertain his debts or other financial obligations. See *State v. Quinones*, No. 124,177, 2022 WL 2112233, at *2 (Kan. App. 2022) (unpublished opinion). Without a proper inquiry, it was impossible for the court to assess Mans' financial resources and the burden that payment of attorney fees would impose on him. We find that the district court failed to comply with K.S.A. 22-4513(b) before ordering Mans to pay BIDS attorney fees.

The district court abused its discretion in setting the BIDS fee amount.

Mans also challenges the amount of the BIDS attorney fee assessment. Under K.S.A. 22-4513(a), a district court must tax a defendant the lesser of two specified amounts as BIDS reimbursement. See *State v. Stevens*, 285 Kan. 307, 330, 172 P.3d 570 (2007), *overruled on other grounds by State v. Ahrens*, 296 Kan. 151, 290 P.3d 629 (2012). In particular, the statute requires the district court to assess the lesser of "all expenditures made . . . to provide counsel and other defense services" *or* "the amount allowed by the [BIDS] reimbursement tables as provided in K.S.A. 22-4522." K.S.A. 22-4513(a). K.S.A. 22-4522(e)(5) requires BIDS to create rules and regulations for its operation and for the guidance of defense counsel, including "adopt[ing] and maintain[ing] reimbursement tables which set forth the cost to [BIDS] for each separate category of service provided."

Although the parties disagree about the proper application of the reimbursement tables when setting a BIDS fee amount, to resolve this dispute we need only conclude

that the record supports Mans' claim that the district court failed to comply with K.S.A. 22-4513(a) when setting the BIDS fee reimbursement amount at \$5,000. A review of the sentencing transcript shows the court arrived at that figure after defense counsel offered it up in response to the district court's statement about "never know[ing] where the cap should stand." The current maximum appears to be \$8,000. See K.A.R. 105-5-8(c). But more to the point, the district court clearly did not arrive at the \$5,000 figure by consulting the BIDS reimbursement tables as required by K.S.A. 22-4513(a). Thus, we find the amount of the BIDS fee assessment must be vacated.

As a final point, we address the State's attempt to justify the amount set by the district court by referencing the Kansas Administrative Regulations governing BIDS attorney compensation. See K.A.R. 105-5-4; K.A.R. 105-5-6(a). As Mans aptly notes, relying on these regulations would be inappropriate because the statute plainly directs the court to consult the reimbursement tables. Moreover, the attorney compensation tables maintained by BIDS clearly state that "the reasonable levels of compensation are not the same as the reimbursement tables which are used for defendant repayment." See Board of Indigents' Defense Services, Reasonable Levels of Compensation, <https://www.sbids.org/s/ReasonComp.pdf>.

In sum, because of the district court's noncompliance with K.S.A. 22-4513(b) and *Robinson*, the appropriate remedy is to vacate the assessment of BIDS attorney fees and remand for further proceedings. On remand, in the event BIDS fees are imposed, the district court must also comply with K.S.A. 22-4513(a) by consulting the BIDS reimbursement tables when specifying the amount of BIDS fees.

Sentence vacated in part and case remanded with directions.