NOT DESIGNATED FOR PUBLICATION

No. 125,478

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JAMES A. VAUGHAN JR.,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; SARA WELCH, judge. Opinion filed September 8, 2023. Affirmed.

Richard P. Klein, of Lenexa, for appellant.

Shawn E. Minihan, assistant district attorney, *Stephen M. Howe*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before WARNER, P.J., GARDNER and HURST, JJ.

PER CURIAM: James A. Vaughan Jr. pleaded guilty to his sixth DUI, and as part of his sentence, the district court ordered him to pay a $2,500 fine. Over 10 years later, Vaughan moved to correct an illegal sentence, challenging the district court's failure to establish an alternate method of payment for his fines and fees. The district court denied Vaughan's motion. Having thoroughly reviewed the law and the record, we affirm.

Factual and Procedural Background

The State charged Vaughan with DUI, in violation of K.S.A. 2008 Supp. 8-1567, and driving with a suspended license, from his conduct on January 22, 2009. According to his plea agreement, Vaughan pleaded guilty to DUI and, because it was his sixth DUI conviction, the district court sentenced him to 12 months in jail followed by 12 months of postrelease supervision and ordered him to pay the mandatory $2,500 fine. But before Vaughan entered that plea, he was arrested again and charged with a seventh DUI and driving while suspended.

Motion to correct an illegal sentence

In May 2020, Vaughn filed a motion to correct an illegal sentence pursuant to K.S.A. 22-3504. His motion argued that his sentence was illegal because the district court had not established a payment plan for his fines, costs, and fees at sentencing or allowed him to perform community service to pay his fines. Vaughan asserted that his sentence did not conform with K.S.A. 2010 Supp. 8-1567(i) and (j) and K.S.A. 2020 Supp. 21-6604(a)(2) and (q), making his sentence illegal.

Vaughan asked the district court to vacate his fines, costs, and fees, relying on *State v. Roberts*, 57 Kan. App. 2d 836, 461 P.3d 77 (2020). That was a restitution case in which the Kansas Court of Appeals held that the plain language of the statute required the district court to establish a payment plan for restitution at sentencing. 57 Kan. App. 2d at 845. Vaughan argued that the *Roberts* decision should be extended to his case so the district court would have to establish a payment plan for the payment of fines, court costs, and fees. Vaughan fails to mention that the Kansas Supreme Court summarily vacated the *Roberts* opinion after the Legislature changed K.S.A. 2020 Supp. 21-6604 to require restitution to be paid immediately unless the district court orders a payment plan.

The district court denied Vaughan's motion to correct an illegal sentence. First, the district court distinguished Vaughan's fines, court costs, and fees, explaining that only the fine is part of Vaughan's sentence. Then, the district court rejected Vaughan's interpretation of K.S.A. 2008 Supp. 8-1567(i) and (j)—that a court must establish a specific plan for the payment of the fines and fees at sentencing—because the *Roberts* holding was based on the plain and unambiguous language of K.S.A. 2018 Supp. 21-6604(b)(1) and (2) which refer to a "plan of restitution," which has no logical extension to the payment of fines resulting from a criminal conviction. Finally, the district court found the statute under which Vaughan was sentenced already addresses the issue of a payment plan for a fine. It held: "K.S.A. 2008 Supp. 8-1567(i) gives the court discretion to formulate a payment plan for the statutorily mandated fine but does not require it do so." The district court thus found that Vaughan's sentence does conform to the relevant statutory provisions and is, thus, legal.

Vaughan timely appeals the district court's summary denial of his motion to correct an illegal sentence.

Did the District Court Err in Denying Vaughan's Motion to Correct an Illegal Sentence?

