

NOT DESIGNATED FOR PUBLICATION

No. 125,300

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellee,*

v.

SHIRLEY K. DAVIS,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Sedgwick District Court; BRUCE C. BROWN, judge. Opinion filed May 19, 2023.  
Appeal dismissed.

*Peter Maharry*, of Kansas Appellate Defender Office, for appellant.

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

Before BRUNS, P.J., CLINE and HURST, JJ.

PER CURIAM: Shirley K. Davis appeals from the district court's refusal to order the production of a new presentence investigation (PSI) report. Davis entered a plea agreement under which she agreed to plead guilty to driving under the influence and three misdemeanor assaults. Through the course of the plea, the district court received and accepted the PSI report that Davis claims erroneously showed the three misdemeanor assaults converted to a single person felony. Although the district court recognized there might be an error, it declined to seek a new or corrected PSI report as the potentially

erroneous PSI report did not impact Davis' sentence. Finding her appeal moot, this court dismisses Davis' appeal.

#### FACTUAL AND PROCEDURAL BACKGROUND

On April 5, 2022, Davis entered into a single plea agreement in which she pled guilty to driving under the influence (DUI) stemming from case No. 21-CR-713; and to three class C, person misdemeanor assault charges from case No. 22-CR-278. Because Davis had two prior DUI convictions within the preceding 10 years, the current DUI conviction was an off-grid felony.

A PSI report was prepared before sentencing which included the three misdemeanor assaults in the plea agreement and categorized them as "AMC" in the conviction code. This "AMC" code indicated that the convictions were "misdemeanors converted to a felony." See Kansas Sentencing Guidelines Desk Reference Manual, Appendix A: Presentence Investigation Report (PSI) – Instructions and Forms Criminal History Worksheet, at 10 (2021). At sentencing on May 11, 2022, Davis' attorney objected to the PSI report on the grounds that the three misdemeanors were prematurely and inaccurately converted to a felony. Davis' attorney argued that the misdemeanors should only be converted to a felony if Davis committed a new crime within three years and claimed that "[o]nce they're converted over they always are converted over." After hearing these arguments, the district court sentenced Davis to 12 months in prison for the DUI, and 90 days total in jail for the three misdemeanor assaults, with the two terms to run concurrent.

Davis' attorney then asked the court to order a corrected PSI report so that the three misdemeanor assaults would not show as converted to a single felony. He explained that if Davis has future dealings with the criminal justice system, she might not remember that the PSI report in this case had errors in her criminal history. The district court

initially agreed to order a new PSI report, but also explained that it did not rely on the converted misdemeanors in determining Davis' criminal history for sentencing, and if Davis commits a new crime in the future a new PSI report would be created in accordance with the applicable statute. However, according to Davis' motion to correct the PSI report, the court notified the parties that it later decided not to order a new PSI report after consultation with the Kansas Sentencing Commission. The court denied Davis' motion to correct the PSI report and she now appeals.

### DISCUSSION

On appeal, Davis argues that her three misdemeanor assaults were inaccurately converted to a single person felony in the PSI report and asks this court to order it be corrected. Although she acknowledges that the allegedly incorrect conversion in the PSI report does not affect her sentence in this case, she argues it could affect her in the future. The State asserts that this appeal is moot because any potential incorrect conversion does not affect Davis' sentence in this case, and alternatively that Davis' argument lacks merit.

Generally, Kansas appellate courts decline to decide moot questions or render advisory opinions. *State v. Montgomery*, 295 Kan. 837, 840, 286 P.3d 866 (2012). "[T]he role of a court is to "determine real controversies relative to the legal rights of persons and properties which are actually involved in the particular case . . . ." 295 Kan. at 840. However, the court's decision to apply the mootness doctrine to dismiss an action is prudential—not jurisdictional—which means that under certain conditions the court may deem it necessary to decide an issue that may otherwise be moot. *State v. Roat*, 311 Kan. 581, 590, 466 P.3d 439 (2020). This court exercises unlimited review to determine whether a case is moot. 311 Kan. at 590.