Legal Framework

Whether a sentence is illegal under K.S.A. 22-3504 is a question of law over which the appellate court has unlimited review. *State v. Mitchell*, 315 Kan. 156, 158, 505 P.3d 739 (2022). When a district court summarily denies a motion to correct an illegal sentence, the appellate court applies a de novo standard of review because the appellate court has the same access to the motions, records, and files as the district court. *State v. Alford*, 308 Kan. 1336, 1338, 429 P.3d 197 (2018). To the extent resolution of this issue requires statutory interpretation, interpretation of a sentencing statute is a question of law over which appellate courts have unlimited review. *State v. Moore*, 309 Kan. 825, 828,

441 P.3d 22 (2019). A court may correct an illegal sentence at any time while the defendant is serving the sentence. K.S.A. 2022 Supp. 22-3504(a). And a defendant may challenge a sentence as illegal for the first time on appeal. *State v. Hambright*, 310 Kan. 408, 411, 447 P.3d 972 (2019).

A sentence is illegal under K.S.A. 2022 Supp. 22-3504(c)(1) when it: (1) is imposed by a court without jurisdiction; (2) does not conform to the applicable statutory provisions, either in character or the term of punishment; or (3) is ambiguous about the time and manner in which it is to be served. See *Mitchell*, 315 Kan. at 158. Kansas courts have repeatedly held that this statute has specific and limited applicability. 315 Kan. at 159.

Vaughan argues his sentence is illegal because it does not conform to the applicable statutory provision. He also argues his sentence is illegal because it violated his due process rights.

Did the Method of Payment Imposed for Vaughan's Fines Conform to the Statutory Provision?

On appeal, Vaughan argues two statutes in effect when he was sentenced in 2010 must be considered—K.S.A. 2009 Supp. 8-1567(g) and (j) and K.S.A. 21-4607(3).

The now-repealed K.S.A. 21-4607(3) states: "In determining the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature of the burden that its payment will impose." Citing *State v. Copes*, 290 Kan. 209, 220, 224 P.3d 571 (2010), Vaughan asserts a district court must account for one's financial resources and the burden of the fine when considering the method of repayment.

As Vaughan points out, the district court did not analyze K.S.A. 21-4607(3). But we cannot fault the district court for that—Vaughan did not cite that statute in his motion. Generally, a party may not raise an issue for the first time on appeal. *State v. Eubanks*, 316 Kan. 355, 365, 516 P.3d 116 (2022). Exceptions to this rule exist, but the party raising the new issue must affirmatively invoke and argue an exception to justify consideration of the issue. *State v. Jones*, 302 Kan. 111, 117, 351 P.3d 1228 (2015). Vaughn has not done so here, so we do not consider this statute.

We note, however, that a panel of this court, in reviewing Vaughan's similar appeal of his sentence for his seventh DUI, held this same issue fails to raise an illegal sentence claim. *State v. Vaughan*, No. 124,345, 2022 WL 3132145 (Kan. App. 2022) (unpublished opinion), *rev. denied* 317 Kan. ___ (March 29, 2023). That panel found that Vaughan's complaint was about a procedural omission by the district court when it imposed his "otherwise lawful fine." 2022 WL 3132145, at *3.

> "[R]esolution of Vaughan's complaint requires us to scrutinize the sentencing procedure utilized by the district court. That is, it does not truly contemplate a sentence imposed by a court without jurisdiction, one that does not conform to the applicable statutory provisions either in character or the term of punishment, or one that is ambiguous about the time and manner in which it is to be served." 2022 WL 3132145, at *3 (citing *Hambright*, 310 Kan. at 411).

This is equally true of Vaughn's appeal of his sentence for his sixth DUI conviction. Thus had we considered Vaughan's K.S.A. 21-4607(3) claim, he would have fared no better.

We next consider Vaughan's argument that his sentence was illegal because the district court did not order an alternate payment method and ordered him to pay fines, fees, and costs. Vaughan asserts this procedure failed to conform to K.S.A. 2008 Supp. 8-1567, which states:

"(g)(1) On the fourth or subsequent conviction of a violation of this section, a person shall be guilty of a nonperson felony and sentenced to not less than 90 days nor more than one year's imprisonment and fined $2,500. . . .

. . . .