The party asserting mootness bears the initial burden of demonstrating that the case is moot. If that prima facie showing is met, the burden then shifts to the party

opposing the mootness finding "to show the existence of a substantial interest that would be impaired by dismissal or that an exception to the mootness doctrine applies." *Roat*, 311 Kan. at 593. While there is no bright-line test for mootness, this court must ultimately determine whether its judgment "would have meaningful consequences for any purpose, including future implications." 311 Kan. at 592-93. Before dismissing a case as moot, this court must "conclude that the requested relief would not have an impact on the appellant's rights." 311 Kan. at 593.

Neither party claims that Davis received an inaccurate or illegal sentence. The district court sentenced Davis without consideration of the three misdemeanors on her PSI report that were converted to a single felony. Thus, neither party objected to the impact or use of the PSI report, or Davis' criminal history score in the present case. However, Davis alleges the PSI report was inaccurate and requests this court to order it be corrected. But that correction would have no effect on her current sentence. Thus, the State successfully meets the prima facie showing that the issue is moot. Therefore, the burden shifts to Davis to prove that she has a substantial interest that would be impaired if the court dismisses this case as moot, or that an exception to the mootness doctrine applies. See *Roat*, 311 Kan. at 593.

While Davis did not explicitly address the State's mootness argument, she did argue that having an inaccurate PSI report could impact any future sentencing should she commit a new crime. There are circumstances in which a defendant would have a substantial interest in having an accurate PSI report and criminal history score, but such circumstances are not present here. The PSI report created for the present case should not be used for any speculative future sentencing in the event Davis commits a new crime. In the unfortunate event that Davis stands accused of committing a criminal offense in the future, the district court will be required to generate a new criminal history score and PSI report. K.S.A. 2022 Supp. 21-6813(a); see *State v. Steele*, No. 115,270, 2020 WL 3393818, at \*2 (Kan. App. 2020) (unpublished opinion).

In *Steele*, the Kansas Supreme Court dismissed as moot the defendant's challenge to his criminal history which included two Colorado convictions that he asserted were incorrectly classified. However, by the time the court addressed his appeal the defendant had been released and was no longer serving any part of his sentence including imprisonment, postrelease supervision, or probation. In response to the State's motion to dismiss as moot, the defendant argued that dismissal would potentially prevent him from challenging classification of his prior convictions in future criminal matters. The court was unpersuaded and explained that the defendant "fail[ed] to explain how a future sentencing court would have authority to ignore the statutory requirements for preparing and considering a presentence investigation in a manner that would deny him his legal right to challenge 'any error in the proposed criminal history worksheet.'" 2020 WL 3393818, at \*2.

As in *Steele*, Davis' argument is too speculative to demonstrate that her future rights would be affected if the PSI report in this case contains an uncorrected error. See 2020 WL 3393818, at \*2. She speculates that if she were to be accused of committing a criminal act in the future, the sentencing court might look at her PSI report in this matter and would not order a new PSI report. She further speculates that the district court would then improperly rely on the current PSI report in calculating her criminal history score, and she and her future attorney would not object to any incorrectly converted misdemeanors. To avoid dismissal for mootness, a defendant must show that their claim protects collateral rights necessitating resolution of their underlying appellate issues. *Roat*, 311 Kan. at 601. Davis' argument does not account for the requirement that any district court she may encounter in a future criminal proceeding adhere to statutory requirements when ordering, preparing, and considering a presentence investigation report, or that Davis maintains the ability to challenge that presentence investigation report. See K.S.A. 2022 Supp. 21-6814(a), (c). As a result, this court dismisses Davis' appeal as moot.

## CONCLUSION

Although Davis' argument is moot, this court understands the potential risk asserted by Davis. If the PSI report in this case is inaccurate, its accessibility in the future poses a nonzero risk of causing confusion. While a district court cannot avoid its statutory duty to order and analyze a PSI report, it may take judicial notice of a prior PSI report pursuant to K.S.A. 2022 Supp. 21-6813(f). To avoid unnecessary confusion and to serve judicial efficiency, the best practice would be to ensure the accuracy of any PSI report relied upon by the district court.

Appeal dismissed.