"(j) In lieu of payment of a fine imposed pursuant to this section, the court may order that the person perform community service specified by the court. The person shall receive a credit on the fine imposed in an amount equal to $5 for each full hour spent by the person in the specified community service. The community service ordered by the court shall be required to be performed not later than one year after the fine is imposed or by an earlier date specified by the court. If by the required date the person performs an insufficient amount of community service to reduce to zero the portion of the fine required to be paid by the person, the remaining balance of the fine shall be due on that date."

The district court found that Vaughan's sentence conformed to this statute. It explained that only the fine, and not the fees and costs, is part of Vaughan's sentence because only the fine is punitive. The district court found that under subsection (j), the district court *may* order community service, not *shall*; thus, the Legislature showed its intent that the creation of a plan by the court for the "terms and time" for payment of fines was discretionary and not mandatory, adding that the second part of the statute sets forth a default payment plan. And because K.S.A. 2008 8-1567(i) provided a payment plan, Vaughan's sentence conformed to the statutes in both character and term of punishment. We have no problem with that rationale or result.

In *State v. Tafoya*, 304 Kan. 663, 669, 372 P.3d 1247 (2016), our Supreme Court held that "a sentence is not rendered illegal simply because the district court judge fails to consider (or fails to state on record that he or she has considered) the financial resources of the defendant when determining either the discretionary amount of a fine or the discretionary method of payment." The statute sets out a discretionary method of payment here. The court was not required to order community service instead of that fine. See 304 Kan. at 669.

What is more, the record shows that the district court did consider Vaughan's financial resources and the burden imposed to some extent because it waived the BIDS administrative fee. Vaughan has thus not shown that the district court did not consider his financial resources and burden when imposing his fine. And the district court could properly consider factors other than finances.

Alternatively, the State cites Vaughan's prior appeal in *Vaughan* and its holding that this type of claim lacks any illegal sentence issue. 2022 WL 3132145, at *3-4. We agree with that panel and find that Vaughan's claim under K.S.A. 2008 Supp. 8-1567 does not fit within the definition of an illegal sentence.

Did the District Court Violate Vaughan's Due Process Rights, Rendering His Sentence Illegal?

Vaughan next asserts that his sentence is illegal because the district court violated his due process by not considering his financial resources when determining the method of Vaughan's payment and imposing his $2,500 fine. He does not claim that the court denied him an opportunity to present information about his financial circumstances. See *State v. Wilkinson*, 269 Kan. 603, 608, 9 P.3d 1 (2000) (basic elements of procedural due process are notice and an opportunity to be heard at a meaningful time and meaningfully).

A judgment is void if the court that rendered it acted in a manner inconsistent with due process of law. *Ford v. Willits*, 9 Kan. App. 2d 735, 744, 688 P.2d 1230 (1984), *aff'd* 237 Kan. 13, 697 P.2d 834 (1985). A void judgment may be vacated at any time, but it must be raised in a proper procedural vehicle. *In re Marriage of Hampshire*, 261 Kan. 854, 862, 934 P.2d 58 (1997); see *In re Estate of Butler*, 301 Kan. 385, 396, 343 P.3d 85 (2015).

But Vaughn does not do so here. Because the definition of an illegal sentence does not include alleged violations of the Constitution, a defendant may not challenge a sentence on constitutional grounds under K.S.A. 2022 Supp. 22-3504. *State v. Lee*, 304 Kan. 416, 418, 372 P.3d 415 (2016). Thus, as our precedent shows, Vaughan has employed the wrong procedural vehicle to advance a constitutional challenge. See *State v. Warrior*, 303 Kan. 1008, 1010, 368 P.3d 1111 (2016).

Because the sentence was ordered by a court with jurisdiction, conforms to the applicable statutory provisions, is unambiguous about the time and manner in which it is to be served, and Vaughan had notice and an opportunity to be heard, Vaughan's sentence is legal. We thus affirm the district court's denial of Vaughan's motion to correct an illegal sentence.

Affirmed.